DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2015-018

[redacted]

FINAL DECISION

This proceeding was conducted under the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case upon receiving the completed application on January 29, 2015,[1] and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated August 26, 2016, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S INITIAL REQUEST AND ALLEGATIONS

The applicant, a [redacted] on active duty, initially asked the Board to remove from his record a CG-3307 ("Page 7") dated March 30, 2012, and an Enlisted Employee Review (EER) dated April 24, 2012, and to have award and sea points that he previously earned as an E-6 returned to his record.

Regarding the Page 7, the applicant stated that several members of his Coast Guard Recruiting Office (CGRO) in [redacted] received the same Page 7 from their supervisor, a chief petty officer who was the Officer in Charge (OIC) and Recruiter in Charge (RIC) of the CGRO. The applicant alleged that the contents of the Page 7 is false in that the CGRO's database, known as the RATS recruiting system, shows that he properly enlisted his recruits in the Reserve under the Delayed Entry Program (DEP) at least 30 days prior to "shipping" (enlistment in the regular Coast Guard).

Regarding the disputed EER, the applicant alleged that his RIC evaluated him inappropriately based on the following:

[1] On September 18, 2015, in response to the Coast Guard's initial advisory opinion, the applicant substantially amended his application by requesting additional relief (removal of the NJP) and submitting significant new evidence.

- "The consistent verbiage and grammatically errors [sic] in the narrative for different sections indicates that it was copied and pasted."
- He was never counseled on any of the issues raised in the disputed EER.
- He had worked at another office (MEPS) for most of the evaluation period and had worked at the CGRO for only a month during the period.
- The EER constituted retaliation for a harassment complaint the applicant had filed against the RIC. The applicant submitted a summary of his EERs showing that he received very low marks on his prior EER, dated November 30, 2011, and his allegation that the even lower marks he received on the disputed April 24, 2012, EER were issued and resulted from a harassment complaint he filed against his RIC.

The applicant stated that he did not appeal the disputed EER marks when he received them because he feared further reprisal.

The applicant also asked the Board to return award points and sea points, which he lost as a result of non-judicial punishment (NJP) he received on September 27, 2012. He alleged that if he had been properly counseled, he would have refused NJP and elected to be court-martialed, or he would have requested administrative separation. The lack of these points disadvantages him when competing for advancement. The applicant stated that during NJP counseling, "the detail in which all other repercussions from NJP are explained during the counseling process is extensive. Each aspect is explained in writing and verbally prior [to] a member making their decision to accept NJP. There is no reference to loss of award/sea points and the impact it will have on a member's career." The lack of this information, he claimed, had him making an uninformed decision, which he has not been able to recover from. He argued that because of the lack of counseling, these points should be returned to his record.

In support of his request, the applicant submitted a letter dated February 25, 2014, from the commanding officer (CO) of his current unit to Commander, Personnel Service Center (PSC), in which his CO asked PSC to restore the applicant's rate from [redacted] E-5 to [redacted] E-6. The CO noted that the applicant's rate had been reduced as NJP for misusing his government phone in 2012. He stated that the applicant had transferred to his unit in September 2012 and highly praised the applicant's performance, leadership, mentorship of subordinates, motivation, and initiative. The CO stated that the applicant did not "fall into self-pity or lay blame on others" when he received NJP on September 27, 2012, for conduct he had committed in 2010. He argued that the "restoration in rate [would] send a message to our enlisted workforce that with hard work, proof of good character, and continued commitment to the Coast Guard, one can recover from a onetime lack of judgment."

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on April 10, 2001. He completed recruit training in 2001 and [redacted] "A" School in 2003 to become a [redacted]/E-4). The applicant advanced to [redacted]/E-5 in 2004 and to [redacted]/E-6 in 2008. He received all standard or higher marks and was recommended for advancement on his EERs.

On August 14, 2011, a civilian sent an email to the RIC "to file a grave insult and harassment case" against the applicant. She stated that she and the applicant had dated for about a month in September 2010 but then stopped. When the applicant learned that she was friends with his colleague in October 2010, he "sent me nasty messages insulting me. I ignored him after telling him to stop texting me." After the applicant apologized, they became friends again and would text from time to time, "but there was no attraction at my end at all." However, on the morning of July 30, 2011, he sent her a photograph of himself in his boxers with the question, "I have a problem can you help." And then he sent her a video of himself masturbating, which she considered "disrespectful, low class, and gross. I texted him back and told him he's crazy and that he should never ever text me again" and she stopped talking to him. However, in August 2011, she recalled that she had left a favorite pair of sunglasses in his car in April or May and asked the applicant's colleague, whom she was still friends with, to get them back from the applicant for her. In response, the applicant sent her "insulting and below the belt attacks on texts … calling me poodle, no personality, etc. If you send me your cellphone number, I can forward his text messages and video and picture he sent me. I'm forwarding this to your attention because this has to stop." In response, the RIC confiscated the applicant's government phone and reported the complaint to the Coast Guard Recruiting Command (CGRC).

On September 23, 2011, the Executive Officer (XO) of the CGRC asked the Coast Guard Investigative Service (CGIS) to investigate the applicant's alleged misuse of his government cell phone to take and send photographs and video of his genitalia and to send those photographs and video to his ex-girlfriend. Pursuant to this request CGIS began investigating the applicant's use of his cell phone by interviewing the applicant and his ex-girlfriend and conducting a forensic examination of the applicant's government cell phone. The forensic examiner found several pornographic images of nude individuals and exposed male genitalia on the phone, as well as a pornographic video featuring male genitalia. The web browser history showed pornographic websites bookmarked and "visited on numerous occasions." The printed browser history in the CGIS report shows a long list of pornographic websites that were "last visited" in August 2011, shortly before the phone was confiscated, and some of these times were during the work day.

On his EER dated November 30, 2011, the applicant received an unsatisfactory conduct mark, a recommendation against advancement, and many low numerical marks (marks of 2 and 3 on a scale of 1 to 7) in the various performance categories. He did not appeal this EER. The EER comments supporting the lowest marks state the following:

- Human Relations: "[He] has instigated and promoted unprofessional behavior in the work place and in his personal life. [He] has been accused of alleged sexual harassment to which he has admitted to unprofessional behavior. He has displayed discriminatory tendencies toward others based on their religion, age, sex, race, marital status, or ethnic background. He allowed his biases to influence appraisals or the treatment of others."
- Integrity: "[He] has continually been untrustworthy. When confronted with a sexual harassment allegation, he denied his involvement and later was provided with evidence of his misconduct when he then confessed."
- Communicating: "[He] continually uses inappropriate language towards subordinates and supervisors. He is unable to take criticism and prefers confrontation. When counseled by his

supervisors concerning his inappropriate remarks and language towards supervisors and subordinates he uses explicit language towards his supervisors. [He] has been counseled twice on his inappropriate language towards subordinates and supervisors."

- Conduct: "[The applicant] has failed to meet minimum standards, brought discredit to the Coast Guard and has failed to conform to military rules, regulations, and standards."
- Advancement: "[He] is not capable of satisfactorily performing the duties and responsibilities of the next higher paygrade and is not recommended for advancement."

On January 3, 2012, CGIS advised the XO and the RIC that its review of the hundreds of messages on the applicant's government cell phone showed that the applicant and another recruiter at the CGRO had exchanged text messages about a potential female recruit and one of the applicant's texts stated, "Plus if I ever banged her that would look bad lol."

On January 17, 2012, his commanding officer (CO), who was the Commander of the Recruiting Command, signed a Page 7 for the applicant's record stating that the applicant had been found "unsuitable for a Recruiting Assignment due to his own actions" and would be reassigned. At the time, the applicant was on paternity leave in [redacted], but he received and acknowledged the entry on January 27, 2012. The Recruiting Command reassigned him on temporary duty from the CGRO to MEPS, the facility for medically qualifying new recruits.

