

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2021-067

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ME1

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 March 26, 2021, and assigned the case to an attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision dated July 17, 2024, is approved and signed by three duly appointed members who were designated to serve as the Board in this case.

APPLICANT’S REQUEST AND ALLEGATIONS

The applicant, a First Class Maritime Enforcement Specialist (ME1) on active duty, asked the Board to correct his record by making the following corrections retroactive to October 1, 2018 (the date he claimed he was wrongly reduced in rate from an E-7 (Chief Petty Officer) to an E-6): (1) reinstating his advancement to the rank of E-7; (2) restoring all benefits from advancement to E-7, including basic pay and basic allowance for housing (BAH); and (3) accruing retirement benefits at the pay grade of E-7. The applicant also asked the Board to remove from his record a “hate incident” filed against him with the Coast Guard Civil Rights Directorate, and all negative administrative remarks included in the CG-3307¹ and enlisted employee reviews (EERs) he received relating to the alleged incident.

The applicant stated that on May 24, 2018, he was frocked to E-7, and that during his participation at the Chief Petty Officers Academy he was “lauded by [his] classmates for [his] openness and truthfulness in addressing policies and the need for a more steadfast Chiefs mess in our organization” and that “[b]ecause of this, [he] was viewed as a viable candidate for an instructor’s position at the Chief Petty Officers Academy.” The applicant explained that “desiring to further [his] career and hoping to help develop the future of the Coast Guard, [he] applied for a highly competitive selective assignment as a recruiter” because he “had hoped that [he] might be able to share some of [his] acquired knowledge and wisdom to newly qualified applicants to the

¹ A CG-3307 is referred to as a Page 7, which can be positive or negative. The Page 7 requested to be removed by the applicant is a negative Page 7.

Coast Guard team.” He then explained the circumstances around his alleged misconduct that occurred on September 18, 2018.

[W]hile attending the Coast Guard Recruiter School, Training Center [] I used the ‘Okay’ hand signal during a class by joining the thumb and index finger in a circle with the other three fingers in the air. I made this signal with the intent of showing my agreement to moving on to the next portion of that morning’s class. I had no knowledge, at that time, of any possible link that this signal might have had to any ‘White power’ groups or ideals, and, certainly, with no intent to discriminate or intimidate against anyone! However, I immediately noticed one of my classmates [had a] very obvious and negative change in attitude toward me, in both looks and actions. At our next break, I approached him and asked what I had done to cause this. When he told me, I was surprised, and I apologized and told him that I had no idea that this signal was now viewed by some as discriminatory. It was apparent that neither my explanation nor my apology was acceptable to him, as his comment to me was that ‘I needed to learn that there would be repercussions for my actions.’ At this point, I still felt that this was a misunderstanding. After lunch break, I was called in to the Course Chief’s office and asked about the incident. I explained what had happened and about our conversation between classes and I thought the issue was resolved. But I was then informed that the Course Chief was going to brief his command of the incident.

The very next morning, the Coast Guard Commandant sent out a message, referencing a national news story about a young service member who displayed this hand signal that was reported to be a sign of ‘white power’. I did recall that a few days earlier, I had seen a comical (so I thought) headline from the Duffel Blog, a satirical news outlet, about the Coast Guard ceasing hurricane response efforts due to cultural awareness training. Though I thought that the headline was funny, I never opened, nor did I read the article, and I stated this to the Preliminary Investigative Officer (PIO). This was during the next meeting, where I was read my rights and was given the chance to make a formal statement. I explained the entire incident, and, once again, stated that I had no knowledge of this hand signal having any meaning other than ‘OKAY’!

Throughout my childhood, and during my Coast Guard career, I have used this signal for one thing and one thing only! To signal ‘OKAY’! In fact, to this day, the Coast Guard, as well as other Armed Services, use this signal for just this reason. For more than 9 years, I worked alongside Coast Guard and Navy divers as a Water Survival Training Safety Supervisor. This hand signal was, and still is, the universal and accepted way for divers and trainers to convey that everything is correct and ‘Okay’ after entering the water, during training and operations.

My statement was taken in a very brief and haphazard fashion, on a small notepad by the PIO. He said that he would transcribe it over the weekend, and that I would have the opportunity to review it and dispute any inaccuracies on Monday morning. When I was not contacted on Monday morning, I requested of the Course Chief to please put me in touch with the PIO. After waiting through the next round of classes, I was informed by the Course Chief that my proofreading, approval, and signature were not required, and *the* report had already been routed to the Commanding Officer for his review. I was not allowed an opportunity to read and/or sign the statement as I should have been. I was very unhappy about this but, at the time, I didn’t feel as though I had any choice in the matter. On September 7, 2018, I was requested to report to the Course Chief’s office where the Training Officer informed me that I was being released from Recruiter School and that I was to proceed back to my Recruiting Station [] to await further disposition. During this conversation with the Training Officer, I was told that due to the previously mentioned incident [], my timing with the hand signal could not have been any worse.

On my drive from [the training center] to my home [], I replayed the previous day’s events over and over in my mind and remembered that just minutes before my release from the school, that the roommate of the offended classmate had presented to the class his presentation that was required as part of the course. Within his presentation was the image of President Donald Trump as a ‘rubber duck.’ Displaying the ‘Okay’ hand signal on both hands. Both during and after his presentation, there were no offended persons which I believe shows a racial bias toward me from the disgruntled classmate based on my race.

On September 28, 2018[,] upon my return to the Recruiting Station [], I spoke with my Recruiter in Charge [RIC], and explained the entire incident. I also took the time to review the CG Investigations Manual where I found that a copy of the report was to be made available to all persons under investigation. I then requested a copy of the investigation from the Recruiting Command (CGRC). I was told that it was not yet available and was assured that I would be provided with a copy as soon as it was by my chain of command.

The next day, I was informed that CGRC had placed an administrative hold on my advancement to E-7, Chief Petty Officer, while the investigation was on going. A few days later, during a phone conversation with my RIC, I learned that the Coast Guard Investigative Services (CGIS) was now looking into the allegations, and again, I requested a copy of the investigation. Once again, I was told that it was still not available and that I would receive it as soon as it was. I was also told to resume normal recruiting operations and that the Recruiting Command would contact me when the investigation was concluded. It should be noted that CGIS found no prior incidents or allegations of racial bias or prejudice of any kind in my past.

Fast Forward to more than a month of silence and after repeated requests by me for a copy of the investigation report, I was unexpectedly informed that myself and my RIC were to meet with the Recruiting Command Chiefs on November 14, 2018 at Headquarters, where CGRC is located. I asked, in what form this meeting was to be held and I specifically asked if this was for a Chief's Council. I was informed that this was not a formal Chief's Council, and that it was only to 'speak with them'. However, the day before the meeting, I received a call from my RIC to let me know that it was being changed to a formal Chief's Council. I asked him if I needed to have representation with me and was told that there was no need for representation at a formal or informal Chief's Counsel.

During this Council, I was subjected to a uniform inspection by a member of the same rank (which is a blatant disregard of policy), then stood before a panel and was questioned about the incident and why I had applied to be selected for recruiting duty. I was quite taken aback and very confused as to why and how some of the questions that were being asked pertained directly to the investigation. An investigation that I still had not been granted the right to see! If, as I was still being told, the investigation was not yet available, the members of this panel should not have known the information that allowed them to ask the questions that they were asking! This, I felt, was further proof that I had been lied to and misled in not affording me the right to review and refute any inaccuracies in the investigative report and the transcribed 'statement'. At the conclusion of this Council, I was informed that the panel would report back to the CGRC Commanding Officer to provide the findings and input. I was informed, a few weeks later, by [], my Area Supervisor, that this Council was NOT completed under the direction of the Commanding Officer which is contrary to their own policy, CGRC INST 1616.12. This explains why I was not advised of any recommendation that would be made to the CGRC Commanding Officer as required by the same policy.

The following morning, I finally received the investigation report via email from my RIC. After a quick review of the 'Findings of Fact', I immediately requested a meeting with the CGRC Command Master Chief to discuss multiple inaccuracies, discrepancies, and omissions, but I was told that he was not available. I then requested to speak with the Regional Supervisor and my RIC said that he would call him. I was told that, after several attempts throughout the day, he never called back.

The next day, my RIC informed me that the CGRC had concluded their investigation and had reached a determination. My RIC and I were directed to report for a meeting the next day and it was then that I was finally able to meet with the Command Master Chief to discuss the inappropriate way that this entire investigation had been conducted. His statement was that I should have made a better statement and should probably should have written it myself! His only other piece of advice; in the future, should I have subordinates who find themselves in a similar situation, to pass along my experiences in this case! We were supposed to meet with the Commanding Officer, and some other personnel within the Chain of Command. With no preamble, the Executive Officer informed me he had reviewed the evidenced and that Command was taking the following actions:

- To immediately remove me from Recruiting and Special Assignments
- I was to report to USCG Base National Capitol region to the Office of Personnel to work [], where I was to manage and maintain the base gymnasium.

- That my former Commander's Recommendation for Advancement be changed to 'Not Recommended.' which formally removed me from the Advancement list and my frocking to E-7 was to be rescinded.

Later that same day, I contacted my friend and mentor of more than 15 years, [], Office of Special Capabilities, CG-721, for guidance and advice. At his request, I forwarded to him the entire investigation, Findings of Facts, my background information, including former supervisors and contact details. The following week CWO4 [] held a meeting with a majority of the Coast Guard Senior Enlisted Leadership, the Rating Force Master Chiefs. During this meeting all parties agreed that there were multiple issues regarding this situation and the subsequent investigation that warranted further scrutiny and challenge. CWO4 [] and the Maritime Enforcement Specialist Rating Force Master Chief, MECM [], requested a meeting with the CGRC Commanding Officer. During this meeting, both CWO4 [] and MECM [] challenged the areas that lacked evidence, without regard for policy, and the areas where there were apparent abuses of authority. They asked the Commanding Officer, that if the act that I had allegedly committed was so serious, why had he not taken it to Captain's Mast, a form of non-judicial punishment. To this he replied, that had he taken this route, I would most likely have requested a Court Martial. Both CWO4 [] and MECM [] replied that they certainly would have urged me to do so. His response to this was, that if I had requested Court Martial, he knew that he would lose, which was why he levied these penalties administratively! This raised an overwhelming concern from both CWO4 [] and MECM [], specifically, if the act that I had allegedly committed was so egregious, why wasn't it taken to a higher level of punishment and penalty?

A few days later CWO4 [] and MECM [] were advised by the Deputy Master Chief Petty Officer of the Coast Guard, CMC [] (DCMS) that they should suggest my next course of action to be a request for a meeting with the CMC [] and CGRC CMC to discuss my concerns and my options in pursuit of redress with the CGRC Commanding Officer. I met with CMC [] and the CGRC CMC on December 6, 2018. The guidance given during this meeting was that I should use all of the options offered in policy through my Chain of Command, these being: Request for Redress, Article 138 (Complaint of Wrong Against a Commanding Officer), Congressional Inquiry, and an application to the Board for Correction of Military Records.

During Christmas break, while I worked to complete my Request for Redress, it was requested, by CWO4 [] and other high-ranking members assigned to CG Headquarters that I be temporarily assigned to the CG Office of Maritime Law Enforcement and Policy MLE-2, due to my knowledge and expertise in these areas. I then, on January 07, 2019, submitted my Request for Redress. Over the course of the next month, I requested, several times, from CGRC, an update of the status of my request for Redress but received no replies. On January 28, 2019, I asked for another meeting with the CMC [] and CGRC CMC. It was, at this time, suggested that I also speak with CMC [], Deputy Commandant for Operations (DCO) for further guidance. He directed me to seek a conference with CMC [] Personnel Servicing Command, as CGRC falls under this Command. Even though I requested several times to meet with him, no response or reply was ever given.

After all of these meetings and dead ends, I felt that I had no choice but to enter into the Equal Opportunity (EEO) Discrimination Complaint Process against the CGRC Commanding Officer, the Executive Officer, and CMC for discrimination against me. My belief was and still is that I was not receiving the fair and proper opportunities, communications, and availabilities to refute and contest an alleged wrongdoing on my part because of my race. I feel, because of the timing and the prevailing social climate, I am, unfairly, being made an example of. Especially when I recall the Training Officer's comment that 'Your timing with the use of this hand signal could not have been worse'!

On February 13, 2019, I received notice that CGRC would NOW meet with me regarding my Request for Redress. I requested to have Lieutenant Commander [], MLE-2 accompany me, as I did not feel comfortable attending any meetings, formal or informal, without a witness. During this meeting, the CGRC Commanding Officer and Command Staff said little except to say that they thought very little of my attempts to refute the findings of THEIR investigation. We had the overwhelming feeling that this meeting was being held only so they could show that it had taken place. So of course, after this meeting, I received an official notification from CGRC that my Request for Redress was denied.

As a first step in the EEO Complaint Process, an Alternative Dispute Resolution meeting was held between me and my chosen representative CWO4 [] and CGRC Command, on February 21, 2019. During this

meeting, the CGRC Commanding Officer implied, several times, that he would agree to a resolution of the EEO Complaint if I were to agree to not pursue a formal UMCJ Article 138, thus joining the two separate policies and processes into one. CWO4 [] intervened in each case and made it clear that these are two separate matters. After the third attempt, we requested to adjourn this meeting with no resolution. We felt that he, CGRC Commander, was not willing to discuss one process without the other.

