

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

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2018-097**

██████████  
██████████ ME2/E-5 (former)

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**FINAL DECISION**

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case after receiving the completed application on February 15, 2018, and assigned it to staff attorney ██████████ to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated November 20, 2018, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

**APPLICANT'S REQUEST AND ALLEGATIONS**

The applicant, a maritime enforcement specialist second class (ME2/E-5) who was discharged from active duty on September 1, 2018, and entered the Reserve the following day, asked the Board to correct his record by taking the following actions:

- Change his April 30, 2015, Enlisted Employee Review (EER) to reflect the scores and comments he originally received;
- Remove a negative CG-3307 ("Page 7")<sup>1</sup> dated November 9, 2015, from his record;
- Change his April 30, 2016, EER to reflect that he was "Recommended" for advancement;
- Retroactively advance him to ME1/E-6;
- Reverse his placement on High Year Tenure (HYT);<sup>2</sup>
- Reinstate him on active duty;<sup>3</sup> and
- Pay him all applicable back pay and allowances.

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<sup>1</sup> An Administrative Remarks form CG-3307, better known as a "Page 7," is used to document important information or counseling in a member's military record.

<sup>2</sup> Military Separations Manual, COMDTINST M1000.4, Article 3.A. ("High year tenure (HYT) is a workforce management tool that establishes limits on the active military service time an active duty enlisted member can complete based on their pay grade. HYT is designed to increase personnel flow, compel members to advance in their rating, and allow more consistent training and advancement opportunities for the enlisted workforce.")

<sup>3</sup> At the time the applicant applied to the Board, he was still on active duty. When he replied to the Coast Guard's advisory opinion in September 2018, he had been discharged and requested that he be reinstated on active duty.

The applicant explained that he was accused of sexual harassment in December 2014. He claimed that he was not afforded a presumption of innocence throughout the proceedings against him. He stated that after the initial investigation report determined that there was a “lack of evidence to find misconduct,” his command determined that the report did not meet the required standard and ordered a second investigation. The second investigation concluded that the applicant had violated the Uniform Code of Military Justice (UCMJ). Because of the legal advice he received, the applicant opted to decline non-judicial punishment (NJP) and request a trial by court martial. The day before the date of the trial, however, all of the charges were withdrawn without prejudice because it was discovered that the alleged victim, a female boatswain’s mate third class (BM3), had been involved in a romantic relationship with the lead criminal investigator assigned to handle the applicant’s case.

Even though the charges were dropped, the applicant asserted, his command was still determined to punish him. He was informed he would be involuntarily separated and sent to an Administrative Separation Board (ASB). The ASB highly recommended the applicant’s retention given the lack of evidence for sexual harassment and the inappropriate relationship the criminal investigator had had with BM3. The Coast Guard ultimately retained the applicant at that time. However, he stated, his command then tried to punish him by giving him extremely poor marks on his October 31, 2015, semiannual EER. He appealed those marks and was ultimately successful because the allegedly inappropriate behavior his command referenced did not occur in that rating period. The applicant stated that his command then retroactively changed his April 30, 2015, semiannual EER to include several low marks and negative comments.

Regarding the April 30, 2015, EER, the applicant alleged that his performance was never observed by any of the members in his rating chain during the rating period because he had been administratively reassigned to a nearby Base. He complained that his rating chain “did not take into consideration [his temporary] immediate supervisor’s thoughts based on his observations of [the applicant’s] performance.” The applicant stated that the EER he originally received from the supervisor who was overseeing his work at the Base had marks that accurately reflected the work he had done in that rating period and contained a “Satisfactory” conduct mark and a “Recommended” for advancement mark. In addition, his command justified changing the marks and comments solely with the allegations of conduct in the investigation, which was led by an investigator in a secret relationship with the supposed victim. The applicant asserted that the reason his charges were withdrawn a day before trial was because BM3’s claims and the investigator’s findings and reliability had been completely discredited, as the ASB noted in its findings. He further asserted that his command’s justification of the marks and comments lacked any actual evidence and made untrue claims. The applicant argued that his command was clearly grasping at anything in order to punish him in any way possible.

The applicant made the same arguments regarding the disputed Page 7. He asserted that his command relied on information gathered from a tainted investigation. The applicant alleged that his command was not interested in seeking the truth or giving him a presumption of innocence but instead was only interested in finding the harshest way to punish him. When the court martial failed and then the ASB failed, the EER and Page 7 were all that the command was left with as a method of retribution against the applicant.

Regarding the April 30, 2016, EER, the applicant stated that the marks and comments all reflect the work he performed during that marking period except for the mark of “Not Recommended” for advancement. He stated that he was not recommended for advancement on this EER because an “isolated incident ... was drug over the course of five days” and was documented in a Page 7 (discussed in the Summary of the Record). The applicant asserted that his command once again did not observe him during this marking period but changed the “Recommended” mark to “Not Recommended” “as an act of retribution” based on the dismissal of the charges and the applicant being retained on active duty after the ASB. He stated that the purpose of changing the advancement recommendation mark was to prevent him from taking the Servicewide Examination (SWE) for advancement. Without taking the SWE, he would not be able to advance to ME1, which would inevitably place him on the HYT list and lead to his discharge. Therefore, the applicant argued, changing his advancement mark was a strategic move on his command’s part to have him discharged from the Coast Guard.

The applicant stated that when he was able to take the May 2017 SWE, he placed twenty-third on the list of 170 members. He alleges that he should have been able to sit for the SWE in 2015 and 2016 and advance but could not because of the “Not Recommended” for advancement marks on his EERs. He stated that given the “movement on the list for 2015 and 2016,” had the movement trend continued he would have advanced before he could have been discharged due to HYT. However, his name was not above the cutoff for advancement in time. He also argued that had the disputed Page 7 and EERs not been in his file, he would have been a much better candidate for a HYT waiver. The applicant asked that the HYT decision be reversed, that he be retroactively advanced, and that he be placed back onto active duty due to the errors and injustices discussed above.

With his application, the applicant provided many relevant documents which are discussed below with the Summary of the Record. He also provided several statements. The first is from the Lieutenant Commander (LCDR) who was assigned as military defense counsel to represent him during the Summary Court-Martial (SCM) proceedings (but not representing him before this Board’s proceedings). The LCDR stated that he represented the applicant from 2014 to 2017. He had reviewed all of the SCM and ASB proceedings and documentation. The LCDR stated that it became apparent to him that “the action against [the applicant] was motivated more out of a personality conflict than an earnest pursuit of justice.” Due to this complicating factor, the LCDR decided to bring a second defense counsel onto the case. The counsels discovered that the applicant was the most recent “in a long string of such claims [from the victim], and [they] noted a concerning lack of evidence of wrongdoing” in each claim. The LCDR stated that they had looked forward to “vindicating” the applicant at SCM as they were confident of their case. However, on the eve of the trial, the victim and the lead Coast Guard Investigative Services (CGIS) agent “were discovered to be in an adulterous relationship with one another. This CGIS agent ultimately resigned after an investigation into their affair.”

The LCDR stated that after the SCM criminal charges were dropped the applicant’s command initiated an ASB proceeding against him. The ASB determined that the applicant had not committed any misconduct, found that there was no basis for separating him and “further suggested

that the lead CGIS agent be again investigated for presenting false testimony during that proceeding.” The applicant’s command then “unilaterally” lowered his marks and changed his comments in the disputed EER, despite that fact that the applicant had been “cleared ... of wrongdoing.” The LCDR stated that he believed this was done to prevent the applicant “from completing the conditions precedent to advance to ME1 and thereby triggering his separation from the Coast Guard through the High Year Tenure program.” The LCDR stated that in his dealings with the applicant, he always presented himself “as a dedicated and respectful Coast Guardsman who takes his job seriously.” The LCDR asked that the Board give the applicant’s requests serious and thorough consideration.

The second statement is from a Captain who worked with the applicant from 2008 to 2011. He stated that the applicant was a very diligent and successful worker and had been an excellent representative of the Coast Guard. He spoke highly of the applicant’s character, commitment, and his ability to handle all assigned taskings. He asserted that the applicant deserved “to have his professional reputation restored.”

The third statement is from a Lieutenant who worked with the applicant from 2012 to 2015. He stated that the applicant at times was required to brief him on the status of the Water Survival Training program and any changes in the policy. He stated that the applicant was “always very professional and presented both the good and bad,” meaning that he was always open and honest. The Lieutenant stated that the applicant had always adhered to Coast Guard policy and required the same of his peers.

The next statement is from a Petty Officer who began working with the applicant in July 2014. He stated that he worked with the applicant frequently throughout his “legal woes.” The Petty Officer stated that the applicant always “maintained his military bearing, respectful demeanor and positive attitude no matter how dire and hopeless the situation might have felt for him.” The Petty Officer stated that as a Yeoman, he was often the bearer of bad news for the applicant, but the applicant had never behaved inappropriately towards him.

The last statement is from a retired Chief Petty Officer who had worked with the applicant for a year. He stated during that year the applicant was under a lot of stress due to being away from his family and dealing with “a lot of hindrances from his previous unit.” The Chief Petty Officer stated that the applicant showed great mental fortitude and resilience by keeping a positive attitude.

### **SUMMARY OF THE RECORD**

The applicant enlisted in the Coast Guard on July 3, 2001. The applicant’s record currently shows that from his enlistment through April 2016, he was recommended for advancement on twenty-seven semiannual EERs and not recommended for advancement seven times, in September 2006, October 2006, October 2008, November 2008, October 2012, April 2015, and April 2016. Five of those “Not Recommended” marks were accompanied by “Unsatisfactory” conduct marks. He received mostly mediocre EER marks, except for the contested marks in this case.

Other than the two negative Page 7s the applicant received during the events at issue here, he has received three other negative Page 7s over the course of his career. The first was on November 1, 2001, a few months after he arrived at his first duty station. It states:

[Applicant] you are being counseled for possible sexual harassment comments towards fellow shipmates. Sexual harassment is one of the most severe forms of disrespect, displays poor leadership, and has no place in our organization. It includes sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature that is made a condition of employment, affects employment decisions, unreasonably interferes with work performance or creates an intimidating or hostile work environment.

You showed disregard for the feelings of a female co-worker through inappropriate language and mannerism. You lack loyalty and commitment to the well-being of others. You were disrespectful and lack accountability for the human relations/sexual harassment responsibilities. You have an apathetic attitude towards the Coast Guard unit policies.

You will give sexual harassment training to the crew and apologize to the female co-worker. Any further incidents of the above nature will result in disciplinary and or administrative action and be forwarded to the Group Equal Opportunity Advisor.

The other two negative Page 7s are dated April 20, 2005, and August 31, 2006, respectively. They both pertain to the applicant's failure to meet his financial obligations. In both instances, he had written a check to cover his chow bill with insufficient funds.

The applicant completed a sexual harassment prevention course on February 26, 2014.

At the time of the incident, the applicant was assigned to the Maritime Law Enforcement/Force Protection Division at his unit. BM3 was serving at the same unit, but she was assigned to Waterside Security.

The applicant began texting BM3 on November 19, 2014. They texted back-and-forth to each other until December 3, 2014, when BM3 asked that they stop.

On December 4, 2014, BM3 was asked by the CGIS lead investigator to sign a voluntary consent form for a search of her cellular telephone. The lead investigator indicated that he was searching for "evidence of inappropriate, threatening or harassing communications." BM3 signed the consent form on December 5, 2014, as did the lead investigator. The next day, December 5, 2014, the CGIS lead investigator took BM3's phone for imaging. The texts that he logged are repeated verbatim below. (Shaded texts are between BM3 and a member other than the applicant.)