CGIS agents had difficulty contacting the complainant because she had changed her phone number in part because of the applicant's texts, but they discovered her new phone number and interviewed her on January 18, 2012. She had retained her prior phone and allowed CGIS to take the information off of it in a File System Dump. During the interview, she stated that she had left her sunglasses in the applicant's car in June 2011 when she attended a game of laser tag with him and his children. She stated that she knew the photograph and video she received on July 30, 2011, were from the applicant not only because of the phone number but because the person in the photograph and video was wearing "Sponge Bob" boxers, and she knew that the applicant "really likes" Sponge Bob. She also recognized his genitalia. She stated that the photograph and video disgusted her and that when she asked a friend to get her sunglasses back from the applicant, he began sending threatening texts "using Filipino words that translated to English as 'ugly ass' and told [her] she was a 'poodle'" in comparison to another woman he had dated. After receiving the inappropriate images from the applicant, she had changed his caller ID on her phone first to "Do Not Answer" and then to "CG Perv" or "CG Pervert." The forensic examination of her phone confirmed her allegations.

On February 15, 2012, the CGIS agents interviewed the applicant after advising him of his rights and telling him that he was suspected of indecent exposure, misuse of government equipment, and using an interstate carrier to transmit obscenity. The applicant claimed that he had had an "on again, off again" relationship with the complainant for over a year and that "during the bad times they argued and would engage in 'text arguments,' by conveying hurtful things to each other via text message." He alleged that the "sexting" messages were reciprocal but that after he sent her one, she replied by telling him never to do that again, and he agreed. He alleged that her complaint was just retaliation because she was mad at him. However, he apologized and

"stated he knew the photos, video, and websites were inappropriate and that he should not have viewed or stored sexually explicit material on his government issued iPhone."

The applicant also told the CGIS agents that he did not know where the complainant's sunglasses were and he denied having sent her threatening messages. Regarding the inappropriate photographs on his government phone, he admitted that four were of him and/or his genitalia, one was of an ex-girlfriend in [redacted] and one was of his wife. One or more of these photographs had been taken in [redacted]. (The report does not mention any inappropriate photographs or videos of the complainant against the applicant.) The applicant also admitted to CGIS agents that he had used the phone to view pornographic websites. Regarding his text to another recruiter about possibly "banging" a female recruit, the applicant stated that it was "just two guys talking."

During the interview the applicant described the RIC as "very by the book" and stated that he thought the RIC did not like him. He stated that the RIC had recently told him that he should be kicked out of recruiting. The applicant stated that when the RIC first confronted him about the complaint against him, "he was not ready to speak" about it. He alleged that he "returned to [the RIC] a few days later and attempted to explain the situation and told [the RIC] everything."

The applicant also submitted a written statement to the CGIS, dated February 15, 2012, in which he again alleged that they had had an "off and on" relationship and that the sexting had been mutual. He wrote that "[w]hen [the RIC] initially questioned me about the cell phone I told him that I did not feel comfortable talking to him about it at that point (due to a very bad relationship between he and I), then I came back and told him everything a few days later. I am utterly ashamed of myself for my personal behavior … Much of the inappropriate content on my phone was transferred over from my personal phone when I moved the contacts over to my government work phone. However, I admittedly know that I was wrong to even engage in this type of conversation and to have inappropriate pictures/conversation on my phone and take full responsibility for my actions."

According to the CGIS report, the applicant called the agent on February 22, 2012, to clarify some of the information he had provided. He claimed that he "did not recall viewing pornographic websites during the normal working day while at MEPS, but conceded if the date and time are correct in the reports he reviewed during his interview on 15 February 2012, then it is possible." He stated that "he has a 'horrible memory.'"

On April 4, 2012, the applicant received the disputed Page 7 in this case from the acting commanding officer (CO) of the Recruiting Command, which is dated March 30, 2012, and which he refused to sign in acknowledgement. The Page 7 states that he was being reprimanded for failing to follow an order of the CGRC and the RIC regarding the DEP. It states that the CGRC had previously instructed all recruiters to have candidates be DEP qualified, entered into the DEP as soon as they had a "ship date," and instructed to attend the DEP program. It states that the applicant had "indicated by action or lack thereof your blatant dislike and disregard for the DEP program … . In direction violation of an order given to all recruiters by both the CGRC

and the RIC, you continued to process qualified applicants into the DEP at your leisure vice the required timeline."

On April 24, 2012, the applicant was transferred and received a "transfer EER," which is the disputed EER in this case. On this disputed EER, the applicant received an unsatisfactory conduct mark, a recommendation against advancement, and even lower marks—primarily marks of 2. The disputed EER comments supporting the low marks state the following:

- Professional/Specialty Knowledge: "[The applicant] blatantly disregards all [CGRO and CGRC] policies concerning the proper procedures for processing applicants. The RIC was required to redo majority of [his] incomplete officer packages that were submitted without the RIC approval due to the lack of required forms and physicals not being submitted. [He] could never give factual answers to the RIC concerning his applicants which showed his lack of conducting proper interviews. [He] would continuously allege required paperwork was misplaced."
- Quality of Work: … [Repeats prior comment] [The applicant's] complete disregard to attention to detail directly lead [sic] to the removal of [CGRO] ship dates for all applicants. [He] enlisted a member who relinquish[ed] legal custody of another individual solely for gaining entry into the Coast Guard. [He] also requested ship dates without the authorization by the Recruiter in Charge for applicants that were not qualified for entry into the Coast Guard such as an applicant without a valid High School diploma and second applicant with a debt to income ratio well above the required 30% [maximum]."
- Monitoring Work: [His] complete disregard to attention to detail directly lead [sic] to the removal of [CGRO] ship dates for all applicants. He blatantly disregards all [CGRO and CGRC] policies concerning the proper procedures for processing applicants. [He] enlisted a member who relinquish[ed] legal custody of another individual solely for gaining entry into the Coast Guard. [He] also requested ship dates without the authorization by the Recruiter in Charge for applicants that were not qualified for entry into the Coast Guard such as an applicant without a valid High School diploma and second applicant with a debt to income ratio well above the required 30% [maximum]."
- Communicating: "[The applicant's] use of inappropriate language towards a female applicant to another recruiter of a sexual nature resulted in his complete removal from CG Recruiting. His continued use of inappropriate language towards supervisors resulted in him no longer being allowed in the Recruiting Office or MEPS."
- Directing Others: "[He] has constantly been disruptive in the office which has lead to his complete removal from both the Recruiting Office and MEPS. [He] has been unrelenting[ly] disrespectful to his immediate supervisors not only in the office but at their homes as well. [His] complete disregard to attention to detail directly lead [sic] to the removal of [the CGRO] ship dates for all applicants. He blatantly disregards all [CGRO and CGRC] policies concerning the proper procedures for processing applicants."
- Working with Others: "[He] has constantly been disruptive in the office which has lead [sic] to his complete removal from both the Recruiting Office and MEPS. [He] has been unrelenting[ly] disrespectful to his immediate supervisors not only in the office but at their homes as well. [His] complete disregard to attention to detail directly lead to the removal of [the

CGRO] ship dates for all applicants. He blatantly disregards all [CGRO and CGRC] policies concerning the proper procedures for processing applicants."

