


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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2023-026


AMT3 (former)

FINAL DECISION

This proceeding is conducted according to the provisions of 10 U.S.C. § 1552. The Chair docketed the case after receiving the completed application on March 14, 2023, and assigned it to an attorney to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision dated January 16, 2025, 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 is seeking retroactive reinstatement to active duty from the date of his discharge, September 30, 2020, until the natural end of his enlistment on November 6, 2022; to include all backpay of all basic pay and allowances he would have earned but for the injustice applied by the Coast Guard in his forced separation. A new DD-214 (not a DD-215) to reflect a characterization of service of Honorable, RE-1 reentry code, total time in service calculation reflective of his total enlistment but for the forced separation, and a favorable narrative. Lastly, removal of adverse CG-3307 and all associated documents from his record.

The applicant asserts his administrative separation is in error and a miscarriage of justice. He firmly denies the accusations against him for creating a false statement to the EEO or for soliciting to commit a crime. The solicitation charge is not supported by evidence other than the statements of the co-worker and spouse who were being actively investigated for their crime of adultery under the UCMJ. Applicant requests the Board give significant weight to the new statements of the Senior Chief and several witnesses who were stationed with the applicant at the time of the events and who remain on active duty and signed their statements under penalty of court-martial.

The applicant rejects the Investigating Officer's (IO) report and claims the statements were taken out of context and/or flagrantly wrong. The applicant denies making a false statement to the Equal Employment Office (EEO) to "get back at" the co-worker for destroying his marriage. The applicant states he wanted the co-worker held accountable for the harm she caused by having an affair with his spouse. The applicant stated his concern for the command to not hold the co-worker accountable given the command's already demonstrated preferential treatment of the co-worker at

the unit because she was an openly bi-sexual female. During the investigation of the co-worker, she made false claims that the applicant asked her to have sex with his spouse. The co-worker and the spouse claimed the applicant asked them to let him join in when they have sex and that the applicant fully knew they were having sex, which only began at the applicants request to aid his spouse in determining if she was a lesbian. The applicant firmly rejected these assertions and there is no evidence in the form of witnesses, texts, emails, or other forms of evidence to support the accusations made by the two women being investigated for their affair. These accusations towards the applicant only began after the investigation of the affair by the co-worker began.

The applicant called the EEO at the advice of an E8 at the unit to discuss his options. When the applicant spoke to the EEO regarding his concern for preferential treatment the EEO told him he had a legitimate claim. The applicant decided to file a complaint citing he would not receive the same treatment as the co-worker had he committed a crime because she was a lesbian and female. Two days after filing the EEO complaint, the command started a retaliatory investigation upon the applicant. The applicant was charged with making a false statement to the EEO in violations of Article 107 of the UCMJ and for solicitation of a crime in violation of Article 82 of the UCMJ. The applicant requested a trial to contest these findings, but command denied his request and administratively separated the applicant from service. The co-worker was found guilty at a captain's mast for extramarital conduct in violation of Article 134 of the UCMJ and command promptly transferred the co-worker to the unit of her choice, Air Station Hawaii.

SUMMARY OF THE RECORD

The applicant is a former Aviation Maintenance Technician Third Class (AMT3). He was involuntarily discharged on September 30, 2020, for misconduct, commission of a serious offense, under COMDTINST M1000.4, 1-B-17. He had two (2) years, one (1) month, and seven (7) days remaining on his enlistment contract, which expired November 6, 2022. His service was characterized as general- under honorable conditions with an RE-4 reentry code.¹ The primary accusation against the applicant for his discharge is solicitation to commit a crime by requesting extramarital conduct in offense of Article 134 and Article 82 of the UCMJ and making a false statement to the EEO in offense of Article 107 of the UCMJ.

In the spring of 2019, the applicant had been married for just over a year and began to have marriage difficulties. His spouse became unsure of her attraction to men or women and began discussing the possibility of a divorce. The applicant and his spouse were friends for many years and dated for two years before getting married. The applicant did not want to get a divorce and requested they attend marriage counseling. The applicant turned down an opportunity to attend a sought after "C" school² to be present for his marriage. The spouse had little interest in going to marriage counseling.

In June of 2019, the applicant began noticing his spouse and a co-worker spending increased time together. The co-worker is an openly bi-sexual person. The co-worker recently divorced from her previous marriage during this same time period. The applicant claims the co-worker would use phrases like "beautiful" or "she's hot", and that she wanted to "really get to

¹ RE-4 reentry codes prohibit reapplication to military services.