***Wednesday Evening to Early Thursday Morning, November 19 – 20, 2014***

- Applicant, 7:18 p.m.: Like I said, I don't know what's going on. But, you are obviously going through something. So I want to stress, if you need me for ANYTHING, even just to talk, let me know.
- BM3, 7:35 p.m.: Thank you, I really appreciate that. I'm kinda surprised you don't know, word always travels so fast with this kinda stuff.
- Applicant, 7:36 p.m.: I heard you say earlier that you were having meetings today so you didn't go to the range. Obviously after work you were distraught about something. And the list has you not going on deployment. I pay a lot of attention to people and their body language, that's why I'm good at playing poker.
- BM3, 7:38 p.m.: Hahahahahaha, now I know who to not play against

- BM3, 7:39 p.m.: It's gonna be a loooooong, rough road and I don't really know what will happen. Hopefully I don't end up having to leave this unit.
- Applicant, 7:39 p.m.: but, that's all I know. And that's just the conclusion that I've come to. I don't need to know more. But I'm willing to know more if you need to talk about it or need help with something. Just don't be afraid to use me
- BM3, 7:40 p.m.: Ohh, yeah, that wouldn't be very good.
- Applicant, 7:41 p.m.: well, nobody at this unit knows more about a long rough road while being assigned to this unit that [sic] I do. I've had conversations with medical, psychiatrist, the [...] area command Master chief, etc. etc.
- Applicant, 7:43 p.m.: That's not to say that I know what you're going through, but I did have personal battles that affected my job along with battles at work that were extremely difficult to deal with at the same time. So, I do know about talking with people.
- Applicant, 7:43 p.m.: and it does help. So if you're comfortable with me, I'll try my best to be helpful for you.
- BM3, 7:45 p.m.: Thank you. And I'm sorry about all you've had to go through. Right now it's just such a whirlwind that I don't even know what's gonna happen. It could be normal again by next Tuesday or [husband] could be in the brig for a year and I become a single mom full time. I don't really know yet. It sucks.
- Applicant, 7:47 p.m.: Well, I'm not a single mom and I don't Think it's possible for me to be, but I will help if I can. Ha ha
- BM3, 7:48 p.m.: Haha, I'm sure you'd make a great mommy.
- Applicant, 7:48 p.m.: I don't want you to think that I'm pushing myself on to you or into your business, but I want to make sure you are using your resources. I am more than happy to be one of those resources.
- BM3, 7:49 p.m.: Oh I know. I've gotten soooooooo many phone calls in the past week, I know everyone's just trying to help. Thank you ☺
- Applicant, 7:51 p.m.: I know I tend to repeat myself a lot, so I want to say that I don't know what's going on. But if it's a situation where you need some place to go, my wife and I have taken a coastie and [sic] for that type of situation. If you understand what I mean
- Applicant, 7:52 p.m.: again, I'm here to help in anyway. My wife is willing to help as well. Or we can just keep it between you and I
- Applicant, 8:26 p.m.: I hope I wasn't out of line, But, I confirmed with my wife. She said that you and [daughter] are more than welcome to come to the house as early as tonight if you need to. You can ride into work with me. And [daughter] can play with our dog and cat
- BM3, 8:35 p.m.: She does love doggies and kitties. Thank you so much for the help and concern, both you and your wife. I have been trying to not break [daughter] from her routine as much as possible. I don't want her to start asking where daddy is and why we aren't home.
- Applicant, 8:52 p.m.: I understand. That's definitely a difficult conversation with a child.
- BM3, 8:53 p.m.: Thankfully she's still a little young to understand. I'm not looking forward to telling her in the future depending on how things go though.
- Applicant, 9:00 p.m.: Well that I can understand because my parents got divorced when I was very young and my mom had to break things down for me.
- BM3, 9:02 p.m.: That's gotta be so confusing. I can't even imagine.
- Applicant, 9:07 p.m.: The good thing about being underway is that it helps a little to break the why isn't he here today questions
- Applicant, 9:09 p.m.: Yeah
- BM3, 9:10 p.m.: Yeah, at least she's already a little used to it. If it's for months it might be a big problem. Especially with his family not knowing and having planned visits.

- Applicant, 9:12 p.m.: Well they will eventually have to find out somehow. You will just have to plan for those things so that it isn't as big a deal when you have to deal with it
- Applicant, 9:13 p.m.: Meaning it doesn't throw you around as much emotionally. You need to be prepared for the hard things.
- Applicant, 9:28 p.m.: It'll get better. Promise
- Applicant, 10:00 p.m.: I'm here. Let me know what you need. Don't worry about the time or place. All you have to do is ask.
- BM3, 10:08 p.m.: I know I'm really quiet and shut off and stuff but it doesn't mean I don't need to hear stuff like that. So thank you so much.
- Applicant, 10:09 p.m.: You are very quiet. I found that weird about you when you first got here. Kind of just naturally want to talk to you, but you intimidate me.
- BM3, 10:16 p.m.: Hahaha, I'm a really nice person, I just have lots of walls. Don't be scared to talk to me, I'm sorry I am so off putting. The CGIS agents have been talking to me for sooooo long and they just said this morning I was so fascinating that they just kept asking questions. I guess when your own best friend for so long you kinda develop a very unique personality.
- Applicant, 10:17 p.m.: Lol. You're definitely not off putting.
- Applicant, 10:19 p.m.: I have my own reasons why I shy away from you.
- BM3, 10:20 p.m.: I've always intimidated people. I just tell myself it's cause I'm super annoying it's easier to accept.
- BM3, 10:20 p.m.: Really? Like what?
- Applicant, 10:21 p.m.: You don't want to know
- Applicant, 10:21 p.m.: Definitely not annoying
- Applicant, 10:22 p.m.: You just make me nervous
- Applicant, 10:22 p.m.: In a way
- BM3, 10:22 p.m.: I'm sorry for that. I don't mean to.
- Applicant, 10:24 p.m.: It's not you
- Applicant, 10:24 p.m.: Well
- Applicant, 10:24 p.m.: Kind of
- Applicant, 10:25 p.m.: I'm just gonna
- Applicant, 10:25 p.m.: [Emoji or GIF not viewable to Board]
- BM3, 10:27 p.m.: Haha, oh I like the mouthless one [non-decipherable emoji] I understand what you're saying. I don't mean to make things weird and I'm sorry that I made ya nervous. I'm a cool girl, though, I won't bite.
- Applicant, 10:30 p.m.: You're just the first person to intimidate me in a very long time. Obviously in a good way, but it is still weird for me. Nervousness, speechlessness, etc. can't explain it
- Applicant, 10:33 p.m.: Ha. Why?
- BM3, 10:39 p.m.: Aww ☺ that's pretty sweet. I feel guilty now.
- Applicant, 10:50 p.m.: Don't worry about it.
- BM3, 10:51 p.m.: Now I know why you felt so bad after your crazy good need gun shot
- Applicant, 10:51 p.m.: I did feel really bad.
- Applicant, 10:51 p.m.: Lol
- Applicant, 10:52 p.m.: I still feel I need to make up for that

- BM3, 10:53 p.m.: Hahaha, don't even worry about it. I was impressed.
- Applicant, 10:55 p.m.: [Emoji or GIF not viewable to Board]
- Applicant, 10:58 p.m.: 😊 better
- Applicant, 10:58 p.m.: That looks too girly
- BM3, 10:58 p.m.: It does look girly. Haha.
- Applicant, 11:03 p.m.: Do you feel a little better than you did earlier?
- BM3, 11:33 p.m.: Much. I was about to burst into tears.
- Applicant, 11:34 p.m.: It's not bad if you do. Sometimes it helps.
- Applicant, 11:34 p.m.: You still might. Just know that someone cares.
- Applicant, 11:36 p.m.: I'll help if I can. You can be my goal. Just promise not to be afraid to ask me. I'll do what I can
- BM3, 11:48 p.m.: Oh I probably will. I need to, it's super hard to hold in all the time. Thank you. I'll try not to be afraid to ask 😊
- Applicant, 12:06 a.m.: Let me know. I'm good at shooting, but better at hugs
- BM3, 12:10 a.m.: Hahaha, you are a good shot.
- Applicant, 12:12 a.m.: We'll see
- Applicant, 12:42 a.m.: Rest this evening. Let me know if you need anything. You're always welcome. Use me as needed. If you want to talk tomorrow, let me know. I'll take you to lunch.
- BM3, 12:52 a.m.: thank you. I will take it easy. You do the same! Have a great evening.
- Applicant, 12:53 a.m.: Sleep well
- Applicant, 1:19 a.m.: I just figured out what you and [daughter] need. I'm bringing you sparklers tomorrow.
- BM3, 1:20 a.m.: Hahaha, yes!!!! How much fun!!!

#### ***Thursday Evening to Early Friday Morning, November 20 – 21, 2014***

- Applicant, 6:27 p.m.: Wanna go eat?
- Applicant, 6:27 p.m.: I still have to give you the sparklers
- BM3, 6:30 p.m.: I'm sorry, I can't. I have to go home and meet with some people at 2:30. I'd definitely rather eat, but there's a ton going on this week. I'm sorry again.
- Applicant, 6:31 p.m.: No worries. I understand. Let me know if you need anything. Remember the offer is still on the table to come stay at my house. We have an extra room.
- Applicant, 6:32 p.m.: I have a futon and a couple of air mattresses. You're more than welcome. Or if you want to just talk, you can call me, or text.
- Applicant, 6:33 p.m.: If you need me for ANYTHING, don't be afraid to ask. I'll meet you wherever whenever for anything
- Applicant, 6:35 p.m.: even if you need me to watch [daughter] while you take care of things
- Applicant, 6:35 p.m.: I'll come over and take her off your hands for you. I'll bring my animals
- BM3, 6:41 p.m.: Thank you. I feel so weird cause I can't hide it like I've always been able to. I'm sooo weak that I can't even swim without shaking like crazy and I'm always on the brink of bursting out in tears and it's so evident when my whole face turns red and now all my clothes are falling off. It was so much easier being terrified of spending an entire weekend with [husband] than wondering how I'm going to make



that weekend pass by quicker. This is horrible, but it was better than living in hell than trying to figure out how to come out of it.

- Applicant, 6:46 p.m.: Well, I'll help you come out of your hell. You just have to tell me what you want. I'll help you figure it out. And if you need to cry, I'll come to you. Or you can come to me
- Applicant, 6:46 p.m.: I'll take care of you. If you will let me. I'll be your shoulder to cry on. Or if you just need to be held, I'll try my damndest to make this easier for you.
- Applicant, 6:50 p.m.: If you need help at the house, give me a call. I'll stay down there with you, or get a hotel nearby
- Applicant, 6:50 p.m.: I'll help you with [daughter]. Whatever you need
- Applicant, 6:52 p.m.: Do you have the find friends app?
- BM3, 7:07 p.m.: I don't even know what I need. I forget everything cause I'm just kinda going through the motions. Like, if you hadn't reminded me yesterday I would have totally not remembered the pool. Crap, I guess I have a whole house to take care of now too. I guess it isn't that different I did it all before anyway. [Husband] never freakin mowed the yard then gave me hell for being "the man." Thanks for the reminder. I have to rake leaves
- BM3, 7:07 p.m.: No, what's that?
- BM3, 7:21 p.m.: Thank you for the fins, and sorry I sucked today. I think I'm insulted that it's so hard for me to sink. I guess I'm not as fit as I thought.
- Applicant, 7:30 p.m.: LOL. You're not sinking at the pool is from natural buoyancy.
- Applicant, 7:31 p.m.: Don't be ashamed of that. LOL. I like it.
- Applicant, 7:32 p.m.: as far as your yard work goes, I will come to your house tomorrow after work...if you're comfortable with that.
- Applicant, 7:32 p.m.: I'll take care of that and anything else you need help with.
- Applicant, 7:33 p.m.: If you and [daughter] come up here, you don't have to deal with yardwork. And, I can take care of you guys while you are dealing with this
- BM3, 7:34 p.m.: Ha, yeah, I guess I can't really get rid of those. And I definitely don't wanna. I think I need a new bathing suit, it's gotten a little big and it was coming loose when I was trying to sink and [another member] was watching the whole time. I wonder what he saw
- Applicant, 7:35 p.m.: I told you already, my wife has given the approval. You can come up whenever you are ready.
- Applicant, 7:35 p.m.: LOL. You won't hear any complaints from me. Promise
- BM3, 7:35 p.m.: You don't have to do that, I've raked soooo many leaves already, I only have a few more bags to go. I appreciate it though! I'm sure I will have projects come up where I'll definitely need two people and I'll definitely let you know if so.
- BM3, 7:36 p.m.: Hahaha, I don't think any man would complain.
- Applicant, 7:40 p.m.: [BM3], again, I don't want you to feel like I'm forcing myself on to you and I'm not going to make you do something you don't want to or feel uncomfortable. But, if you are even remotely starting to feel too busy, or remotely overwhelmed, call me. I'll do anything. I want you to know that I care.
- Applicant, 7:45 p.m.: I don't think you understand exactly how short the leash you have on me is. You don't even have to ask, if you hint at something, I'm on it. I'm at your feet.
- BM3, 7:58 p.m.: thank you. I don't wanna put you out or make anything awkward. I'm still trying to be ok with accepting people.
- Applicant, 7:59 p.m.: Nothing will be awkward. Just let me know.
- BM3, 8:01 p.m.: I will



- Applicant, 6:22 p.m.: Did you leave or are you still here?
- BM3, 6:22 p.m.: I'm still here, on the phone. I just wanna change and leave.
- Applicant, 6:22 p.m.: We are in the cubes meeting
- BM3, 6:23 p.m.: Sweet. I'll probably miss it all
- Applicant, 6:25 p.m.: That's fine. I'll let you know. You want to go eat after work? Or do you need help with anything at home or anything else? Talk? Anything?
- Applicant, 6:26 p.m.: Liberty. Normal Monday stuff.
- Applicant, 6:48 p.m.: Do you need food? Want to go get something to eat? I haven't left the base yet. If you don't want to go eat, I'm going to head home, you can always call or text me later if not
- BM3, 6:51 p.m.: I don't really have much of an appetite, I'm sorry. I'd love to go eat, but I don't think it would stay down.
- Applicant, 6:52 p.m.: I'm available for talking also. Remember, all you have to do is ask
- BM3, 6:52 p.m.: ☺ Thank you.
- Applicant, 6:59 p.m.: you're welcome. This will more than likely be my last text to you until I see you Monday. I feel like I'm smothering you. I want to reiterate, I'm here for you if you need me, day or night. If you want to keep talking, let me know.
- BM3, 7:01 p.m.: Don't feel like that, I'm just stubborn and it's hard for me to talk. I appreciate that you check in.
- Applicant, 7:02 p.m.: Quit being stubborn
- Applicant, 7:05 p.m.: DAMMIT, I forgot to give you the sparklers! Tell [daughter] not to be mad at me and that I'm sorry
- BM3, 7:07 p.m.: Aww she will love them anytime she gets them. We will have so much fun.
- Applicant, 7:14 p.m.: Sorry. Doing it again. Let me know if you need anything. Keep your head up. I'll let you go.
- BM3, 7:19 p.m.: Thank you. Have a great weekend!