On March 11, 2019[,] I began the process of routing my Official Article 138 to the Personnel Servicing Command Commanding Officer.

As a final step in the Alternate Dispute Process (EEO Complaint), I was told that I needed to meet with a Resolving Official, Command's Legal Representative, and my personal representative, MECM []. The dates and the Resolving Official changed several times, with no apparent reason. The day before the meeting did take place, the Resolving Official was changed once again. Rear Admiral [], who at that time was part of the Personnel Servicing Command's Chain of Command, was appointed. During this meeting, I was asked why I had filed this complaint and what my expectations for resolution were. I was then told that none of my requests or expectations would be entertained because I had filed a formal Article 138! Again, it was apparent from the beginning that these two SEPARATE items were being treated by CGRC as one and they had no intention of adhering to proper policy or procedure. This meeting was supposed to be about the EEO Complaint only and the presiding Official should have had no knowledge or at least no bias because of the Article 138 filing. Obviously Rear Admiral [] was well aware of both and, as in previous instances, would not discuss one without the other! When we stressed this point, he then agreed to a resolution of removing/redacting any verbiage which pointed toward discriminatory acts or discrimination from me Enlisted Employee reviews and any associated documentation (CG-3307s). It was painfully clear that Personnel Servicing Command was determined to keep this within their own Chain of Command and my every attempt at redress was being 'stone-walled'!

Three and a half months later I received Personnel Service Command's response, denying redress, and finding no reason to oppose or revisit the procedures that had been taken against me by CGRC. As a result of all of this and given the exorbitant amount of time that CGRC and Personnel Serving Command took during this process, I was now unable to compete in a Service Wide Exam and meet the criteria for advancement before my Terminal Eligibility Date due to High-Year tenure. To my mind, I believe that the CGRC Commanding Officer as much as admitted that these steps were taken to penalize me to such an extent that my career would be ended, with little regard to the true nature of this incident. Again, I was being used as an example so that this Command could say that they have a record of punishing acts of racial discrimination. My timing was indeed not only poor, but disastrous!!

During the time that all this was transpiring, the Coast Guard has investigated several policy changes. The Civil [R]ights Manual has been revised to include a non-exhaustive list of hand signals, symbols, and signs thought to be discriminatory in nature and providing clear-cut instructions to commands for dealing with infractions. The Personnel Servicing Command has also re-defined the removal from advancement list policies and procedures, which were unclear and ambiguous in scope.

At the time of my alleged incident, the Anti-Defamation league had published a statement clarifying the use of the 'OKAY' hand symbol as non-racist. 'Montel Williams spoke out publicly of claims that had been made regarding Midshipmen from the U.S. Naval Academy using the 'OKAY' symbol and asserted that it was not racist in nature. Even now, this symbol is found all over social media, mobile phone message services, emojis, music videos, and publications world-wide!

When last I checked, the offended classmate has never entered a formal complaint process against me. With my repeated attempts to address my, at that time, Chain of Command about this incident, my inability to gain access to the transcribed report of investigation, never having been granted the opportunity to review or refute any findings, and the outright denial of my right to proofread and sign my statement, this entire process and punitive action directed toward me is and has been, contrary to proper procedure and the ideals of the U.S. Coast Guard. Sadly, this entire two-year process only points to, in this case, the Coast Guard having not followed its own policies and the mistreatment of one of its own, heretofore, valued members.

In support of his application, the applicant also provided various records. Only those documents relevant to his application will be summarized in this opinion.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on January 16, 2001, at the age of 18. As reflected on his Member Information Sheet, he is a white male (not Hispanic or Latino).

The applicant attended A school from October 8, 2001 to June 25, 2001, and basic training between June 26, 2001 and December 13, 2001, after which he was assigned the rank of E-3/Seaman.

On or about November 25, 2002, the applicant rose to the rank of E-4/Gunner's Mate Third Class (GM3). On August 1, 2007, he was promoted to an E-5/Gunners Mate Second Class (GM2). On January 1, 2010, his position changed to E-5/Boatswain's Mate Second Class (ME2). On February 1, 2015, he was promoted to E-6/Boatswain's Mate First Class (ME1).

On May 24, 2018, after attending the Chief Petty Officers Academy, the applicant was frocked an E-7/ME1, Chief Petty Officer, and was selected to be a recruiter. On September 10, 2018, the applicant began attending Recruiter School.

On September 14, 2018, during a live nationally televised event, an unnamed Coast Guardsman made the 'Okay' hand gesture behind a Commanding Officer who was speaking, which generated thousands of tweets, a widely viewed video, and extensive news coverage. On September 16, 2018, Duffel Blog published a widely publicized satirical article about the removal of the Coast Guard watch stander as a result of the September 14, 2018 events. The Coast Guard has reported that no adverse action has been taken against this Coast Guardsman as a result of his actions on September 14, 2018.

On September 18, 2018, while attending a recruiting school class, the applicant made the 'Okay' hand signal in response to another class member saying Blue Lives Matter during a presentation. The applicant's hand gesture was interpreted by SK1, an African American class member sitting adjacent to the applicant, as a racial gesture. At that time, the applicant immediately apologized for making the hand gesture. According to the applicant, SK1's roommate during recruiter school presented the day before he did, on September 17, 2018, and the roommate's presentation included an image of President Donald Trump as a 'rubber duck' displaying the 'Okay' hand signal on both hands.

On September 19, 2018, the Commandant of the Coast Guard sent an email with the subject: "Hurricane FLORENCE Response – ICP [] Incident," regarding the use of the "okay" hand gesture by another Coast Guardsman on September 14, 2018, during a televised event. The Commandant noted that as military members, law enforcers, and first responders, our words and actions must unambiguously support our Core Values and sustain America's trust in us. Following the gesture, the Coast Guard responded by removing the member from his watch standing duties, opening an investigation, and posting the following statement on Twitter: "We are aware of the offensive video on Twitter – the Coast Guard has identified the member and removed him from

the response. His actions do not reflect those of the United States Coast Guard.” The Commandant stated that, while due process demands that the Coast Guard not assume the intent behind the member’s gesture, regardless of intent, the individual demonstrated a lack of professionalism and poor judgment, distracting from our urgent response operations during a critical natural disaster. The Commandant closed the email by noting that continued success requires all Coast Guard men and women to keenly focus on the mission and maintain a culture of respect and professionalism at all times.

On September 20, 2018, Commander (CDR) K directed Lieutenant (LT) S to conduct an investigation into the circumstances surrounding the allegation that the applicant used a racially offensive hand gesture during recruiter school training on September 18, 2018 to be completed by September 26, 2018. In conducting the investigation, the LT S interviewed the instructor and the twelve students in Recruiter School class 06-18 who were in attendance during the events in question and provided his findings and recommendations.²

On September 26, 2018, at the conclusion of the investigation, LT S issued a memorandum Subject: Preliminary Inquiry into Alleged Use of Racial Hand Gesture in Recruiter School Training. LT S made the following findings of fact.

SK1 and the applicant attended Recruiter School class X and sat across from each other in class. On the morning of Tuesday, September 18, 2018, per the Recruiter School Syllabus, the class participated in an impromptu mock presentation activity. For the activity, one student is chosen at random to act as a recruiter, talking to a specific group of people. Two other students were given questions cards to ask during the presentation. Though not required, the remainder of the class was encouraged to participate, and role play as the audience during the activity. For class X, the topic of the mock presentation activity was a recruiter presenting to a group of police, attempting to recruit them into the Coast Guard Reserves. YN1 was chosen as the recruiter for the presentation.

YN1 began his presentation by thanking the “police” for their service during such a tumultuous time. At the end of YN1’s introduction, SK1 stated “Blue lives matter.” After SK1 made this statement, the applicant, looking at SK1, raised his right hand, formed in the shape of the “OK” symbol, to the right side of his head. The applicant made no further gestures. ET2 witnessed the applicant making this gesture. No one else in the class witnessed the gesture. SK1 was immediately, noticeably offended by the applicant’s gesture. SK1 perceived this gesture to be in reference to the newer meaning of the “OK” hand symbol as “White Power.” The applicant knew that he had offended SK1 through his face and body language. SK1 was unable to focus for the remainder of the class.

The class was dismissed for lunch at the conclusion of the activity. As everyone departed from lunch, the applicant approached SK1 and apologized for this action. SK1 told him “ME1 you have been crossing the line with numerous offensive statements in

² Five students responded that they had not witnessed any inappropriate gestures while in class, were not identified in any other part of the investigation or provided no response to the above question to bring suspicion of having any knowledge of the incident under investigation.

class, this time you went too far.” OS1 (SK1’s roommate during school) witnessed the apology. OS1 noticed a change in SK1. After the apology, OS1 asked SK1 what was wrong. SK1 told him what had happened during the class with regard to the applicant making a gesture towards him. OS1 recommended SK1 inform the Recruiter School Chief.

SK1 was physically affected by the gesture. He was unable to eat lunch and became anxious. He has continued to feel pressured and uncomfortable around the applicant. During the lunch break, SK1, with OS1, notified OSC of the applicant gesturing the “OK” symbol towards him. Once class reconvened, OSC pulled the applicant out of class to discuss the incident. The applicant admitted that he had flashed the symbol toward SK1 during class. The applicant generally stated that he had made the stupid gesture and apologized for it. OSC counseled the applicant on his actions and notified the chain of command of the incident. The applicant rejoined the class.

At dinner that evening, SK1 told YN1, ET2, and AMTI of the incident because they asked him what was wrong, having noticed a significant change in SK1’s demeanor. The following morning, Wednesday, September 29, 2018, before class started, the applicant approached SK1, apologized again for his actions, stated that it is not who he is and that he was only joking. MKC overheard the apology. MKC, the applicant’s roommate, asked him what the apology was about. The applicant provided him a brief synopsis of the incident.

At 1215 on Wednesday, ADM released an All Hands email in response to the Coast Guard’s actions during Hurricane FLORENCE and the incident at ICP [] where a watchstander flashed the “OK” symbol next to his head in the background of a live news broadcast.

During the first day of Recruiter School, Coast Guard Recruiting Command’s Operations Plan is briefed to the students. One of CGRC’s mission emphasis in the plan is diversity, with targeted goals of 35% under-represented minorities accession for active duty enlisted and officers. The applicant became agitated and dissented against the requirements of having to select underrepresented minorities over white males. Though perceived negatively by and offending SK1, OSC stated that the applicant’s reaction was not outside of the norm experienced in other Recruiter School classes.

The applicant is current on his Mandated Training for “Civil Rights Awareness” and “DHS No Fear Act and Anti-Harassment.” When asked about his prior knowledge of the “OK” symbol having a secondary meaning for “White Power,” SK1 claimed to have learned of it a month prior, after the symbol was reportedly flashed during a Congressional hearing.

When asked about his prior knowledge of the “OK” symbol having a secondary meaning for “White Power,” the applicant claimed to have only learned of it days before on Duffel Blog, a satirical news website focused on military issues. Duffel Blog published a satirical article about the removal of a Coast Guard watchstander at ICP [] on September 16, 2018.

The earliest noted use of the “OK” symbol to represent “White Power” is in 2015. In February 2017, the website “4chan” started a hoax campaign to hype the use as “OK” meaning “White Power,” causing the new meaning to go “viral”. The reason for the hoax campaign was to trigger reactions, specifically “trolling the libs.” With the success of the campaign, numerous new white supremacy and alt. right groups have adopted the symbol to mean “White Power.”

Based on these findings of fact, LT S opined that the applicant’s gesture towards SK1 on the morning of 18 September 2018 was not with the intent of the universal meaning of “OK.” SK1 was immediately offended and negatively affected by the gesture and was already offended by the applicant’s actions during class prior to the gesture. LT S found the applicant was aware that the “OK” symbol had other offensive meanings, but noted there was confusion surrounding the new meaning(s) of the symbol. LT S stated that, because of the broad definitions of prohibited harassment and hate incident as well as the non-definitive nature of this case, he did not feel confident in stating an opinion if either definition is met. LT S opined that, regardless if this constitutes harassment or a hate incident per Civil Rights law, the applicant’s actions were unacceptable, against our Core Values, and showed a clear lapse in judgement. As a special duty assignment, recruiters are held to a higher standard than a normal assignment. If their actions do not meet or maintain those high standards, they can be removed from their assignment.

LT S recommend that the Civil Rights Service Provider be consulted to help determine if this incident meets either definition of prohibited harassment or hate incident. If so, then applicable Uniform Code of Military Justice (UCMJ) charges should be brought against the applicant. Because of the actions, LT S recommended the applicant be removed from his current position as a recruiter.

On September 28, 2018, the applicant was disenrolled from Recruiter School for fault.

On October 4, 2018, CAPT G sent a memorandum to COMDT (G-00H) through COMDT (CG-00H-2), Subject: Findings and Outcome of Report of Hate Incident at Recruiter School. The memo stated that the Recruiter School Chief received a report that the applicant, a student in recruiter school, used a hand gesture targeting the legally protected status of race on 18 September 2018. An administrative investigation was immediately initiated to ascertain the facts relative to the allegations and completed on 26 September 2018. CAPT G stated that, having reviewed the facts found in the investigation and its associated enclosures, he determined that the allegations are substantiated and had taken the following actions: (1) disenrolled the applicant from recruiter school for fault – misconduct and directed that he return to his parent command; (2) briefed Coast Guard Recruiting Command on the incident and will forward a copy of this memorandum and the investigation to the Commanding Officer, Coast Guard Recruiting Command for his review. Any additional action on this matter will be handled by Coast Guard Recruiting Command.