² School for speciality skills to enhance job performance and meet qualification standards for advancement.

know her” when discussing his spouse. The applicant viewed his relationship with the co-worker as a real friendship but still found those types of comments uncomfortable.

In the fall of 2019, the applicant began asking the co-worker if she had engaged in sexual relations with his spouse. The co-worker repeatedly denied the applicant’s accusation. The applicant asked his spouse if she had engaged in sexual relations with his co-worker. His spouse repeatedly told him no, the two were just friends.

In November of 2019, the applicant discovered cards from the co-worker addressed to his spouse. They were provocative in nature and made it clear to him that his suspicions were correct, and the co-worker was having an ongoing sexually romantic relationship with his spouse. The cards ranged from a Halloween card, an undated card, and a birthday card for his spouse who celebrates her birthday June 28 each year. The applicant realized the pair had been having an affair since at least June of 2019 and had lied to him when he questioned the nature of their relationship. The applicant discovered that the co-worker had went with his spouse for Thanksgiving due to pictures posted on social media. The applicant and his spouse were in discussions of divorce, which is why the applicant did not celebrate the holiday with his spouse.

In December of 2019, the applicant reported the affair to his chain of command. An investigation into the allegation started shortly after. During the investigation, the co-worker and spouse claimed the applicant wanted the two women to sleep together to assist in his wife’s sexual identity questions and asked if he could have a threesome with them, to which they both declined. The applicant has repeatedly denied the accusations. The co-worker and spouse failed to provide any evidence of their accusations other than their own statements.

In March of 2020, the IO completed the investigation of the co-worker and found she had violated Article 134 of the UCMJ for extramarital conduct. The command completed a captain’s mast of the co-worker and then instructed for a transfer of her choice to occur. The co-worker requested air station Hawaii, a highly coveted location. The applicant became frustrated at the preferential treatment of the command towards the co-worker with the apparent belief that he would not have received the same treatment had he committed the crime. The applicant filed an EEO complaint alleging preferential treatment and sexual harassment by the co-worker. Two days later, the command opened an investigation against the applicant for the solicitation of sex and the false statement to the EEO for claiming hostile work environment.

In May of 2020, the IO completed the investigation of the applicant and found he had solicited the co-worker and spouse to have sex based on the statements offered by the co-worker and spouse. The IO found the applicant filed a false statement with the EEO because he only wanted to get back at the co-worker for having an affair with his wife, an affair that the IO confirms the applicant encouraged and agreed to but because they would not include him became upset and turned the co-worker into command. Then, when command did not issue a punishment but instead what appeared to be a reward to transfer the co-worker to a highly sought after unit the applicant became angry and made an EEO complaint of discrimination.

In June of 2020, the command presented the applicant with nonjudicial punishment (NJP) charges, and the applicant declined to accept. The applicant asserted his right to request trial by

court martial to contest the charges. The command chose to forego a trial and initiated an administrative separation of the applicant citing the same charges.

In September of 2020, the applicant contested the separation prior to the action being taken by submitting a personal statement asserting his apology for any confusion or misleading commentary. It has been his intention to have his concerns reviewed and he would respect the outcome of the EEO review. The applicant was separated from the Coast Guard with an RE-4 reentry code, banning him from rejoining a military branch and other forms of law enforcement and limiting government work opportunities.

VIEWS OF THE COAST GUARD

On September 26, 2023, a Judge Advocate (JA) for the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum on July 21, 2023 prepared by the Coast Guard Personnel Service Center (PSC).

The JA concurred with the PSC evaluation of the applicant's request. PSC determined there was no error or injustice and the applicant's request should be denied.

The JA argued that the applicant failed to prove an error or injustice, citing the IO's report stating that the applicant made a false statement to get back at the co-worker. The applicant states the IO misstates and misrepresents the applicant's response to discussing his reasoning for filing an EEO claim. The JA rejects that the applicant could have a reasonable belief that he might be in a workplace environment that created preferential treatment towards the co-worker and thus creates a hostile work environment. The JA rejects that the applicant believed his unit to be a hostile work environment by different treatment occurring between him and another service member. The JA notes the investigation did not uncover any evidence of preferential treatment of the co-worker or evidence of mistreatment towards the applicant. The JA argues that the applicant's EEO statements are not protected statements because the IO reports the applicant made false statement to simply get the co-worker in trouble, therefore false statements are not protected.