### *Early Sunday Morning, November 23, 2014*

- Applicant, 12:19 a.m.: Just a reminder, if you would like to meet my wife and I at the aquarium tomorrow. We will be doing a behind the scenes thing with the XO around 9:30. Up to you. Let me know if you want to meet us. I'll get the tickets. The behind the scenes thing is free.
- Applicant, 12:19 a.m.: ...so don't worry about any money issues.
- BM3, 12:26 a.m.: I totally forgot. We're gonna go to church in the morning. [Daughter] loves being in the baby room with other kids and I like the time alone to think and listen to other adults. Plus the aquarium was [husband's] favorite thing to do, so it would make me feel reeeeaally horrible to go without him. Thank you for inviting us, I hate that it feels like I say no a lot.
- Applicant, 12:26 a.m.: Saying no all the time is not a bad thing as long as it is the right thing to do. Don't apologize for that. I'll see you Monday
- Applicant, 12:29 a.m.: Let me know if you need anything. My wife [...] said you can call her if you need another woman for anything...talking, etc. let me know. I'll give you her cell #
- BM3, 12:29 a.m.: I'm just a really reserved person and now I'm even more terrified of letting people in. I certainly don't mean to be rude or anything.
- Applicant, 12:32 a.m.: You aren't being rude. You will get there...promise. It might take some time, and it might not be with me. But you will get there.

- BM3, 12:34 a.m.: ☺ Thank you. I really appreciate you always being here.
- Applicant, 12:50 a m.: I'll always be here. Whatever you need. Again, if you need my wife, she is available also. I know there might be some things you [might not] want to talk to another guy about ... not that you would be comfortable talking with some strange woman. She is just offering in case.
- Applicant, 12:51 a.m.: Have a good night
- BM3, 12:54 a.m.: you have a great night too.

### *Monday Evening, November 24*

- BM3, 5:00 p m.: He keeps throwing balled up napkins at me!!
- Applicant, 5:01 p m.: [Two emojis or GIFs not viewable to Board]
- BM3, 5:01 p m.: I don't wanna miss any hot a bml
- BM3, 5:02 p m.: And hit\* Holy crap.
- Applicant, 6:24 p m.: You ok?
- Applicant, 6:29 p m.: Liberty
- BM3, 7:08 p m.: Yeah, I had a late running meeting again. Thank you!
- Applicant, 7:09 p m.: No problem. Let me know if you need anything
- Applicant, 7:09 p m.: DAMMIT! First thing tomorrow I'm giving you those sparklers.

### *Wednesday, November 26, 2014*

- Applicant, 2:52 p m.: Looking at granting liberty. Waiting on BOSN.
- BM3, 2:53 p m.: Woo! I'll have alllll day to work out
- Applicant, 2:53 p m.: I'll let you know when granted
- Applicant, 2:59 p m.: Liberty just granted
- BM3, 2:59 p m.: Woo yay!
- BM3, 2:59 p m.: Thank you.
- BM3, 3:00 p m.: 2-a-day for me. Thank you again for the sparklers, [daughter] loves them!!!
- Applicant, 3:01 p.m.: If I don't see you, good luck at Bosn's(lol). If you need me for anything or just want to get away, let me know. Be safe during the snow.
- BM3, 3:06 p m.: I'll make the best of it. Thank you, and you have a wonderful holiday too.
- Applicant, 3:06 p.m.: I don't know what you need to do two a day for. You look good. Just don't overdo it on the food tomorrow
- BM3, 3:06 p.m.: Cause I can look better that [sic] good, of course. And the gym is closed tomorrow so I have to make up for it. ☺
- BM3, 3:16 p m.: Haha, thank you. Could be better I'm
- BM3, 3:18 p m.: Forget the "I'm"
- Applicant, 3:20 p m.: I enjoy talking to you. I enjoy the back-and-forth stuff
- BM3, 3:23 p m.: Really? I always feel like I suck at giving it back.
- Applicant, 3:23 p m.: let's test it
- Applicant, 3:23 p m.: shut up

- Applicant, 3:25 p m.: [An emoji or GIF not viewable to Board]
- BM3, 3:30 p m.: Make me [A GIF not viewable to Board]
- Applicant, 3:31 p m.: I was expecting a “no you shut up”
- Applicant, 3:32 p m.: but that was so much better
- BM3, 3:32 p m.: Ha, I guess I’m a little beyond the teenage type flirting. Thank God!
- Applicant, 3:34 p m.: wha... well what do you want for me? Remember, history repeats itself.
- Applicant, 3:34 p m.: from me
- Applicant, 3:34 p m.: And don’t know it, those were the good days
- Applicant, 3:38 p m.: I kind of miss the old playful flirting. But, I also get the “let’s %#^\*” method also.
- BM3, 3:39 p m.: No, I meant the “no you shut up”, I can do much better, be more exciting.
- BM3, 3:40 p m.: I love flirting! It depends on the person. Sometimes you just gotta go for it.
- Applicant, 3:40 p m.: LOL. Oh! Never mind.
- Applicant, 3:40 p m.: Baby I over thought that one
- Applicant, 3:40 p m.: LOL. Maybe!
- Applicant, 3:40 p m.: I hate this talking to the phone while driving thing
- Applicant, 3:42 p m.: i’m just making it worse. I should stop. LMAO
- Applicant, 3:42 p m.: I don’t know how to do that! Promise me you will show me
- BM3, 3:43 p m.: Hahaha [A GIF not viewable to Board]
- BM3, 3:45 p m.: It’s a keyboard app I have. Gif’s are the best way for me express what’s happening on my face, so I love using them.
- Applicant, 3:47 p m.: [An emoji or GIF not viewable to Board]
- Applicant, 3:48 p m.: Well, you’re just going to have to imagine what my face is doing until you show me how to do that
- BM3, 3:48 p m.: Riffsy keyboard. Check it out.
- Applicant, 3:49 p m.: am I interrupting your workout? Are you hot and sweaty yet?
- BM3, 3:50 p m.: Nah, I’m gonna use the Y by my house, I’m not back yet. I had errands to run.
- Applicant, 3:51 p m.: okay, just saying that I can give you a work out also.
- Applicant, 3:51 p m.: I promise I can make you laugh. Laughter is good for the core
- BM3, 3:53 p m.: Ha, yeah it is. It’s my favorite thing to do.
- Applicant, 3:56 p m.: Well, you should do it more often. I don’t see you do it enough.
- Applicant, 3:57 p m.: You will just have to tell me if I’m getting carried away or out of line, because I miss the playful flirting
- BM3, 4:00 p m.: Don’t ya flirt with your wife?
- Applicant, 4:02 p m.: Occasionally, but sometimes I just grab her boob. It doesn’t really effect her [sic] unless it’s in public. The[n] she gets embarrassed, which is fun for me.
- Applicant, 4:12 p m.: So I’m pretty much stuck to playfully embarrassing her
- BM3, 4:15 p m.: Why stuck?
- Applicant, 4:17 p m.: Because playful flirting leads to other stuff. And I miss the challenge.
- BM3, 4:18 p m.: Ahhhh, gotcha. The challenge is pretty cool.

- Applicant, 4:20 p.m.: And it's fun to just flirt without knowing what's coming next
- Applicant, 4:24 p.m.: Sometimes flirting is enough. Other times flirting leads to foreplay and then just sex. Sometimes the process is short, sometimes it's long. But it's still unknown. When you're married, you know what comes next
- BM3, 4:25 p.m.: Ya don't have to always know. That's where openly communicating comes in.
- Applicant, 4:28 p.m.: touché. But after seven years, surprising each other becomes more difficult
- BM3, 4:32 p.m.: Yeah, I guess I can see that. Just gotta think outside of the box.
- Applicant, 4:57 p.m.: [An emoji or GIF not viewable to Board]
- Applicant, 5:10 p.m.: [A GIF not viewable to Board]
- Applicant, 5:25 p.m.: [A GIF not viewable to Board]
- Applicant, 5:25 p.m.: You've unleashed a monster
- BM3, 7:21 p.m.: isn't it awesome?!
- Applicant, 8:14 p.m.: Pphhpp. Please
- Applicant, 8:16 p.m.: Believe me...without crossing lines...you're good!

### ***Thanksgiving Day, November 27, 2014***

- Applicant, 12:37 a.m.: [A GIF not viewable to Board]
- BM3, 4:54 p.m.: Happy thanksgiving to you too!

### ***Friday, November 28, 2014***

- Applicant, 12:42 a.m.: Liberal leave is for tomorrow. Your section leader should have sent a text. I'm sorry. I should have sent you a text in case they didn't. You can have off tomorrow, but you will use a day of leave. I think [member] is going in tomorrow. Let me know what you would like and I'll let the bm1 know.
- BM3, 12:44 a.m.: What's liberal leave? Grrrrr [member]. I didn't put in leave prior, does it still apply to me? I'll just put it in on Monday I guess?
- Applicant, 12:48 a.m.: Liberal leave is you can have it if you want it. You don't have to already have a chit in, you can take care of it monday. Or you can go in tomorrow. They might just let you leave tomorrow after quarters. Depends on how many people are there. They might not charge you for a day of leave if you do that, but they might not grant liberty until normal time. Decision is yours.
- Applicant, 12:49 a.m.: If you stay home tomorrow, you and [daughter] can build a snowman. I want to build a snowman.
- BM3, 12:50 a.m.: Ohhhhh, ok. I'll just stay home. I haven't taken any leave yet. That'll be fun ☺ she thinks the snow is so weird.
- Applicant, 12:51 a.m.: I'll let [member] know. Let me know if you need anything. And I'll start passing info to you as I get it.
- Applicant, 12:55 a.m.: Glad to know you survived at Bosn's
- BM3, 12:56 a.m.: Thank you! I wouldn't have gotten it any other way. I didn't know anyone else to text, I knew you'd actually answer me. It was actually great. His wife and I are pretty similar and his youngest boy is soooooo cute.
- Applicant, 12:58 a.m.: [An emoji or GIF not viewable to Board]
- Applicant, 1:01 a.m.: He really shouldn't breed in my opinion.
- BM3, 1:02 a.m.: Why's that?

