

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2016-026

██████████
██████████

FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case after receiving the applicant's completed application on November 30, 2015, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated September 22, 2016, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant asked the Board to remove from his record two "Performance & Discipline" CG-3307 forms ("Page 7s")¹ dated March 16, 2005, and a third dated October 4, 2012. He also asked the Board to raise the low mark of 3 he received for the performance category "Judgment" to a "standard" mark of 4 (on a scale from 1 to 7) on his Enlisted Employee Report (EER) dated September 30, 2012. The applicant stated that the low mark of 3 he received for Judgment resulted from the October 4, 2012, Page 7 and is punitive and factually inaccurate.

The applicant stated that he discovered the alleged errors and injustice in his record on October 31, 2014, and that it is in the interest of justice for the Board to consider his request because of "emotional distress" and his "consecutive overseas – arduous sea duty."

The applicant alleged that the disputed Page 7s "present elements of legal torts in false light with defamation that palter the truth to mislead reviewers. Oppressive and incomprehensible, the factually inaccurate and emotionally biased remarks resulted from improper motives of the accuser that were not investigated and are contrary to the internally issued Equal Opportunity

¹ A form CG-3307, "Administrative Remarks" record entry, better known as a "Page 7," "provides a means of recording miscellaneous entries, which are not recorded elsewhere in a Personnel Data Record (PDR). Administrative Remarks entries are made to document counseling or to record any other information required by current directives, or considered to be of historical value." Personnel and Pay Procedures Manual (PPPM), PSCINST M1000.2A, Chapter 10.A.

Policy Statement.” He also alleged that the disputed Page 7s unjustly appear more than once in his electronic personnel data file (PDR). The three disputed Page 7s state the following: [REDACTED]

1. 16MAR05: On 06 January 2005, you appeared before me at Captain’s Mast for violation of Article 93 Cruelty & Maltreatment and Article 134 Conduct Bringing Discredit to the Armed Forces, Knowingly Furnishing Alcohol to a Minor. While I dismissed the charges, I informed you at the conclusion of the mast that my decision should not be interpreted as you being found innocent, but merely that there was not enough evidence to take any further disciplinary action. I felt compelled to document this situation for future use by your command, should you decide to put yourself in a similar situation in the future. However, I hope that this will serve as a deterrent for you and you will never find yourself in this situation again.

Additionally, [REDACTED] on this date you were counseled for your lapse in judgment in attending [REDACTED] party during March/April 2003 with subordinates from your command where underage drinking was occurring. During this party, you were observed by numerous persons loitering in the presence of a teenaged civilian girl who was heavily intoxicated, partially unclothed, and receiving assistance from her female friends. You then remained alone in a bedroom with this individual after she was placed in bed with the door closed. Although you have denied any improper conduct or intentions, your decision to place yourself in a position of inappropriate familiarity with this teenaged girl raises serious questions regarding your judgment and responsibility and has brought discredit to your professional reputation as a member of the Armed Forces. [This Page 7 is signed by the applicant’s Sector Commander and states “Member refused to sign.”] [REDACTED]

2. 16MAR05: On 16 Mar 2005, you were counselled on and you were given the opportunity to review and sign an administrative remarks entry (CG 3307) received by me [the applicant’s Officer in Charge (OIC)] on 16 March 2005 and signed by [the Sector Commander] (comments stemming from Captain’s mast of 06 January 2005). After [REDACTED] are refusing to sign this entry based on:
 - a) You contend that the basis for these charges were in retaliation for holding other personnel accountable for UCMJ violations.
 - b) Second paragraph summation is not correct in that you state that you were never alone in a bedroom, with the door closed, with an under-aged girl.
 - c) You continue to maintain your innocence to these charges and that you were not found guilty of any wrong doing.

Refusal to sign this entry does not mean that this entry will not be made part of your permanent record. [REDACTED]

Present during this counseling session was [a chief warrant officer]. [The OIC signed this Page 7 and the applicant signed it in acknowledgement.]

3. 04Oct2012: In mid-June 2012, several of your subordinates made a complaint to District 14 Work Life staff about their [REDACTED] s [REDACTED] ng you [REDACTED] or over the period of Nov 2011 – May 2012. Upon completion of Unit level Preliminary and

Coast Guard Investigative Services investigations, you were not found to have committed any crimes or UCMJ violations. However, your conversation with an [REDACTED] actions towards your subordinates directly conflict with the high standards set for a Chief Petty Officer and were an embarrassment to the Coast Guard Core Value of Respect. As a Chief Petty Officer, you are expected to lead with a sterling example. Unprofessional conversations on such subject matter as personal sexual experiences and nude beaches are unacceptable and have no place in our Coast Guard. Also, you brushed insulation off of another member; physical touching of another in this manner without their permission is prohibited. Additional unprofessional behavior towards subordinates, peers, or superiors will be met with the strictest consequences.

The chain of command is an essential component for maintaining professionalism and good order and discipline within any military organization, including [the cutter] [REDACTED]. Not utilizing the chain of command undermines the system and eliminates your effectiveness as a leader. Having received significant counseling and additional training from the Chief Petty Officer's Academy, I expect you to adjust your leadership style to focus on mission completion and adherence to the Core Values. I demand that you foster a culture of respect within your department. It is possible and required for you to be able to hold others accountable in a respectful way while addressing the deficiency. Such action must be swift, judicious, and even[ly] applied. The chain of command is available to support and assist you and should be your first resource when confronted with any difficult situation. Any further instances of disrespect will be met with the strictest consequences. [This Page 7 is signed by the applicant's CO and by the applicant in acknowledgement.]