On December 17, 2018, CAPT W sent a memorandum to CG PSC-EPM-2, Subject: Request Reassignment Due to Unsuitability for the applicant. CAPT W noted that, in accordance with COMDTINST M1000.8, Ch.1.F, the applicant was no longer considered suitable for continued duty as a result of his own actions. As a result of an investigation, it was determined that the applicant does not currently possess the maturity and judgment necessary for special assignments. While in Recruiter school, the applicant made a hand gesture during a presentation

that was received as discriminatory. Behavior of this nature heightens the risk for further instances that could result in placing the Coast Guard and recruiting in a very negative light to the public. CAPT W noted no disciplinary actions were pending, the applicant had been removed from the MEC Servicewide Exam (SWE) advancement list, and his performance had been documented in an EER.

On December 17, 2018, the applicant received the following Page 7's signed by CAPT W:

- Entry Type: Assignment and Transfer (A&T-3)
Reference Section 1-E, Military Assignments and Authorized Absences, COMDTINST M1000.8 (series)
Responsible Level: Unit
Entry: Found to be unsuitable as a Coast Guard Recruiter due to severe lack of judgment and maturity, per Article 1-E-4, Military Assignments and Authorized Absences, COMDTINST M1000.8 (series). Commander (CO-PSC-EPM) notified this date and reassignment requested.
- Entry Type: Performance and Discipline (P&D-7)
Reference: None
Responsible Level: Unit
Entry: (General-Negative)

Dec 17 2018: While in Recruiter school, you made a hand gesture during a presentation that was received as discriminatory. Behavior of this nature as an ambassador of the Coast Guard to the public, poses a high risk for further instances that could result in placing the Coast Guard and recruiting in a very negative light. Although I did not impose punishment, I find that your lack of maturity and good judgment, as evidenced by your actions, are not in keeping with our Core Values and did not reflect the decorum nor the professionalism the Coast Guard expects of its Chief Petty Officers.

Effective this date, for the reasons noted above, I am revoking your recommendation for your advancement to Chief Petty Officer and removing you from the May 2017 Service Wide Exam eligibility list. Per COMDTINST M1000.2 (series) my recommendation cannot be appealed, however it can be changed at any time.

In order to gain a future Commanding Officer's recommendation for your advancement to Chief Petty Office, I expect that you will consistently strive to meet the criteria for a mark of '6' in all of your E-6 performance dimensions, especially Judgment. You must carefully consider the impacts your actions have on (1) our workplace climate and (2) how your peers, subordinates, and superiors view you as a leader. Leaders must demonstrate the epitome of professionalism and decorum at all times. This is applicable to all levels of our organization.

On January 7, 2019, the applicant sent a memorandum to CAPT, Subject: Request for Redress of Grievances Under Article 138, UCMJ. The applicant stated his grievances were: he was wrongfully removed from the advancement list due to an accusation of a Hate Incident while attending Recruiter School; and he has wrongfully had a Hate Incident filed in his record for a wrongful accusation while attending Recruiter School. He requested the following redress: advance to E-7 with back pay to October 1, 2018; and the memorandum, Findings and Outcome of Report of Hate Incident at Recruiter School, and associated CG-3307s, be expunged from his permanent record.

3. While attending Recruiter School, I took part in an impromptu 'sales pitch' with a fellow class member. When the class was notified that we could be moving on to another exercise, I used an 'okay' symbol in acknowledgement. As a classmate appeared to have taken exception to this, I approached him and apologized for any offense he may have received. I assured him that it had not been my intention to do

anything but provide acknowledgement. The individual was apparently not satisfied with my apology and approached the Lead Instructor and School Chief to lodge a complaint. Later that afternoon, the School Chief questioned me about the incident and notified me that he would inform his command.

4. I was interviewed by the Preliminary Inquiry Officer (PIO) on Friday, 21, Sep 2018. I was told by this individual that he would take my oral statement, transcribe it, and provide me an opportunity to review it before I signed it (and before it would be included in the investigation). On Monday, the 24th, I participated in a phone conference with the PIO and the School Chief to obtain an update on the investigation. I was informed at that time that my signature was not needed, the investigation was complete, and it had been submitted to the Commanding Officer. I had not been provided an opportunity to review my transcribed statement. The day before the class graduation I was pulled aside by the training officer and told that I was being disenrolled from the course and directed to return to my permanent Duty Station to await final disposition.
5. I requested a copy of the investigation several time during the following month and a half. I was told that it was not available, and that I would receive it when it was. As per [the Administrative Investigations Manual], a member under investigation must receive a copy of the investigation and be given a chance to refute any inaccuracies within. I was never given this chance and feel as though all parties involved presumed me guilty. Prior to my receipt of the investigation, I was wrongly subjected to a Chief's Council, normally used as a disciplinary tool. It was found later to have been performed without the Commanding Officer's direction and outside of policy, further strengthening the presumption of my guilt.
6. When I was finally afforded the opportunity to read the finished investigation, on 15 November 2018 (long after it had been routed to and approved by the CO of the training Center, I noted that my accuser and another individual had been allowed to write their own statements, in addition to my accuser having his interview transcribed. Additionally, the transcription of my interview was inaccurate, but I had never been permitted the opportunity to identify and correct the error.
7. Immediately upon identifying these problems, I requested an audience with the Command Master Chief (CMC) and my Regional Supervisor. I was informed that they were not available and that my Recruiter in Charge (RIC) would call them to set up a meeting or phone conference. The next day, I was informed that the Commanding Officer had reached his decision, and that I was to meet with the Command the following Monday. The following morning, I was afforded a few minutes to meet with the CMC, and explained the inaccuracies in the investigation and the problems with the entire process. The CMC told me that it was too late and that I could pass on to my peers and future subordinates the need to draft their own statements.
8. To date, my accuser has not entered the Civil Rights process or otherwise filed a grievance through the proper channels. That fact, combined with the incorrectly executed investigation and suspicious denial of any opportunity to defend myself, makes my removal from the advancement list unfair, capricious, and completely unsupported.
9. The Anti-Defamation League, a nationally recognized civil rights group, has made assertion that the use of the 'okay' symbol is not a racist symbol (Exhibit 18) of Enclosure (2)). Moreover, as defined in [the Coast Guard Civil Rights Manual], a Hate Incident requires an 'intentional act of intolerance.' Without knowledge of the supposedly racist meaning of the hand symbol (which has been debunked), intent cannot exist. Recently, LT T[], was subjected to UCMJ charges for the use of the same hand signal. Those charges were dropped due to the finding that the symbol was not, in fact, a racist gesture.
10. Coast Guard operators in the professional specialties of law enforcement and diving are trained and required to use this symbol as an acknowledgement. It was conspicuously mentioned in the HEALY diving death mishap report that the divers' inability to make the required 'okay' symbol signified that they had been too cold to complete the dive safely. One of them any negative findings in that report was the use of an alternative symbol for 'okay,' the only acceptable gesture was the same one that I used to signify 'okay, and which law enforcement operators (such as myself) are trained to use to signify 'okay.'

Just as Cuttermen use nautical terminology in their daily speech, so too do Law Enforcement professionals like myself adopt the language of our training and missions into our daily lives.

11. While the PIO found that there was no definitive evidence that I had acted in such a manner as to have committed a Hate Incident or a Civil Rights violation, the [CO] decided that I had instigated a Hate Incident. He then filed the required memoranda with the Civil Right Directorate, thus attaching the title of 'racist' to my name. My performance has been exemplary throughout my career. A review of my record and references from anyone with whom I have served will reveal a Coast Guardsman who is committed to our Core Values and has always upheld the highest ethical standards of a dedicated law enforcement professional. The accusation that I not only disregarded the code by which I have lived by more than 15 years sickens me.

On February 6, 2019, CAPT W responded to the applicant's Request for Redress in a memorandum and denied his request. CAPT W found the applicant's lack of maturity and good judgment are not in keeping with our core values and did not reflect the decorum nor the professionalism the Coast Guard expects of its Chief Petty Officers or recruiters. As a result, he would not recommend the applicant's advancement to Chief Petty Officer during the current marking period. To the degree that he had any authority to recommend or remove the October 4, 2018 memorandum from the record, CAPT W believe that the Commanding Officer acted within his authority and saw no reason it should be removed from Coast Guard records. The applicant was notified he could file an Article 138 UCMJ, complaint to the officer exercising general court-martial jurisdiction (OEGCMJ) regarding the decision.

On March 6, 2019, the applicant sent a memorandum to CAPT P (CG-PSC), Subject: Complaints of Wrongs Under Article 138, in which he stated he: was wrongfully removed from the advancement list due to an accusation of a Hate Incident while attending Recruiter School; had wrongfully had a Hate Incident filed in my record for a wrongful accusation while attending Recruiter School. The applicant asked for the same relief as articulated in the first Article 138 request. The applicant made many of the same arguments that have been discussed in detail above and need not be rearticulated here. In addition to those arguments, the applicant further stated:

8. At a later meeting, the CMC informed me that the PIO had 'recorded what he had heard' when transcribing my statement. By this phrase, the CMC attempted to use the very rationale for the policy in [the Administrative Investigations Manual] requiring an interviewee to review and approve any transcription of his statement as a defense for the PIO's failure to do so. Not only has a violation of Commandant policy resulting in tangible consequences to my career been excused by the CMC and CO of the Recruiting Command but has, in fact, been endorsed by both of them.
 9. To date, my accuser has not entered the Civil Rights process or otherwise filed a grievance through the proper channels. That fact, combined with the incorrectly executed investigation and suspicious denial of any opportunity to defend myself, makes my removal from the advancement list unfair, capricious, and completely unsupported. Again, this is a violation of Commandant policy, endorsed by the Commanding Officer and CMC of the Recruiting Command.
- ...
12. During the Command Resolution meeting to my Civil Rights complaint, I asked for a couple of minutes to confer with my representative, [] to ensure that I had a full understanding of the resolution offered. When we re-convened, I agreed to the Recruiting Commands resolution. Immediately following my acceptance, the Commanding Officer stated 'break, break' and attempted to conflate the Article 138 process with the Civil Rights Complaint process, by requesting whether my intention was to go forward with the Article 138 process if we, the Recruiting Command and I, came to an agreeable resolution. The Executive Officer voiced to the Commanding Officer that he recommends that the offer of resolution be removed if the Article 138 could not be discussed, as there would be no way to protect the organization

if the Article 138 went forward. MLES3 [] made three attempts to steer the meeting back into the Civil Rights Process, keeping the two processes separate as per policy. He voiced his interpretation of the concerns from Recruiting Command that if I was not going to dismiss my pursuit of an Article 138, then they would not go forward with their offer of resolution. This ultimately led to the abrupt adjourning of the meeting. This situation further underscores a lack of respect for policy endemic in the Recruiting Command. In my more than 17 years of service, I have never felt like a command or organization has ever held anything over my head or prioritized underhanded motives. The aforementioned actions have severely degraded my outlook on a career that has been brought short by the presumption of guilt where none was reasonably or prudently demonstrable.

A memorandum dated March 11, 2019, from CAPT W (CG RC) to CAPT P (CG PSC-C), Subject: Response to Complaint Filed Under Article 138, UCMJ notes that CAPT W was responding to the March 6, 2019 complaint filed under Article 138, UCMJ. CAPT W noted that he had previously reviewed the applicant's written request to redress his grievances and, after carefully reviewing the request, including a meeting with the applicant and his representative, he had denied his request of grievances. CAPT W found the applicant's lack of maturity and good judgment are not in keeping with our core values and did not reflect the decorum nor the professionalism the Coast Guard expects of its Chief Petty Officers or recruiters. As a result, he withdrew his recommendation for advancement to Chief Petty Officer, removed him from Special Assignments, and documented the incident. CAPT W noted that he believed the Commanding Officer acted within his authority and saw no reason to expunge the October 4, 2018 or March 6, 2019 memos from Coast Guard Records.

In a memorandum dated March 27, 2019, from CAPT P (CG-OSC) to the applicant, Subject: Notice of Opportunity to Provide Rebuttal under Article 138, CAPT P stated he had reviewed the complaint and its responses and found it partially complies with the requirements of Chapter 25 of the Military Justice Manual. The applicant alleged that he had a Hate Incident filed in his record for a wrongful accusation while attending Recruiter School. That decision was made by the Commanding Officer of [] and not CAPT W. As such, pursuant to 25.B.2 of the Military Justice Manual, CAPT P noted the decision to file a Hate Incident in the record is not a proper subject of a complaint of wrongs against CAPT W. The removal of the recommendation for advancement, and the associated CG-3307, were acts taken, or ratified by, CAPT W, and are proper subjects of a complaint of wrongs. As such, CAPT P noted he would review those acts. The applicant was provided with a copy of the respondent's response and notified he had 10 working days from receipt of this memorandum to rebut any matter contained therein.