- Applicant, 1:04 a.m.: I can't stand him. And I don't want others like him in this world. Sorry. Took my filter off for that one.
- BM3, 1:05 a.m.: Haha, it's ok. Everyone feels differently about people. There are some people that I hate too.
- Applicant, 1:05 a.m.: [An emoji or GIF not viewable to Board]
- Applicant, 1:44 a.m.: I'll babysit and wake you every few hours with food and a drink
- BM3, 1:44 a.m.: I wanna sleep until Monday morning
- Applicant, 1:46 a.m.: I have that. Just sayin
- BM3, 1:46 a.m.: Hahaha, for three days? I'll definitely do without the food. Maybe just some strong whiskey to keep me out
- BM3, 1:48 a.m.: that would be cool to hibernate for so long.
- Applicant, 1:48 a.m.: [A GIF not viewable to Board]
- BM3, 1:50 a.m.: Hehe 😊
- Applicant, 1:50 a.m.: Ha. This gif texting is the best.
- Applicant, 1:50 a.m.: Sorry. I'm Gonna ruin it for you
- BM3, 1:51 a.m.: I know! I'm obsessed.
- Applicant, 10:13 p.m.: Noooo, you are!
- Applicant, 10:16 p.m.: [A GIF not viewable to Board]

### *Monday, December 1, 2014*

- Applicant, 1:58 p.m.: Don't put in any chit for Friday. Not until they tell everyone to
- Applicant, 2:25 p.m.: Are you still interested in doing a lifeguard course? There is one coming up in January.
- BM3, 2:26 p.m.: I think I'll be at [...] for that. what are the times and dates though?
- Applicant, 2:27 p.m.: As of now it is jan 12-15
- BM3, 2:28 p.m.: Yeah, I'm supposed to be at [...]. I don't have orders yet, but I had my annoying mother in law fly out for it, so I'd better go!
- Applicant, 2:29 p.m.: Lol. Ok
- BM3, 2:30 p.m.: Guess I should check on that, huh?
- Applicant, 2:30 p.m.: There are a bunch more dates available basically every month
- BM3, 2:32 p.m.: Awesome! I can't wait to go. What are the times during the day? Cause I can't do the ones into the evenings or on the weekend with [daughter].
- Applicant, 2:34 p.m.: I'll let you know in a bit. You're awesome. I just want you to know that. I love how you fired back on that one. You go girl!
- Applicant, 2:34 p.m.: [A GIF not viewable to Board]
- Applicant, 7:47 p.m.: I don't like that I don't talk to you much during the day
- BM3, 7:48 p.m.: Why's that? I've just had lots of people to see recently.
- Applicant, 7:50 p.m.: I did see you smile a couple of times towards the end of the day. That was nice
- Applicant, 7:50 p.m.: I just feel like there's more that I want to say to you, or do for you.
- Applicant, 7:50 p.m.: I know you're busy talking with other people that you need to. maybe I'm just jealous 😞

- BM3, 7:53 p.m.: What do you mean? Ha, no one wants to hear me bitch for an hour than [sic] cry cause I feel bad about it [A GIF not viewable to Board]
- Applicant, 7:54 p.m.: Well obviously you are wrong! Because I do
- Applicant, 7:55 p.m.: Maybe? But I think you underestimate me. I really do want to be there for you
- BM3, 7:57 p.m.: Well you're crazy
- BM3, 7:58 p.m.: Why?
- Applicant, 8:00 p.m.: From what you've told me, my mom went through a lot of the same stuff that you went through. I don't remember because I was too young, but she told me about it.
- Applicant, 8:01 p.m.: she had a strong support system that helped her through and after her situation. I want to make sure that you know somebody is here for you
- Applicant, 8:02 p.m.: I don't know what support, if any, you are getting from others. I just want to make sure you get what you need
- Applicant, 8:02 p.m.: and I'll do what I can to provide what you need
- Applicant, 8:03 p.m.: if you're getting everything you need from others, great. But I'll still be here
- Applicant, 8:04 p.m.: I'm going to cross a small line... tell me if it is inappropriate.
- Applicant, 8:07 p.m.: You are extremely beautiful, with an extremely beautiful daughter. I don't want to see you destroyed because of one person
- Applicant, 8:09 p.m.: you fought and survived. Not a lot of people do. Believe me...you will make someone extremely happy.
- Applicant, 8:11 p.m.: I get excited just knowing you are in the same room as me.
- Applicant, 8:13 p.m.: I haven't been able to get to know you as much as I would like. But there are many things that I love about you just from the small amount of work that we have done together.
- BM3, 8:17 p.m.: I'm slowly building a support system. I've always done it all on my own, it's hard to open up. Thank you! I never thought someone would be excited that I made it, ya know? After being told that I deserve everything and worse. I'm sooooo confused
- BM3, 8:17 p.m.: I'll always talk, I'm from [State]. I love to talk. ☺
- Applicant, 8:18 p.m.: FYI...I was born in [same State]
- Applicant, 8:20 p.m.: You don't deserve any of that crap. And talking can help with the confusion. Remember, you don't have to figure this stuff out on your own. You have too much stuff to do already. Let others take some of the load and just walk behind them. I'll do it.
- BM3, 8:20 p.m.: Really? Where?
- Applicant, 8:20 p.m.: I was born at [...]
- Applicant, 8:24 p.m.: I understand that trust is something you might struggle with right now. I'm sorry that that might be an issue. Don't be afraid to take someone's hand. Not everyone is a bad person. Some are. Some people are genuine though.
- BM3, 8:30 p.m.: I know some people really are great, and you're right it's super hard to trust. I though [husband] was great. And I'm usually a really good judge of character.
- Applicant, 8:32 p.m.: Sometimes people get it wrong. Nothing wrong with that. Some people are good at lying and putting up fronts. Again, nothing wrong with not seeing through it. You learn. You survive. And you make your life better.
- Applicant, 8:33 p.m.: I want to give you a hug right now.
- Applicant, 8:35 p.m.: Talking...you think I'm crazy... I'll sit and listen to you make fart noises with your mouth for an hour and then you can cry after wards about how sore your mouth is. If that's what you need to move another step forward, sign me up.



- BM3, 8:37 p.m.: Hahaha that's hilarious. Well this week we're supposed to be having a session together....so after that I might be a wreck and need to do something weird like that. Who knows.
- Applicant, 8:39 p.m.: I have an idea...
- Applicant, 8:39 p.m.: If you don't mind... completely up to you, let me know. I'll sit and talk with you, or just listen to you. Whatever you need
- BM3, 8:41 p.m.: What's your idea?
- Applicant, 8:41 p.m.: My wife has a friend and her husband visiting [...] this week. They are staying off [...]. Do you and [daughter] want to go eat with us in [...] Wednesday night? We are probably going to go to Fire and Ice.
- BM3, 12/1/, 8:43 p.m.: What time? [Daughter] is really strict about her own bedtime and will wreck havoc if she's at a restaurant anytime other than right after a nap. She's in the terrible two's aka, the hide-the-kid stage
- Applicant, 8:43 p.m.: ...previous conversation... I'll even hold you while you cry. I'm not sure when your last hug was, but I'm available.
- Applicant, 8:43 p.m.: Lol
- Applicant, 8:43 p.m.: We haven't set a time yet, 6? 7ish?
- BM3, 8:46 p.m.: [Daughter] goes to bed by seven. I'd love to go to dinner with you guys but I think it might end up way more stressful than happy. She's quite a handful.
- Applicant, 8:50 p.m.: If we move it up some, would you go? If not, that's fine. I'll take you out myself after work sometime.
- BM3, 8:52 p.m.: This sounds horrible but I'd rather not take [daughter] anywhere with new people. It's sooo stressful.
- Applicant, 8:52 p.m.: K. That's fine
- BM3, 8:52 p.m.: Sorry. But thank you for the invite. That's wonderful of you.
- Applicant, 8:56 p.m.: You're always welcome
- Applicant, 9:05 p.m.: Are you doing anything for the Christmas holidays? Want to get together? My wife will be gone and my mom will be visiting for a few days, so if you're free or bored or whatever...I'll be also.
- BM3, 10:36 p.m.: Where's your wife going? Honest I don't know what we're doing. [Husband] might be back, my sister might visit, both? I have no clue.
- Applicant, 10:37 p.m.: She is going to visit her dad and horses in Florida.
- Applicant, 11:13 p.m.: Well, YOU and [daughter] are more than welcome to come up here. I'll make you guys some of your crazy meatless food
- Applicant, 11:19 p.m.: Chili. I can make chili and salad. That doesn't have to have meat in it. I'll make it worth your time. And she can come play with the dog and cat
- Applicant, 11:19 p.m.: Ooohhhh. And hot chocolate
- BM3, 11:20 p.m.: Hahaha, Aww thank you. She eats meat, I just don't really fancy it. Why didn't you go to FL too? It's so much warmer!
- Applicant, 11:21 p.m.: Standby crew. And I can't stand her dad. You know...in laws.
- Applicant, 11:21 p.m.: Could
- BM3, 11:21 p.m.: Hahahahahahaha. So, this person you know...will he be doing a double hit?
- BM3, 11:23 p.m.: Sorry you can't stand him, it sucks for relationships. But you two seem to have made it work.

- Applicant, 11:25 p.m.: Yep. I don't talk to him unless I have to. She does all the talking to him for me. He knows that I don't care for him. He tries sometimes to make amends and I humor him, but that doesn't last more than about a day.
- Applicant, 11:27 p.m.: My not dealing with him is my reward for doing CPR on him the last time he had a heart attack
- BM3, 11:28 p.m.: Wow! That's crazy. I bet it was hard to do that
- Applicant, 11:30 p.m.: I've thought back on it some... I'm pretty sure I did for [wife] more than I did it for him.
- Applicant, 11:32 p.m.: Whatever the outcome, I'm sure it won't be an easy transition.
- Applicant, 11:32 p.m.: I hope you know that you and [daughter] are always welcome. And I will meet you or come to you if needed.
- Applicant, 11:32 p.m.: I know that you don't know what the future holds and I'm not sure what outcome you are hoping for, but if you need to just get away...
- Applicant, 11:37 p.m.: Will you let me take you out sometime? Feel free to say no. I can take the answer "no"
- Applicant, 11:41 p.m.: [A GIF not viewable to Board]
- BM3, 11:42 p.m.: I can't go out, I have a little one. I'm pretty worried about the outcome. It's miserable being a single mom with a career and no family close by.
- Applicant, 11:44 p.m.: I'm sure it is. I was thinking right after work before you have to go get her. But, that's ok. I'm sure you have plenty to do.
- BM3, 11:45 p.m.: I usually have to run to the train. But if we get out early some day I might be able to.
- Applicant, 11:45 p.m.: Soooo, you're saying there's a chance! Lol

### ***Wednesday, December 3, 2014***

- Applicant, 2:51 p.m.: [A GIF not viewable to Board]
- BM3, 2:54 p.m.: Ha, I love Daniel Tosh
- Another member, 5:40 p.m.: [Applicant] is like a puppy just waiting for you to pet him and give him attention
- BM3, 5:41 p.m.: Ugh, I know. He's like "stop it!! You're smiling and I like it". Geesh.
- BM3, 6:22 p.m.: Hahaha. That cracked me up. Whoopsie
- BM3, 7:54 p.m.: What happened with the deployment?
- Applicant, 7:56 p.m.: They are still going tomorrow. One boat crew.
- BM3, 7:56 p.m.: But you got out of it?
- Applicant, 7:56 p.m.: I think it is [members]
- Applicant, 12/4, 7:58 p.m.: No. They decided they weren't going to send a BO
- BM3, 7:58 p.m.: I wish I could go so bad.
- Applicant, 7:58 p.m.: yeah, for some reason Bosn said that [member] and I could not go and didn't need to know why... whatever that means
- Applicant, 7:58 p.m.: oh I wanted to. I just needed to be back by the time my wife leaves
- BM3, 7:59 p.m.: That's weird? It's good though since ya didn't want to.
- Applicant, 8:01 p.m.: Bosn is just screwing things up and pissing people off once again
- Applicant, 8:01 p.m.: yeah, I told them I would go if they could get me back by the time my wife leaves

- Applicant, 8:03 p.m.: I seriously cannot stand that guy
- BM3, 8:14 p.m.: I really like Bosn, he's straight forward. I don't know why everyone dislikes him.
- Applicant, 8:16 p.m.: there are many, many reasons why. You probably just haven't been exposed to them yet
- Applicant, 8:17 p.m.: He has made some good decisions, and there were a couple of times he looked out for the crews.
- Applicant, 8:18 p.m.: But, he does more stupid things and makes more bad decisions far more than he makes good ones. And he makes commonsense situations way more difficult than they need to be because he steps in and micromanages everything
- Applicant, 8:19 p.m.: and I mean EVERYTHING
- Applicant, 8:22 p.m.: Getting his hands dirty, no matter his rank, is his way of micromanaging. He doesn't trust or rely on his first classes.
- BM3, 8:23 p.m.: He's getting better I think. There are all kinds of different people. I think I was gifted with seeing the good in a very objective way. I don't mean to argue with ya.
- Applicant, 8:24 p.m.: There is an incredible list of problem issues with him that he creates. i'm not trying to tell you that you're wrong, but I do know there are many many things you just aren't aware of
- BM3, 8:25 p.m.: I can be pretty ignorant sometimes.
- BM3, 8:27 p.m.: I end up in a lot of bad situations because of it. Plus I give people too many chances and open doors.
- Applicant, 8:29 p.m.: Nooo. I think you just find the good and hold onto that
- Applicant, 8:30 p.m.: Nothing wrong with that, just don't be disappointed later. Expect that everyone has some flaw. In my opinion, he has a couple of major ones that effect a lot of things in big ways
- BM3, 8:32 p.m.: Oh I know people aren't perfect. I like the flaws. Accepting them is a fun journey to take.
- Applicant, 8:32 p.m.: You are just a good hearted person
- Applicant, 8:35 p.m.: You just have to be careful, some people take advantage of people like that
- Applicant, 8:48 p.m.: The big thing is don't let me form an opinion for you...no matter how much you like me. Just take in as much other things as you can before you develop an opinion on someone.
- Applicant, 8:48 p.m.: First impressions aren't what they are cracked up to be. People make big money fooling people and others are just really good at it.
- Applicant, 8:54 p.m.: Don't trust me either until you are completely comfortable with knowing me and who I am...I have flaws also. So do you.
- Applicant, 8:54 p.m.: Some might say that one of yours is a blessing though.
- BM3, 9:08 p.m.: I agree. But you do deserve a rest! And some Reese trees
- Applicant, 9:09 p.m.: Haha they were delicious
- BM3, 9:13 p.m.: Hey. I've been doing a lot of thinking lately and kinda pouring my heart out and the counselor I talk to brought something up that kinda struck me. It's really hard being a strong woman in this job, especially dealing with a serious issue like I currently am. I'm trying to find some self worth and respect but I can't because others don't really respect me. I kind of feel like some of the things we talked about and some of the things that were said or implied might have been inappropriate considering my current emotional state...of crazy. Of course I should have said something then, and it's my own fault for not, but I don't want to get caught up in something that could be negatively viewed by someone else or that keeps me from figuring my own things out just because I'm trying to not hurt your feelings. I reeeccally appreciate all that you've offered me and [daughter] and the smiles and especially the help at work, but I think maybe staying professional would be best for now. Of course I know you're always there if I need help or to talk, as am I for you,

but as a good shipmate. I'm sorry if this sounds rude or anything, I'm trying to learn to better set clear boundaries and speak up.