The JA confirmed that the command correctly administratively separated the applicant within the rights and authority granted to the command.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 19, 2023, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty (30) days. The applicant, through counsel, responded on March 25, 2024 with firm objection to the JA's review of the facts. The applicant asserts the Coast Guard accepted unvalidated accusations as factual evidence such as the statements of the co-worker against the applicant for soliciting her for sex or a threesome with his spouse. Additionally, the representation by the IO of the applicant's reasoning for filing the EEO is erroneous and incomplete. The applicant shared an affidavit expressing, as he did at the time of the investigation, that he has never solicited the co-worker for sex or a threesome, nor did he make a false statement to the EEO when he contacted the organization for guidance on his perceived preferential treatment of the co-worker by command.

APPLICABLE LAW AND POLICY

The Board may correct errors or remove injustices in a service member's records pursuant to 10 U.S.C. § 1552(a).

- (1) Error can be defined as either legal and/or factual.
- (2) Injustice, when not also error, is treatment by the military authorities that "shocks the sense of justice."³ In addition, the Board has the authority to decide whether an injustice exists in an applicant's record on a case-by-case basis. The application must file within three years after discovery or reasonably should have discovered the alleged error or injustice for a correction or relief.⁴

The applicant received an NJP for violating UCMJ Article 82 (10 U.S.C. 882) Soliciting commission of offenses.

b. Elements.

- (1) That the accused solicited or advised a certain person or persons to commit a certain offense under the UCMJ; and
- (2) That the accused did so with the intent that the offense actually be committed. [Note: If the offense solicited or advised was attempted or committed, add the following element]
- (3) That the offense solicited or advised was (committed) (attempted) as the proximate result of the solicitation.

The applicant received an NJP for violating UCMJ Article 107 (10 U.S.C. § 907 False official statements; false swearing punishable, among other things, false official statements made with the intent to deceive. MCM, paragraph 41, on page IV-55, states that the elements for a charge of false official statement violation of Article 107 are as follows:

b. Elements.

- (1) False official statements.
 - (a) That the accused signed a certain official document or made a certain official statement;
 - (b) That the document or statement was false in certain particulars;
 - (c) That the accused knew it to be false at the time of signing it or making it; and

³ *Sawyer v. United States*, 18 Cl. Ct. 860, 868 (1989) citing *Reale v. United States*, 208 Ct. Cl. 1010, 1011, cert. denied, 429 U.S. 854, 50 L. Ed. 2d 129, 97 S. Ct. 148 (1976).

⁴ 33 C.F.R. § 52.22

(d) That the false document or statement was made with the intent to deceive.

The applicant's command when implementing an NJP is subject to the Military Justice Manual, COMDTINST M5810.1G (January 2019), which states:

2.B.1. Commanding officers and officers-in-charge of Coast Guard units. All commanding officers may impose NJP upon personnel assigned to their units.

2.K.1. Nonjudicial in Nature. A commanding officer's decision to impose NJP does not constitute a judicial finding of guilt and is not a criminal conviction. A member does not have a criminal record as a result of the imposition of NJP. This distinction prevents the stigma of a criminal conviction while still giving a commanding officer a prompt and efficient tool to maintain good order and discipline at the unit. It is equally important to note that while NJP is an administrative process, as opposed to a criminal process, in order to punish an individual under Article 15, UCMJ, the mast authority must determine that the member committed all elements of an offense as defined by the UCMJ.

2.K.7. Burden and standard of proof. The standard of proof required in order to award punishment at NJP is a preponderance of evidence. This standard means that before NJP may be awarded, the commanding officer must determine it is "more likely than not" that the member committed an offense defined by the UCMJ. Each element of each offense as defined in the MCM must be supported by a preponderance of the evidence (i.e., it is "more likely than not" that the element occurred). This standard is more rigorous than a "probable cause" standard of proof used by law enforcement to obtain a warrant, but a lower standard than that required to convict at court-martial.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552(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 applicant brings this request within three years of its occurrence making the application timely for review.
3. The applicant is requesting retroactive reinstatement to active duty from the date of his discharge, September 30, 2020, until the natural end of his enlistment on November 6, 2022; to include all backpay of all basic pay and allowances he would have earned but for the injustice applied by the Coast Guard in his forced separation. A new DD-214