- Responsibility: "[He] blatantly disregards all [CGRO and CGRC] policies concerning the proper procedures for processing applicants. [He] adamantly complained and challenged all new policy procedures put in place at [the CGRO] which in turn disrupted the office environment. His inability to adapt to changes resulted in multiple applicant ship date cancellations."
- Setting an Example: "[He] blatantly disregards all [CGRO and CGRC] policies concerning the proper procedures for processing applicants. [His] complete disregard to attention to detail directly lead to the removal of [the CGRO] ship dates for all applicants. [He] enlisted a member who relinquish[ed] legal custody of another individual solely for gaining entry into the Coast Guard. [He] also requested ship dates without the authorization by the Recruiter in Charge for applicants that were not qualified for entry into the Coast Guard such as an applicant without a valid High School diploma and second applicant with a debt to income ratio well above the required 30% [maximum]."
- Customs and Courtesies: "[He] referred to his supervisors using inappropriate language in front of subordinates. Continued use of inappropriate language and behavior lead [sic] to his removal from [the CGRO] and MEPS."
- Integrity: "[The applicant] could never give factual answers to the RIC concerning his applicants which showed his lack of conducting proper interviews. [He] would continuously allege required paperwork was misplaced. [He] has continuously been untrustworthy at [the CGRO]. When two applicants went to MEPS for inspect ship, applicants redid the DD-4/1 and DD-4/2 forms vice the required DD-4/3 form which released them from USCG Reserves and enlisted them into active duty. [The applicant] stated it is impossible to know which forms the applicants are signing because the MEPS system does no[t] show them. Which later the RIC proved differently."
- Loyalty: "[He] adamantly complained and challenged all new policy procedures put in place at [the CGRO] which in turn disrupted the office environment. His inability to adapt to changes resulted in multiple applicant ship date cancellations. His continued use of inappropriate language towards supervisors resulted in him no longer being allowed in the Recruiting Office or MEPS."
- Respecting Others: "[His] use of inappropriate language towards a female applicant to another recruiter of a sexual nature resulted in his complete removal from CG Recruiting. His continued use of inappropriate language towards supervisors resulted in him no longer being allowed in the Recruiting Office or MEPS."
- Human Relations: "[His] use of inappropriate language towards a female applicant to another recruiter of a sexual nature resulted in his complete removal from CG Recruiting. His continued use of inappropriate language towards supervisors resulted in him no longer being allowed in the Recruiting Office or MEPS."
- Adaptability: "[He] adamantly complained and challenged all new policy procedures put in place at [the CGRO] which in turn disrupted the office environment. His inability to adapt to changes resulted in multiple applicant ship date cancellations."

- Judgment: "[He] enlisted a member who relinquish[ed] legal custody of another individual solely for gaining entry into the Coast Guard. [He] also requested ship dates without the authorization by the Recruiter in Charge for applicants that were not qualified for entry into the Coast Guard such as an applicant without a valid High School diploma and second applicant with a debt to income ratio well above the required 30% [maximum]." [His] complete disregard to attention to detail directly lead [sic] to the removal of [the CGRO's] ship dates for all applicants."
- Initiative: "[His] complete disregard to attention to detail directly lead [sic] to the removal of [the CGRO's] ship dates for all applicants. [He] has constantly been disruptive in the office which has lead [sic] to his complete removal from both the Recruiting Office and MEPS."
- Conduct: "UNSATISFACTORY: Failed to meet minimum standards [he] brought discredit to the Coast Guard as evidenced by adverse CG-3307 entries by failing to conform to military rules, regulations, and standards."
- Advancement: "NOT RECOMMENDED: The individual is not capable of satisfactorily performing the duties and responsibilities of the next higher pay grade."

On May 8, 2012, the applicant was charged with additional offenses under the UCMJ, which were later dismissed pursuant to a pretrial agreement and are not in the record.

On May 14, 2012, the Commander of the CGRC signed a final report on the applicant's complaint of harassment against the RIC, which was dated April 17, 2012. He reported the following:

> [The applicant's] allegations are not substantiated in that the behaviors directed towards [him by the RIC] were not based on a protected status … . However, [the applicant] and other production recruiters at [the CGRO] brought up valid points regarding areas wherein [the RIC's] rapport with his recruiters could be improved; specifically that the environment in the Recruiting Office was not conducive to the success of the recruiters as professional and individuals. However, many of the specific negative interactions that [the applicant] personally experienced with [the RIC] were triggered by his own failure or unwillingness to follow correct recruiting procedures or other directions given by [the RIC].

The report stated that the CGRC's Command Master Chief would counsel the applicant about the findings of the investigation and the RIC would receive guidance and mentoring and implement a plan to improve the working environment at the CGRO.

On August 8, 2012, the applicant signed a pre-trial agreement "in exchange for good consideration and after thorough consultation with my defense counsel, offer to plead as follows at non-judicial punishment provided the convening authority agrees to dismiss the charges and specifications preferred against me on May 8, 2012." In exchange for having the May 8, 2012, charges dismissed, the applicant agreed to plead guilty at mast to the following:

- One count of violating Article 92 for "on divers occasions on, about, or between 6 August 2011 and 12 August 2011, violate a lawful general order, to wit: COMDTINST 5375.1B, Limited Personal Use of Government Office Equipment … by wrongfully using government provided internet technology to access prohibited websites.

- A second count of violating Article 92 for, "on, about, or between December 2010 2011 [sic] and August 2011, violate a lawful general order, to wit: COMDTINST 53.75.1B, Limited Use of Government Office Equipment … by wrongfully using government provided internet technology equipment to store sexually explicit materials."
- One count of violating Article 134 for "on or about 30 July 2012 [sic], knowingly used a common carrier to transport into interstate commerce obscene material in violation of 18 U.S.C. 1462, which conduct was prejudicial to the good order and discipline or of a nature to bring discredit upon the armed forces."

Part I of the pretrial agreement shows, *inter alia*, that the applicant was satisfied with his legal counsel; that he entered the agreement voluntarily; that he understood the meaning and effect of his plea and fully understood its attendant effects and consequences, including the possibility of an administrative discharge; that he might receive an other than honorable administrative discharge; and that the charges and specifications preferred against him on May 8, 2012, would be withdrawn and dismissed without prejudice. Part II shows that he understood that the limits of NJP included admonishment and reprimand, forfeiture of not more than one-half of one month's pay for two months, reduction to E-5, 60 days' restriction, and 45 days of extra duties.

The applicant's defense counsel wrote a memorandum dated August 9, 2012, to the applicant's CO in support of the pretrial agreement. She noted that the CO had refused to approve a prior pretrial agreement because it had included three conditions that the CO had rejected. The three rejected conditions stated that the May 8th charges would be dismissed with prejudice, that the applicant would not plead guilty to the Article 134 charge, and that the applicant would not be reduced in rate at mast. In trying to get the CO to accept the pretrial agreement for NJP in lieu of court-martial, the applicant's defense counsel wrote the following:

> 2. … [The applicant] does not dispute sending the video or photograph from the phone. However, that conduct does [sic] fall within the prohibitions of 18 U.S.C. 1462 because (1) the transmission was not interstate; (2) because the transmission was not in commerce or commercial; and (3) because the transmission was not "obscene" (discussed further below in paragraph 4). At a court-martial, [the applicant's] guilty plea could not survive a providence inquiry, not because he disputes the underlying conduct, but because the conduct is not prohibited by the charged statute. However, a Nonjudicial Punishment plea is not subjected to the same legal scrutiny as a courts-martial plea and may survive in that forum.
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> 3. Use of his government phone as [his] primary personal phone was encouraged by a command Senior Chief (regional supervisor) during his visit to [the applicant's] recruiting station … . The Senior Chief noticed that several recruiters were carrying two phones, one government and one personal, and advised the group that using the government phone as a primary personal phone was permissible and more efficient. … Perhaps the Senior Chief's advice was imprudent and [the applicant's] reliance upon it was unwise – however, it is highly mitigating in this case.
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> 4. The transmission of the video and photograph alleged in Charge II are arguably a misuse of the government phone, as with the storage of images alleged in specification 2 of Charge I. However, the transmission was not interstate (sender and receiver were both within [redacted]), not commercial, and not obscene within the meaning of the statute. Obscenity is appropriately judged based on the contemporary community standards. In this case, the most relevant "community" by which to evaluate this private adult-to-adult transmission is that of [the applicant and his on-again, off-again girlfriend … . [They] exchanged several explicit pictures between them over the course of their relationship, establishing a standard between them by which sexually explicit material was