- Applicant, 9:21 p.m.: Sounds good. No issues here
- BM3, 9:27 p.m.: I'm sorry, again. But thank you for understanding.
- Applicant, 9:28 p.m.: Absolutely no problem. Just let me know what you need. I'll help in whatever way you need

#### ***Thursday, December 4, 2014***

- Applicant, 6:36 p.m.: I have your lifeguard gear when I see you next
- BM3, 7:39 p.m.: Woo, yay.
- Applicant, 7:52 p.m.: Just remember that these will be given to you, not issued. So we expect you to get your lifeguard cert. you don't have to use our gear, but it is incentive to be part of the water survival program
- BM3, 7:55 p.m.: Oh I thought I wouldn't get it until I got my cert.
- Applicant, 8:03 p.m.: Nope. We bought the gear specifically for you. So it's yours. We just ask that you try to pass
- BM3, 6:04 p.m.: Of course I will. Thank you.

On December 12, 2014, the applicant was reassigned to a temporary duty station during the ongoing investigation.

The CGIS investigation report is dated December 15, 2014. The lead investigator is named on the first page as such and many times throughout the report as having been responsible for gathering evidence and conducting interviews. He imaged BM3's cell phone, ran criminal background checks on the applicant and BM3, and interviewed various persons with knowledge of the alleged events including BM3. The lead investigator made an entry into the CGIS investigation on December 12, 2014, stating that he had reviewed the text messages between the applicant and BM3 and he had found "numerous inappropriate electronic communications sent from [the applicant] to [BM3]."

On December 23, 2014, the applicant was provided with his *Miranda* and *Tempia* rights. He was advised that he was being investigated for allegations of sexual harassment. The applicant acknowledged his rights and indicated that he did not desire to consult a lawyer but that he did wish to make a statement and answer any questions.

#### ***First Administrative Investigation***

On January 8, 2015, the first investigating officer, who was a chief petty officer, submitted his Preliminary Inquiry Report.<sup>6</sup> He had been assigned by the applicant's command to conduct a standard investigation on December 11, 2014, "into the facts and circumstances surrounding allegations of sexual harassment to [BM3] perpetrated by [the applicant] as stated in [CGIS report]." The investigating officer found that on November 20, 2014, there had been a Maritime Safety

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<sup>6</sup> This investigator was designated as a Preliminary Investigating Officer (PIO) but is not referred to as such in this decision to avoid confusion with the second PIO.

Security Team (MSST) Water Survival training. He reviewed the text messages exchanged between BM3 and the applicant and interviewed members who were present during the training. The investigating officer concluded that there was “not enough sufficient evidence to suggest there was any unwanted sexual contact perpetrated from [the applicant] toward [BM3] 20 November 2014 while conducting water survival training.” Regarding the text messages, the officer stated that “while some texts are inappropriate; there are no texts in the report that would be categorized as violations of Uniform Code of Military Justice.” He recommended that the applicant receive a negative Page 7 as there were no UCMJ violations, and that he be required to review the Anti-Discrimination and Anti-Harassment policies.

The investigating officer attached emails and responses he had sent to four witnesses who were present at the MSST Water Survival training. The same three questions were asked of all four witnesses: 1) Did you see the applicant hold BM3 inappropriately; 2) Did you see the applicant tickle her legs; and 3) Did you see the applicant do anything that would warrant investigation? The four witnesses’ answers were the following:

- 1) “The answer to all of these is no.”
- 2) “All answers to above questions were no.”
- 3) “1. No, I did not observe [the applicant] hold BM3 inappropriately. The only time I observed ME2 physically holding BM3 was during water rescue demonstrations consistent with American Red Cross Lifeguard water recovery procedures. 2. No. At no time throughout the day did I observe [the applicant] tickle BM3’s legs. 3. No. The only times I observed ME2 making physical contact with BM3 was during his emergency recovery demonstrations. As soon as he completed them, I would break off and work with another group of break-in responders.”
- 4) “The answer to the above questions were [sic] no.”

The investigating officer provided an email dated December 23, 2014, with notes from an interview with the applicant. The officer noted that members had taken turns being both “master” and “responder” during the training. The entire training had lasted approximately four hours. The investigating officer explained to the applicant that it had been said that he held onto BM3 for too long and the applicant said that the only contact he had with her was “when she was breaking in as responder and all contact was within the regulations of the training.” The applicant stated some of this contact included recovering a person in the event they are struggling to swim, so the trainer will simulate recovering a person from the bottom of the pool. When asked what happened in response to the allegation that the applicant had tickled BM3’s legs, the applicant stated that he had “never purposefully tickled her legs ever.” He reiterated that the only physical contact he had ever had with her has been at the pool during Water Survival training.

The investigating officer also provided an email with notes from an interview with BM3. He asked her to explain what happened with regards to the allegation that the applicant held her for an inappropriately long amount of time. She stated that it was during a simulated recovery of a person struggling to swim. She had told him “OK I get it,” indicating that she understood the technique, twice “before he would let go.” The investigating officer asked her to explain what had happened with regards to the allegation that the applicant tickled her legs. She stated that he had tickled her legs twice during the training and it was inappropriate unwanted contact. The investigating officer asked about the applicant swimming beside BM3. She stated that he swam beside

her for 15 to 20 minutes during the training and it “was not necessary.” She asserted that he could have performed that portion of the instruction standing poolside.

On January 19, 2015, the Executive Officer (XO) of the applicant’s command sent the Commanding Officer (CO) a memorandum recommending a second investigation into the circumstances surrounding the allegations of sexual harassment. The XO stated that the submitted investigation was insufficient. He stated that the legal office had reviewed the investigation and concurred “with the inadequacy of the report.” The XO therefore recommended that a different investigator be assigned to perform a standard investigation. The CO added a handwritten note next to his name: “CONCUR. Assign a new Investigating Officer” with his initials and dated January 22, 2015.

### *Second Administrative Investigation*

On January 20, 2015, a lieutenant junior grade was assigned as the Primary Investigating Officer (PIO) to conduct a standard investigation into the allegations of sexual harassment. The PIO was instructed to begin the investigation on January 20, 2015, and complete the investigation no later than January 27, 2015.

The applicant made a voluntary written statement for the second investigation on January 26, 2015. He stated that on November 19, 2014, he saw BM3 looking physically distraught and crying. “As a shipmate,” he asked if she was alright and if he could do anything to help. He stated that she replied that she had personal issues. He stated that he sent her a text later the same day “to again make sure that she was ok and didn’t need anything.” He stated that she replied it would be a long, rough road and that she didn’t know what would happen. He stated that after he told her again that he was available if she needed to talk, she told him that her husband might go to the brig and she may become a single mother. The applicant stated that in case it was a domestic issue, he offered his home to BM3 and her child “if they needed to get away from him while she figured things out.” He also told BM3 that his wife was willing to help BM3 if she would like another woman to talk to. He stated that BM3 said there was an alarm on the house and “they” were watching her husband closely. The applicant stated that he had informed his wife of the situation and his wife was also on board with BM3 and her child staying at their house. The applicant stated that he was “counseling and offering encouragement and assistance” to BM3 via text. He stated that at one point she sent an emoticon of a head with closed eyes and a gun pointed to it. He stated that after that he continually offered to help her with anything she needed and told her that it would get better. The applicant stated that he had offered to take her out to lunch because she was not eating regularly and he also invited her out with his family several times.

The applicant stated that there were many texts that went back and forth between him and BM3. He stated that he was attempting to “offer counseling, words of encouragement and [would] often say things to make her laugh or try to feel good/confident in herself again.” He stated that on December 3, 2014, BM3 sent a text saying that she was concerned the text messages between them might be inappropriate and that she would like to keep things professional. The applicant replied that he did not have any issues with that and that he was still available if she needed anything. He stated that at that point he cut off communication with her except to tell her that he had

Water Survival gear for her. The only communication he had with her after that was of a professional nature during working hours.

Regarding the Water Survival training, the applicant stated that BM3 was one of the members who was breaking-in as master and responder. The instructors had decided the lifeguard swim test would be conducted that day as well. The applicant stated that he observed BM3 as “still distraught about her current domestic issue.” He stated that he asked her if she was interested in working on her master and responder qualification that day. The applicant stated that BM3 replied that she still wanted to proceed with the qualifications. He stated that she “struggled with part of the swim test and [he] had to verbally encourage her to continue in order to pass the test.” After the swim test the instructors moved on to the Water Survival portion. The applicant stated that he conducted training by first giving verbal instruction, then doing a demonstration, and then having the student conduct the task. He stated that other instructors use the same method and that this is “in line with the manuals and knowledge of the staff.” The applicant asserted that he has had physical contact with each member who has served on break-in capacity and it has always been in the view of others and in accordance with manuals. He stated that he never “had any inappropriate contact with BM3 ... or any other break-in.”

BM3 provided a written statement dated January 26, 2014. She stated that around the middle of November, the applicant “began to text [her] concerning issues going on in [her] personal life.” She stated that prior to that they had rarely talked and it had always concerned work. BM3 stated that the applicant offered “condolences and someone to talk to” without asking what was wrong. She stated that she thought that was nice, but after she politely declined his help he continued to offer “relentlessly.” She stated that “he said he would come to [her] house ... and then it moved to him offering to spend the weekend there, or in a hotel nearby.” She stated that she felt uncomfortable with him knowing where she lived so she always declined. BM3 stated that the applicant made several comments about how beautiful she and her daughter were and some comments about BM3’s body. She stated that the applicant had asked if she had the “Find My Friends” application so that “he would know exactly where [she] was” if she ever needed to talk. She stated that she “thought that was pretty creepy.”

BM3 stated that she “knew that things were crossing the line of supervisor/trainee,” but that she was worried of the possible retribution that happens when you tell someone to stop. She stated especially when that person “possibly, and probably, won’t respond well to being denied.” BM3 stated that he asked her to lunch and dinner several times but she would just make excuses. She did not think it was professional to have dinner alone with the person in charge of the qualification she was trying to obtain. She stated that at one point the applicant began talking about how much he loved flirting, but before she realized that he was talking about flirting with her she “threw out a general ‘I love to flirt!’” She stated she was trying to say she smiles and laughs a lot and she was not meaning to give him a “green light.” BM3 stated that this conversation led into the applicant expressing sexual discontent in his marriage “and the desire to seek out other ways to fulfill those needs.” She stated that she tried to turn the conversation around back to his wife.

Regarding the Water Survival training, BM3 stated that she chose to do the lifeguard test even though it was not scored that day so that she was not sitting on the side of the pool. She stated

that she had not eaten “for a few days” so she was not strong enough to do it, but decided to try anyway. She stated that she went to the far side of the pool and did the side stroke so she could face the wall of the pool and “not have to deal with anyone.” BM3 stated that the applicant did not know she was not feeling well, so there was no need for supervision. She stated that he nevertheless entered the pool between her and the wall while wearing goggles. She stated that she was getting uncomfortable “while being watched” so she stated she was not feeling well at lap four and left the pool. The applicant told her to keep going because she only had one more lap. She stated that she was sure she had two more laps to go, and she pointed this out because she felt that he only wanted to continue watching her swim. BM3 stated that she did not feel like fighting so she “swam and let him watch me.”