In a memorandum, dated April 5, 2019, from the applicant to CAPT P (CG-PSC), thru (1) CG, (2) CG SECTOR, Subject: Response to Opportunity to Provide Rebuttal Under Article 138, UCMJ, the applicant reiterated his requests for advancement to E-7 and removal of the associated memorandum, 3307s, and comments in Direct Access from his permanent record. He stated:

1. While I am aware that the actions taken by Captain [W] were within his authorities, I believe that they were based upon an investigation and procedures that were conducted outside of policy and that the allegations were unsubstantiated. During the interview process, the Preliminary Investigative Officer (PIO) informed me that he would transcribe my statement and return with it for clarification and signature. I was never afforded this opportunity, if I had, I would have been able to clarify and accurate the statement recorded. Additionally, I was never given the ability to rebut the findings of the PIO's report before judgment was handed down. This was due to not having access to the report until the day after being subject to an unauthorized Chief's Counsel, both fall outside of policy and are unreasonable. I believe the handling of this case was, on multiple levels, based upon a misjudgment, where the totality of circumstances showed a

different picture. This entire package has been brought before several Rating Force Master Chiefs, multiple colleagues, and support structure. After reviewing, all believe that this circumstance was dealt with unjustly.

2. Furthermore, to have intent a person must have knowledge. During my interview with the Preliminary Investigative Officer (PIO), I made the comment that I had read a headline from the Duffel Blog Article [], not the entire article. Having knowledge of the satirical, non-factual basis of the Duffel Blog as a media outlet, I did not take my reading of the headline as factual. As such, I dismissed the article without further thought. To find this as knowledge of a subject, is unreasonable.
3. The same symbol that I used that day in class has been utilized since the early 19th century with the same meaning that I meant on that day, 'Okay'. I have used this hand signal my entire life with the same meaning. I, today, since that day, based on the belief that this hand signal is discriminatory in fashion, have not used this hand gesture since a shipmate felt wronged. When the offended shipmate changed his body language and leered at me from across the classroom, I took the first opportunity to speak with my shipmate. I posed to him that it was not meant in any other way than 'okay', and that my intentions were never to discriminate against himself or another person. My apology was accepted the next day before class had resumed. But in this case the Commanding Officer made the assertion the allegation w[as] substantiated. To this I pose the question, why was my accepted apology and subsequent behavior modification insufficient? If it was not sufficient, why wasn't the Civil Rights Complaint Process entered by that individual?
4. The act in question, in reference (g), has been debunked in a case that has caught national notoriety. LT [] case was overturned. The Anti-Defamation League, a national pillar for civil rights, asserted the 'OK' sign is not in fact a sign for 'white power'. This same outcome, I believe, would and should be found in my case. When 'dropped' from Recruiter School by the Training Officer, [], he asserted that sometime in the careers of good leaders, things happen that slow down their progression, and that in my case the timing could not have been any worse. Timing by my understanding, is not a numeral from which we count on for judgement of character, and certainly not a standard of which to scrutinize the maturity and judgement of our personnel.

On May 24, 2019, the applicant entered into a Resolution Agreement with the Coast Guard, the relevant portions of that agreement are copied below:

1. This Resolution Agreement is entered into between the Department of Homeland Security, United States Coast Guard [and the applicant] (hereafter, the Aggrieved Person) for the purpose of resolving the dispute raised in Case Number [] and all issues raised as further specified in paragraphs 2 and 4.
2. This agreement represents a good faith effort by both parties to reach an amicable resolution. By executing this agreement the parties hereby agree to resolve all of the issues raised between the parties through the date of execution of this agreement, including aggrieved person's pre-complaint of discrimination, including all claims of monetary reimbursement, and any other claims for relief relating to all issues raised, which have been filed or could have been filed by him [] against the Coast Guard, the Department of Homeland Security or any of its components, through the date of execution of this agreement.
3. The Aggrieved Person alleged that he was subjected to discrimination based on Race (Caucasian) when on January 7, 2019 he received the paperwork for a Page 7, which released him from special assignments and removed him from the advancement list.
4. The Coast Guard agrees to:
 - a. Change Enlisted Employee Review (EER) remarks to remove mention of discrimination and hand gesture, and replace with 'offended another member.' This action should occur no later than 30 days from the date of the last signature of this agreement.
 - b. Remove sentence from EER remarks regarding negative stance on recruiting initiates. This action should occur no later than 30 days from date of the last signature of this agreement.

- c. In reference to the December 17, 2018 CG Form 3307 remove language regarding discrimination and hand gesture and replace with ‘offended another member.’ This action should occur no later than 30 days from date of the last signature of this agreement.
5. By executing this agreement, the Aggrieved Person withdraws and dismisses, with prejudice, his or her claim of discrimination identified above, and any other allegations, complaint, grievance, or other action he or she has filed. The Aggrieved person agrees not to institute, file or otherwise initiate or cause to be instituted, filed or initiated on his [] behalf, any civil court litigation against the Coast Guard, the Department of Homeland Security or any of its components, concerning the claim of discrimination identified above and any other allegations, complaints, grievance or other action he or she has filed.
6. The Aggrieved Person agrees that by signing this Resolution Agreement, the terms of this agreement are in full settlement of all pending claims filed regarding his/her employment that arose up to the signing of this agreement.
7. By executing this agreement, the parties affirm they entered into this agreement voluntarily, with full knowledge and understanding of its terms and conditions, after having the opportunity to have this agreement reviewed by their respective legal advisors.

...

13. The Aggrieved Person acknowledges s/he has had an opportunity to review this agreement with a representative, each statement is understood and accepted by her/him, and s/he voluntarily, and without duress, reservation, or coercion, agrees to settle this matter subject to the terms and conditions herein.

A memorandum dated June 18, 2019, from CAPT P (CG PSC) to the applicant through CAPT W (CG RC), Subject: Complaints of Wrong, Article 138 provided:

1. In [your letter dated March 6, 2019], you request redress for various wrongs alleged, pursuant to Article 138, Uniform Code of Military Justice (UCMJ), following your previously denied request for redress per [the memorandum dated February 6, 2019.] Pursuant to Chapter 25 of [the Military Justice Manual] and [the UCMJ], as Commander, Coast Guard Personnel Service Center, I exercise general court-martial jurisdiction over personnel assigned to the Coast Guard Recruiting Command and I am the appropriate person to act on your complaint . . . I have heard your complaint and inquired into your alleged harms, and for the reasons detailed below, I deny your requested redress pursuant to Article 138, UCMJ
2. [The memorandum reiterates the applicant’s complaint and requested redress.]
3. In [the memorandum dated March 27, 2019], I informed you that . . . the CG [] decision to file [the October 4, 2018 Report of Hate Incident] was not a proper subject of a complaint of wrongs against CAPT [W], Commanding Officer of the Coast Guard Recruiting Command. Accordingly, I reviewed only those acts taken, or ratified by, CAPT [W].
4. In [your letters dated March 6, 2019 and April 5, 2019,] you object to the manner CG []’s Preliminary Inquiry was conducted, particularly not being afforded an opportunity to review the Preliminary Inquiry Officer’s (PIO) summary of his interview with you. Of note, the PIO’s summary of your interview states, in part, that: (1) you made an ‘okay’ hand gesture at SK1[], a classmate; (2) SK1 []’s face and body language after you made the gesture showed immediate offense; (3) you immediately apologized to SK1 [] after class, and again the following morning; (4) you understood the offensive nature of the ‘okay’ symbol as a ‘White Power’ symbol; and (5) after making the ‘okay’ hand symbol at SK1 [], you immediately knew what you did was wrong and offensive.
5. Your interview summary was signed by the PIO, LT [S], as ‘true and correct’ to the best of his knowledge, and there is no indication in the record of any motive by LT [S] to misrepresent, or fabricate,

- any of your statements. Notwithstanding, after your interview with LT [S], you provided three submissions [dated January 7, 2019, March 6, 2019, and April 5, 2019] to clarify your statement to the PIO. I have reviewed and considered each of those submissions. In each of those submissions, you acknowledge: (1) using the 'okay' symbol in the classroom after a class exercise; (2) observing that a classmate (SK1[]) took 'exception' to your use of the 'okay' symbol; (3) apologizing to the classmate after noticing that he took exception to your use of the symbol. In reference (f), you state that the classmate that took exception to your use of the symbol 'changed his body language and leered at [you] from across the classroom,' after you used the symbol, and that you were aware that the 'okay' hand symbol was, at least in the satirical' sense, reported as a racially insensitive gesture.
6. Your written statements corroborate the signed statements of SK1 [] and OSC [C], as well as the interview summaries of OS1 [S], ET2 [A], and MKC [Z], provided as part of [the September 26, 2018 preliminary inquiry.] Taken together, these statements and summaries clearly indicate that your use of the 'OK' symbol was inappropriate and that you offended SK1 [] as a result.
 7. After a thorough review of all the material and careful deliberation, I find that CAPT [W]'s actions were neither arbitrary nor capricious, and were in keeping with his discretion, his authorities, and his responsibilities. I find that you were not unduly wronged by Coast Guard Recruiting Command. Accordingly, I find your complaint to be without merit.
 8. My decision is only pursuant to your request for redress under Article 138, UCMJ. My action as reflected in this memorandum does not impact any other proceedings, investigations or agreements convened by or entered into by a separate authority.
 9. For the reasons cited above, your request for relief under Article 138, UCMJ, is denied. In accordance with Chapter 25 of reference (c), I will forward a complete copy of your complaint along with a copy of this memorandum notifying you of my decision to the Judge Advocate General (CG-094) of the Coast Guard.

On June 19, 2019, the applicant was issued a Page 7, which he acknowledged on June 21, 2019, wherein his frocking to E-7 was rescinded and he was removed from the Service Wide Exam eligibility list. The Page 7 read:

While in Recruiter school, you offended another member. Behavior of this nature as an ambassador of the Coast Guard to the public, poses a high risk for further instances that could result in placing the Coast Guard and recruiting in a very negative light. Although I did not impose punishment, I find that your lack of maturity and good judgment, as evidenced by your actions, are not in keeping with our Core Values and did not reflect the decorum nor the professionalism the Coast Guard expects of its Chief Petty Officers.

Effective this date, for the reasons noted above, I am revoking your recommendation for your advancement to Chief Petty Officer and removing you from the May 2017 Service Wide Exam eligibility list. Per COMDITINST M1000.2 (series) my recommendation cannot be appealed, however it can be changed at any time.

In order to gain a future Commanding Officer's recommendation for advancement to Chief Petty Officer, I expect that you will consistently strive to meet the criteria for a mark of '6' in all your E-6 performance dimensions, especially respect for others. You must carefully consider the impacts your actions have on (1) our workplace climate and (2) how your peers, subordinates, and supervisors view you as a leader. Leaders must demonstrate the epitome of professionalism and decorum at all times. This is applicable at all levels of our organization.

A memorandum dated August 9, 2019, from CAPT V (CG LMJ) to CDR (PSC), Subject: Article 138 Review noted the action of the Officer Exercising General Court-Martial Jurisdiction

with respect to the Article 138 complaint filed by the applicant was legally sufficient and appropriate. No further action was deemed necessary.

In support of his application, the applicant provided eight sworn statements. They are summarized below and provided to the Board for review.

The applicant also provided a sworn statement from his attorney regarding a telephonic conversation he had with the Coast Guard member (SK1) who filed the Complaint against the applicant.

On or around January 22, 2020, I had a telephonic discussion with [SK1] . . . During the discussion, [SK1] outlined for me what he had previously observed [the applicant] do that caused him to file a complaint. I noticed some inconsistencies in his verbal outline of what occurred versus the official statement he had filed against [the applicant]. For example, he did not indicate that [the applicant] used the 'ok' symbol more than once but in the official statement he claimed he had done it three times.

It was very apparent during my conversation with [SK1] that he did not like [the applicant]. He even indicated that he had formed a negative opinion of [the applicant] prior to and unrelated to the alleged incident. [SK1] commented multiple times that [the applicant] was 'arrogant' and a bit of a 'chauvinist,' however, he did not have examples of [the applicant] acting in such a manner.

With respect to the hand gesture, he claim[ed] [the applicant] used in a racist manner, he acknowledged that they symbol in question is also universally known as the symbol for 'OK' or 'agreement' and that even divers in the Coast Guard use the symbol to indicate they are doing fine during the dive. When I asked about how he knew he was using the symbol with the intention to convey it as a hate symbol rather than 'OK' or as a way to show agreement, he conceded that he could not know for an absolute certainty but believed that because [the applicant], after learning that [he] had been offended, came up to him and told him he was not using the hand gesture to indicate white power and he apologized. Inexplicably, [SK1] took that follow up by [the applicant] as evidence that [the applicant] had used the hand gesture to convey it as a hate symbol.

[SK1] stated that he was happy that [the applicant] was being disciplined and he seemed to take pleasure in the fact that he launched such investigation. After having discussed the matter with [SK1], it is my belief that [SK1] used this incident to target someone that he just didn't like rather than a genuine belief that [the applicant] was a racist and was purposely conveying such a message to [SK1].

The applicant provided a sworn statement from CWO4:

I have known [the applicant] for 16 years. As a young Petty Officer Third Class, I was immediately drawn to him for his stand out leadership as we commissioned [] together. As a Gunnery mate and Small Arms Instructor, he was instrumental [in] assisting me to get our personnel qualified to reach full operation capable. It was at this point I became a career long mentor for [the applicant]. Be it work related, or family related, he has always reached out to me as a sounding board.

[The applicant] is known for seeking those challenging positions. A Small Arms Instructor for recruits at [], a Close Quarters Combat Instructor and Advanced Marksmanship Instructor for our Basic Tactical Operators Course [], a Tactical Operator at [] and most recently his desire to become a recruiter to bring in the brightest for our Deployable Specialized Forces. He has not shied away from the tough jobs and is always there when the going gets tough.