Regarding the disputed Page 7s dated March 16, 2005, the applicant stated that they concern "horrific allegations filed against me to include sexual assault. Those false allegations resulted in my immediate removal from the unit and extensive USCG Investigative Service (CGIS) investigations of CGIS [REDACTED]." The applicant stated that he submitted a Freedom of Information Act (FOIA) request for the CGIS report 04-0196 and did not receive anything. The applicant alleged that the Page 7s do not comply with paragraph 4.c.(4)(A) of Part V of COMDTINST 1000.14C. The applicant stated that the charges against him were dismissed but the Page 7s "palter the truth and attempt to mislead future reviewers that I am guilty of the false allegations accused." The applicant alleged that the "fabrications and gross exaggerations [against him] were the immediate retaliatory result of subordinates being held accountable through other non-judicial punishment (NJP) proceedings for a prohibited romantic relationship that was discovered from their attempt to conceal an abortion that I initiated report of through the chain of command."

Regarding the disputed Page 7 dated [REDACTED] October 4, 2012, the applicant stated that it resulted from false allegations lodged against him shortly after he was removed from consideration for appointment to chief warrant officer (CWO) and [REDACTED] contains "private information and sensitive knowledge that [he wants] kept safeguarded onboard that eroded my position as a respected supervisor and ultimately fueled new allegations. These allegations were shortly lodged after subordinates were given NJP and Alcohol Inc [REDACTED] initiated [REDACTED] if through the chain

of command.” The applicant stated that after baseless allegations were made against him, he was immediately transferred from his unit and the charges were thoroughly investigated. He stated that he underwent many polygraph tests and the charges were dismissed. However, after being returned to his unit, he received “the exaggerated CG-3307 warning me against future misconduct that I had already been adjudicated from” and he received a mark of 3 for Judgment on his EER, which had been delayed pending the outcome of the investigation. The applicant alleged that the language in this Page 7 is “designed to depict inclinations of disgrace, criminal conduct, and being guilty of illegal acts.” The applicant alleged that CGIS had found the allegations to be unfounded and that the Page 7 is “inaccurate and pervading of emotional personal influences” and “serve[s] as oppressive assurance.”

The applicant alleged that the Page 7s violate the Commandant’s Equal Opportunity Policy Statement, which “guarantees a work environment free from unlawful discrimination, reprisal, and harassment.”² He stated that they overshadow everything else he has accomplished through merit and will inhibit his future promotion and growth as a leader. He argued that they are contradicted by the fact that he has received five Good Conduct Medals, as well as Achievement Medals.

The applicant stated that successful leadership is a continuing challenge and an “art never finished” and that it causes him “anguish to have failed on providing the best leadership and tact on occasion,” but he wants to redeem himself “through hard work, development, and improving upon any potential with equal opportunity through the basis of merit and unlawful discrimination.” He stated that “[t]he unpopular tact [he] displayed by insisting to report others for their infractions resulted in making [him]self a target of frustration that others distanced themselves from. The gross exaggerations, fabrications, distrust, rumors, threats, and still the current situation in the wake of the past investigations continues to be discouraging and has been a traumatic series of events to attempt to recover from.”

The applicant stated that he was stationed at remote regions overseas, which was very stressful due to logistics, weather, and time zone differences, etc., with a condensed, six-hour work day (tropical hours) and was “regretfully short on tact when interacting with subordinates so that [he] could squeeze more work out of the day and keep progress steady. [He] neglected and did not respect [his] shipmates to the best of [his] ability in that way. [He] immaturely was more focused on what was accomplished rather than the way in which it was accomplished and became domineering to a new generation of higher educated subordinates. These insensitive and uncompassionate instances of initiating the process to hold subordinates accountable through the chain of command that resulted in their NJP, followed by the unfounded allegations and gross exaggerations against [him] are emotional torture where [he] continue[s] to be judged against after being cleared of the charges. ... [His] struggle with unpopular and domineering leadership styles at the time is something that made [him] the focus of subordinate group anger. The previously effective leadership style formerly expressed upon [him] has become outdated and ineffective to today’s Coast Guard that is no longer tolerated. [He] continually strive[s] to be a more sensitive, balanced leader to all of [his] co-workers and look[s] forward to growth opportunities provided by the Coast Guard.”

² The Record of Military Processing indicates that the applicant is a white/Caucasian male.

The applicant acknowledged that he did not appeal the disputed documents or apply to the Personnel Records Review Board (PRRB) for their removal or correction. He stated that such procedures were “not appropriate after receiving absent support throughout the biased investigations. Agitating the situations with appeals would prove futile when they were already subject to the internal review process, monitored, influenced, and approved by the district legal office. It was necessary to start healing from the prolonged emotional distress.”

In support of his allegations, the applicant submitted copies of the Page 7s and the following:

- COMDTINST 1070.1, issued on September 29, 2011, concerns the PRRB and the BCMR.
- Part V of the Manual for Courts-Martial United States provides the rules for NJP.
- Chapter 10.A.1. of the Personnel and Pay Procedures Manual (PPPM) concerns the distribution of Page 7s and provides that two copies of each should be made and that one copy is entered in the unit PDR and another is entered in the Headquarters PDR.
- COMDTINST 1000.14C, issued on June 4, 2015, which states in section 8 that the wording of a Page 7 must be included in the PPPM and that, unless authorized by a COMDTINST, a Page 7 will not be issued. It also states the following:
If a member refuses to sign an Administrative Remarks, Form CG-3307 entry, after being counseled regarding its content, the words ‘member refused to sign’ must be entered in the member’s signature block along with the date counseled.
- COMDTINST M1000.8A, issued on June 2015, the military assignments manual states in Chapter 1.C.6.h.(3) that “[a]s a matter of career planning, petty officers who aspire to command should request appropriate executive petty officer (XPO) assignments or other leadership positions in order to gain necessary experience.” In addition, Chapter 1.C.8.b. states that candidates for an XPO position “must have no marks less than four on their enlisted evaluations and [redacted] conduct for four years prior to submission of request.”
- COMDTINST M1650.25D, issued on May 2008, provides the eligibility criteria for all Coast Guard medals and awards, including the Achievement Medal and the Good Conduct Medal.
- The precept for the Career Retention Screening Panel, dated March 11, 2014, provides that in choosing members for mandatory retirement, the panel members should “confine themselves to facts of record and not predicate judgments on rumor or hearsay.” Enclosure (1) to the precept provides that the panel should consider documentation of sub-standard performance; sexual assault or harassment; other adverse information; failure to demonstrate upward mobility by, for example, consistently participating in the service-wide examination for advancement and obtaining officer-in-charge certification; and lack of assignment to positions of increased leadership and responsibility.
- In a letter dated January 24, 2015, the applicant requested the reports of the investigations involving himself with case numbers [redacted], [redacted], and [redacted] pursuant to FOIA and the Privacy Act. In a letter dated April 30, 2015, CGIS responded to the applicant’s

FOIA request received on March 18, 2015. The response states that as investigatory material, the reports are exempt from the Privacy Act's requirement to release information to first-party requesters and so only the parts of the reports releasable under FOIA could be provided. Of the 157 responsive pages found, the letter states, 102 were partially releasable and 55 were withheld as handwritten statements summarized in the reports. (Redacted copies of the reports, as submitted by the applicant, are summarized below.)