> condoned. As evidence that [the applicant] did not intend to submit [his girlfriend] to material that she was not receptive to, note that in her own statement, [he] sent her no more pictures or photographs after she asked him (for the first time) to stop.
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> 5. … The military justice system should not, and cannot, be used to regulate the personal, off-duty adult dating relationships of every service member. It would be ideal for every service member to conduct every off-duty interaction with friends and acquaintances with utmost civility and respect; however, this is not legally required. The Coast Guard should not allow the court system to be used for retaliations within personal relationships.
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> 6. … [The applicant] surely exhibited poor judgment in his use of his government phone for his image transmissions to [his girlfriend]. However, such an orders violation, especially when considered with the Senior Chief's guidance that using the government phone for dual purpose as a personal phone was permissible, and also taking into account the prior precedent between [the applicant and his girlfriend] is minor misconduct. As such, it is appropriately resolved at Nonjudicial Punishment.
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> 7. This misuse of the government phone, which took place a year ago this month, is the *only* disciplinary infraction noted in [the applicant's] 11 years of service to the Coast Guard. His cooperation and ready admissions to investigators evidence his genuine remorse and acceptance of responsibility. A career-ending federal conviction [if tried by court-martial], *over a year after* the misconduct, is not necessary to adequately punish [the applicant] or send a strong cautionary message to the fleet. The reduction in rank of a First Class to Second Class will operate as a walking billboard within the command, advertising the severe consequences of misuse of government property. The financial consequences to [his family] and the personal humiliation of [him] in being reduced in rank are appropriate and adequate consequences for his misconduct.
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> 8. [The applicant] respectfully requests that you consider and approve [the pretrial agreement]. …

On September 27, 2012, after being counseled about his rights and waiving his right to a representative, the applicant was punished at mast. The NJP consisted of a reduction in pay grade to [redacted]2/E-5 and 45 days of restriction with extra military instruction, but with 20 of them suspended on condition of good behavior. According to the Court Memorandum, he was charged with offenses under Articles 92 and 134 of the Uniform Code of Military Justice (UCMJ) for violating a lawful general order or regulation and for "other offenses," respectively.[2] The attached specification states the following:

> [The applicant] did … on or about 30 July 2012 [sic] send a video message of himself masturbating in violation of 18 U.S.C. 1462.[3] [He] also violated COMDTINST 5375.1B[4]

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[2] Article 92 of the UCMJ (10 U.S.C. § 892) prohibits the violation or failure to obey "any lawful general order or regulation" or being derelict in the performance of duties. Article 134 (10 U.S.C. § 934), called the "general article," prohibits "all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty."

[3] 18 U.S.C. § 1462 makes it an offense to use a common carrier or interactive computer service for interstate or foreign commerce in—

> (a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or
> (b) any obscene, lewd, lascivious, or filthy phonograph recording, electrical transcription, or other article or thing capable of producing sound; or
> (c) any drug, medicine, article, or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of

> which brings discredit upon the armed forces between December 2010 to on or about August 2011.

On January 14, 2014, the Commander of the CGRC signed another report to take final action on an administrative investigation of the RIC. The report notes the prior complaints against the RIC filed by the applicant in BCMR Docket No. 2014-071 in 2011 and by the applicant in this case in 2012. The report states that in October 2013 recruiters in the office had found his iPad opened to the webpage of a fantasy football team that the RIC maintained with the team name of "Texas Cracker Killers." In November 2013, a third party complained that the RIC had told a female recruiter she was "PMSing." The report states that all but one of the RIC's subordinates expressed displeasure, fear of intimidation or reprisal, and/or confusion about policies and practices" at the CGRO under the RIC's leadership.

The report also notes that the CGRO had been underperforming before the RIC arrived and that the perception of his superiors was that he was "an excellent [Recruiter in Charge] who corrected a foundering ship to include improved mission performance and an excellent recent Standardization Inspection." The RIC had "inherited an office with substantial professionalism and operational problems and … he set out to correct them with a firm hand. This change in expectations and firmness caused great discontent for recruiters who were already in the office." The report states that despite counseling and mentoring, the RIC was unable to lead the CGRO in a manner that supported workplace satisfaction and recommended that the RIC be removed. The report concludes that the RIC did not actually engage in prohibited harassment but that "the totality of [his] statements, practices and action led his staff to reasonably believe that some of his actions were based on protected categories of race, ethnicity or gender."

VIEWS OF THE COAST GUARD

On August 19, 2015, the Judge Advocate General of the Coast Guard (JAG) submitted an advisory opinion in which he recommended that the Board deny relief.

The JAG stated that this case is distinguishable from another case, BCMR Docket No. 2014-071, in which the Board removed two EERs from the record of another member at the same CGRO who had filed complaints against the RIC. The JAG alleged that unlike the situation in 2014-071, the disputed EER in this case is substantiated by the Page 7 dated January 17, 2012, in the applicant's record; by the EER comments explaining why he received a low mark for the performance factor "Communicating"; and his subsequent transfer. Moreover, the JAG noted that the Civil Rights Directorate, which investigated the applicant's complaint, found that his allegations were not substantiated and that "many of the specific negative interactions that [the applicant] personally experience with [the RIC] were triggered by his own failure or unwillingness to follow correct recruiting procedures or other directions given by [the RIC]."

> whom, or by what means any of such mentioned articles, matters, or things may be obtained or made; or …

[4] COMDTINST 5375.1B contains the Coast Guard's policy for "Limited Personal Use of Government Office Equipment and Services," and prohibits the use of such equipment and services for, *inter alia*, sexually harassing others and viewing, storing, or transmitting sexually explicit material.

Based on the report of the Civil Rights Directorate, the JAG concluded that the applicant has failed to prove his claims by a preponderance of the evidence.

The JAG also adopted the findings and analysis provided in a memorandum on the case prepared by PSC. Regarding the disputed Page 7, PSC stated that the applicant was reprimanded for failing to follow an order from the Recruiting Command regarding the DEP. PSC stated that the fact that other recruiters at the CGRO also received this Page 7 does not show that it was erroneous or unjust.

Regarding counseling, PSC stated that members may receive performance feedback or counseling in on-the-spot comments, counseling sessions, and mid-period or end-of-period counseling sessions. PSC stated that mid-period counseling is not required for petty officers, who receive semiannual EERs. PSC noted that the applicant received low marks on his EER dated November 30, 2011, and was counseled at that time but did not appeal or dispute that EER. PSC stated that the disputed EER dated April 24, 2012, thus reflects a "trend in poor performance," rather than a significant drop in the applicant's marks. Regarding the applicant's failure to appeal either EER, PSC stated that the EER appeals process "is designed to review marks the evaluee believes were based on incorrect information, prejudice, discrimination, or disproportionately low marks for the particular circumstances" and that members may appeal EER marks both verbally and in writing. PSC noted that the applicant's claim that he failed to appeal the disputed EER because he feared retaliation is not consistent with the fact that he refused to sign the Page 7 when the RIC gave it to him, which shows that he did not fear the RIC.

Regarding the applicant's claims that the poor marks were assigned as retaliation, PSC noted that the comments supporting the marks show that the applicant had admitted to sexual harassment and had also used "inappropriate language towards a female applicant to another recruiter of a sexual nature," which resulted in his reassignment and complete removal from recruiting. PSC stated that after the applicant was transferred from the CGRO, the Recruiting Command conducted another investigation of alleged harassment and a negative climate at the CGRO and that the investigator concluded that the RIC's practices, statements, and actions had "sustained the mistrust and discontent in the office" and recommended the RIC's removal. PSC conceded that the evidence shows that the environment of the CGRO was negative while the applicant was assigned there and later resulted in the RIC's removal. However, PSC argued, the applicant "displayed poor performance that was independent from his supervisor's influence," in particular his documented "trend of sexual harassment and unprofessional behavior."