When [the applicant] had racial claims made against him, he immediately called me again for advice. Knowing this is completely not his character, I began contacting everyone I could. I obtained a copy of the investigation, discussed with my chain of command, [] and requested a meeting with his CO, who I knew from past assignments. Additionally, we requested visits with MCPO-CG and D-MCPO-CG. . . . After

reviewing the case with several Master Chiefs and Chief Warrant Officers, not a single person supported the decision the CO had made and felt [the applicant] had been used to make an example of. A review of the investigation will reveal that as soon as [the applicant] had accidentally did something that offended someone, he immediately approached the person to apologize. This was exactly what should happen and is exactly his character. Instead, a complete investigation was launched, with the facts not identifying racism and a command who ignored the facts and instead labeled [the applicant] a racist based on personal opinion, which in itself could be construed as racism.

Contact with former shipmates and supervisors will show you how tremendous of a leader [the applicant] is. I have a list of several of varying races who will all speak the same way of [the applicant]. Not one of them will mention anything about [the applicant] being a racist, but instead how he gets along with everyone and will standup to make those touch decisions.

CWO4 also provided his personal notes for consideration by the Board:

-Incident occurred during an impromptu mock scenario. No ground rules were established for limitations on audience participation; however, participation of some sort was encouraged.

-Prior to any scenario based exercises, to include our own Civil Rights training, ground rules are needed to not only steer the scenario, but also ensure nobody become offended during the impromptu actions of the group.

-During the impromptu scenario, [the applicant] did in fact display a hand gesture, that at the time of using it, he was responding to SK1's comment and was meant as OK. During his interview, he was asked if he knew the alternative meaning, which he said that he had just learned about through a satirical article on Duffle Blog making fun of the Coast Guard. He was not however asked if this was his intention.

-[The applicant] immediately realized he offended someone during the role playing scenario and addressed it immediately with the involved party, offering apology and stating 'It's not me. It's not who I am. I was joking.' Having knowledge of the Duffle Blog article is what brought this into perspective, not actually showing a symbol of hate.

-[SK1] was already disturbed prior to the incident on [the applicant's] position on giving all men and women the same chance of entering the service, instead of focusing recruitment initiatives on minorities. This frustration was voiced in both verbal and written statements. Based on [SK1's] own statements, he had already internalized racial tensions with [the applicant] prior to this event.

-OSC [] stated that '[the applicant's] reaction to the minority recruiting initiatives was a normal response received by other recruiters and [was] nothing was out of the ordinary.'

-[The applicant] voiced his frustrations during a previous discussion on under-represented minorities. Not because of race, but because his belief on all men and women are equal, regardless of race and should have a fair chance.

-If this is a normal response at the recruiter school when this question is asked, why is no ground rules, interventions or briefs given to discuss the possible tensions that may arise as part of this discussion and that open dialogue is encouraged? After all it was this discussion, done without any type of rules established that initiated the tensions to begin with. This scenario proves that the course/discussion itself breeds unintentional race tensions.

-During investigation, after PIO met with [the applicant], he stated that he would be going home over the weekend to work on the case and he would return the following week and meet back with [the applicant] to discuss the incident. This meeting never took place nor did [the applicant] receive the opportunity to refute any findings or expand on any information collected.

-When member returned from recruiter school, he requested to review the findings of fact to refute any facts by providing his side of the story. This was requested multiple times through Senior Chief [], but was never provided.

-PIO's findings could not determine if the actions met the harassment or hate definition.

-Memo from CAPT [] stated as fact that [the applicant] used a hand gesture that targeted a legally protected status of race. [The applicant] has openly stated that he did use that hand gesture, but at no time was there any racial motive behind that gesture. When he realized someone was offended, based on the knowledge he had from a satirical article, he immediately apologized to the person offended and informed them it was not his intentions. If it was racially motivated, this apology would not have been immediate. By making this statement without having this officially reviewed by a Civil Rights service Provider for determination, a recommendation provided in the findings an outcome report, or any type of due process, [the applicant] has essentially been racially profiled himself.

Repercussions of the incident

-Member was disenrolled from recruiter school

-[The applicant] was advised on Nov 13 by SC [] that he would be going through a Chiefs Counsel on Nov 14.

-By CGRC INST 1616.2, CPO councils are only for those members E6 and Below. A member frocked to the rank of Chief is given that same respect. The rank of E6 in this case only applies to pay purposes since member not only was frocked, but also attended CPOA.

-Per COMDTINST M1000.2B, 'Frocked' members are authorized to assume the title and wear the insignia of the rate to which frocked.'

-Per CGRC INST, member was in troops and stood before panel for uniform inspection.

-Member of panel was CPO. If a panel of sorts was used for this member, it should have been E8/E9 only.

-Per CGRC INST, member was required to be advised of proposed recommendations. No recommendations were provided to the member.

-Per CGRC INST, not recommended for advancement is not a recommendation provided by a Chief Council.

-Per CGRC INST, a report is required to be sent to the CGRC CO following the Chief's Council documenting the recommendations.

-Member rank of Chief removed (Due to advance on Oct 1, 2018)

-Member removed from recruiter duties, a job in which he looked forward to impacting the future of the organization.

-Member will be transferred after 1 year

-Member will face severe financial hardship due to purchasing a house in the area and having to sell in the middle of remodeling.

-Member will be forced out by HYT

Past Performance

- A review of [the applicant's] EER summary shows that he has been a 6 & 7 sailor.
- He successfully completed the rigorous CGRC Recruiter Selection Board Panel to even enter into the recruiter special assignments.
- An inquiry to his previous supervisors would show an above average performer.
- Being a DSF Tactical Operator, his belief is that all members deserve the same opportunity regardless of age, race or gender is something that is embodied by the Coast Guard.

Meeting with CGRC CO

- CWO3 [] and MECM [] met with CAPT on 28 Nov from 0850-1030 to discuss[] entire situation
- It was expressed that established CG processes for civil rights were not followed and civil rights advisors were not brought in for input or guidance.
- Discussed that a Chief's Counsel was held on a Chief, which goes against established policy. In addition, the process for the counsel did not follow established protocols within CGRC policy.
- Discussed that a member's anchor was removed without giving him the ability to refute any claims.
- Discussed the opinions of one person were taken as fact, without consideration of members thought process.
- Discussed how the discussion on minority recruiting, without any established ground rules or guidance, led to a person placing racial judgment on another member, a judgement which led to the situation at hand.
- Discussed a brief that was given in the days following the incident which included cartoon duck images of an Italian duck and a Donald Trump duck, whose hand was displaying the same gesture. With the tensions surrounding Columbus Day, a day which honors Italian born explorer Christopher Columbus, there are many groups in the US which have labeled him a White Supremist due to his actions against the natives when he landed in America. As a major in Homeland Security, I know there are several examples within our history that display the characteristics of Domestic Terrorism. If there was anything briefed or displayed during this course that showed racial bias, it was this slide; however, nobody in the class was offended, to include the person making the racial claims against this member.
- When it was requested that the CPO Anchors be re-instated due to the punishment of the events, which went through zero NJP process, was too harsh, CGRC CO stated that his staff desired NJP vice the actions he took. He then stated that would be a more fair process, which would allow him to refute the claims against him and the he would most likely request CM, CGR CO acknowledged that if it went to CM, the case would be dropped. This is very concerning, because it means the CO has recognized and processed that the claims are not fully substantiated.
- Discussed that the statement by the CO in his memo to CG-00H stated that the member 'targeted the legally protected status of race', a statement which was not supported by the investigation. The PIO stated during his opinion that he could not determine if the definition of hate or harassment were [sic] met and recommended Civil Rights Office get involved. This did not happen and by making this claim, CGTC [] has labeled this member a racist to the Coast Guard.
- CGRC CO stated that while Civil Rights office was not involved, that CGIS was and a completed review of the member's social media profile was reviewed and came back flawless.
- Advised CGRC CO that member is desiring to seek Congressional support for claims against him.
- Had second meeting with CGRC CO, XO, CMD Chief to mediate civil rights complaint. Requested all statements labeling [the applicant] a racist be removed and evals be changed.

-CGRC CO stated that if he changed the marks, it would now allow [the applicant] to advance, which is not what they wanted.

-CGRC XO advised the CO not to agree to any changes unless the civil rights complaint was dropped. I then asked the CO 'are you saying you will not make[] any changes unless [the applicant] drops his complaint against them.

CWO4 also provided an email chain amount Coast Guard senior leadership with the subject line "Questionable administrative action" where Master Chief Petty Officer of the Coast Guard (MCPOCG) responded to MECM stating:

I'm sure [] can evaluate the situation and discuss with CAPT [] if needed as well. Please follow up with me. I'm concerned this 'hand gesture' issue will get too far. Just for everyone's awareness, CGIS investigated the hand gesture that made the news during the hurricane and determined it was not 'hate related'. I don't want to downplay bad actions but I also don't want to overreact by assuming leadership is expecting a specific outcome.

MECM provided a statement dated August 4, 2020:

In November of 2018, I was approached by CWO 4 [] about [the applicant]. [The applicant] had been dis-enrolled from Recruiting School at Training Center [] for a supposed altercation with another student. During a class where they were supposed to discuss hot topic issues they would encounter in the field as recruiters, [the applicant] discussed the topic of 'Police Lives Matter'. According to [the applicant] he ended the conversation with the term 'OK' both verbally and with a hand gesture (OK symbol). The other student took this as a racial sign. The event was investigated by an investigation officer (IO). The IO could not find evidence that this was a premeditated racial gesture by [the applicant]. The Commanding Officer (CO) of [] dis-enrolled [the applicant] from the course and the CO of Recruiting Command withdrew his recommendation for advancement, thus returning [the applicant] back to the paygrade of ES (ME1).

Upon reading the investigation report with CWO 4[], other Rating Force Master Chiefs and myself, we concluded that its finding didn't match the consequences. We (CWO [] and myself) requested a meeting with CAPT [], who was the CO of Recruiting Command. Despite recommending what we considered appropriate levels of action based on the investigation's findings, he did not change his advancement recommendation for [the applicant].

[The applicant] took his case to the Equal Opportunity Officer. I was his representative on the Alternative Resolution (ADR) panel. The ADR panel agreed that all language pertaining to a racial action be expunged from his employee evaluation (EER) review. The ADR panel did not have the ability to override the CO's recommendation for advancement.

In conclusion, I believe that this matter had other avenues of lower level resolution. [The applicant] before and after this incident has been a top performer. I base this off of his EER's and reputation in the field. At no time during my interactions with him have I found him having a leaning towards racial biases. Despite this incident, [the applicant] meets all of the prerequisites for the next paygrade.

CDR B provided a character reference, dated September 8, 2020, wherein he noted that, while the applicant had only been assigned to his division for a short period, he demonstrated a strong commitment to the team and their goals. CDR B noted the applicant's positive attitude, strong communication skills, initiative, and immediate responsiveness to everything he was tasked to do. CDR B stated the applicant demonstrated maturity, professional and communication skills he would expect of a Chief Petty Officer and he had no doubt the applicant could perform at that level.

CDR R provided a statement, dated September 11, 2020, wherein he stated the applicant served as his senior Maritime Law Enforcement Specialist from June 2016 to July 2018. CDR R noted he completely trusted the applicant to train, lead personnel, and care for migrants and detainees. His honesty and integrity were never in doubt and he demanded the same from his subordinates. CDR R stated the applicant is a dedicated and professional Coast Guard member who has the ability to continue to make the Coast Guard a better place.

LT G provided a statement dated September 20, 2020, wherein he stated he has known the applicant for the past nine years and supervised him for four years. LT G stated the applicant consistently presented himself with the upmost professional and held others to the high standards of Honor, Respect, and Devotion to Duty. His performance and quality of work earned him the highest performance factor employee reviews, well above his peers of the same rank. Throughout his career the applicant has been an example to both junior and senior members and has always carried himself in the most professional manner. LT G stated that, if given the opportunity to work with the applicant again he would not hesitate to have him work for him providing his skills, high standards, and leadership.

MECS V provided a statement dated September 21, 2020, wherein he stated that, while only assigned to his branch for a short period (24 months), the applicant demonstrated a strong commitment to the team and their goals. The applicant was hungry for knowledge and was always seeking out additional responsibility. Due to the applicant's performance, he was afforded the opportunity to attend the U.S. Army Airborne Training school. The applicant was a member of a very small number of Coast Guard members to have ever attended and completed the airborne school and earn his "Jump Wings."

VIEWS OF THE COAST GUARD

On October 13, 2021, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case. In doing so, he adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC argued that the application is timely and argued that the applicant should be denied relief because CAPT W's actions were neither arbitrary nor capricious and were in keeping with his discretion, responsibility and authorities as Commanding Officer of the Coast Guard Recruiting Command and the correct policies were applied. The applicant failed to provide evidence to support his claims that improper processes were followed during the course of his investigation. Specifically, that he believed he was lied to and misled by not affording him the right to review and refute any inaccuracies in the investigation report or his transcribed statement. Additionally, the applicant had entered into a resolution agreement on May 24, 2019.

The resolution agreement states that:

By executing this agreement the parties hereby agree to resolve all of the issues raised between the parties through the date of execution of this agreement, including aggrieved person's pre-complaint of discrimination, including all claims of monetary reimbursement, and any other claims for relief relating to all issues raised, which have been filed or could have been filed by him against the Coast Guard, the

Department of Homeland Security of any of its components, through the date of execution of this agreement.