- A letter dated May 23, 2012, states that the applicant was considered for appointment to CWO by a board convened on April 10, 2012, and that he was not selected for appointment. The letter states that the applicant was removed from consideration by the board itself because "he was found not fully qualified for appointment to CWO2 due to two separate incidents documented in CG-3307s dated April 15, 2002 and March 16, 2005. The Board found that both of these incidents revealed evidence of a pattern of conduct inconsistent with the Coast Guard's core values ... [and] inconsistent with the definition of a chief warrant officer."
- A database print-out of the applicant's EER marks shows that he has usually received good to superior marks but that he was not recommended for advancement on his EER dated November 30, 2004, and that on his September 30, 2012, EER, he was not recommended for advancement and received a mark of 3 for Judgment, which assesses a member's analytical thought and decision-making.
- Another database print-out and documents show that the applicant has received numerous awards, including five consecutive Good Conduct Medals, dated August 17 of 2002, 2005, 2008, 2011, and 2014, and three Achievement Medals, including one for superior performance of duty while assigned as the head of the Deck Department of a cutter from July 2011 to June 2014.
- The Commandant's Equal Opportunity Policy Statement, dated August 31, 2015, expresses the Coast Guard's commitment to, *inter alia*, promoting professional growth and opportunity; upholding the core values of honor, respect, and devotion to duty; and eliminating illegal discrimination and harassment from the workplace.
- A memorandum dated October 31, 2014, from the Director of the Coast Guard Security Center to the applicant bears the subject line "granting security clearance with strong caution," states that he had been granted a secret security clearance but strongly cautions that his "personal conduct involving questionable judgment and unwillingness to comply with rules and regulations can raise questions about your reliability, trustworthiness and ability to protect classified National Security Information." It states that his record showed—

a pattern of inappropriate behavior and personal conduct that is not in keeping with the Core Values of the Coast Guard. [CGIS:] shows] you were reprimanded for indecent behavior with a female and you knowingly furnished alcohol to a minor. You were given Captain's Mast but your case was dismissed with a negative Page 7 warning due to lack of evidence and no further disciplinary action was taken against you. [CGIS:] cited allegations of sexual assault on an unknown intoxicated civilian female. You were then counseled on a negative Page 7 warning for your lapse in judgment in which you were observed by numerous people loitering in or near the room of the young woman who was intoxicated. [CGIS:] cited allegations of indecent assault on a [seaman] in which you inappropriately touched her buttocks. You were not found to have committed any crimes or UCMJ violations. However, you were issued a negative Page 7

warning, noting your conversations with and actions towards your subordinates directly conflict with the high standards set for a Chief Petty Officer and were an embarrassment to the Coast Guard Core Value of Respect. ... You are advised that future receipt of ANY derogatory information, especially of a similar nature, will be cause of reconsideration of your security clearance eligibility.

- ALCOAST 117/15, issued in 2015, is titled “The Military Justice Process and the Presumption of Innocence,” and states that the Commandant expects the process to be fair and impartial and that justice be served in every case. It also states that the Coast Guard “respect[s] those who come forward just as we protect the rights of the accused who are presumed innocent until proven otherwise. ... Our efforts must ensure that those accused of a crime have their cases fairly and impartially heard.”

REPORTS OF INVESTIGATIONS

CGIS Report

This Report of Investigation (ROI) states that on August 20, 2004, the applicant’s CO requested the investigation of allegations that on May 1, 2004, while his wife and children were out of town, the applicant invited a teenaged female member to his house to watch movies, provided her with alcoholic beverages, and sexually assaulted her by touching her in several places, including her “crotch area.” The ROI states that after the young woman arrived, he drove with her to a Pizza Hut where he bought two pizzas and they returned to his house, where he supplied her with two beers, although she was underage. The ROI states that the young woman claimed that during the movie, which she had rented, they exchanged back massages, which she did not consider to be sexual. However, then while sitting beside her, the applicant placed his left hand on her right inner thigh under her dress and “eventually moved his hand to her crotch.” She stated that the applicant rubbed her vaginal area through her underwear for about three seconds and, when she asked him what he was doing, asked her if she wanted to have some fun. When she responded negatively and reminded him of his wife and children, he immediately removed his hand and moved away from her. She stated that at work the next day, the applicant pulled her aside to apologize and admitted [redacted] appropriate.

The ROI states that the young woman stated that she did not promptly report the matter because she thought she would be blamed for going to the applicant’s house alone and wearing a dress, consuming alcohol while underage, and exchanging back massages. She also felt guilty and embarrassed because the applicant was married and she did not know how her colleagues would react. She claimed that the applicant “began to treat her differently at work after this incident and seemed depressed and jealous once she started dating someone else a few days later. Then on August 2, 2004, she told the applicant about something, which is redacted in the ROI, and he “flipped out.”