For the underwater rescue portion, BM3 explained the rescue procedure just like the applicant, above. She stated that the applicant only used her for demonstration purposes and even when she said she understood, he would continue to hold her. She stated a second time she understood and then nervously laughed because she felt that he was just using the excuse to touch her. She stated that she is often used for demonstrations due to her size, and she was fine with that, but she felt the applicant held her a prolonged period of time. Later, BM3 was floating with her arms on a rescue tube and her legs floating behind her. She stated that the applicant came and pushed her legs so she spun around and made her float away. She stated that he then came over again and tickled her leg on the outside of her right calf twice. She stated that at that point she stood up and walked to the other side of the pool. She stated that after the pool incident he continued to text her and make comments about her being beautiful.

The PIO’s Investigating Officer Report is undated, although he mentioned that he was unable to complete his investigation by January 27, 2015, due to inclement weather and subsequent Base closures. The PIO made 108 findings of fact regarding the circumstances of the allegations. He found that on November 19, 2014, the applicant witnessed BM3 looking “physically distraught about something” and as if she had been crying. The applicant told the PIO that he asked BM3 at that time if she was alright and if she wanted to talk about anything. The applicant stated that BM3 replied that she was having “personal issues” and that she would be alright with time. The PIO stated that later that day at 2:29 p.m. the applicant began to text BM3. The PIO included his own summary of their first text conversation in his findings.

The PIO stated that on November 20, 2014, the unit conducted a Water Survival training. He summarized the applicant’s and BM3’s statements and noted that none of the other members present at the training saw any of the inappropriate conduct described by BM3 take place.

Later that day, the texting between the applicant and BM3 resumed. The PIO summarized the remainder of the text messages; discussed the elements of UCMJ Articles 80, Attempt; 92, Failure to obey order or regulation; and 93, Cruelty and maltreatment; and added the following opinions:

- The applicant engaged in an unacceptable personal relationship with BM3, and therefore violated Article 92 of the UCMJ.<sup>7</sup>

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<sup>7</sup> Discipline and Conduct Manual, COMDTINST M1600.2, Article 2.A.2.c.



- The applicant was attempting to engage in an unacceptable romantic relationship with BM3, thereby violating Article 80 of the UCMJ.<sup>8</sup>
- If the applicant had been given the opportunity, the applicant “would have engaged in such a relationship with BM3.”
- The applicant maltreated BM3, who was his subordinate, thereby violating Article 93.
- The applicant sent BM3 “numerous text messages containing sexual/explicit language and innuendos that have no place in a professional relationship between supervisor and subordinate.”
- The applicant knew that the messages were inappropriate because he asked her to let him know if he should stop or that he was “crossing a small line.”
- The applicant had sexually harassed BM3.<sup>9</sup> He stated that the applicant “made several unwelcome sexual advances towards BM3 ... both in the pool during training and via text messaging.”
- BM3 had not wished to engage in such a relationship with the applicant because she stated several times that she did not wish to meet with the applicant outside of work despite his “numerous attempts to coax her into doing so.”
- BM3 had had multiple opportunities to “put an end to [the applicant’s] inappropriate behavior with a firm ‘No’ or ‘Stop,’” but her subordinate role made her too uncomfortable to say anything.
- The fault was entirely with the applicant.
- The applicant should be charged with UMCJ Articles 80, 92, and 93, and the charges should be disposed of at NJP.

The PIO attached a CG-4910, Report of Offense and Disposition, which was backdated to January 19, 2015. The details of offense on this report are as follows:

Article 80 & 93 – From 07 November 14 to 03 December 2014, [the applicant] sexually harassed, or attempted to, BM3 ... through various inappropriate actions and comments. Article 92 – From 07 November 2014, [the applicant] engaged in interpersonal relationship misconduct through inappropriate interactions with a junior member in his direct chain of command.

Four members were named as witnesses in the Report of Offense and Disposition, including BM3. The applicant signed it but did not indicate whether he wanted legal representation at that time. The PIO recommended that the case be disposed of at Mast with the following explanation:

On 19 November 2014, according to a CGIS report, [the applicant] began communicating with BM3 ... via text messaging. Over the course of the conversation, [the applicant] made several unwanted advances and comments of a sexual nature towards BM3 ... On 20 November, 2014, BM3 ... attended Water Survival training as a break-in, where [the applicant] was acting as the qualified instructor, and [BM3’s] supervisor. According to BM3 ..., during the training, [the applicant] swam in very close proximity to BM3 ... and

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<sup>8</sup> *Id.* at Article 2.A.2.f.

<sup>9</sup> Civil Rights Manual, COMDTINST M5350.4C, Article 2.C.2.b.3. and *Id.* at 2.B.2.

watched her swim while wearing swim goggles. Also during the training, [the applicant] allegedly tickled [BM3's] leg twice. After the training, [the applicant] continued his seductive behavior towards BM3 ..., sending numerous text messages to BM3 ... including persistent requests for dinner, dates, and unwanted sexual advances.

The XO noted on the CG-4910 that the applicant had been informed of his right to refuse an NJP and to confer with counsel. The XO signed the report and also recommended disposal of the charges at mast. Although not in the record before the BCMR, the applicant apparently rejected NJP and demanded trial by court-martial.

### *Original April 30, 2015, EER*

The applicant received a regular EER dated April 30, 2015. This is the EER that is entirely in dispute before the BCMR. As originally submitted into the applicant's record, the EER had four average marks of 4, sixteen above average marks of 5, and five high marks of 6 (out of a scale of 1 to 7). He received a conduct mark of "Satisfactory" and a mark of "Recommended" for advancement. The EER contained five comments. For Developing Subordinates, the comment states that the applicant "made great contributions to the development of junior personnel consistently shared his knowledge and experience through training." For Loyalty, the comment states that the applicant continued "to exhibit pride in the Coast Guard; has backed peers and Program transition. Has done best job possible under circumstances." For Adaptability, the comment states that the applicant had "adjusted well to changes in work routine and supervisors as would be expected from a Second Class Petty Officer. Maintained high degree of effectiveness." For Judgment, the comment states that the applicant "demonstrated experience and considered good alternatives while managing the Water Survival Program all decisions made promptly with best information." And for Initiative, the comments states that the applicant "took on new idea for the sign; and saw it to completion; bullet given for this factor does not meet any guidelines for a mark of 6" (the applicant received mark of 5 in this category).

### *Criminal Proceedings*

On June 2, 2015, the applicant was charged with violating Articles 92, Failure to Obey an Order or Regulation, and 93, Cruelty and Maltreatment. The Article 92 specification states "[i]n that [the applicant] on active duty, did, at ..., on or about 20 November 2014, violate a lawful general order to wit: Article 2.B.1.c., Discipline and Conduct, COMDTINST M1600.2, dated 29 September 2011, by wrongfully engaging in sexual harassment against [BM3]." The Article 93 specification states that the applicant, "on or about 20 November 2014, did maltreat [BM3], a person subject to his orders, by following her underneath the water and watching her swim, holding onto her body longer than necessary while demonstrating a water rescue technique, and tickling her leg without justification."

On August 24, 2015, the applicant was charged with violating Articles 92, Failure to Obey an Order or Regulation, and 128, Assault. The Article 92 specification states that the applicant "who knew or should have known of his duties, from on or about 19 November 2014 to on or about 3 December 2014, was derelict in the performance of those duties in that he willfully failed to comply with Chapter 2.C.2. of the [Civil Rights Manual] as it was his duty to do." The Article

128 specification states that the applicant did, “on or about 20 November 2014, unlawfully touch [BM3] on her leg with his hand.”

On October 23, 2015, all four charges were withdrawn without prejudice.

### *Initial Separation Proceedings*

On November 9, 2015, the applicant was informed that his command was initiating an involuntary separation due to his commission of a serious offense.<sup>10</sup> The applicant was informed that the conduct that caused the involuntary separation was:

On or about 19 November 2014 to 03 December 2014, [his] misconduct detailed in enclosures (1-4) includes sexual harassment, maltreatment, and the unlawful touching of a female co-worker. This behavior represents a serious violation of Coast Guard core values, particularly of our core value of respect, and reflects poorly on your judgment, integrity, and professionalism as a Petty Officer in the United States Coast Guard.

You were previously advised of, trained on, and counseled on your duties to comply with Chapter 2.C.2. of the Coast Guard Civil Rights Manual, COMDTINST M5350.C, dated May 2010. In accordance with enclosure (1) and (5), you willfully failed to comply with this directive and this is the second time in your career you engaged in sexual harassment.

The applicant’s CO did not recommend a particular characterization of discharge. He informed the applicant that he had a right to an ASB and to representation at the ASB. The applicant was also informed of important timelines and acknowledgements he was required to make. The enclosures were listed as:

1. CG-3307 dtd 09Nov2015
2. CGIS Action Report dtd 03Dec2015
3. CGIS Report Extract
4. Victim’s Preference Statement dtd 21Oct2015
5. CG-3307 dtd 01Nov2001
6. Exercise of Rights Memorandum

The applicant signed and acknowledged receipt of the involuntary separation notification on November 9, 2015. He indicated that he understood that if he received a General discharge he might be deprived of some rights and privileges. He indicated that he wished to consult with a military lawyer. He also indicated that he waived his right to make a statement at that time but retained his right to make a statement at a later time.

On November 13, 2015, the applicant memorialized his exercise of rights regarding the involuntary separation proceedings. He indicated that he had consulted with a military lawyer on November 12, 2015, and that he understood the rights he was exercising. He waived his right to submit a written statement but asked to appear before an ASB with the representation of a military lawyer.

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<sup>10</sup> Military Separations Manual, COMDTINST M1000.4, Article 1.B.17.b.(3).

*Negative Page 7s & October 31, 2015, EER*

Before the ASB convened in May 2016, the applicant's command made several negative entries in his personnel file. First, the applicant received the disputed Page 7 on November 9, 2015. He refused to acknowledge the Page 7 by signature, but it is signed by his CO. It states:

On or about 19 November 2015, you began to send text messages to a married co-worker who was recently a victim of domestic violence. Within a ten day period of messaging, you sent her approximately 255 text messages, including unwanted romantic advances, offers to physically comfort her, suggestive remarks, comments on her physical appearance, requests for her to install a tracking application on her phone, and other seductive behaviors. Furthermore, on or about 20 November 2015, you took advantage of your position as the Water Survival Training Master during a training evolution to sexually harass and unlawfully touch your co-worker. These acts of misconduct are detailed in CGIS investigation ... Specifically, you committed the following serious offenses:

On or about 19 November 2014 to on or about 3 December 2014, you were derelict in the performance of your duties in that you willfully failed to comply with Chapter 2.C.2. of the Coast Guard Civil Rights Manual, COMDTINST M5350.C, dated 20 May 2010. You were previously advised of, trained on, and counseled about this duty. This is the second time in your career that you have engaged in sexual harassment.

On or about 20 November 2014, you maltreated a female co-worker, a person subject to your orders, by following her underneath the water and watching her swim, holding onto her body longer than necessary while demonstrating a water rescue technique, and tickling her leg without justification.

On or about 20 November 2014, you unlawfully touched a female co-worker on her leg with your hand.

Your misconduct represents a serious violation of Coast Guard core values, particularly our core value of respect. That you, while married, selfishly exploited the personal misfortune of a vulnerable female co-worker as an opportunity to pursue a physical relationship with her reflects poorly on your judgment, integrity, and professionalism as a Petty Officer in the United States Coast Guard.

On December 2, 2015, the applicant received a semiannual EER for the six months ending on October 31, 2015, with four very low marks of 2, seven marks of 3, six marks of 4, six marks of 5, and two marks of 6. He received an "Unsatisfactory" conduct mark and he was "Not Recommended" for advancement. He received four comments to accompany the four marks of 2. The first comment stated that during the marking period the applicant was "counseled on the dereliction in his performance of duties" when he engaged in sexual harassment. The comment states that the applicant's "actions were displayed for all to see and set a poor example for his peers, subordinates, and those affected by his bad decision making." The comments repeatedly refer to the sexual harassment allegations, both from the Water Survival training and from the text messaging conversations. The comments supporting the "Unsatisfactory" conduct mark cite the negative Page 7 dated November 9, 2015, and state that during this marking period he "failed to meet the minimum standards as evidenced by the CG-3307 the member received for sexually harassing and maltreating a female coworker." The comment supporting the Not Recommended for Advancement mark states that he had "demonstrated that he is not capable of performing the duties and responsibilities of the next higher pay grade through his lack of leadership, poor judgment and decision making." The applicant refused to sign his member counseling receipt page.