PSC also noted that in the applicant's written statements he acknowledged (1) using the "okay" symbol in the classroom after a class exercise; (2) observing that SK1 took exception to the use of the "okay" hand symbol; (3) he apologized to SK1 after he noticed that SK1 took exception to his use of the "okay" symbol. PSC further noted that the applicant's written statements support the signed statements of SKQ and OSC, as well as the interview summaries of OS1, ET2, and that "[t]hese statements and summaries clearly indicate that the applicant's use of the 'ok' symbol was inappropriate and that the applicant clearly offended SK1."

The JAG recommended not granting relief, stating that the "[a]pplicant utilized his administrative remedies pursuant to 33 C.F.R. §52.13(b) by entering into a settlement resolving his claims and dismissing all claims barring further relief by the Board", and noted that "[a]s part of the agreement, Applicant's claims were withdrawn and dismissed with prejudice":

The JAG argued that the applicant's claims lacked merit and he should be denied relief, noting:

Applicant, an Active Duty E-6, had his advancement to E-7 withheld on 28 September 2018, pending the finalized outcome of an investigation into his actions on 18 September 2018 that offended another Coast Guard member. As a result of the findings of the investigation, Applicant was issued a set of Enlisted Employee Reviews (EER's) in December 2018 and February 2019, which did not recommend him for advancement. Applicant was also issued a negative CG-3307 counseling form (Page 7) in Dec. 2018 pertaining to his actions on 18 September. Applicant filed two requests for redress under Article 138 of the Uniform Code of Military Justice (UCMJ) as well as an Equal Employment Opportunity (EEO) discrimination complaint with the DHS Office of Civil Rights requesting redress of grievances. Applicant subsequently entered into a settlement agreement with the Office of Civil Rights in May 2019 accepting resolution of his claims that included a change to the wording in his EER's and the Page 7. As part of the agreement, Applicant's claims were withdrawn and dismissed with prejudice.

...

On 24 May 2019, Applicant entered in a resolution agreement with the Department of Homeland Security/Coast Guard regarding his EEO complaint that he was subjected to racial discrimination based on race (Caucasian) when on 07 January 2019 he received a Page 7 which released him from special assignment and removed him from the advancement list. The execution of the agreement was for the resolution of all issues raised between the parties through execution of the agreement including all claims of monetary reimbursement and any other claims for relief relating to all issues raised, which have been filed or could have been filed by him against the Coast Guard. The Department of Homeland Security, or any of its components, through the date of the agreement. In the agreement the Coast Guard agreed to change the language in the Applicant's EER and change the language in the Applicant's Page 7.

The JAG further claimed that on June 18, 2019, CG-PSC responded to the applicant's UCMJ Art 138 complaint and denied the applicant's requested redress. On June 19, 2019, the Coast Guard changed the language in the applicant's Page7 "according to the terms of the resolution agreement". And on June 21, 2019, the applicant acknowledged the changed language in the Page 7 and "was also counseled and acknowledged that the language in his EER's was changed according to the terms of the resolution agreement." On August 9, 2019, the applicant received notification from the Coast Guard Office of Military Justice had reviewed the action of CG-PSC regarding his Article 138 complaint and found PSC's denial legally sufficient and appropriate.

The JAG argued that as a threshold matter that the applicant should be barred from any further relief because he entered into the resolution agreement with the Coast Guard and these claims “overlap” the claims he submitted to the Board. The JAG pointed to paragraph 3 of the agreement, which states: “the parties agree to resolve all of the issues raised between the parties through the date of execution of this agreement including aggrieved person’s pre-complaint of discrimination, including all claims of monetary reimbursement, and any other claims of relief which have been filed or could have been filed by him/her against the Coast Guard, the Department of Homeland Security or any of its components, through the date of execution of this agreement.” According to the JAG, “[t]his language makes clear that the resolution agreed upon which this document covers the resolution of all of the claims that Applicant now raises before the Board because all of these claims were or could have been filed at the time of this agreement.”

The JAG further argued that the applicant failed to provide sufficient evidence to establish error or injustice, making the following points:

- The applicant has not proven by a preponderance of the evidence that the Coast Guard committed error or injustice in the preliminary investigation, noting that the applicant gestured the OK symbol, SK1 was “immediately offended and negatively affected,” that the applicant ‘was aware that the ‘OK’ symbol had other offensive meanings’, and that ‘regardless of if this constitutes harassment or a hate incident per Civil Rights law, [the applicant’s] actions were unacceptable, against [Coast Guard] Core Values, and showed a clear lapse in judgement.”
- The applicant’s allegations regarding procedural error by the Coast Guard also lack merit regarding the witness interviews and preliminary investigation report. According to the JAG, that the fact that the investigating officer did not let the applicant review and correct his interview statement prior to submitting the finalized report is not procedural error, and that “[p]olicy in regards to collecting evidence from witnesses has a discretionary aspect and states that a preliminary investigating officer can collect either a witness statement or a witness summary depending on the situation.” The JAG argued that “[n]owhere in policy regarding conducting witness interviews is it mandatory for the investigating officer to have his summary proofed and corrected by the interviewee” or “to allow the interviewee to review and proof the investigation report prior to its submission to the convening authority.” The JAG also noted that the applicant was given the opportunity to draft and write his own statement and declined.
- Even if there were inaccuracies in the interview summaries, any errors “were not of the type that would have had a material effect on the . . . ultimate opinions in the report” and that “the Applicant’s statements subsequent to his interview statement corroborate and acknowledge that he used the ‘OK’ symbol; observed his classmate take exception to his use of the ‘OK’ symbol; and acknowledged awareness that the OK symbol was, at least in a ‘satirical’ sense, reported as racially insensitive.” According to the JAG, “[t]aking these together, even if there were some inconsistencies or slight misstatements in the PIO’s witness summary, they were not material to the ultimate findings and it was still possible for the Investigative Officer to come to the opinion

that Applicant's actions were unacceptable, against Core Values, and displayed a lapse in judgement."

- The JAG concluded that "[t]he Commanding Officer's actions of revoking Applicant's recommendation for advancement, and documenting these actions through [] a Page 7 and EER's were neither erroneous nor unjust and were in keeping with his discretion, and authority. Therefore, Applicant has not met his burden to overcome the presumption of regularity that the Coast Guard acted correctly, lawfully, and in good faith."

Even so finding, the JAG recommended that the applicant had not exhausted his administrative remedies regarding the removal of the Hate Incident filed with CG-00H, and suggested:

[T]he one issue . . . that the Board *could* potentially find was not covered by the resolution agreement may be the request for the expungement of the [] memo of 04 Oct 2018, Findings and Outcome of Report of Hate Incident. While Applicant raised his claim and had it pending at the time of the Resolution agreement, and therefore arguably resolved it through the resolution agreement, CG-PSC denied to address applicant claim was procedural and Applicant was told that he would need to submit an Article 138 claim through the [] command to obtain redress for that particular issue. Again, arguably this did not extinguish Applicant's claim and it was still pending and therefore dismissed by the resolution agreement. However, if the Board believe that this particular issue was not included in the resolution agreement, then the Board should still not grant relief because Applicant has not exhausted his administrative remedies. Applicant can still utilize the Art 138 process through the correct Chain of Command to address removal of this particular memo. Therefore, if the Board finds that Applicant's claim regarding removal of the [memo] is not barred through the execution of the Resolution agreement, the Board should still deny Applicant's claim for failure to exhaust his administrative remedies.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

The Chair sent the applicant a copy of the Coast Guard's advisory opinion and invited him to respond within thirty days. The Chair received the applicant's response on March 16, 2022.

The applicant stated that he disagreed with the Coast Guard advisory opinion for the following reasons:

1. While I was issued 02 sets of Enlisted Employee Reviews (EER) marking me as Not Recommended, December 2018 and February 2019, both were based on the belief that I acted in a discriminatory manner towards a shipmate.
 - a. The December 2018 EER was a Change in Commanding Officer's Recommendation, completed due to the complaint filed by Training Center [] Command. Again, this was based upon the unfounded belief that the 'OK' symbol is in fact a discriminatory gesture. The Coast Guard still to this day, along with other branches of the Military utilizes this same had gesture in daily operations alongside the civilian world where it is used in everyday communications and should not have been grounds for marking me as Not Recommended for Advancement.
 - b. The February 2019 EER was a Transfer Evaluation and only completed due to my Permanent Change of Station (PCS) as required per policy prior to a member's transfer to a new unit. Being this was completed only two months after the Change of Commanding Officer's Recommendation EER it is unrealistic to think they would then change their beliefs on the prior Not Recommended marking. Although it was made clear and stated in the email chain from the Master Chief Petty

Officer of the Coast Guard as provided in my original BCMR, I had done nothing to warrant a Not Recommended. If they were to change the recommendation to Eligible, this would have caused scrutiny on their own judgments within Coast Guard Headquarters.

2. I agreed upon a resolution through the Equal Employment Opportunity (EEO)/Civil Rights Directorate with the Coast Guard Recruiting Command based on the unfair and partial treatment of myself based on their bias against me. This has now come into question several times during my Request for Redress and my Complaints of Wrongs under Article 138 and during in person meetings with Rear Admiral [] and Maritime Enforcement Master Chief []. It is to my knowledge and the advisory of the Civil Rights Directorate representative, that the EEO process is not and should not be combined and compounded with any other processes. As with my case, it was not based upon the belief of the recruiting Command that I had Discriminated against another member, rather it was based on their unfair treatment of me as stated in my original BCMR request.

APPLICABLE LAW AND POLICY

Article 138, Complaints of Wrongs, 10 U.S.C. § 938, provides:

Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000d *et seq.*, prohibits discrimination on the basis of race, religion, sex, color, or national origin in any program or activity receiving federal financial assistance.

Department of Homeland Security Regulations, 6 C.F.R. § 21, implements Title VI of the Civil Rights Act, which prohibits discrimination due to race, color, or national origin in DHS-assisted (grant) programs, including USCG programs.

DHS Delegation of Authority 3095 assigns to the DHS Officer of Civil Rights and Civil Liberties (CRCL) authority over EEO complaints, including accept/dismiss, investigations and final decisions, affirmative employment, special emphasis, diversity, ADR, civil rights laws involving federally-assisted (grant) programs, and racial profiling.

DHS Delegation of Authority 19000 delegates authority over policy and operational matters involving Civil Rights Directorate programs from the Officer of CRCL, to the Deputy Officer of CRCL.

The Coast Guard Military Assignments and Authorized Absences Manual, COMDTINST M1000.8A (January 2017), then in effect, designates Recruiting Duties as a special duty assignment.

1.E.2.a sets the minimum requirements for all special duty assignments which includes a member “(1) Must consistently exhibit mature judgement, even temperament, tact, diplomacy, and discretion.”

1.E.7.a. Recruiting Mission. The Coast Guard’s recruiting mission is “To meet the Commandant’s military recruiting goals by enhancing public awareness and maintaining the best qualified, diverse applicant pool

with an innovative trustworthy team of professionals.” Recruiting qualified personnel for the Coast Guard is a complex, highly competitive task. The Coast Guard competes directly with the Department of Defense services and private industry for the new personnel resources required each year.

1.E.7.b. Key Element to Providing Human Resources. The recruiter is the key element in providing human resources for the Coast Guard. The recruiter is the first contact with the service for the vast majority of Coast Guard military members. The selection, motivation, and training of a recruiter is a top priority to the success of the Coast Guard’s mission.

1.F.4 provides that reassignment from positions requiring special screening can occur for “[t]hose member considered unsuitable for continued duty as a result of their own actions (e.g. poor performance, lack of leadership, misconduct, lack of interest, poor attitude, or other similar reasons).”

The Coast Guard Civil Rights Manual, COMDTINST M5350.4C (May 2010), in effect at the time, chapter 2.c. addresses prohibited practices, including the Coast Guard Anti-Harassment and Hate Incident Procedures Policy.

1. Anti-Harassment & Hate Incident Procedures Policy

The purpose of this policy is to prescribe procedures, in accordance with the Coast Guard and DHS Anti-Harassment Policy, for combating harassment in the U.S. Coast Guard and to promptly correct any harassment that occurs. This policy also prescribes additional notification procedures for conduct that would constitute a hate incident. The Coast Guard continually strives to meet the highest standards of personal respect by valuing human dignity and diversity in accordance with our core values of honor, respect, and devotion to duty. In order to meet this objective, every commander, manager and supervisor must be personally committed to and responsible for the fair and equal treatment of all Coast Guard personnel and to those with whom it interacts. To this end, the Coast Guard’s goal is to safeguard the workplace environment so that no member of the workforce shall be subject to physical or verbal harassment, abuse or violence based on an individual’s race, color, religion, sex, national origin, age, disability, genetic information, sexual orientation, marital status, parental status, political affiliation or any other basis protected by law.

The Coast Guard is committed to providing an environment free of harassing behavior for all of its members and employees. The Coast Guard provides all of its members and employees the opportunity to achieve their full potential in order to improve unit cohesion, military readiness and mission execution. The Coast Guard will not tolerate retaliation against any employee for reporting harassing conduct under this or any other policy or procedure, or for assisting in any inquiry about such a report. Harassment is a violation of Coast Guard core values and will not be tolerated and employees will be protected should retaliation occur.