A witness, interviewed on August 26, 2004, stated that she had heard rumors about the applicant and the young woman, who had told her about the applicant putting his hand on her thigh under her dress and asking if she wanted to look around. She found the young woman’s claims to be credible because she once heard the applicant “explain how to ‘get with girls’ by grabbing their crotch and asking if they wanted to fool [redacted].” In addition, the applicant had told this witness that the young woman “would occasionally put her head on his shoulder or lap”

and had asked him if he wanted to see her sunburn and had pulled down one side of her bikini bottom and told him to touch it. The witness also stated that the applicant appeared jealous [REDACTED] he heard about the young woman and someone else. The witness also accused the applicant of letting someone else “take the fall” for providing an underage member with alcohol when the applicant had done the same and for letting her “take the fall” for failing to report it when he also knew about it.

Another witness stated that the young woman had told him about the applicant grabbing her crotch, and he believed the allegation because the applicant had told him and another member “how to get a girl” by grabbing her crotch and asking if she wanted to fool around. The witness stated that someone had written the applicant a letter warning him that what he had done to the young woman was known by everyone at the station and that he should “change his ways or else.” The letter [REDACTED] in the applicant’s work mailbox. The witness stated that the applicant’s “eyes watered” when he read the letter and he was too distracted to answer simple questions. [REDACTED]

Another [REDACTED] stated that once after he told the applicant he had not had a girlfriend for several months, the applicant told him “to go up to a girl and place a hand on their thigh, rub it a little and ask if they want to have fun.” The applicant told him that if the girl let him keep his hand there, he would know she was “into him.” This witness also stated that the applicant had agreed not to let anyone know about the young woman’s visit to an abortion clinic that his wife had seen and that the applicant had provided him with alcohol on two occasions. [REDACTED]

Other members stated that they had heard about the incident from the young woman or others either before or after she reported it. [REDACTED]

The ROI states that on August 31, 2004, the applicant was advised of his rights and advised that he was suspected of providing alcohol to minors and indecent assault. In an interview on September 8, 2004, the ROI states, the applicant “appeared shocked at the allegations and stated that he had not heard about them prior to the interview.” He denied that the incident ever took place or that he had ever been alone with the young woman. He denied exchanging back massages with her and he denied having supplied her or the other underage witness with alcohol. He claimed that he preferred wine to beer and “drank a certain wine every other day” but could not recall the name of the wine. He stated that someone had given him the wine for Christmas. (This person denied having given the applicant wine but stated that he might have recommended a wine called “Fat Bastard.”) The applicant denied having told one of the witnesses that the young woman had put her head on his shoulder or lap and denied that she had ever pulled down her bikini strap to show him her sunburn. He denied having a particular “pick up line” or telling other members how to “pick up” girls. He stated that the young woman was a “big flirt” who, after snorkeling one day, rubbed her breasts and said, “It’s cold out there.” The applicant stated that the young woman had made the allegations in retaliation for his reporting her romantic relationship with another [REDACTED] member. He stated that he had learned about their relationship a week or two before he reported it but learned that the command already knew about it and had ordered them to stop. [REDACTED]

In a written statement, the applicant repeated his claims and stated that he was never alone with the applicant at his house or her home but the [REDACTED] had once taken her snorkeling after she repeatedly asked. However, after she pointed to her nipples, touched them, and said that the

water was cold, he “decided in my mind to not hang out alone again.” The applicant stated that he knew about her abortion before she told him but he did not know that the comm [REDACTED] unaware of it until she told him. He found out from her boyfriend, who drove her to the clinic and who also told him that the BMC and XPO knew about their relationship and had counseled them about it and told them to stop. When the applicant learned that they were still dating, he reported it to the XPO. The applicant stated that he reported the young woman’s abortion to the command and that he thought the XPO knew about it too. The applicant stated that he was the “bad guy” at the station for ensuring that members completed their work, while the XPO “is always letting others slide from trouble.” The applicant stated that he had also faced resentment from others who had to work for someone who was younger than them.

The ROI states that a Pizza Hut receipt showed that on May 1, 2004, the applicant had in fact bought p [REDACTED] l that the video store’s records showed that the young woman had rented the movies as she had claimed. [REDACTED]

CGIS Report [REDACTED]

This ROI concerns allegations that in April 2003, during a “going away party” at a member’s house, the applicant had sexually assaulted an intoxicated 18-year-old female civilian after she got drunk, passed out, and was carried to a bedroom by friends and placed on the bed. These allegations were made by someone who was questioned pursuant to CGIS Report [REDACTED]

According to the ROI, some of the party-goers checked on the woman occasionally after she passed out, but at one point they found the door locked. They knocked on the door several times and tried to open it [REDACTED] credit card for a period that witnesses variously reported as 30 seconds, about one minute, three to five minutes, or five to six minutes. Some reported hearing nothing from inside and one heard only “rustling sounds” from inside before the applicant opened the door from the inside, stepped out of the room, and closed the door behind him. One witness stated that the applicant did not talk to him and walked away. Another stated that the applicant “appeared nervous and tried to change the subject” when he asked the applicant why he was in the room. Another stated that the applicant looked like a “deer caught in the headlights” and claimed that he was “taking care of” the woman because she was so drunk. Another claimed that the applicant appeared “nonchalant” and walked away.

When the applicant left, the others looked in the room to check on the woman. One stated that she appeared to be dressed but could not recall if she was on top of or under the covers. Another stated that she was lying on her side under the covers and there were no clothes on the floor. One witness stated that her clothing “appeared to be tampered with” or “ruffled.” However, later that evening, someone at the party who was an Emergency Medical Technician (EMT) was asked to help the woman and found her in a bathroom, unconscious and naked, except for maybe her panties. Her friends [REDACTED] were cleaning her up because she had vomited on herself. The EMT woke her up with a “sternum rub” but she quickly went back to sleep. Based on her experience, the EMT did not think the woman was in danger of alcohol poisoning, so she did not call an ambulance.

The member who first reported this incident state [REDACTED] another member [REDACTED], when asked why the applicant had been giving him a hard time at work, stated that the applicant had attended a

party at his house and was caught in a room with a teenager who was passed out drunk with her shirt up. One witness stated that he did not report the incident because when some of his mates had asked the applicant about it, he “began to treat them different[ly] and made work more difficult.”