The applicant received a second negative Page 7 dated December 15, 2015, for behavior from November 9 to 19, 2015. The applicant's CO signed the Page 7 but the applicant refused to

acknowledge by signature. The Page 7 states that the applicant “willfully disregarded the lawful orders of [his] direct supervisor and overtly disrespected [his] supervisor in the presence of [his] subordinates while working in the Unaccompanied Personnel Housing (UPH) division.” The applicant was told that he had made excuses and inappropriate remarks towards his supervisor when asked to do a simple task. The Page 7 states that the applicant “aggressively” interrupted his supervisor and stated “it is none of your business.” The applicant was informed that he had failed to uphold the Coast Guard Core Values and that his behavior had reflected poorly on his “judgment, integrity, leadership, and professionalism.”

On December 17, 2015, the applicant appealed his October 31, 2015, EER. The applicant stated that he had been charged with misconduct and maintained his innocence “of all charges referred against [him].” He stated that he had refused NJP and after the SCM was dismissed his command had “targeted” him. He asserted that his command had done this by removing him from his primary duties, excluding him from morale functions, and “impugn[ing his] character by issuing administrative remarks entries for any action that could possibly be perceived as misconduct.” He argued that his EER marks were “disproportionately low” and specifically appealed fifteen of the assigned marks. For each category, the applicant provided specific examples and reasons that he believed his mark should be increased to marks of either 4, 5, or 6. He also appealed his “Unsatisfactory” conduct mark because it was based on “incorrect information” and “prejudice” against the applicant. He again asserted his innocence and gave examples of work he had performed successfully during that reporting period. One of the enclosures the applicant provided with his appeal was an email with recommended marks from his immediate supervisor from his temporary command, but that email is not before the BCMR.

On December 30, 2015, the applicant’s CO negatively endorsed the applicant’s appeal of his October 31, 2015, EER. He recommended that two marks, Professional Specialty Knowledge and Communication, be changed but that the rest remain the same. The CO stated that “much of the information contained in [the applicant’s] appeal memo was already taken into consideration when developing” his EER. He stated that he firmly believed all marks except the two he recommended raising were appropriate given the applicant’s “performance during the marking period, as well as the culmination of misconduct ... beginning in November 2014 and concluding on 22 October 2015.” The CO gave a timeline in order to “offer a more detailed account of [the applicant’s] negative performance leading up to and during the marking period.” The CO stated that on December 15, 2014, after CGIS concluded its investigation, the command “opened an administrative investigation into other allegations of misconduct” by the applicant. After the applicant had exercised his right to reject NJP, the case was referred to SCM. The CO stated that on October 21, 2015, BM3 “initiated a preference statement requesting that the case not proceed to court-martial and be handled administratively.” The CO stated that on October 22, 2015, after conferring with Legal, he “dismissed all charges” against the applicant and made the determination, “based on a preponderance of the evidence, [that the applicant] committed the offenses ... and [the CO] would be pursuing administrative separation on the basis of misconduct for commission of a serious offense.” He stated that the applicant was given a negative Page 7 which was “used as justification for marking several EER performance categories.” The CO acknowledged that the Page 7 was delivered to the applicant outside of the EER’s marking period, he stated that the events discussed in the Page 7 “span over multiple marking periods, the conclusion of [the applicant’s SCM] on 22 October 2015 (during the marking period) triggered the documentation of the serious

nature of these events in his regularly scheduled EER.” The CO recommended raising the mark for Professional Specialty Knowledge from 3 to 4 and raising the mark for Communicating from 3 to 4. For all of the other marks that the applicant requested be raised, the CO explained why he felt the assigned marks should remain in effect.

On March 23, 2016, the applicant was provided with a decision on his appeal of his marks from his October 31, 2015, EER. The reviewing authority stated that he ultimately agreed with the applicant’s request for revision of his marks. He raised all fifteen marks to ten marks of 4 and five marks of 5 and he changed the conduct mark to “Satisfactory.” The reviewing authority added:

To be candid, in reviewing your record, I am troubled by your inability to take personal accountability and your failure to adhere to the Coast Guard’s Core Values. Your conduct as outlined in [the PIO’s] Report of Investigation clearly shows that you engaged in inappropriate text messages with another member of your command and displayed tendencies of predatory behavior. Your service record indicates that you have been counseled for this type of behavior in the past, and I find this repeated behavior egregious and not in keeping with the Coast Guard’s Core Values. While criminal charges against you have been dismissed, this evidence supports other authorized administrative actions.

To be clear, my reason for direction the revision of your EER stems from one fact: that both your misconduct and poor performance occurred prior to this marking period, and thus, should not be reflected in your marks for the period ending 10/31/2015. It is most appropriate for a previous set of marks to be revisited.

### ***Retroactive Revision of April 2015 EER & Disputed April 2016 EER***

On April 19, 2016, the applicant received a letter from his CO who informed him that his April 30, 2015, EER was being retroactively changed. Nine marks of 4 and 5 were being lowered to four marks of 2 and five marks of 3. In addition his conduct mark was changed to “Unsatisfactory” and he was “Not Recommended” for advancement. The CO added ten comments to the EER. The CO repeatedly referenced the sexual harassment allegations in the comments. For example, the Directing Others comment was changed to state:

[The applicant] is assigned the mark of a “3” for failing to meet all the components of a “4”, specifically the standard for: ‘knowing and using people’s abilities to ensure that high work standards are maintained.’ While participating as an instructor in a training exercise, he failed to instill confidence or maintain standards of work when he unnecessarily followed a female co-worker underwater and watched her, held onto her body for longer than necessary while demonstrating a water rescue technique, and tickled her leg. Furthermore, [the applicant] failed to meet a “4” - ‘keep others motivated toward the completions of work’ when he selfishly utilized the aforementioned training environment to inappropriately touch a female co-worker and watch her swim underwater. Due to her discomfort and his relentless desire to engage in this behavior, she voluntarily removed herself from the evolution thereby delaying her qualification. Additionally, despite his duty to not participate in this type of negative behavior and being trained and counseled on sexual harassment, he chose to engage in acts that satisfied the “2” block, specifically: ‘had difficulty in directing and influencing others effectively’ and ‘did not instill confidence in subordinates.’

The CO also repeatedly referenced the texting, for example, by saying that the applicant was in “pursuit of a prohibited, romantic relationship with a subordinate” and that he “attempted to engage in a prohibited relationship with a female co-worker, a person subject to his orders, and while married.” The CO stated that the applicant has “showed disregard for the feelings of his subordinate through making unwanted sexual advances, texts, and inappropriately touching her

during a unit training evolution.” The CO commented that the applicant had a lack of respect and remorse. Regarding the “Unsatisfactory” conduct mark, the CO stated that the applicant “failed to meet the minimum standards of conduct ... as evidenced by the Preliminary Investigative Report ... and CGIS Investigation.” The CO stated that the applicant had not earned his recommendation for advancement during that marking period because he had “demonstrated through his actions that he [was] unable and unwilling to perform the duties of his paygrade as evidenced through his lack of leadership, integrity, and professionalism.” (See Enclosure).

The applicant received his next regular EER on April 30, 2016. He has asked the Board to change his mark of “Not Recommended” for advancement to “Recommended.” He received one 3 (in Respecting Others), seven 4s, thirteen 5s, and four 6s. He received a “Satisfactory” conduct mark but was “Not Recommended” for advancement. There are only two comments. The first explaining the mark of 3 in Respecting Others reiterates the events that were documented in the December 15, 2015, Page 7. The second comment states that the applicant had not received his CO’s recommendation for advancement to the next higher pay grade because he had “not demonstrated the requisite tact and judgment required of a more senior Petty Officer ... [He] needs to channel his conviction in a positive and productive manner to gain the vital leadership and professional skills necessary to succeed at the next higher paygrade.”

### *Administrative Separation Board*

The ASB released its opinion on May 3, 2016, and ultimately recommended that the applicant be retained without probation. The ASB hearing was held on February 17, 2016. The applicant elected to appear before the ASB. The board made twenty findings of fact after conducting a formal hearing. The ASB first found that the applicant had a “pattern of misconduct and poor performance.” The ASB found that BM3 was a victim of domestic violence, which had occurred in early November 2014. It was noted that a certain member was the lead CGIS investigator on the applicant’s case. The board found “inconsistencies” in both BM3’s and the lead investigator’s testimony before the ASB. It was determined that BM3 and the lead investigator were “engaged in an inappropriate relationship,” but due to the inconsistencies in the lead investigator’s testimony it was not possible to determine when that relationship began.

The ASB found that the lead investigator was prepared to testify at the applicant’s SCM before the relationship was “exposed,” which ultimately led to the “dismissal [of the charges] two days before the court martial was scheduled to begin.” The investigator “admitted to deleting his personal texts and emails related to the relationship prior to his CGIS investigation.” He also gave BM3 a twenty-four hour period from December 4 to 5, 2014, before he required her to turn her cell phone in to forensics for a search of its contents. The lead investigator received “a two-week unpaid suspension for his inappropriate relationship with BM3.” The ASB found that the CGIS lead investigator, who had had a relationship with BM3, who “was responsible for developing the cell phone data report that was extracted from [BM3’s] phone,” which “was the basis of [the applicant’s] charges for which the board considered.”

The ASB found that BM3 reported that during Water Survival training on November 20, 2014, the applicant “touched/poked her leg, held her longer than necessary, and tickled her leg in the pool.” The applicant denied the allegations. There were “multiple members ... in the pool on

20NOV15, and none of them witnessed the allegations that [the applicant tickled or inappropriately touched BM3.” The ASB noted that previous “administrative investigations did not reveal additional evidence to support the allegation of harassment in the pool.” All of the witnesses testified that the applicant had used training standards and “common safety practices during pool training” on the day in question. The board found that the applicant and BM3 “engaged in extensive personal discussions via text messages.” The texting began in November 2014 and ceased on December 3, 2014, “at the request of BM3.” The ASB found that the applicant “did not engage in any personal or inappropriate communication with BM3 ... after she requested he stop.” The board further found that text messages from both the applicant and BM3 “were personal in nature and often inappropriate.”

In its opinion section, the ASB stated that it had “serious reservations related to the credibility and character” of the lead investigator. The relationship was “only revealed after the two were involved in a motorcycle accident two days before [the applicant] was scheduled to appear before court martial.” The lead investigator was “prepared and ready” to testify against the applicant before the case was dismissed. The investigator was “responsible for gathering critical evidence in the allegations against [the applicant].” The ASB stated that it was their opinion that the lead investigator “used his power and position to take advantage of a vulnerable BM3 ... The nature by which he conducted himself gives reason to question all of the evidence and specifically his testimony.” The ASB in particular did not believe that the lead investigator was truthful regarding the timeline of his relationship with BM3.

It was the ASB’s opinion that BM3 was a “victim on several levels in this case. She was targeted due to her vulnerability by both [the investigator and the applicant].” The ASB stated that BM3 had inconsistencies in her testimony which also gave the board reason to question her truthfulness, especially with regards to her relationship with the investigator. The board found that the applicant was romantically interested in BM3 and “attempted to take advantage of her situation for his own personal benefit” via text message. The board stated:

Despite his motivation, the board concluded that the overall totality of the text messages read like a consensual two-way conversation. Coast Guard policy related to sexual harassment states that if a member believes he/she is being harassed they shall tell the harasser that the behavior is unwelcome and request it cease. There were several opportunities for BM3 ... to tell [the applicant] to cease, but she failed to do so. In several text exchanges she welcomes continued conversation of a personal nature. Both members authored texts that the board considered inappropriate. [The applicant] ceased all personal communication with BM3 ... upon her first request.

There was no evidence presented that supported the allegation of inappropriate harassment in the swimming pool on 20NOV14.

The ASB noted that the applicant had a “pattern of mediocre performance coupled with several instances of misconduct” over his fourteen-year Coast Guard career. However, the board found that the “narrow focus of this administrative proceeding was to examine the two specific allegations of misconduct ... Thus, his performance was not considered as a reason for separation.” The board found that no basis for discharge was proven by a preponderance of the evidence. The ASB therefore recommended that the applicant be retained in the Coast Guard and not placed on probation. If the applicant were to be separated, the board recommended an honorable discharge. All members of the ASB agreed with this opinion.



The applicant's command negatively endorsed the ASB's decision on June 6, 2016. The CO stated that sufficient evidence was presented to meet "the mere 'preponderance of evidence' established by policy." He therefore requested that the applicant be separated from the Coast Guard. He stated that he had already determined before the ASB convened and after considering the evidence that it was "more likely than not [the applicant] engaged in sexual harassment, maltreated, and improperly touched BM3." The CO stated that his conclusion was supported by his own opinions and several findings he laid out. The CO asserted that the text messages, either "on their own or in totality" violated the sexual harassment policy. He stated that BM3 was "a credible witness and [had] no incentive to falsify allegations against [the applicant]."