Despite ample public and private efforts in the United States over the past 100 years, harassment still occurs. As a military, multi-mission, maritime service performing a broad range of services to a diverse nation, these types of incidents go against everything the Coast Guard stands for and are contrary to applicable laws and regulations. The Coast Guard has determined that the most effective way to limit harassing conduct is to treat it as misconduct, even if it does not rise to the level of harassment actionable under civil rights laws and regulations. In the usual case, a single utterance of an ethnic, sexual, or racial epithet that offends an employee would not be severe enough to constitute unlawful harassment in violation of federal law; however, it is the Coast Guard’s view that such conduct is inappropriate and must be stopped.

1.a. Defining Harassment

Prohibited Harassment is defined as including, but not limited to, unwelcome conduct, whether verbal, nonverbal, or physical conduct that has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, offensive, or hostile environment on the basis of an individual's protected status, which includes: race, color, religion, sex, national origin, age, disability, genetic information, sexual orientation, marital status, parental status, political affiliation, or any other basis protected by law. Among the types of unwelcome conduct prohibited by this policy are epithets, slurs, stereotyping,

intimidating acts, and the circulation or posting of written or graphic materials that show hostility toward individuals because of their protected status. Acts of physical violence, and actual, implied, or veiled threats of violence, are forms of prohibited harassment. Any form or manner of threatening or provoking remarks or threatening gestures in the workplace is also prohibited.

...

I.d. Harassment Complaint Procedures

Every employee and military member is responsible for responding to and eliminating prohibited harassment in the Coast Guard. The specific actions required vary based on position and authority. All Hands are prohibited from conducting harassing behavior of any type.

Everyone is encouraged to inform any person engaging in harassing conduct that the conduct is unwelcome

Reporting Procedures for Victims and Witnesses:

1. Any victim or witness of prohibited harassment is encouraged to report the inappropriate conduct to their chain of command. All Hands are required to ensure protection of confidentiality to the extent possible.
2. Alternatively, anyone may report prohibited harassment to any Coast Guard Civil Rights Service Provider (CRSP) and/or the Civil Rights Directorate (CRD). For conflict of interest matters, CRSPs may only consult the chain of command upon approval by Director of Civil Rights or his/her designee.

...

I.e. Defining Hate Incidents

Hate incident is defined as any intentional act (conduct or speech) of intolerance committed against a person, a group of individuals, or property which is motivated, in whole or in part, by the offender's bias against a race, color, religion, sex, national origin, disability, age, or sexual orientation and which is intended to or is more likely than not to have the effect of intimidating others or inciting others to similar conduct.

Examples of hate incidents include the display, presentation, creation or depiction of a noose, a swastika, or any other symbol widely identified with oppression or hatred, irrespective of size, type or how it is displayed or presented. Other symbols, whose display, presentation, creation or depiction would reasonably be construed to encourage oppression or hatred, are also considered to be examples of hate incidents. Hate incidents also include the display, presentation, depiction, or distribution of photographs, images, or other printed or electronic material that is evidence of oppression or hatred, irrespective of size, type or how it is displayed or presented.

Incidents of hatred and prejudice are a vile and divisive part of American history, and unfortunately continue to occur today. The above list of examples is provided only as a sample of acts or expressions that constitute hate incidents.

Due to their likelihood to effect or intimidate others, hate incidents require additional notifications and processing over and above other incidents of harassment.

The Enlistments, Evaluations, and Advancements Manual, COMDTINST M1000.2B (February 2018), in effect at the time, provides in relevant part:

Chapter 3 ENLISTED ADVANCEMENTS

A. Advancements, Reductions, and Changes in Rates and Status.

1. General.

a. Objective. The objective of the enlisted advancement system is to ensure the required degree of proficiency at the various grade levels within each rating and advance those best qualified to fill vacancies.

...

4. Responsibilities

b. Commanding Officers/Officers in Charge. CO/OICs are responsible for the execution of the advancement program. . . .

(4) Mandatory Removal of Recommendation of Ready. An advancement recommendation of ready must be removed for members who receive an unsatisfactory conduct mark, NJP punishment, a court-martial conviction, or a civil conviction. When applicable, notify Commanding Officer, CG PPC (ADV) to invalidate the recommendation for advancement of the candidate.

...

6. Additional Eligibility Requirements for Members Competing in E-7, E-8, or E-9 Examinations.

a. General.

(1) Members recommended for advancement to chief petty officer, senior chief petty officer, and master chief petty officer must be superior in leadership, military characteristics, technical knowledge, and performance of duty. They must be professionally qualified to fill any chief petty officer billet of their rating. Recommendations for participation in the chief, senior chief, and master chief petty officer competition should not be initiated solely on the request of the member.

(2) In addition to the basic eligibility and advancement requirements of Article 3.A.5. of this Manual, these members must meet the following requirements to be eligible to participate in the appropriate servicewide exam:

(a) For 24 months prior to the terminal eligibility date and through the effective date of advancement, have no unsatisfactory conduct mark, court martial (CM) or civil convictions, or non-judicial punishments (NJP). See Article 3.A.13. of this Manual for additional guidance for members who lose their eligibility after participating in the servicewide exam.

(b) Be able to meet the obligated service requirements of Article 3.A.20.d. of this Manual unless otherwise prohibited by Reference (c), Military Separations, COMDTINST M1000.4 (series).

...

32. Frocking of Enlisted Members.

a. Commandant Authority. Under the authority of Section 632, Title 14, U. S. Code, the Commandant has the authority to frock Coast Guard enlisted members. Enlisted members above the cutoff on the current advancement eligibility list may be considered for frocking when:

...
(3) In selected instances in which the higher rate is a significant factor in establishing the member's stature, thereby enhancing their ability to carry out their duties successfully,
...

e. Enlistments. The following are authorized upon approval of request for frocking:

(a) Insignia. Frocked members are authorized to assume the title and wear the insignia of the rate to which frocked.

(b) Housing. Frocked members are entitled to housing commensurate with the rate to which frocked.

(c) Armed Forces Identification Card. A new Armed Forces Identification Card, DD Form 2 CG, will be issued to reflect the higher rate.

(d) Pay, Allowances, and Travel Entitlements. Pay, allowances, and travel entitlements will continue to accrue at the lower permanent rate/pay grade. Pay and allowances of the higher rate/pay grade will accrue from the effective date of actual advancement as listed in the CG PSC advancement announcement.

(e) Performance Evaluations. Enlisted performance evaluation forms will continue to be submitted in the lower permanent rate as outlined in Chapter 4 of this Manual.

(f) Authorities of Frocked Pay Grade. Frocking does not authorize increased disciplinary powers under Article 15, UCMJ.

(g) Time in Grade. Time in grade computation for retirement and advancement is computed from the date of actual advancement, not the date frocked.

The Coast Guard Recruiting Manual, COMDTINST M1100.2F (March 2016), then in effect, provides:

CHAPTER 2 – POLICIES

2.A. GENERAL

1. Recruiting Process Overview. The Coast Guard is a career with jobs that offer service to the nation, rewarding missions, personal challenges, teamwork, responsibility, personal benefits, vocational training, and the potential for advancement. The recruiting process involves promoting all of these aspects in seeking, evaluating, selecting, and accessing productive individuals into the Coast Guard or Coast Guard Reserve. All applicants who meet the prescribed standards and eligibility requirements are acceptable for enlistment or commissioning. No applicant will be refused because of race, color, religion, national origin, gender, or sexual orientation.

2. Selective Recruiting and the “Whole Person” Concept. To be considered for entry into the Coast Guard or Coast Guard Reserve, applicants must meet the basic eligibility criteria and the

specific requirements of the relevant accession program. However, meeting the eligibility requirements does not guarantee acceptance into the Service. An application may be denied when, based on articulable facts, it is determined that accession would not be in the best interest of the Coast Guard. In reviewing an application, the Coast Guard will evaluate how all of an applicant's attributes combine to form the "whole person" and assess the applicant's potential for success in the Coast Guard or Coast Guard Reserve. Selective recruiting combines the "whole person" concept with factors such as the recruiter's judgment, needs of the Service, and the current recruiting environment.

2.B. RESOURCES AND ADMINISTRATION

1. Assignment to Recruiting Duty. Recruiting positions are considered special duty assignments. Coast Guard members desiring assignment to recruiting duty must meet the minimum standards for special duty and additional qualifications required for recruiting duty. Recruiting duty is both rewarding and challenging, and potential recruiters must project a positive, energetic, and supportive attitude toward a career with the Coast Guard and/or Coast Guard Reserve. Recruiters should be enthusiastic about their Coast Guard experiences and willing to share those experiences with others. See also Article 1.E.7. of Reference (f), Military Assignments and Authorized Absences, COMDTINST M1000.8 (series), for information on the required qualifications and the application, selection, training, and assignment process for recruiting duty.

The Coast Guard Administrative Investigations Manual, COMDTINST M5830.1A (September 2007), provides in relevant part:

CHAPTER 4. CONDUCTING STANDARD INVESTIGATIONS

E. MANAGING THE STANDARD INVESTIGATION

3. Documenting Evidence from Witnesses

a. Interview Summary. In most cases witness statements will be required. In-person interviews are the most effective means to obtain witness statements. However, when circumstances dictate, the Investigating Officer may interview witnesses using alternate means (e.g., telephone interview). An effective tool available to an Investigating Officer is a written summary of a witness interview prepared and signed by the Investigating Officer and attached as an evidentiary exhibit. This is a convenient and effective method to document facts because witnesses frequently provide more information in verbal interviews than is in the written statements. Investigating officers should generally presume that interview summaries may be needed even if witnesses provide written statements.

6. Conducting Witness Interviews.

f. Witness Summary. Summaries of witness statements compiled by the investigating officer, or board of investigation is advisable in all situations where it is not possible or advisable to obtain a witness statement or when witness provided more information in verbal interview than in the written statement. This information can include the personal observations of the Investigating Officer. Investigating officers must consult with appointed legal counsel to determine which method of obtaining a witness statement is required.

7. Rules of Evidence. Because a Standard Investigation is an administrative and not a judicial proceeding, the rules of evidence normally used in court proceedings do not apply. Therefore, the evidence that may be used is limited by only a few rules. Investigating Officers or reviewing officials with questions regarding these rules should consult their servicing legal office.

8. Standard of Proof. Since a Standard Investigation is not a criminal proceeding, there is no requirement that facts and findings be proven beyond a reasonable doubt. Instead, unless another specific directive states otherwise, in a Standard Investigation the findings of fact need only be supported by a preponderance of the evidence. That is, findings of fact should be based on evidence that, after considering all evidence presented, points to a particular conclusion that is more likely than not the correct conclusion.

F. CONCLUDING THE INVESTIGATION.

1. Preparing the Finding of Facts, Opinions and Recommendations. After all the evidence is collected, the Investigating Officer must review it and make findings of fact. The Investigating Officer should consider the evidence thoroughly and impartially, and make factual findings, opinions, and recommendations that are supported by the facts and comply with the particular instructions of the Convening Authority. Every factual finding must be supported by statements or documentary or physical evidence attached as an exhibit to the Investigative Report.

CHAPTER 6. FORWARDING, REVIEW, AND ACTION ON INVESTIGATIVE REPORTS

C. RESPONSIBILITIES OF THE CONVENING AUTHORITY

1. Upon receiving a report of investigation, the Convening Authority shall ensure that it is complete and meets the needs of the Coast Guard using the guidance in this manual and other relevant directives. If Final Action by the Convening Authority is authorized, the Convening Authority may take Final Action as described in Article 6.E. below. If the Convening Authority does not have authority to take Final Action on the investigation, or otherwise determines that action on the investigation at a higher level of command is appropriate, the Convening Authority shall review the investigation as described below, and forward the report via the chain of command to the appropriate level of command for Final Action.

E. ACTION OF THE FINAL ACTION AUTHORITY (FINAL REVIEW)

1. Routine Investigations. The Final Action may be appended to the underlying investigation by the Final Action Authority who shall approve or disapprove the findings or fact, and may make additional findings of fact warranted by evidence contained in the investigation. The investigating officer's opinions and recommendations need not be addressed except to the extent necessary to properly resolve issues and take action. When directing an action, the Final Action Authority shall state that it is based on the approved or additional findings of fact.

The Coast Guard Recruiting Command Instruction 1616.2, October 31, 2017, provides the following regarding the Chief Petty Officer (CPO) council:

1. PURPOSE. The Chief Petty Officer (COP) Council is designed to guide, improve, and/or correct unacceptable behavior and performance of enlisted members E6 and below and officer training candidates, through non-judicial means. It is a formal counseling procedure with the Command Master Chief (CMC) and a select number of CPS's, who will thoroughly review the issues and any underlying factors, counsel the member, and provide a recommendation to the chain of command. The intent is to intervene at an early point and provide clear guidance to the member before it leads to formal administrative actions.

2. ACTION. Coast Guard recruiting Command (CGRC) Chief's Mess will convene a CPO Council when it is deemed necessary by the command to correct a member's performance or behavior. The CPO Council will thoroughly evaluate the situation, counsel the member appropriately, and advise the Co on such matters as advancement recommendations, performance probation, and other administrative measures.

...