One witness reported that the applicant had told him about his experience in overseas brothels, where someone “could live out their fantasies,” and that the girls who worked in the brothels were probably under eighteen years old but some older girls were available.

The alleged victim stated that she had no recollection of the evening other than being with her friend and “did not feel wronged in anyway.” She asked that her personal information not be given out and stated said she did not want to speak to the CGIS agent. She refused to be interviewed in person. [REDACTED] provide an affidavit.

The alleged victim’s friend stated that she was “a little bit drunk” that night when she went to the bedroom and found that her friend was sitting with “one of the boys.” Her friend was “wabbling” and vomited on the bed, so they took her to the bathroom to clean up. She estimated that she was in the bathroom with the alleged victim and the EMT for about an hour. Then they lay down on a futon in the living room. She also reported that she had tried to get the alleged victim to contact CGIS, but she refused and had stopped responding to her phone calls and messages. [REDACTED]

On December 30, 2004, the applicant was advised of his rights and informed that he was suspected of sexual assault. During the interview, the applicant kept referring to a Christmas party despite reminders [REDACTED] was not being asked about a Christmas party. The applicant denied that he would go to a party without his wife and denied that he would ever drink alcohol to the extent that he would not remember the details of a party. He stated that he did not recall talking to or checking on a girl who had passed out at a party.

Upon inquiry, the applicant was able to describe the house where the party was held and then recalled attending a party at the house without his wife. He reported seeing a girl, who had earlier been trying to “get with” everyone, topless and vomiting into a toilet while someone held back her hair. The applicant claimed that he stayed in the bathroom to make sure she was okay and stood by while her friend took her to the bedroom. He denied that he had ever been alone with the girl in a room and called the allegations “outrageous.”

The applicant denied ever assaulting anyone and denied ever being alone with any of the girls. When asked about someone knocking on the door, he stated that one of the girls had left the room and “it must have been her that knocked on the door.” The applicant stated that if the girl had accused him of something, she was lying. He stated that her top was off and she was not wearing a bra. He claimed that while his friend put her to bed and started cleaning her off, he stayed for about five minutes, watching, for support. He could not recall who had closed the door, who had knocked on the door, or who had opened the door. He stated that he left the room because other people started coming in.

The applicant stated that the others’ version of [REDACTED] was incorrect and “bullshit.” He stated that he was in the bedroom with others, could not recall being alone with her or touching

her, and did not remember anyone knocking on the door. He stated that she “was conscious the whole time and was continually asked if she was okay.” He claimed that one of the [REDACTED] was under another member’s influence, which would explain why she was implicating him.

The applicant repeated some of these claims in his written statement for the investigation and added others. He stated that there were two friends in the bathroom helping the sick girl who was vomiting and that they took off her shirt because of the vomit. He claimed that he was never alone with the girl, that he cannot recall who closed the door, and that if someone was knocking, he did not hear them because of the music. After the girl was put to bed, he shot baskets outside with a friend. They checked on the girl once more and she was still in the bedroom with the door shut but one of her friends was with her.

CGIS Report [REDACTED]

This Report states that on June 21, 2012, the applicant’s CO had requested an investigation into allegation [REDACTED] the applicant had committed an indecent assault on another member by rubbing his hand on her buttocks over the top of her uniform without her consent in September 2011. The member had reported that while the cutter was underway in September 2011, she had had leaned against the bulkhead to support herself while holding heavy mooring lines and might have gotten fiberglass on the back of her coveralls. When they ran out of rope, she was told to fetch more from the Aids to Navigation shop. She entered the shop alone and [REDACTED] to pick up the rope behind some boxes. At that point, the applicant entered the shop, told her she was “covered in fiberglass,” and “without warning or permission, began to pat her upper left buttocks area, over her coveralls, moving down her buttocks to the left side in a slow motion which lasted approximately 5 seconds [REDACTED] with a soft to medium squeeze.” She stood up, told the applicant, “I got it,” referring to the fiberglass and left the shop. His action had made her “mad and disgusted,” and she told two other members, one of whom told her to write it down “in case something similar happened again and that he would take care of that incident.” She did not report it to the command because she thought the person she had told would take care of it, she was afraid of retribution, and she was new to the Coast Guard. However, she later decided to report the incident because she thought nothing had been done. She noted that the matter had been reported to the Chief’s mess, but the applicant is a chief. She stated that the Deck Department, which the applicant headed, was a hostile working environment, that she was uncomfortable around the applicant and tried never to be alone with him, and that she had heard him speaking to others about matters “unprofessional, inappropriate and sexual in nature toward women.”

A witness stated that in September 2011, when they had been working in the bos’n hole, he noticed that the female member “seemed ‘freaked out’” so he asked her if she had a problem. She told him that the applicant had brushed fiberglass off her butt over her coveralls and being uncomfortable around him. He could not recall exactly what she had said but had gotten the impression that the applicant had touched her inappropriately and made her mad. He and another member had reported the incident to someone who said he would take care of the incident and also told the female member to write it down. The witness stated that the applicant had spoken to him and others about things that “could have been considered unprofessional, inappropriate and sexual in nature towards women.” [REDACTED]

Another witness stated that sometime in September 2011, the female member told him that the applicant had brushed her buttocks over her coveralls in the ATON shop and had [REDACTED] caressing motion ... in a perverted way,” which made her upset and mad. This witness did not inform the command because the female member had already told a superior. The female member had also told this witness that she felt uncomfortable around the applicant and felt that the “deck force was a hostile working environment.” He also stated that the applicant had spoken to him and others in a way that “could be considered unprofessional and sexual in nature towards women.”

Another witness stated that in September 2011, the female member had approached him on the pier and appeared upset. She told him that the applicant had touched her buttocks while brushing debris off her. Therefore, the next day, he and another member called for a meeting of the first class [REDACTED] officers to decide what should be done. They decided that the incident should be addressed to the Chief’s mess. He thought at the time that the incident had been reported and would be taken care of.