- (not a DD-215) to reflect a characterization of service of Honorable, RE-1 reentry code, total time in service calculation reflective of his total enlistment but for the forced separation, and a favorable narrative. Lastly, he requests removal of adverse CG-3307 and all associated documents from his record.
4. The Board, in full view of all facts, assertions, and applicable laws, views this case as a miscarriage of justice. The requirement for an NJP is a command determining that “more likely than not” the member committed an offense defined by the UCMJ. Given the totality of the information and accused parties who impeached themselves with inconsistent or contradictory statements, the Board finds that (1) the command’s finding that the applicant violated the UCMJ Article 107 is unsupported by the evidence, and (2) the applicant received unequal treatment. It appears unreasonable to think another command or authority could arrive at the same conclusion of guilt based on the same limited evidence.
 5. The command appears to make a clear error in asserting that by a preponderance of evidence the applicant committed the alleged offenses when the evidence consisted of a co-worker who has a motive to be untruthful because the applicant reported her unlawful conduct, and a command with a motive for retaliation for being accused of preferential treatment. A hostile work environment does not need to be open and hostile towards one party; preferential treatment based on impermissible factors will suffice. The applicant does not assert the command to be aggressive towards him, but instead offered preferential treatment towards the co-worker making her consequences for violating the UCMJ minimal compared to if he had violated the UCMJ, which he asserts he has not. The command proved the applicant’s concerns correct when the co-worker received a captain’s mast with the only outcome being her opportunity to PCS to a new unit of her choice. The co-worker chose the most sought-after unit, Air Station Hawaii, and the command worked to find a placement for her at the new unit of her choice in response to her being found guilty of violating the UCMJ. By contrast, the applicant was discharged from the service upon a finding that he violated the UCMJ.
 6. The Coast Guard’s position that the applicant, out of prejudice towards the co-worker’s sexual orientation, decided to lie to the EEO is not supported by the record. First, the applicant clearly and understandably perceived unfair treatment from his command, which is understandable considering that a coworker had been having an open extramarital affair with his spouse for at least several months and given only a slap on the wrist. The applicant’s feeling of betrayal, hurt, and frustration are understandable. But even if the command determined that his subsequent complaint – relying on facts the command had already established were true – wasn’t actually a violation of the EEO policy does not render his allegations false. By that strained logic, every unsubstantiated EEO complaint would result in punitive action for making a false official statement – an absurd result that would fly in the face of statutory whistleblower protections enjoyed by military personnel.

7. The applicant was charged for soliciting others to commit a crime, allegedly asking the co-worker to have sex with his wife, and for making false statements to the EEO when the applicant alleged sexual harassment and hostile work environment against the co-worker. The IO wrote in the report that the real reason the applicant made the EEO complaint was because he “won’t let [the co-worker] get away with ruining [his] marriage” and therefore made a false statement instead of holding a sincere belief that he was being prejudiced. This is a misuse of the applicant’s interview. He was encouraged by a member of his chain of command to contact the EEO. The applicant, not having legal training, described in non-legal language what occurred at his workplace. The EEO office also encouraged the applicant to file a complaint. The Coast Guard claiming he lied to the EEO without any other evidence than to call him a liar has a chilling effect on other service members experiencing grievances in their workplace. The applicant may not have been able to prove his allegations, but the results of not finding the legal aspects of a harm doesn’t preclude the applicant from sincerely feeling harmed, and does not render his allegations false.
8. The most glaring concern with the command’s actions is how differently they handled imposing legal penalties. These charges appear to be in direct conflict with the other. If the applicant did in fact solicit for the co-worker to have sex with his spouse, it seems unlikely he would be angry to “let her get away with it” months later and not be worried during an EEO investigation that these claims of him propositioning the two women would be discovered. He did not think the co-worker would be held accountable for her conduct because of the established preferential treatment by command towards the co-worker as cited by at least five material witnesses in signed statements. This does not create a false official statement. The Board concludes the answer to these questions is that the prior command made a clear error in retaliatory behavior towards the applicant for reaching out to the EEO in the first place. It is reasonable to understand that the applicant believed command action towards the co-worker to be preferential treatment, regardless of whether it was or was not. The applicant reported what he perceived as an injustice to the EEO and the EEO had a role to investigate.
9. The co-worker and command controlled the applicant’s fate and relied solely on self-serving personal statements without obtaining objective facts or other supportive evidence. There is no physical evidence such as written allegations by the applicant of coworker or command actions that had not factually occurred, nor evidence of solicitation such as texts, notes, or even other witnesses beyond the two already being investigated for the extramarital affair that the applicant committed sexual harassment against the two women. The applicant repeatedly stated he did not think he had a hostile work environment but that the co-worker would be given preferential treatment as she had been known to receive as testified to by five witnesses to have received in the past based on her gender and sexual orientation. The command latched onto this accusation to then identify the applicant as homophobic, and the applicant became the target for expressing a concern that had the co-worker stated the same concern (preferential