Regarding the applicant's claims about points, PSC explained that pursuant to Article 3.A.16. of COMDTINST M1000.2 (hereinafter, "Enlisted Manual"), only the points for awards and sea time earned "from the eligibility date of the member's current grade through the SWE eligibility date" count toward a member's placement on an advancement list, which is determined by a point system in which members receive points for awards, time in grade, time in service, etc., but primarily for their performance on the SWE. Therefore, because the applicant was reduced in rate to [redacted] at mast on September 27, 2012, only the sea time and awards points he has received since that date count toward his placement on the current advancement lists for [redacted]. PSC stated that the applicant's claim that he was not counseled about this provision in the advancement rules before he accepted NJP does not justify restoring the points he lost due to his

reduction in rate because there is no requirement for a member to receive counseling on every possible administrative consequence of NJP.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 21, 2015, the Chair sent the applicant a copy of the views of the Coast Guard and invited a response within thirty days. The applicant submitted a response on September 18, 2015.

The applicant stated that he did not dispute his EER dated November 30, 2011, because during that marking period he had used his government cell phone inappropriately, and his marks reflected that. However, he argued, there was no justification for the marks he received on his EER dated April 24, 2012. He stated that the claim that he had used discriminatory recruiting practices is a fabrication. He argued that there "is no evidence to support any of [his] evaluations, however there is evidence that supports [the RIC's] bias." He again pointed out that he was working at MEPs for most of the marking period and that he received the disputed EER shortly after he filed a harassment complaint against the RIC.

The applicant stated that there is no evidence of a "trend in sexual harassment." He admitted that he had previously misused this government telephone in his communications with his girlfriend but noted that it was during the prior marking period and that it therefore should not have affected his April 2012 EER. The applicant stated that the only evidence of a "trend in sexual harassment" is from the RIC, who was later found not fit to be a supervisor at the CGRO. He argued that his claims about the RIC are proven by the fact that others complained about the RIC, that the RIC was found to lack leadership, and that the RIC was removed from his position. The applicant argued that it is unfair that his career was destroyed by a minor rules violation with a government cell phone but the RIC was "allowed to walk away from [his discriminatory conduct] over and over for years unscathed while working as the Recruiter in Charge of an office of diverse people recruiting diverse people in the [urban] area."

The applicant alleged that there is no evidence supporting the claim in the Page 7 that recruits were not DEP'ed in a timely manner and that the database shows that none were DEP'ed fewer than 30 days from their ship dates.

In support of these allegations, the applicant submitted the following:

- A print-out from the CGRC database shows that the applicant recruited 24 members while assigned to the CGRO, including 13 recruits who identified as non-Hispanic Caucasians, 6 who identified as Hispanic, 2 who identified as Hawaiian/Pacific Islander, 1 who identified as Asian, 1 who identified as African American, and 1 who identified as "other." In addition, 2 of his 24 recruits (both non-Hispanic Caucasians) were female.
- The applicant in BCMR Docket No. 2014-071, an MKC, stated on behalf of the applicant that the MKC worked with the RIC from July 2011 through June 2012 and "saw nothing but intimidating, manipulative and hostile behavior from him"; that he filed two formal complaints against the RIC; and that he received relief from the BCMR. The MKC stated that anyone who disagreed with the RIC would be "belittled and intimidated." He stated that the

applicant in this case was subject to abuse by the RIC, and "[o]nce Chief found out that [redacted] did not like him Chief began to pick at him. [redacted] eventually got tired of this harassment and filed at least one complaint against [the RIC]." The MKC stated that the RIC influenced the applicant's NJP with "lies and manipulation" and that the punishment was "unjust and bias[ed] based off of manipulation and lies." He also alleged that the delay between the applicant's offense and the mast was not fair or proper.

- A YN1 stated that she reported to the CGRO in July 2011, which was when the RIC arrived. She stated that the RIC "seemed to take his new responsibilities to an extreme. He implemented a new recruiting process which was alarming and discriminatory towards white males. All of the recruiters spoke up about these practices and how we disagreed with them but [the RIC] did not back down and we were forced to participate … . When the Assistant Recruiter In Charge (ARIC) stood up to [the RIC] about how he did not agree with his practices, he was reprimanded, sent to work at a different office, and eventually forced out of recruiting. This sent a negative and intimidating message throughout the office that either you agree with Chief or start looking for a new job. Which Chief made clear several times by threatening the recruiters with negative actions like page 7's and or removal from recruiting. I found his leadership and management to be extremely harsh and discouraging." The YN1 stated that when the RIC and the applicant "started to have issues the environment in the office became very hostile. It seemed as though everyone was walking on egg shells to keep from stirring up any new drama. During this time, [redacted] maintained a very professional and positive attitude despite being constantly demeaned by [the RIC]. In my opinion, [the applicant] was treated very unfairly by his chain of command. He was held in limbo by the command for a very long time not knowing whether he was staying at the office or leaving."
- An AMT2 wrote that as soon as the RIC arrived at the CGRO in the summer of 2011, "his leadership skills were in question to all of us. He used threatening tactics to get people to do what he wanted. … He had one other recruiter besides [the applicant] removed from recruiting because he said he was a racist (which he wasn't) that came out in the investigation that was done."
- In a list of allegations against the RIC that the applicant called his "log" but that was apparently prepared after the events and pursuant to his complaint, the applicant alleged that the RIC routinely lied or twisted his words around, would railroad subordinates out of their jobs as soon as they disagreed with him, and had already done so to the MKC and himself. He alleged that the RIC had claimed to have been mistreated because he is Hispanic and stated several times, "It's a white man's Coast Guard." He alleged that the RIC asked every subordinate "what are you," meaning what race are you. He alleged that the RIC was micromanaging, overbearing, harassing, demeaning, demoralizing, and constantly reminding them that he was in charge. The applicant complained about the RIC's policies regarding leave and "comp time" for weekend honor guard duty and alleged that the RIC worked only part-time but required his subordinates to work more than full time and to leave the office at least 30 minutes after him. He complained that he was required to ask the Assistant RIC's permission to speak to the RIC and could talk to him only about work matters. He complained that only the RIC and Assistant RIC were allowed to answer phone calls to the CGRO. He alleged that the RIC required him to "recruit a girl and put her in" before putting another male recruit in. He alleged that the RIC kept a government vehicle for his own use and had allowed a non-

military-type female to drive it but required others to be in uniform when driving government vehicles.

AMENDED REQUEST FOR RELIEF AND ADDITIONAL EVIDENCE

The applicant submitted another application in September 2015 in which he requested removal of the NJP he received on September 27, 2012. On November 4, 2015, the applicant asked that his two applications be combined and considered together.

Regarding the NJP, the applicant alleged that the RIC provided incorrect and untruthful information to his CO. He argued that the preponderance of the evidence shows that the RIC is deceitful and not credible. The applicant alleged that the RIC "manipulated a remote command's opinion of me based largely on lies as he did to multiple previous recruiters under his supervision." The applicant argued that because the CO relied on the RIC's lies, he did not have an accurate depiction of the applicant while deciding his punishment. He noted that the CO visited their CGRO and spoke with the RIC the week before the applicant's mast. He argued that the RIC took a "minor violation"—minor because the command offered to have the offense tried at mast instead of court-martial—"and created a situation based on false information and lies about me that destroyed my reputation within the command" and has hindered his advancement.

Regarding the EERs, the applicant stated that he admitted to having "sexted" his girlfriend on his government cell phone during the day he was accused of having done it. He argued that it could not be considered sexual harassment because she was his girlfriend. The applicant also argued that the CGRC database printout proves that he did not use discriminatory practices in recruiting members, as the RIC claimed. He noted that he is "married to a Japanese woman and have two bi-racial sons. The claim that I am or have used discriminatory anything is heinous and offensive." He argued that the evidence shows that it is the RIC who is racist, but the command called the name of the RIC's fantasy football team ("Texas Cracker Killers") a "single error in judgment" and ignored or downplayed the claims of his subordinates. Regarding the comment in the EER that he had been disrespectful to his "immediate supervisors" in their homes, the applicant denied ever having been to the RIC's home.