Another witness stated that while in port in September 2011, the female member had told him that the applicant had brushed and patted her buttocks while she was bent over in the ATON shop. She was upset and the applicant had been unprofessional. He thought that the chain of command had been informed and would handle the situation. The witness had not seen any inappropriate interactions between them but the female member “had conveyed [REDACTED] that she felt uncomfortable around [the applicant] while working on the bridge of the ship.”

Another witness stated that he was present on the pier when the female member, who was upset, reported to two other [REDACTED] the applicant had touched her buttocks while brushing dusted fiberglass off her. The next day, they decided to hold a first class meeting to decide what to do with the information. They decided to take the matter to the Chief’s mess.

A witness who was the “first class representative” stated that the female member had told him she did not want to “push the issue” but wanted to ensure that those types of actions stopped. He had later spoken to her “on multiple occasions” to ensure no other incidents occurred. He had thought the matter was closed.

A chief admitted that one of the first class petty officer’s had reported the female member’s complaint about the applicant to the Chief’s mess. The chief had assumed that the matter would be taken care of by the command master chief and was surprised to learn that the female member “was a potential victim of any type of harassment.”

Another chief stated that he had been informed of “a potential indecent act committed by [the applicant] against [the female member] while in uniform. [The witness] could not remember the words used to describe the act he [REDACTED] he did not get the impression that an assault had occurred.”

Another chief stated that he learned about the female member’s complaint against the applicant from another member who had just been punished at mast. The female member told him that the applicant had “brushed her back [REDACTED] [REDACTED]g permission” and he did not get the impression that she felt it was an assault but that her “personal space had been violated.”

When he asked if she wanted to pursue the matter, she said she did not want the matter to go any higher than him. He told her he would speak to the applicant and that his door was always open. Then he spoke to the applicant about the incident and "reminded him to be more aware of personal space and touching crewmembers." He thought the matter was resolved until the command heard about it through the work-life office.

The command chief stated that he had heard about the first class meeting in October or November 2011 from their representative. He was told that sometime in September 2011, the female member had complained that the applicant "had touched her, not specifying which part of the body, while brushing something off her uniform and that it had made her uncomfortable." He had not gotten the impression that a sexual assault had occurred. He was told that she did not want to make a formal complaint, "and to keep the incident at the chief level." He asked to be informed of a [REDACTED] incident and told the applicant "to be more mindful of his actions." The command chief stated that it "appeared to be an invasion of space" and would have reported it if he had thought otherwise even if the female member had not wanted it to be reported. Because he had not heard any further complaints, he had considered the matter closed.

On June 27, 2012, the applicant was advised of his rights and advised that he was suspected of sexual assault and of wrongful sexual contact. The applicant stated that during an evolution in September 2011, he had noticed that several members had fiberglass on their uniforms and was concerned because they were not wearing protective gear. He did not want the fiberglass dust to get inside the cutter. He told two members to brush each other off and then grabbed a rag and wiped the female member's back off. He claimed that he used a quick brushing motion across her back and at no time touched her buttocks. He wiped her off because she had the most fiberglass on her uniform. He claimed that the two other members saw him brush her off and that after doing so, he showed her that the rag was covered in fiberglass. She did not indicate that she was uncomfortable with what he had done but appeared startled as if someone had wiped a spider off her. The applicant claimed that he had previously counseled the female member about her choice of friends because she had been at a beach party where other underage members had drunk alcohol. The applicant stated that he heard about her complaint from the command chief, who advised him to pay more attention to his actions but did not tell him that he had offended the female member or that she had felt assaulted.

One of the two members the applicant named as being present during the incident stated that he had not seen the applicant brush her off but she had told him about it when the ship was in port and was upset about it. She did not tell him that the applicant had grabbed her buttocks but did tell him that she had felt uncomfortable around the applicant even before the incident. The other member stated that he and others had gotten fiberglass on their uniforms that day and they had wiped it off their own uniforms with their own hands. He did not see the applicant wipe off anyone's uniform or see anyone use a rag to wipe off the fiberglass.

The ROI states that on July 11, 2012, the applicant underwent a polygraph test concerning the incident and was asked twice if he had "touched that girl's buttocks" and denied it. The examiner had found that "no deception was indicated."

The ROI contains a Report of Adjudication dated [REDACTED] November 17, 2012, which states that no punitive action would be taken but that the applicant would receive a Page 7 instead.

VIEWS OF THE COAST GUARD

On April 20, 2016, the Judge Advocate General of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case and adopted the findings and analysis in a memorandum on the case prepared by the Coast Guard's Personnel Service Center (PSC).

PSC summarized the record and stated that under Article 2.B.2.(3) of COMDTINST 1600.2, the Discipline and Conduct Manual, COs and OICs must investigate allegations of sexual harassment, and the actions taken will depend on the severity of the conduct, the state of evidence, and the limits on the commander's authority, as well as other factors. PSC stated that prompt administrative action should be taken and that the available options included formal or informal counseling and evaluation in the member's performance review.

PSC stated that negative Page 7s "must be member specific and describe who, what, when, where, why, and how." PSC argued that the disputed Page 7s were completed in accordance with this requirement.

PSC recommended that the Board deny relief because the applicant "has not provided sufficient evidence showing that [the disputed documents] are erroneous or unjust." PSC stated that the information collected by CGIS during the investigations constituted "a sufficient basis for the applicant's CO and OIC to reasonably draw and document the conclusions in [the disputed documents]."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 28, 2016, the applicant responded to the views of the Coast Guard. The applicant argued that the innuendoes and warnings in the Page 7s "are contradicting and punitively condemning." He stated that the PSC failed to acknowledge the requirements in ALCOAST 117/15 that the rights of the accused be protected. He argued that his rights and due process were not respected and that the COs and OICs acted as puppets of the District legal office. He alleged that if they did not, they risked being relieved of command for cause. However, ALCOAST 117/15 requires all members to "exercise independent judgment involved in the military justice process – striking apparent and imputed bias" and states that "the rights of the accused are presumed innocent until proven guilty."