treatment because the applicant is a white male) it is doubtful she would face accusations of being a sexist or racist. The applicant spoke with the EEO in hopes of improving a situation that should not be occurring, which the applicant described as unequal treatment among the service members at the unit. Command's response to the applicant seeking to speak with the EEO creates an enormous chilling effect for those feeling violated to not reach out in fear of retaliatory action.

10. The communication by the applicant to the EEO is protected speech.⁵ The Coast Guard rejected that this speech is protected because of their assertion that the applicant lied. There is no evidence that the applicant lied. The applicant maintains that he did not lie and told the IO what he told the EEO when the IO pressed him. The interview appeared incriminating instead of the neutral fact gathering that the IO should have been engaging in. The applicant stating that he filed the EEO complaint because he did not want the co-worker to get away with ruining his marriage does not support the finding that he made a false statement. The applicant shared his motivations him to come forward regarding the comments made by the co-worker towards him about his wife's appearance, which the EEO identified as possible sexual harassment. Additionally, the preferential treatment received by the co-worker from the command was described by the EEO as possible hostile work environment activity. The EEO advised the applicant to file a complaint and they would investigate. The EEO receives numerous complaints that after investigation fail to rise to the legal level of consequences originally reported. That does not mean those complaints were intentionally false allegations. An employment complaint is by its nature highly emotional and personal. What one person finds offensive may not bother another. This is why the role of the EEO is to protect communications by those coming forward to avoid retaliatory behavior regardless of if the complaints rise to the level of legal consequence or not.
11. "By a ponderance of evidence" is the standard used throughout the investigator's reports to determine a finding of solicitation of sex by the applicant, however there are only witness statements to serve as evidence. These witness statements do not all concur with the occurrence of accusations asserted. There are clearly diverging assertions to what occurred leading up to the investigation of the extra martial affair between the co-work and spouse of the applicant. The use of cards and social media provided clear evidence the co-worker violated the UCMJ by having an affair with the applicant's spouse and she was convicted of this at court martial. However, these guilty parties were the only sources claiming the applicant solicited for sex, even though the applicant firmly denies and request a court martial to prove his innocence, which he is denied. The investigator accepted the statements of some to be trustworthy and appears to ignore the statements of others without an explanation for this decision. For example, the applicant stated that the co-worker having the affair with his spouse would repeatedly comment on how attractive his wife is and she wanted to "really" get to

⁵ 10 U.S.C. § 1034 (b)(1)(B)

know her better. In many investigations for sexual harassment such comments would be deemed at least inappropriate in a workplace setting and even potentially harassing given the frequency and continued pursuit of the applicant's spouse. However, the investigator states that there is no evidence of sexual harassment by the co-worker towards the applicant. Then, the applicant is accused of sexually harassing the co-worker and filing a false accusation against his co-worker. The investigator accepted the assertions made by the impeached co-worker and the applicant's spouse that the applicant sexually harassed them by requesting to have sex with either of them or conduct a threesome together. These assertions were never corroborated by anyone else nor is there a text, email, or other form of evidence to support the co-workers claims that the applicant requested her to have sex with him or his spouse. The applicant has repeatedly denied those accusations though it has been recommended that the applicant is simply lying. It is evident based on the conclusion and recommendations made by the investigator that they choose to rely on some statements as truthful and disregard other statements.