4.DISCUSSION.

a. Initiation. The Commanding Officer (CO), Executive Officer (XO), Operation Officer (OPS), Regional Leader, Regional Supervisor, Recruiter-in-Charge (RIC), or division Chief may request a CPO Council via the CGRC CMC. The request must be approved by the CGRC CO or XO prior to convening. The CPO Council can only convene if the member has not been to a Captain's Mast or performed performance probation for the specific behavior or lack of performance in question. The CGRC senior enlisted members may convene to discuss the procedure and provide recommendations on the council panel members.

b. Composition. The Recruiting Command CMC will be the Council Chairperson and will designate no less than two other CPOs to participate. The panel will be made up by master Chiefs, Senior Chiefs or Chief petty Officers from the CGR or nearby recruiting office. The CMC will provide the panel members with the member's job assignment and all of the facts relevant to the issue which predicated the Council being convened. The panel members shall become familiar with the matter prior to convening of the Council. The CPO Council chairperson will discuss the rules of the Council prior to the member entering into the room.

c. Procedure.

(1) The role of the CPO Council is strictly limited to behavior and attitude review of the member.

(2) The CPO Council will normally be held in a conference room or private space. In all cases, the CPO Council is considered a 'closed' proceeding and shall not be held in the view of personnel who are not members of the Chief's mess or are not involved with the matter being reviewed.

(3) The member standing before the council will be in Tropical Blue Long with combo cover and subject to a uniform inspection.

(4) The CPO Council is not punitive in nature. There will be no saluting, scripts, swearing in of witnesses, green tablecloths, or other items of nature that might appear similar to a Captain's Mast. It at any time the council feels the member's behavior or an event warrants non-judicial punishment or a more formal investigation, the CMC will suspend the proceedings and defer the matter to the XO.

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 and policy:

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.³

³ The Board noted that a possible exception exists as to a memorandum dated October 4, 2018, referred to as the "TRACEN memo, Finding and Outcome of Report of Hate Incident", in which CG-PSC denied addressing the applicant's claim because it was not within his chain of command. In the interest of justice, the Board will address that issue on the merits.

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.⁴

3. The applicant discovered the error or injustice on November 14, 2018, and the BCMR received his application on March 26, 2021. Therefore, the application was timely 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).

4. The applicant alleged that certain documents in his military record are erroneous and unjust. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in the military record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.⁵ 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."⁶

5. The applicant asked the Board to remove from his record a "hate incident" filed in his name with the Coast Guard Civil Rights Directorate as well as any and all negative administrative remarks (*i.e.*, CG-3307 and EERs) relating to this incident because they are erroneous and unjust. In addition, the applicant asked the Board to (1) reinstate his advancement to the rank of Chief Petty Officer (E-7), retroactive to October 1, 2018; (2) restore all benefits from advancement to Chief Petty Officer (E-7), retroactive to October 1, 2018, including basic pay and BAH; and (3) accrue retirement benefits at the pay grade of E-7, retroactive to October 1, 2018.

6. The applicant has acknowledged that he made the "Okay" hand gesture during recruiter class on September 18, 2018. He alleged that he did so to show agreement, that his actions were not racially motivated, that at the time of the incident he was unaware of the alternative meanings of the hand gesture, and had no intent to offend anyone. The applicant alleged that he was disparately treated by the Coast Guard, because the Coast Guard did not take any adverse action against at least two other Coast Guardsmen who also were found to have made the hand gesture while on duty around the same time. He further alleged that one of the other Coast Guardsman was the roommate of the offended member and that she had, the day before the incident in question, given a presentation that included a slide showing a picture of Donald Trump as a rubber duck with both hands extended with the "Okay" symbol and that no adverse action was taken against this Coast Guardsman, nor were any classmates offended.

7. The Board finds the applicant has failed to demonstrate by a preponderance of evidence that the Coast Guard's actions were either erroneous or unjust. The Military Assignments and Authorized Absences, COMDTINST M1000.8A (January 2017) at 1.E.7.a and b provides that the Coast Guard's recruiting mission is to meet the Commandant's military

⁴ *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. §1552 does not require them).

⁵ 33 C.F.R. §52.24(b).

⁶ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

recruiting goals by enhancing public awareness and maintaining the best qualified, diverse applicant pool with an innovative trustworthy team of professionals. Recruiting qualified personnel for the Coast Guard is a complex, highly competitive task. The Coast Guard competes directly with the Department of Defense services and private industry for the new personnel resources required each year. The recruiter is the key element in providing human resources for the Coast Guard. The recruiter is the first contact with the service for the vast majority of Coast Guard military members. The selection, motivation, and training of a recruiter is a top priority to the success of the Coast Guard's mission.

8. A recruiter is a special duty assignment, public facing, and requires the utmost diplomacy and respect in interactions with potential recruits. As a result of an investigation, it was determined that the applicant did not possess the maturity and judgment necessary for special assignments and that behavior of this nature heightens the risk for further instances that could result in placing the Coast Guard and recruiting in a very negative light to the public. The Board agrees that recruiting is a special duty assignment, and notes that it was within the Commanding Officer's (CO) scope of authority to remove the applicant from his recruiting position. Regarding the applicant's allegations regarding the other Coast Guardsmen, the Board finds that it is within the CO's discretion to determine what action to take based on the facts of a given case, and that in the case the actions by the applicant were specifically directed at the offended member. As such, the Board finds the applicant has failed to prove by a preponderance of evidence an error or injustice with respect to the decision to remove him from his recruiting position.

9. Regarding the applicant's allegations of error during the investigation, the Board finds the greater weight of the evidence reflects the investigation was conducted in accordance with the requirements of the Administrative Investigations Manual, COMDTINST 5830.1A. The investigating officer compiled summaries of the witness statements, including the applicant's interview as part of the investigation report. Contrary to the applicant's assertions, there is no requirement he be afforded an opportunity to review either the summary of the interview or the investigation report prior to its submission to the convening authority. Further, the Board notes the applicant provided multiple statements clarifying his initial interview that were reviewed and considered as part of the Article 138 complaint process as well as by the Board in this case.

10. Regarding the applicant's request for the Coast Guard to remove from his record any and all negative administrative remarks relating to this incident, including the Page 7 and any associated EERs, the Board denies relief. The applicant's command provided him with a negative Page 7 because of his demonstrated lack of judgment and maturity which is within the CO's discretion to ascertain from the facts of the investigation. The JAG pointed to the fact that the applicant's command provided him a negative Page 7 on December 12, 2018 stating that his "lack of maturity and lack of good judgment, as evidenced by [his] action, are not in keeping with our Core Values and did not reflect the decorum nor the professionalism the Coast Guard expects of its Chief Petty Officers." The applicant's CO submitted a change of recommendation revoking the recommendation for his advancement to Chief Petty Officer because the applicant "does not currently possess the maturity and judgment necessary for an E-7." The Coast Guard further explained that the applicant's CO was within his authority to find that the applicant's actions did not display the maturity or judgment necessary of a Chief Petty Officer and to issue the applicant paperwork to document the actions taken. Accordingly, there was no error or injustice in the CO's

reliance on the facts from the investigation or to take the subsequent actions that they did. The JAG explained that the CO's actions of revoking the applicant's recommendation for advancement and documenting these actions through a Page 7 and EERs were neither erroneous or unjust, and were within his discretion, and authority. The JAG concluded by stating that the applicant has not met his burden to overcome the presumption of regularity that the Coast Guard acted correctly, lawfully, and in good faith. The Board concurs that the applicant has failed to demonstrate by a preponderance of evidence the existence of an error or injustice in the issuance of the negative Page 7 or the EERs that warrant relief.

11. Rather the record reflects that on September 18, 2018, during a role play by a student who was acting as a Coast Guard recruiter to a group of police officers, SK1 remarked "Blue Lives Matter," and the applicant joined his thumb and index finger in a circle with the other three fingers in the air and placed it on the right side of his head while looking in the direction of SK1. When asked what happened, the applicant told the Recruiter Chief that he had made a stupid gesture and apologized for it; that he knew that he had offended SK1 and apologized. According to the applicant's statement, at the time the applicant made the gesture the applicant was laughing and the class was joking around. The investigation concluded that the applicant did use a racial hand gesture, directed at SK1, during Recruiter School, and that the gesture had a significant negative impact on SK1's ability to train. The Board finds that such behavior was appropriately documented in the applicant's file and warranted the CO's withdrawal of the recommendation for advancement.

12. The Board notes that the May 24, 2019, Resolution Agreement entered into between the applicant and the Coast Guard reflects that the Coast Guard acknowledged that the applicant's actions did not rise to the level of a hate incident, but that he did offend another member. As reflected in the December 7, 2018, Page 7, the CAPT who signed the Page 7 noted that although not a hate incident, the applicant's actions were taken as discriminatory and he did offend another member. As such, the CAPT found that consistent with the intent of the Coast Guard Civil Rights Manual and the Coast Guard Recruiting Manual, "[b]ehavior of this nature as an ambassador of the Coast Guard to the public, poses a high risk for further instances that could result in placing the Coast Guard and recruiting in a very negative light" and that the applicant's "lack of maturity and good judgment, as evidenced by [his] actions, are not in keeping with [the Coast Guard's] Core Values and did not reflect the decorum nor the professionalism the Coast Guard expects of its Chief Petty Officers." As highlighted by the JAG, the Coast Guard has determined that the most effective way to limit harassing conduct is to treat it as misconduct, even if it does not rise to the level of harassment actionable under civil rights laws and regulations. In the usual case, a single utterance of an ethnic, sexual, or racial epithet that offends an employee would not be severe enough to constitute unlawful harassment in violation of federal law; however, it is the Coast Guard's view that such conduct is inappropriate and must be stopped.

13. As to the applicant's request for the Coast Guard to reinstate his advancement to the rank of Chief Petty Officer (E-7), retroactive to October 1, 2018, the Board denies relief. Under the authority of Section 632, Title 14, U. S. Code, the Commandant has the authority to frock Coast Guard enlisted members. Pursuant to the Enlistments, Evaluation and Advancements Manual, COMDTINST M1000.2B, Chapter 3.A.32.e, a frocked member is entitled to "assume the title and wear the insignia of the rate to which frocked," and "entitled to housing commensurate

with the rate to which frocked,” and a “new Armed Forces Identification Card . . . will be issued to reflect the higher rate.” However, pursuant to subparagraph (d) “Pay, allowances, and travel entitlements will continue to accrue at the lower permanent rate/pay grade. Pay and allowances of the higher rate/pay grade will accrue from the effective date of actual advancement as listed in the CG PSC advancement announcement” and (g) “Time in grade computation for retirement and advancement is computed from the date of actual advancement, not the date frocked.” The record reflects that the applicant was training to become a recruiter with the Coast Guard and was frocked an E7/MEI on May 24, 2018, but that he never actually advanced to E-7. Pursuant to COMDTINST M1000.2B, Chapter 3.A.32, a frocked member continues to the lower permanent rate/pay grade. Therefore, the Board finds that the applicant is not entitled to the relief requested, and declines to grant the applicant’s request to (1) reinstate his advancement to the rank of Chief Petty Officer (E-7), retroactive to October 1, 2018; (2) restore all benefits from advancement to Chief Petty Officer (E-7), retroactive to October 1, 2018, including basic pay and BAH; or (3) accrue retirement benefits at the pay grade of E-7, retroactive to October 1, 2018.

14. As to the applicant’s request to remove from his record any and all negative administrative remarks (i.e. CG-3307 and enlisted employee reviews) relating to this incident, the Board declines to grant relief. The record reflects that changes were agreed to by the applicant as part of the settlement agreement process. Accordingly, the Board denies further relief and finds that the current CG-3307 and EER referencing the incident are correct.

15. Regarding the October 4, 2018, memorandum, “Finding and Outcome of Report of Hate Incident,” the applicant was previously instructed by CG-PSC that if he wished for this memo to be removed from his record that he should submit an Article 138 petition through the appropriate chain of command to obtain this redress and, if his request is denied, to then petition the BCMR. The Board finds that the Coast Guard declined to consider the memorandum at that time for procedural and not substantive reasons. The JAG argued that “potentially the only issue not covered by the resolution agreement between the Coast Guard and the applicant is the applicant’s request for expungement of the 04 October 2018 CG [] memo, Findings and Outcome of Report of Hate Incident, and that as to this memo the applicant’s requested relief should be denied because he failed to exhaust available administrative remedies.” As to this memorandum, the Coast Guard explained that CG-PSC denied addressing the claim because CG-PSC was not in the Chain of Command of the authority of that memorandum and therefore felt it was improper to address the issue. The Coast Guard asserted that the reason CG-PSC denied addressing the applicant’s claim was procedural, and in fact the Coast Guard advised the applicant that he would need to submit an Article 138 claim through the CG command to obtain redress for that particular issue and he failed to do so. However, although the applicant failed to exhaust his administrative remedies by submitting an Article 138 petition through the appropriate chain of command, the Board finds that it is in the interest of justice and the Board has the authority to now consider whether to remove this memorandum from the applicant’s record. The record reflects that the Coast Guard acknowledged that the applicant’s actions did not rise to the level of a hate incident, but that his actions were a breach of good judgment and not in keeping with the core values of the Coast Guard. Accordingly, the Board finds that the removal of the October 4, 2018, memorandum from the applicant’s record is consistent with Coast Guard’s prior actions and also should be removed from the applicant’s record.

ORDER

The application of First Class Maritime Enforcement Specialist [REDACTED] [REDACTED] USCG, for correction of his military record is denied and alternate relief is granted. The Board directs the Coast Guard to remove from the applicant's record the October 4, 2018, Coast Guard memorandum titled "Findings and Outcome of Report of Hate Incident."

July 17, 2024

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