The applicant stated that he was unable to see the evidence against him until after the investigations were completed when he submitted a FOIA request. He noted that there is no appeal process for a CGIS report and his allegations of retaliation were not pursued. He also alleged that some witness statements and claims were omitted from the ROIs. He called this "witness tampering" and "cherry picking" for reviewers who then made "permanent emotionally written judgments" against him. He explained that he submitted a written statement for the 2012 ROI but it was not included in the copy of the ROI he received. He denied having stated that he had touched the female member and stated that he only said it was a possibility that he might have swiped fiberglass off someone's back and that he would have done so with a rag. He noted that one of the members interviewed stated that he had not seen the applicant assault anyone.

The applicant alleged that the “unprofessional conversations” mentioned in the [REDACTED] “are exaggerated instances from me warning shipmates to wear condoms in foreign ports” because of sexually transmitted diseases and “sharing local area knowledge that included known nude beach locations” and the fact that local massage parlors are most likely brothels.

Regarding the 2004 CGIS reports, the applicant stated that they “piggybacked off each other and extended on some sort of witch hunt with hearsay and rumors from coworkers that [he] had personality conflicts with.” He denied sexually assaulting anyone or providing a minor with alcohol. He stated that the other members “did not respect my freedom of thought regarding abortions” and were infuriated when he insisted on holding members accountable for a prohibited romantic relationship that resulted in an abortion, which led to their punishment at mast. He stated that “[s]omeone having a few disgruntled coworkers collaborate an accusation and spread rumors does not constitute back-handed convictions that circumvents justice from biased parties. The necessary social engineering to curbe sexual assault in the military has swung the pendulum too far in this [REDACTED] the scales of justice need to be rebalanced.” The applicant alleged that the process of encouraging sexual assault reports, treating the victims, and not pursuing reports of ulterior motives “attempts to balance out and protect the service against undesirable perception by the public.” He argued that the fact that ALCOAST 117/15 was released proves that “something became unbalanced” in the military justice system that required urgent correction. He alleged that he was found not to have committed sexual assault but his alleged [REDACTED] ulterior motives were ignored and he was pursued in some sort of witch hunt based on exaggerated rumors. As a result his future potential was hammered, which is abusive.

The applicant notes [REDACTED] SC failed to address the removal of the duplicate copies of the disputed Page 7s and does not address ALCOAST 117/15. He stated that the advisory opinion simply echoes “the previously indolent approach towards justice in this case.” He asked the Board to find the courage to take action that will bring healing and justice to right the wrong.

In support of his allegations, the applicant submitted the following documents:

- An ALCOAST Release Policy states that ALCOASTs are Commandant Notices of an urgent nature requiring wide distribution within the Coast Guard.
- ALCOAST 117/15, issued on March 27, 2015, was also submitted with the application and is noted above.
- The cover page of COMDTINST M1600.2, Discipline and Conduct.
- Pages from the ROIs, which are summarized above.
- COMDTINST M1754.10D, dated April 19, 2012, concerns the “Sexual Assault Prevention and Response (SAPR) Program,” provides for reassignment of the victim if requested or in the victim’s best interest and reassignment of the alleged offender if it is in the best interest of the victim. The “supportive services for the alleged offender” include monitoring for suicidal ideations, affording the member due process and respect, keeping information on a need-to-know basis, and assigning the member to meaningful work in a public or open area with no one-on-one [REDACTED] [REDACTED] g with [REDACTED] personnel.

APPLICABLE REGULATIONS

Chapter 10.A. of the Personnel and Pay Procedures Manual (PPPM) authorizes the recording of “Administrative Remarks” on Page 7s “to document counseling or to record any other information required by current directives, or considered to be of historical value.”

Enclosure (1) of COMDTINST M1080.10I, the PDR Manual, provides that all CG-3307s will be retained in a member’s EI-PDR.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552.
2. The application was not filed within three years of the applicant’s discovery of the alleged error or injustice because he received the disputed Page 7s more than three years before he applied to the Board. Nevertheless, his application is considered timely because he continued serving on active duty after he received the Page 7s, which tolls the Board’s statute of limitations.³
3. 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
4. The applicant alleged that three Page 7s in his record and a low mark for Judgment on his 2012 EER are erroneous and unjust and a result of retaliation. In considering allegations of error and injustice, the Board begins its analysis in every case by presuming that the disputed Page 7 is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that it is erroneous or unjust.⁵ Absent evidence to the contrary, the Board presumes that a member’s military records have been prepared “correctly, lawfully, and in good faith.”⁶
5. The Board finds that the Page 7 dated March 16, 2005, regarding his CO’s decision to dismiss the charges against him with a warning and counseling him about his conduct at the “going away party” in 2003 is neither erroneous nor unjust. The Page 7 has two paragraphs, which the Board will address separately:

³ *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that, under § 205 of the Soldiers’ and Sailors’ Civil Relief Act of 1940, the BCMR’s three-year limitations period under 10 U.S.C. § 1552(b) is tolled during a member’s active duty service).

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).

a. The first paragraph concerns the charges resulting from CGIS [REDACTED] which the CO had decided to dismiss with a warning. In this warning, the CO wrote that did not find the applicant innocent but thought that there was not enough evidence to convict him on the charges. That ROI shows that the applicant was accused of having inappropriately touched and propositioned a subordinate female who told colleagues soon after the incident but did not report the matter officially until the applicant reported that she had an inappropriate relationship with another member. The record shows that the female subordinate may have reported the applicant's misconduct of May 1, 2004, because he had reported her inappropriate relationship and abortion with another member. Presumably, she felt that he was acting hypocritically since he had attempted to have an inappropriate relationship with her himself. Although the applicant denied her allegations of mis[REDACTED] the ROI shows that she had told colleagues about his giving her alcohol, touching her thigh and crotch, and propositioning her soon after May 1, 2004, and weeks before he reported her misconduct. Moreover, documentation from the Pizza Hut and video [REDACTED] supported her claims of what happened that day. Therefore, the ROI supports her allegations against the applicant. The applicant complained that her actions constituted retaliation prohibited by the Commandant's Equal Opportunity Policy Statement. However, even if she decided to report his inappropriate conduct only because he had reported her misconduct, her retaliatory motivation for reporting would not constitute illegal retaliation because she was a very junior subordinate—not his supe[REDACTED]