12. The investigators opinion caused the command to harbor a severe animus towards the applicant, as demonstrated by the comments included on the applicant's separation panel sheet:

“Member needs to be separated for misconduct, COSO, Art. 107. While there are additional violations that meet criteria for a COSO, I am most disturbed by the member filing a false claim of sexual harassment against the member that he solicited to have sex with his wife. I do not wish to police the members marital bedroom however his actions concerning lying cannot be tolerated, his false allegations of sexual harassment could have ended another members career. Misconduct, COSO, General, RE-4. NOTE: additional investigation has been added that strengthens the basis for separation and a general.”

13. Despite command's acceptance of the accusations against the applicant, there appears to be more evidence to support the applicant's assertions against the co-worker and command. The most glaring evidence to support the applicant's statements that the co-worker did in fact make such inappropriate statements regarding the appearance of the applicant's spouse is the affair the co-worker did in fact have with the applicant's spouse. Yet the applicant's command agreed that the applicants claim of sexual harassment by the co-worker was without merit and accepted the accusations asserted by the co-worker that the applicant was soliciting sex for his wife and himself from the co-worker without any evidence other than the co-worker claimed he made such requests. Statements of a co-worker who lied about having a sexual relationship with fellow a service members spouse, then continued to lie and make contradictory statements to the IO, is the evidence relied upon to end the service career of the applicant.

14. Additionally, the applicant repeatedly stated affirmatively that he never requested the co-worker to have sex with him or his wife. He did not ask the co-worker to help with his marriage. He firmly denied the co-workers accusations that she was used by him and his spouse. However, this accusation is readily accepted by the investigator without any other evidence than the co-worker and spouse (the two parties having a secret affair) claiming that the applicant did these things to them. This accusation only came after the investigation began on the co-worker for the extramarital affair. The timing creates a less reliable evidentiary weight to the co-workers assertions. The co-worker and spouse statements claim all three parties knew the affair occurred and describe it almost like a business arrangement to help the spouse discover her sexual preference. They described it as all three agreeing for the sexual interaction to occur and not romantic in nature. The co-worker states the applicant made this request of her in July of 2019. However, the evidence the applicant presented to the investigator contradicts this assertion as there are highly romantic gestures of the co-worker pursuing the spouse through gifts and cards written with sexual innuendos, which began in June of 2019. The written messages by the co-worker to the spouse does not read like a business arrangement, but something a person willingly pursuing another person would write.
15. The co-worker wrote romantic words to the applicant's spouse in a birthday card she gave to the spouse on June 28, 2019. When the investigator asked the co-worker about the birthday card the co-worker acknowledged she gave a card. The investigator asked what she wrote in the card. The co-worker responded, "Happy Birthday" that's all. The investigator stated the card read more than Happy Birthday and repeated to ask what the card said. The co-worker failed to answer the question as she began to cry and shared she had previously suffered from suicidal thoughts earlier that week. The investigator comforted her and never returned to the question about the card or the romantic nature of the co-workers' words in pursuing the applicant's spouse as early as June 2019. This is even more concerning because when the investigator shared their report, they also note that the co-worker claims the husband began sexually harassing and soliciting her for sex with his spouse in July of 2019, a month after the romantic birthday card the co-worker sent to the spouse. The investigator appears to ignore these impeaching statements by the co-worker. The spouse and co-worker claim to have only had three (3) sexual encounters all occurring in July 2019 and no other time. However, additional romantic gestures and cards include a Halloween card and an undated card. The Halloween card from October 2019 from the co-worker to the spouse read:

"Dear Baby,

I have three requests for this Halloween...

1. Will you be my pumpkin?
2. Will you keep me safe from all the scary Halloween decorations?
3. Will you be my sexy cop Halloween date?

If you answer yes to all three then you get to eat the reeses cup. If your answer is not yes to all three, you still get to eat the reeses cup because your so cute.

To my one and bonely, Little but mighty, [co-worker]”

Another card sent from the co-worker to the spouse read: “Babe, just wanted to make you feel special. Anything that makes you smile is worth it. [co-worker]”