The applicant argued that the only evidence against him are the words of the RIC, whom the Coast Guard removed from his position and who is a habitual liar.

In support of this request, the applicant submitted some of the same documents he had previously submitted, as well as a copy of the application for BCMR Docket No. 2014-071, in which that applicant proved by a preponderance of the evidence that the RIC knew that the applicant had filed two complaints against him about issuing unlawful orders when the RIC prepared the applicant's EERs dated November 30, 2011, and May 31, 2012, and that there was no other evidence of poor performance or misconduct to support the sudden decline in his marks.

SUPPLEMENTAL VIEWS OF THE COAST GUARD

On March 18, 2016, the Board received a supplemental advisory opinion from the JAG in which the JAG again recommended denying relief. The JAG stated that the record shows that

the Coast Guard had investigated the applicant's claims and concluded that many of the specific negative interactions that the applicant had complained about were caused by his own failure or unwillingness to follow correct recruiting procedures or other directions given by his supervisor. The JAG noted that the applicant failed to address the Civil Rights Directorate's report of the investigation of his complaint.

The JAG argued that, unlike the case of the applicant in BCMR Docket No. 2014-071, this applicant's record contains documentation of "negative behavior," substantiating the low marks and negative comments in the disputed EER. The JAG noted that like the disputed EER, the applicant's prior, November 30, 2011, EER contains similar comments regarding failing to meet standards, failing to conform to rules, and demonstrating unprofessional behavior, sexual harassment, and inappropriate language in the workplace. The JAG argued that because the applicant did not file his own complaint until after the November 2011 EER was issued and the April 2012 EER is similar to the November 2011 EER, the April 2012 EER apparently reflects a pattern of poor performance on the part of the applicant, rather than reprisal by the RIC.

Regarding the NJP, the JAG noted that the applicant was advised of his rights and voluntarily consented to the NJP.

Regarding the Page 7, the JAG noted that the applicant submitted no evidence to disprove the statements therein.

APPLICANT'S RESPONSE TO THE SUPPLEMENTAL ADVISORY OPINION

On April 19, 2016, the applicant responded to the Coast Guard's supplemental advisory opinion. The applicant argued that his NJP should be removed because the alleged offense "was not filed under the correct article" of the UCMJ. In support of this claim, he submitted part of an exchange of emails with a Navy JAG officer dated April 5, 2016, in which the JAG stated "you use that Article [134] when you want to charge someone with violating federal law. In this case, they were charging you with that federal law (the 18 USC section) that is normally used for child pornography. That of course is not what we were dealing with and besides, there was no evidence that you violated the law anyway." The applicant also alleged that the "sexting" incident was used to lower his marks in both marking periods, contrary to regulations. He argued that not one of the eight criteria that require an unsatisfactory conduct mark under Article 4.D.4.b. of the Enlisted Manual were met in either marking period.

The applicant alleged that the CGRC conducted inadequate "self investigations" that did not include interviews with his coworkers at the CGRO or MEPs. He argued that the statements he has submitted from his coworkers and his "log" prove this point.

The applicant stated that his EER dated November 30, 2011, should also be "in question" because it was prepared by the RIC. He argued that he has proven that the RIC was racially biased against him.

Citing provisions in the current Enlisted Manual, the applicant argued that Article 4.D.1.c., regarding a member's "limited opportunity to perform,"[5] applied to his case because he was working at MEPS for most of the marking period for the disputed EER. The applicant argued that pursuant to Article 4.D.2.d., there was insufficient documentation of poor conduct to warrant a Page 7 or unsatisfactory conduct mark.[6] The applicant also argued that the investigation of the RIC shows that he was racist and sexist and unqualified to properly evaluate any employee, including the applicant.

On May 10, 2016, the applicant the following additional information to the Board:

- A text message dated March 28, 2012, purportedly from the RIC, which states, "As of today you are no longer authorized to come anywhere near the office or MEPS. Do not contact me directly. You may contact HSCS [redacted] if you have any questions. You will receive all your tasking directly from CGRC. Ok thanks."
- An email from the applicant to someone dated April 11, 2012, alleging that the RIC had tarnished his record and told lies about him.
- A summary of an interview between the applicant and an investigator for CGRC dated April 19, 2012, in which CGRC was attempting to corroborate the applicant's complaints. The summary indicates that the investigator discussed and listed protected statuses with him, and the applicant stated that the RIC's conduct "was a violation of the Coast Guard core values: Honor, Respect, and Devotion to Duty, rather than based on a protected status." The applicant explained that he had received two Page 7s with "falsehoods about him." Regarding racial issues, the applicant stated that the RIC "may believe that he ([the RIC]) had been discriminated against in his career and that [the RIC's] treatment of him ([the applicant]) is retaliation against the treatment that [the RIC] had received in the Coast Guard" because the RIC had once made a statement "in the office implying that he believed he was in a 'white man's Coast Guard.'" However, the applicant stated that he could not prove and did not want to pursue a harassment complaint from that angle. The applicant wanted the complaint to say only that the RIC's behavior was "inconsistent with the Coast Guard core values." The applicant stated that the RIC did not like him and was "overpowering and overbearing." After taking a Myers-Briggs test, the RIC had told everyone that he had a dominant personality type and would naturally butt heads with anyone else who also possessed a dominant personality type. The applicant complained that while working at MEPS, the RIC had canceled and reinitiated four of his recruits to receive credit for recruiting them. He alleged that recruits had complained about the RIC, too. The applicant complained that the RIC "uses evaluations, booking and negative Page 7s (CG-3307) as intimidation and leverage." The applicant complained that whenever an issue arose, if he disagreed with the RIC, the RIC considered that the applicant was the one with a problem. When asked if the RIC targeted him, the applicant stated that he was targeted because he also had a dominant personality type and that the RIC felt threatened by himself and the other E-6

[5] The applicant cited provisions of the current Enlisted Manual, COMDTINST M1000.2A, which went into effect in 2015.

[6] Article 4.D.2.d. of the current Enlisted Manual states that a one-time minor infraction, such as being late to work, "is insufficient to be classified as an adverse remarks entry" and that adverse remarks dealing with minor infractions should focus on patterns of unacceptable behavior.

in the office due to their rank and so were targeted and mistreated them more. The applicant stated that the RIC had given him a Page 7 for two "cussing tirades," which the applicant did not consider to be "tirades," and he had refused to sign it. The applicant stated that in one of the alleged "tirades"—a discussion of his household goods transportation on March 28, 2012—he had not used profanity at all. He complained that the Page 7 about the DEP was also false, and he alleged that the RIC had once criticized him for recruiting two Hispanic females to join the Coast Guard when they came to the CGRO to ask for directions to the Air Force recruiting office.

- An email from the applicant to a senior chief dated April 24, 2012, by which the applicant forwarded his list of complaints against the RIC and stated that the RIC had cursed at someone at MEPS and did "not know how to communicate like a human being." He provided a list of people who he said had complained about the RIC.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely filed.

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.[7]

3. The applicant asked the Board to expunge from his record a Page 7 dated March 30, 2012, his EERs dated November 30, 2011, and April 24, 2012, and the NJP he received on September 27, 2012, because, he alleged, they are erroneous and unjust. He also asked the Board to reverse the consequences of his NJP on his points total in competing for advancement. In 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 her record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.[8] 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."[9]

4. The record shows that the applicant's CO signed the disputed Page 7 on March 30, 2012, which criticized the applicant for failing to follow the order of the CGRC and his RIC regarding enrolling candidates in the DEP at least 30 days before their "ship date." The applicant alleged that the Page 7 is false but submitted no evidence to prove this claim. He alleged that other recruiters received the same Page 7, but this claim does not show that the counseling he

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[7] *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).

[8] 33 C.F.R. § 52.24(b).