b. The second paragraph of the first Page 7 dated March 16, 2005, counsels the applicant about "his lapse in judgment" during the "going away party" in 2003 as revealed in CGIS [REDACTED]. This ROI shows that several witnesses testified that the applicant had been alone in a locked bedroom with a teenaged girl who had passed out drunk and that he did not unlock and open the door for a period of one to six minutes even though they were repeatedly knocking on the door and trying to unlock it with a credit card. The Page 7 described his actions as "loitering" in her presence "with the door closed." The applicant alleged that one of his accusers had recently been punished at mast and so had reason to retaliate against him, but this claim does not explain why several witnesses—not just one—told the CGIS agent about the applicant being alone in a locked room with an unconscious, drunk teenaged girl. The ROI strongly supports the Sector Commander's decision to formally counsel the applicant in writing about his "lapse in judgment." The Board finds that the applicant has not proven by a preponderance of the evidence that the content of the first Page 7 dated March 16, 2005, in his record is erroneous or unjust.

6. Because the Board finds no grounds for removing the first Page 7 dated March 16, 2005, from the applicant's record, the Board will not remove the second Page 7 dated March 16, 2005, either. This Page 7 was apparently prepared because the applicant refused to sign the first Page 7 dated March 16, 2005, which he was allowed to do. Because he signed this second Page 7, the preponderance of the evidence indicates that he wanted his reasons for refusing to sign the first one documented in his record. Therefore, although the applicant is now requesting the removal of this second Page 7 along with the first, the Board also finds that it would be an injustice to remove the second one from his record because [REDACTED] and on [REDACTED] documents for the record his disagreement with the first, which the Board is not removing.

7. The Board finds no grounds for removing the Page 7 dated October 4, 2012 from the applicant's record. This Page 7 counsels the applicant about inappropriate conversations with subordinates, "brush[ing] insulation off of another member" without her permission, and showing disrespect by failing to use the chain of command. The ROI shows that the female member complained to some petty officers in September 2011 that the applicant had followed her into the ATON shop and touched her buttocks as she was bent over to pick up some rope. Witnesses reported that they noticed she was upset that day and when they asked her why she was upset, she told them about the applicant touching her buttocks in the ATON shop. After a meeting about her complaint, the first class petty officers forwarded the issue to the chiefs, who merely spoke to the applicant about being more careful in touching other members. At the female member's request, the incident was not reported higher than the chiefs. In June 2012, however, one of the petty officers [REDACTED] about the incident was punished at mast and reported the incident to the command. As the applicant alleged, this petty officer's report may have been made in retaliation for being taken to mast. However, that petty officer's motivation does not cast doubt on the female member's September 2011 complaint, which many petty officers and chiefs had known about for months prior to the mast of the member who reported it. The ROI shows that the investigation also revealed that the applicant had engaged in inappropriate conversations of a sexual nature with male subordinates, and the applicant submitted no evidence to rebut the counseling about his failure to use the chain of command. Therefore, the Board finds that the applicant has not proven by a preponderance of the evidence that the disputed Page 7 dated October 4, 2012, is erroneous or unjust.

8. The applicant has not proven by a preponderance of the evidence that the disputed Page 7s were unauthorized or improperly prepared. He alleged that the Page 7s do not meet the requirements of COMDTINST 1000.14C, but that instruction was issued on June 4, 2015, long after the Page 7s were prepared. In 2005 and 2012, COMDTINST 1000.14B was in effect, and it states that Page 7s must document only events listed in the PPPM, which "will include authorized example CG-3307 entries." Enclosure (6) to the PPPM then in effect, COMDTINST M1000.2A, lists the following types of events that may be documented on a Page 7: accession; assignment and transfer; advancement and reduction; performance and discipline; separation; selective reenlistment bonus; and selective reserve enlisted bonus. The three disputed Page 7s are all labeled as performance and discipline Page 7s. One of the examples of a performance and discipline Page 7 shown in the enclosure is a "General-negative" Page 7 and the requirement for the text of a negative Page 7 is that the "[e]ntry must be member-specific and describe who, what, when, where, why and how." The Board finds that all three disputed Page 7s are sufficiently specific to meet these requirements.

9. The applicant alleged that the low mark of 3 he received for Judgment on his EER dated September 30, 2012, is erroneous and unjust because it is based on the information in the Page 7 dated October 4, 2012. Because the applicant has not proven this Page 7 to be erroneous or unjust, however, the Board finds no reason to raise the disputed EER mark.

10. The applicant complained that his Headquarters EIPDR contains more than one copy of the negative Page 7s. COMDTINST 1000.14B states that Page 7s "must be prepared in original and one copy," which are entered in the unit PDR and the Headquarters PDR, respectively. Other regulations, however, sometimes require a CO to attach copies of unit records,

including Page 7s, to other documents entered in a member's record for various purposes, such as letters of recommendation for various actions. Therefore, numerous such duplications of various positive, negative, and neutral documents are very common in Coast Guard Headquarters EIPDRs. As there is more than one copy of the negative Page 7s, there is also more than one copy of a Letter of Commendation and certain administrative documents in the applicant's EIPDR. Because in the Board's experience such duplicative entries are common enough to be completely normal in Coast Guard military records and he has not shown that any law or policy prohibits the entry of more than one copy of any document in a member's record—only that initially the unit is required to send one copy of the original Page 7 for entry in a member's EIPDR—the Board is not persuaded that the duplications in the applicant's record are erroneous or unjust.

11. The applicant made numerous allegations with respect to the actions and attitudes of members involved in the three CGIS investigations of his inappropriate conduct with young women. Those allegations not specifically addressed above are considered to be unsupported by substantial evidence sufficient to overcome the presumption of regularity and are not dispositive of the case.⁷

12. Accordingly, the applicant's request should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

⁷ 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”).

ORDER

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

September 22, 2016