16. These cards were submitted for evidence of the co-workers affair with the spouse. Additional pictures from social media accounts show the co-worker and spouse spending time together on September 16, 2019 at the beach and on December 1, 2019 at Glamis Sand Dunes. However, the co-worker states she only had a sexual relationship with the spouse on three occasions during July of 2019. However, Halloween takes place in the month of October. This assertion by the co-worker on having a non-sexual relationship beyond the summer appears to be, based on the evidence of cards, gifts, and social media, a false statement made by the co-worker to the investigating officer. However, the investigating officer nor command held the co-worker accountable for or questioned the inconsistent statements made against the applicant.
17. Further, the spouse accused the applicant of sexual harassment when questioned by the investigating officer. She stated she would provide text messages to prove her husband’s “constant requests” for sex. She offered one text exchange as evidence from October 27, 2019, where the spouse is expressing concern that the applicant deleted her from his social media and he asked her not to pick him up from the airport. She displays sadness to lose him and adds laughter to the message exchange (“haha”), which demonstrates her comfort with the applicant as a pleasant conversation and undercuts her harassment claims. The applicant does ask his spouse (still married to each other at the time of this message exchange) if she would be comfortable with having sex together. The message does not appear aggressive or persistent in nature, but instead a husband still in love with his spouse. The applicant, while discussing sex with his then current spouse, states, “there’s no need to resist unless you say otherwise.” The statement is in response to his spouse laughing about how he could still want to have sex with her while they are in talks of divorce. The applicant from this statement does not appear to be forceful, explicit, aggressive, or harassing in nature of his inquiry at the possibility of sex with his current spouse. In fact, the applicant’s response demonstrates respect for his spouse’s boundaries giving her the decision-making power if they will or will not have sex together. Nothing in this exchange appears to support the allegation the applicant encouraged his spouse to have sex with another person or that he wanted to join in their sexual conduct. Alternatively, it demonstrates how upset he is that she is having sexual relations with another person. This is not the response of a person who solicited for sex to occur from the co-worker with his wife. Confusingly however, this is the evidence the investigating officer accepted to support their findings

- for violation of Article 134 via Article 82 of the UCMJ against the applicant claiming the applicant solicited for sexual relations and encouraging the co-worker to have sexual relations with his spouse, as well as the applicant sexually harassing his spouse and co-worker. The Board disagrees with these conclusions.
18. The applicant fought against his discharge requesting a trial by court martial to which his command denied his request. The captain recommended an honorable discharge, but the applicant received a general with an RE-4 for misconduct.⁶ This speaks to the equity of the circumstances. A high-ranking leader at the time of the investigation is recommending that the discharge type be honorable. When a service member receives an honorable discharge the RE code cannot be RE-4. An honorable discharge would have allowed the applicant to re-enlist in another branch or have a less prejudicial job seeking experience outside of the military. Though, even with an honorable discharge, the Board reviews the NJP charges for violating the UCMJ as erred in totality due to the lack of evidence. The command or IO has not been proven that the applicant committed the offenses charged based on all evidence available.
 19. The Board also notes that, although not prohibited, choosing to pursue administrative discharge in response to his request for trial by court-martial is also unfair to the applicant. While not independently constituting error or injustice, it is clearly a deliberate short-circuiting of the applicant's rights. Before his turn-down of NJP, the command apparently was not considering administrative separation. Indeed, the much more significant wrongdoer in this situation – the co-worker who had slept with applicant's wife – had not been and was not separated. This Board can only conclude that the command separated applicant from service because of his refusal to accept punishment at a UCMJ Article 15 proceeding and request a trial which could result in his criminal conviction, but could also result in his acquittal. While this Board won't speculate further on the command's motivations to pursue separation, the refusal of the applicant to accept punishment for alleged misconduct he claims he did not commit at NJP is not a proper basis to pursue separation. This looks especially unfair when the evidence, viewed in totality by this Board, does not appear to support any of the charges against the applicant to a level that would have supported a court-martial conviction.
 20. The command failed to prove every element by a preponderance of evidence that the applicant more likely than not committed the offenses charged against him. Witness statements submitted by the investigating officer do not discuss sexual harassment by the applicant towards the co-worker at all, yet the IO still found the applicant committed this solicitation. The IO received no corroboration of the claims made by the co-worker against the applicant, which by this point the coworker had already been investigated for and received an NJP for misconduct so the witnesses would have been aware this accusation occurred. The witness statements assert they did not witness a hostile work

⁶ CAPT [redacted]: Recommendation for Discharge of AMT3 [applicant], 2112488, USCG