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

received on the Page 7 was inaccurate. Even if, as he alleged, all of his recruits during the reporting period "shipped" to recruit training more than 30 days after they were enlisted under the DEP, this would not prove that the Page 7 was erroneous or unjust because the Page 7 may document conduct that occurred before the start of the reporting period for the EER and because, as noted in the comments for the EER dated April 24, 2012, the applicant's actions caused many of the CGRO's original "ship dates" to be canceled and rescheduled. The Page 7 is signed by the applicant's CO, and the fact that his RIC was later removed for inability to lead the CGRO in a manner that supported workplace satisfaction does not cast any significant doubt on the validity of the CO's Page 7. The Board finds that the applicant has not proven by a preponderance of the evidence that the disputed Page 7 is erroneous or unjust.

5. Regarding the EERs, the Board notes that the applicant did not appeal either of them and initially admitted that he did not complain about the November 30, 2011, EER because he had committed misconduct during the marking period. He also alleged that he did not appeal the EERs because he feared retaliation by the RIC. The Coast Guard pointed out that the applicant did not fear the RIC enough to sign the disputed Page 7 when the RIC presented it to him for signature on March 30, 2012, and the applicant indicated to the investigator and he had refused to sign another Page 7 as well. However, as the applicant noted, the Board has already removed the November 2011 and April 2012 EERs of the applicant in BCMR Docket No. 2014-071 because that applicant proved by a preponderance of the evidence that the low marks on his EERs "were adversely affected by factors that should not be in the rating process." In 2014-071, there was no evidence of misconduct or poor performance in the applicant's record, and he had formally accused the RIC of implementing discriminatory recruiting practices, although they were apparently new practices sanctioned by CGRC. In addition, an investigation conducted in 2013 had shown that the workplace climate was poor and some of the RIC's subordinates thought that he would retaliate if they crossed him in some way. In light of this evidence, the Board will not interpret the applicant's failure to appeal the EERs as evidence that they are correct. Although he apparently did not fear retaliation when he refused to sign the Page 7s, he may nonetheless have feared retaliation when he received the EERs.

6. The applicant alleged that his April 24, 2012, EER was prepared in retaliation because he had filed a harassment complaint against the RIC. In subsequent submissions, he also alleged that it was a result of racism. The May 14, 2012, report of the Civil Rights Directorate's investigation of the applicant's complaint, however, noted that the applicant's complaint was not based on a protected status, such as race. The summary of his interview with the investigator shows that the applicant rejected race as a basis and was accusing the RIC of violating the Coast Guard's core values. The only things he mentioned regarding race were that the RIC had once said something that implied he thought "it was a white man's Coast Guard" and that the RIC might be retaliating against him because the RIC thought he himself had been discriminated against. The report shows that while "the environment in the Recruiting Office was not conducive to the success of the recruiters, … many of the specific negative interactions that [the applicant] personally experienced with [the RIC] were triggered by his own failure or unwillingness to follow correct recruiting procedures or other directions given by [the RIC]." This finding is supported by the summary of their interview and by the applicant's own statement to CGIS on February 15, 2012, that the RIC was "very by the book," which did not suit the applicant. The record shows that the applicant filed his complaint against the RIC on

April 17, 2012, before the EER was finalized, but he filed it after the RIC presumably asked the applicant for his EER input.[10] In addition, the record shows that during the marking period for the April 24, 2012, EER, the applicant was disqualified first from recruiting based on his text about potentially "banging" a recruit and then from working at MEPS because of additional misconduct. The record supports the applicant's claim that in 2013, the RIC had a fantasy football team called the Texas Cracker Killers, but given the substantial evidence in the record of the applicant's misconduct and poor performance, the Board finds that he has not proven by a preponderance of the evidence that the low marks and negative comments on his April 24, 2012, EER were assigned because of racism or retaliation.

7. The applicant alleged that the April 24, 2012, EER is erroneous and unjust because he was assigned to MEPS on a temporary basis for most of the marking period. However, the record shows that the applicant had been disqualified from recruiting by the CO, and the comments in the EER show that the applicant's rating chain received input from the MEPS command about the applicant's performance at MEPS. Each of the low performance marks on this EER is supported by an appropriate comment reflecting poor performance in that dimension. Accordingly and given the evidence of the applicant's negative performance and disqualification from both recruiting and MEPS during the marking period, the Board finds that he has not proven by a preponderance of the evidence that the marks and comments in his April 24, 2012, EER are erroneous or unjust or a matter of retaliation or racism.

8. The applicant alleged that the April 24, 2012, EER is unjust because the comments are repetitive and insufficient to support the marks, especially the unsatisfactory conduct mark, as required by Article 5.B.1. of the Enlisted Manual, COMDTINST M1000.2.[11] The record shows that the comments are very repetitive, but repetitive comments are not prohibited by the Enlisted Manual. Nothing in the regulations prohibits the same example or description of poor performance from being cited to support a low mark for more than one performance dimension. For example, failing to follow required procedures reflects on the quality of one's work, one's need to be monitored by a supervisor, one's direction of and setting an example for others, one's responsibility, etc. The Board finds that the repetition of the comments in the EER does not render it invalid or unjust. The EER comments are not full of details but they are sufficiently specific to show why the applicant received the low marks, and the comment supporting the unsatisfactory conduct mark cites adverse Page 7 entries, bringing discredit on the Coast Guard, and failing to conform to military rules, regulations, and standards. The record contains two adverse Page 7s received by the applicant during the marking period. They document his disqualification from recruiting and his failure to follow the CGRC's policy regarding the DEP. The record also shows that the applicant's conduct during the marking period resulted in his

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[10] Article 5.D.3.b. of COMDTINST M1000.2, the Enlisted Manual, requires the Supervisor to seek input for an EER from the evaluee, which should be submitted at least 14 days before the end of the marking period. The Supervisor also makes recommended marks on the EER, drafts any required supporting comments on an EER, and forwards the EER to the Marking Official at least 9 days before the end of the reporting period.

[11] Article 5.B.1. of the Enlisted Manual, COMDTINST M1000.2, provides that low marks of 1 or 2 and high marks of 7 on an EER must be supported by remarks and an unsatisfactory conduct mark "must be supported by an adverse entry for (1) Non-judicial punishment; (2) Court-martial; (3) Civil conviction; (4) Financial irresponsibility; (5) Not supporting dependents; (6) Alcohol incidents; and (7) Not complying with civilian and military rules, regulations, and standards." For reason (7), it requires "specific examples of … nonconformance to civilian and military rules, regulations, and standards which discredited the Coast Guard."

removal from MEPS. Therefore, the Board finds that the applicant has not proven by a preponderance of the evidence that the comments in the EER do not meet the requirements of the Enlisted Manual or that the unsatisfactory conduct mark is unjustified.

9. The applicant alleged that he was not counseled about the issues raised in the April 24, 2012, EER, but the record shows that the applicant considered the RIC to be "very by the book" and that they had had several negative interactions because the applicant had failed to follow the CGRC's or the RIC's policies regarding recruiting. Article 5.B.2.i. of the Enlisted Manual does not require documented performance feedback during each marking period and states that performance feedback "occurs whenever an evaluee receives any advice or observation from a rating official on their performance or any other matter on which they may be evaluated. Performance feedback can occur during a counseling session, particularly during a mid-period session, through on-the-spot comments about performance, or at the end of the enlisted employee review period." Given the evidence in the disputed Page 7 and the Civil Rights Directorate's report, the Board finds that the applicant has not proven by a preponderance of the evidence that he received so little performance feedback during the reporting period that the marks and comments in his April 24, 2012, EER are erroneous or unjust.

10. In his response to the supplemental advisory opinion, the applicant argued that his November 30, 2011, EER should be removed because the RIC was on his rating chain at the time. However, the applicant has admitted and the report of the investigation shows that the applicant committed significant misconduct during the marking period for this EER by using his government cell phone to transmit a photograph of his genitalia and a video of himself masturbating in July 2011 and then by sending the recipient additional, insulting texts with his government cell phone in August 2011. Although he argued that his misconduct should not be considered sexual harassment because the recipient of the photograph, video, and texts had previously been his girlfriend, the Board finds that he has not proven by a preponderance of the evidence that his low marks and corresponding EER comments noting that he had been accused of sexual harassment and admitted to unprofessional behavior in his communications are erroneous or unjust.

11. The applicant alleged that the following comment in the November 30, 2011, EER is erroneous and unjust: "He has displayed discriminatory tendencies toward others based on their religion, age, sex, race, marital status, or ethnic background. He allowed his biases to influence appraisals or the treatment of others." As evidence, he submitted a print-out from the CGRC database showing that he recruited 24 members while assigned to the CGRO in [redacted], including 13 recruits who identified as non-Hispanic Caucasians, 6 who identified as Hispanic, 2 who identified as Hawaiian/Pacific Islander, 1 who identified as Asian, 1 who identified as African American, and 1 who identified as "other." In addition, 2 of his 24 recruits were female (both non-Hispanic Caucasians). Therefore, 13 of his 24 recruits (54%) identified as being non-Hispanic Caucasian, 11 (46%) did not, and 11 (46%) overall identified as being non-Hispanic Caucasian males, and 13 (54%) did not. With no basis for comparison, the Board finds that these statistics do not overcome the presumption of regularity or prove by a preponderance of the evidence that the RIC's assessment of the applicant's recruiting was erroneous or unjust. The Board finds no grounds for removing the November 30, 2011, EER from the applicant's record.

12. The applicant argued that his EERs should be removed because his case is similar to that of the applicant in BCMR Docket No. 2014-071, wherein the Board expunged two EERs for an applicant who had previously filed two complaints against the RIC and accused the RIC of discriminatory recruiting practices. In 2014-071, there was no evidence of misconduct or poor performance in the applicant's record and so the preponderance of the evidence before the Board in that case supported that applicant's allegation that the EERs were retaliatory. In this case, however, there is ample evidence of the applicant's misconduct and poor performance in both reporting periods. Based on his misconduct, he got disqualified first from recruiting and then from MEPS, and both the CO and RIC found that he had failed to follow authorized recruiting policies. Therefore, the Board finds that the applicant's case is significantly different from that of the applicant in BCMR Docket No. 2014-071, and the grant of relief in 2014-071 should not determine the outcome of this case.

13. The applicant asked the Board to remove his NJP dated September 27, 2012, from his record. He argued that his offenses were "minor" because they were punished at mast instead of court-martial and that the only evidence against him was the RIC's claims. He complained that the specification for one of the charges cited 18 U.S.C. § 1462, which concerns interstate commerce in obscene materials. The Board finds, however, that the report of the investigation contains ample evidence that the applicant misused his government cell phone to "sext" and harass his ex-girlfriend, contrary to regulations. The pretrial agreement and his attorney's memorandum in support of the pretrial agreement also show that he knowingly accepted the NJP, including the reduction in rate, to avoid court-martial and punishment for additional UCMJ offenses that he had been charged with on May 8, 2012.

14. The applicant's attorney's memorandum to the CO in support of his pretrial agreement shows that the applicant intentionally pled guilty to violating Article 134, the general article prohibiting "all disorders and neglects to the prejudice of good order and discipline," even though the prepared specification for the charge cited 18 U.S.C. § 1462 and even though his attorney determined that his misconduct did not meet the elements of a violation of 18 U.S.C. § 1462. According to the Manual for Courts-Martial United States, the three clauses of Article 134 make punishable "[t]hree categories of offenses not specifically covered in any other article of the code … Clause 1 offenses involve disorders and neglects to the prejudice of good order and discipline in the armed forces. Clause 2 offenses involve conduct of a nature to bring discredit upon the armed forces. Clause 3 offenses involve noncapital crimes or offenses which violate Federal law." The Article 134 specification in this case cites 18 U.S.C. § 1462 as if relying Clause 3 of Article 134 but also states that his conduct "was prejudicial to the good order and discipline or of a nature to bring discredit upon the armed forces" and so also describes an offense under both Clause 1 and Clause 2. The specification thus appears to try to fulfill the requirements of all three clauses, whereas meeting the terms of only one of the three clauses is sufficient to establish a violation of Article 134. Given that the applicant's ex-girlfriend changed her phone to show "CG Perv" or "CG Pervert" whenever he called her after he sexted her, the Board is not persuaded that the applicant did not violate Article 134 even though the specification is poorly written. Therefore and because the applicant knew from his attorney that 18 U.S.C. § 1462 was incorrect and still chose to plead guilty at mast to violating both Article 92 and Article 134 to avoid court-martial and to avoid punishment for the additional charges laid against him on May 8, 2012, the Board finds no grounds for removing the NJP from his record.

15. The applicant asked the Board to restore points in the advancement system that he lost because of his reduction in rate. He argued that he should have been expressly warned that one of the consequences of accepting the NJP would be a loss of points. Under the rules for NJP in the Manual for Courts-Martial United States, a service member who, like the applicant, has the right to reject NJP and demand trial by court-martial must be counseled about "the maximum punishment which the nonjudicial punishment authority may impose by nonjudicial punishment," and the maximum punishment that the applicant's CO could impose included a reduction in rate. The record shows that the applicant was advised that he could be reduced in rate at mast. In fact, his attorney's memorandum shows that he knew he would be reduced in rate at mast because the CO had previously rejected a condition in a prior proposed pretrial agreement that would have prevented the CO from reducing the applicant's rate at mast. Under the Enlisted Manual and other Coast Guard policies, a reduction in rate from E-6 to E-5 has several administrative consequences, but the rules do not require a member to be counseled about every administrative consequence of a reduction in rate. The Board finds that the applicant has not shown that his loss of points in the advancement system because of his reduction in rate at mast is erroneous or unjust.

16. The applicant argued that relief should be granted because, he alleged, his RIC was racist and dishonest. The record indicates that upon reporting as the new RIC in the summer of 2011, the RIC had been tasked with improving the performance of the CGRO, which the CGRC considered to be poor, and with implementing new, authorized recruiting policies, which his subordinates considered discriminatory. The record also shows that his subordinates found him "very by the book," "intimidating," "manipulative," "extremely harsh," "discouraging," and "hostile," which led to his removal in January 2014 for poor leadership after the third investigation of a subordinate's allegations in 2013. None of the investigators found that the RIC's policies or leadership were actually discriminatory. The third concluded that the RIC had not actually engaged in prohibited harassment but that "the totality of [his] statements, practices and action led his staff to reasonably believe that some of his actions were based on protected categories of race, ethnicity or gender." In addition, the third investigation noted that the RIC's iPad had been found open to the webpage of his fantasy football team called the Texas Cracker Killers and he had once told a female recruiter she was "PMSing." The Board certainly does not condone the RIC's actions but is not persuaded that the disputed Page 7, EERs, and NJP are inaccurate or unjust in light of the evidence against the applicant.

17. The applicant made numerous allegations with respect to the actions and attitude of the RIC and the disputed documents. Those allegations not specifically addressed above are considered to be unsupported by substantial evidence sufficient to overcome the presumption of regularity and/or are not dispositive of the case.[12]

18. Accordingly, the applicant's request should be denied because he has not proven by a preponderance of the evidence that the disputed Page 7s, EERs, NJP, reduction in rate, or loss of points were erroneous or unjust.

ORDER

[12] 33 C.F.R. § 52.24(b); *see Frizelle v. Slater*, 111 F.3d 172, 177 (D.C. Cir. 1997) (noting that the Board need not address arguments that "appear frivolous on their face and could [not] affect the Board's ultimate disposition").

The application of [redacted], USCG, for correction of his military record is denied.

August 26, 2016

[redacted]