- environment by command towards either the co-worker or the applicant. Unfortunately, multiple witnesses interviewed also shared they were close enough friends with the co-worker to have engaged outside of work in social settings where they only knew the applicant through work. This makes the witnesses favorable to the co-worker and less than favorable to the applicant, but the investigating officer relied upon these interviews to create their conclusion and recommendations.
21. The applicant provided five (5) witness signed affidavits to support his application. These are eyewitnesses present at the time of the investigation and a working knowledge of the environment of command. Each stated under oath that they witnessed preferential treatment of the co-worker by command in numerous ways over the two years the co-worker worked at the unit. The witness comments stated the co-worker received better training jobs, would be offered slots to training schools more senior members should have been offered, and got to represent the unit alongside higher ranking service members when the co-worker wasn't as qualified as others who weren't selected. The witnesses include a senior chief, two (2) first class petty officers and two (2) second class petty officers. None of these members benefit from supporting the applicant other than doing what they believe to be the right thing. These witness statements were not given weight by the Coast Guard JAG when reviewing the applicant's application.
 22. There is no evidence of a statement made to the EEO by the applicant that indicates a false statement. The applicant perceived and genuinely believed the co-worker received preferential treatment and would not be punished for the crime she committed under the UCMJ the way that he would be punished had he committed such a crime. Ironically, the outcome of this investigation only proved the applicant's point. The applicant forcefully discharged from the Coast Guard for misconduct that had no other proof than the co-worker and spouse claiming he asked them for sex. This is after the Coast Guard itself determined that the co-worker had in fact engaged in the misconduct the applicant alleged. There were no other witnesses, texts, emails, or other forms of evidence to corroborate the story being told by the two women having an affair together making these statements during the investigation of their conduct. The timing of the co-workers assertions appears retaliatory in nature and an attempt to distract from her own misconduct. The allegations against the applicant for solicitation for sex occurred after the applicant went to command about the co-workers inappropriate relationship. Though, the co-worker asserted this it did not appear the command accepted these concerns or at the very least would not permit these accusations to mitigate the co-workers conduct. However, once the applicant filed the EEO compliant the command opened an investigation against the applicant within two days based on the solicitation for sex allegations and making a false claim to EEO.
 23. After full review of the applicant, co-worker, witness statements, IO reports, and command conduct, the preponderance of evidence weighs in the favor of the applicant.

The goal of protecting our service members from prejudicial accusations, rhetoric, or behavior is understandably a top priority for the Coast Guard. However, it appears the pendulum swung too far the other direction in this case regarding whose voice gets to matter the most. The applicant and the co-worker's statements should have been weighed equally against the other, alongside the facts and timeline of events. When the Board completes a neutral review in this manner of the facts of each parties conduct it becomes clear the applicant has been charged with violations of the UCMJ in error and endured a significant miscarriage of justice.

24. The Board finds it in the best interest of justice to grant the applicant full relief. The Coast Guard should grant the applicant constructive service credit time with all back pay and allowances that flow from this correction as if the applicant had completed his natural enlistment contract, but for his improper discharge. The applicant will receive credit for time in service as active duty to now include the date of his discharge, September 30, 2020, until the natural end of his enlistment on November 6, 2022; to include all backpay of all basic pay and allowances he would have earned but for the injustice applied by the Coast Guard in his forced separation. The Coast Guard should issue the applicant a new DD-214 (not a DD-215) that reflects an Honorable characterization of service, a RE-1 reenlistment code, total time in service calculation reflective of his total enlistment but for the forced separation, and a narrative reason for separation as "Completion of Required Service." Lastly, the Coast Guard should remove the adverse CG-3307 and all associated documents from the applicant's record to ensure the full restoration of justice is achieved.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of former AMT3 [REDACTED], USCG, for correction of his military record, back pay, and removal of adverse files against the applicant is fully granted. The Coast Guard shall grant the applicant constructive service credit time with all back pay and allowances that flow from this correction as if had completed his natural enlistment contract, but for his improper discharge. The applicant will receive credit for time in service as active duty to now include the date of his discharge, September 30, 2020, until the natural end of his enlistment on November 6, 2022; to include all backpay of all basic pay and allowances he would have earned but for the injustice applied by the Coast Guard in his forced separation. The Coast Guard shall issue the applicant a new DD-214 (not a DD-215) that reflects an Honorable characterization of service, a RE-1 reenlistment code, total time in service calculation reflective of his total enlistment but for the forced separation, and a narrative reason for separation as "Completion of Required Service." Lastly, the Coast Guard shall remove the adverse CG-3307 and all associated documents from the applicant's record.

January 16, 2025