The CO quoted the sexual harassment policy and asserted that the applicant had engaged in "seductive behavior" which was unwelcomed by BM3.<sup>11</sup> The CO stated that despite BM3's "repeated rejection ... his 'seductive behavior' escalated such that BM3 ... removed herself from training on 20 November 2014." The CO asserted that the ASB placed the burden of not being harassed on the victim by requiring her to tell the applicant to stop. He stated that it was the applicant's duty not to sexually harass her at all times. He also noted that BM3 was junior to the applicant and "required his approval for certain professional qualifications she was seeking."

The CO argued that the ASB "adopted a bias against all other credible evidence based on the relationship between BM3 ... and [the lead investigator]." He asserted that the ASB "unnecessarily focused on and detailed half of its findings and two of five opinions on issues that "were irrelevant to whether [the applicant] sexually harassed, maltreated, or unlawfully touched BM3." The CO claimed that the applicant's testimony during the ASB "completely contradicted the two interviews and written statements that [the applicant] provided during separate administrative investigations." (The ASB transcript is not in the record before this Board.) He stated that the relationship between BM3 and the lead investigator began in March 2015, which was months after the initial CGIS investigation was complete. The CO stated that even *if* the relationship had started before the events in question, that would not have changed the fact that the applicant sent the inappropriate text messages or acted as he did on November 20, 2014. The CO argued that other than extracting the cell phone forensic evidence on December 4, 2014, the lead investigator was not responsible for gathering critical evidence against the applicant.

The CO also argued that the ASB's report "contained numerous factual errors that wrongly depicted or improperly weighted certain events" and listed two instances. First, the CO pointed out a typo, wherein the ASB had written 03DEC14 but clearly had meant 03DEC15. Second, he took issue with the sentence "[Lead investigator's] initial investigation on 04DEC14 was the basis of [applicant's] charges." He stated that any report of sexual assault must be reported to CGIS, so the report of sexual assault was the basis.

Given the applicant's 2001 counseling for "possible sexual harassment" and the reasons given above, the CO negatively endorsed the ASB's recommendation. He recommended that the applicant be separated "for the benefit and good order and discipline."

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<sup>11</sup> Civil Rights Manual, COMDTINST M5350.4, Article 2.C.2.d.

On July 22, 2016, the ASB report received a second negative endorsement from the Area reviewing authority. He stated that he did not concur with the ASB's findings and recommendations. Instead, he concurred with the CO's June 6, 2016, endorsement.

On January 6, 2017, the Final Reviewing Authority for the ASB approved the recommendation of the board to retain the applicant.

### *Separation Due to High Year Tenure*

In February 2017, the applicant transferred to a new permanent command.

On November 6, 2017, the applicant requested a waiver of HYT Professional Growth Point from the Personnel Service Center (PSC). He stated that he understood that if he did not receive a waiver he would be separated no later than September 1, 2018, because he was not eligible for retirement. He asked to be retained "because of legal and personal concerns rising from being accused of sexual harassment and assault in 2014 which kept [him] from being able to effectively compete for advancement until May of 2017." He maintained that he had been falsely accused and stated that he had applied to this Board. He asserted that due to being "Not Recommended" for advancement on his EER, he was not able to take the SWEs, although he was vague about which SWEs he was prevented from taking. He stated that he was able to compete for advancement in May 2017 and he ranked twenty-third out of 172 and he also had taken the November 2017 SWE. He stated that he was a highly motivated individual with career goals and ambitions and asserted that he could still be a valuable asset to the Coast Guard.

Also on November 6, 2017, the applicant's new permanent command positively endorsed his HYT waiver request. His new CO stated that the applicant had "proven to be a valuable asset to the unit, serving professionally and displaying our Core Values daily." The CO spoke highly of the applicant's experience and knowledge in his rating. He particularly spoke highly of the applicant's training programs where he was a team leader and was "directly responsible for the qualification of multiple boarding officers and boarding team members." The CO stated that the applicant had the command's high recommendation for retention past his HYT Professional Growth Point and a waiver while his BCMR case was pending.

On November 8, 2017, the applicant's waiver request received a second positive endorsement from the Sector reviewing authority, Captain S. Captain S stated that he concurred with the CO's endorsement. Captain S stated that the applicant was unable to participate in several SWEs due to UCMJ violation charges, but those charges were withdrawn due to a lack of evidence.

On December 6, 2017, PSC denied the applicant's request for waiver of his HYT Professional Growth Point. He was informed that he would be separated on September 1, 2018, the date of discharge required by HYT policy.<sup>12</sup> The applicant was honorably discharged on September 1, 2018.

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<sup>12</sup> Military Separations Manual, COMDTINST M1000.4, Article 3.G.1.a. ("All HYT candidates (E-3 to E-8) will separate, or retire if requested and retirement eligible, no later than 1 September of the year following the year their active military service time exceeds their PGP, unless granted a HYT PGP waiver.").

## VIEWS OF THE COAST GUARD

On September 10, 2018, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case.<sup>13</sup> The JAG took the position that even without the sexual harassment allegations, the applicant would not have been able to advance in rank prior to his HYT Professional Growth Point and therefore would have been separated on September 1, 2018, in any event.

The JAG stated that the applicant advanced to BM2 on October 31, 2008. He changed his rate to Maritime Enforcement Specialist (the ME rating) on April 30, 2010, and became an ME2. The applicant received a Special EER on November 18, 2008, after being disciplined and was not recommended for advancement. The JAG noted that the applicant was also not recommended for advancement on EERs on October 31, 2008; October 31, 2012; April 30, 2015; and April 30, 2016. The JAG stated that these five “Not Recommended” marks “were the only times the Applicant would have been ineligible to sit for a Service Wide Exam (SWE) or otherwise advance.”<sup>14</sup> The JAG pointed out that there had been approximately fourteen opportunities over the applicant’s ten years as a BM2 and ME2 for him to sit for the SWE to compete for advancement.

The JAG argued that the command’s decision to initiate a “second investigation was not an error or unjust.” The JAG admitted that “it is not standard to order a second investigation” but asserted that “there are no policies or procedures that prohibit the [ordering of a] re-investigation into the allegations of a violation of a law or policy.” The command had sought legal advice which confirmed that the first investigation report “failed to document or analyze the myriad of text messages that preceded the alleged inappropriate conduct.” The JAG stated that the second investigation was “more thorough and laid out evidence to support its conclusions.

The JAG stated that just as the applicant was within his right to refuse an NJP, the command was “within its discretion to proceed with seeking administration separation, changing EER’s, and issuing negative Page 7’s.” The JAG argued that none of these actions were improper or unjust. The JAG asserted that the changes to the April 2015 EER were based on the findings of the investigation and were performed pursuant to policy and without error. The JAG noted that the applicant had fifteen days to appeal his April 30, 2015, EER marks when they were retroactively changed but there was “no evidence of an appeal.” In addition, the JAG asserted that when the disputed EER was originally completed by the applicant’s temporary command, the investigation was still pending. The JAG stated that it was “understandable that the command would avoid commenting on matters under investigation in the Applicant’s regular EER until some final action was taken.” The JAG admitted the Coast Guard had erred in citing events from a previous marking period in the applicant’s original October 2015 EER, but noted that this error has already been corrected.

The JAG stated that the applicant’s main argument was that the ASB found that BM3 was not credible and therefore his command was not permitted to consider any of the information

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<sup>13</sup> The JAG sent the BCMR a supplementary memorandum on October 25, 2018, but it was not in the applicant’s favor and it arrived well past the Chair’s deadline for an Advisory Opinion in this case. Therefore, the memorandum and enclosures will be sealed and not considered by the Board.

<sup>14</sup> Enlisted Accessions, Evaluations and Advancements manual, COMDTINST M1000.2, Article 3.A.4.b.(3).

resulting from the administrative investigation. The JAG argued that a “command’s evaluation of a member, including what facts to consider and what credibility to give certain evidence, is solely within the command’s discretion and is separate and distinct from other administrative actions.” Therefore, the command was not bound by the recommendations of the ASB or the final action of the separation proceedings. The JAG asserted that given the “numerous text messages between the applicant and his subordinate and the statements made by the victim to the investigating officer, the command’s evaluation of the evidence was not clear error nor manifestly unjust.”

The JAG also emphasized that the applicant was ultimately discharged pursuant to the HYT process while he was stationed at his new command, which had nothing to do with the command in question. The applicant had been a Second Class Petty Officer for approximately nine years when the HYT process was published in 2017. The JAG argued that the applicant failed “to explain how the alleged actions of the [previous] command prevented him from reaching his professional growth points either before he was stationed [there] or after he transferred” to his final command. The JAG pointed out that the applicant’s HYT waiver request “places blame squarely on the ‘... accus[ation] of sexual harassment and assault in 2014 which kept [him] from being able to compete for advancement until May of 2017.’” The JAG stated that this accusation ignores the “fact that there were potentially 14 SWE cycles during which he failed to advance to First Class Petty Officer.” The JAG also stated that denying the applicant’s HYT waiver request was not an error or unjust, as that decision is at the sole discretion of the Commander PSC-EPM. The JAG argued that given the applicant’s “record of several instances of not being recommended for advancement and having previous disciplinary actions taken against him, this decision was not clearly an error or manifestly unjust.” Therefore, the JAG asserted that there was no error or injustice in the applicant’s record and recommended that the Board deny the requested relief.

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

On September 17, 2018, the Chair sent the applicant a copy of the Coast Guard’s views and invited him to respond within 30 days. He responded on September 27, 2018, and stated that he disagreed with the Coast Guard’s advisory opinion.

The applicant addressed the Coast Guard’s contention that the first investigation “failed to document or analyze the myriad of text messages that preceded the alleged inappropriate conduct.” The applicant pointed out that the first investigation report stated that the “CGIS report contains texts sent between [the applicant] and [BM3] while some texts are inappropriate; there are no texts in the report that would be categorized as violations of the Uniform Code of Military Justice.” The first investigator went on to state that although there were “no apparent UCMJ violations, some of the texts ... could be deemed inappropriate.” The applicant argued that the first investigation “clearly address[ed]” the text messages and found no violation. The applicant stated that during the ASB hearing, the first investigator testified that he felt he had conducted a thorough investigation. The first investigator had also testified that it was his impression that the applicant’s command was going to pursue charges against him no matter what the recommendation of the investigation was.<sup>15</sup>

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<sup>15</sup> The applicant stated that he did not have a copy of the transcript of the ASB hearing, but he did have a copy of the audio recording for all three days should the Board wish to hear it.

The advisory opinion stated that the second investigation was “more thorough and laid out evidence to support its conclusions.” The applicant argued that there was no evidence to support the PIO’s conclusions because he “looked at the same CGIS report and took the statements of the previous investigation and came to his conclusion.” The applicant claimed that the command was able to find an investigator who would write a report as they wished. He stated that the PIO was an Ensign and had received a Driving Under the Influence (DUI), which usually leads to an automatic discharge. He was allowed to advance to Lieutenant Junior Grade because the applicant’s command “helped him push through his advancement.” The applicant admitted he is unable to prove this and stated he only heard about it secondhand. However, he stated, he did know that the PIO was discharged prior to the applicant’s ASB and that the PIO did not respond to requests from Legal to testify.

The applicant stated that in addition to the first CGIS investigator testifying at the ASB that his command was going to pursue charges against him no matter what, the command’s Operations Officer also testified that he felt that the command was after a specific negative outcome against the applicant. The applicant stated that he disagreed with the Coast Guard’s assertion that it was not improper for his command to seek administrative separation, change EERs, and issue negative Page 7s. He argued that his SCM charges had been dropped by the time these actions had been taken. The applicant stated that given all of the evidence, it is clear that his command was in pursuit of a guilty outcome and did not give him the presumption of innocence to the point that it “shocks the sense of justice.”

Regarding his April 2015 EER, the applicant again asserted that his SCM charges were dropped and that his presumption of innocence should have remained in effect, as he was never tried at NJP or court martial. In response to the JAG’s claim that the command was waiting for the completion of the investigation or the resolution of the court-martial before taking administrative action, the applicant noted that the second administrative investigation, even assuming there was new information in it, was completed sometime around late January 2015 and well before his original April 2015 EER was prepared. The April 2015 EER was changed in April 2016, almost a year after the original EER and after his command had failed at attempting to punish him in his October 2015 EER. The applicant asserted that this was further proof of injustice in his record.

The applicant stated that the Coast Guard was correct in stating that he had only appealed his October 2015 EER and not the changed April 2015 EER. He stated that it became apparent to him and his legal team that “any further appeals at that time wouldn’t achieve the relief [he] was seeking.” He explained that throughout this process he was also handling “personal battles on the mental and family front due to the stress that was created during this entire battle.” He stated he had also initiated an Inspector General investigation and an inquiry with his Senator’s office, so he did not “have the time to appeal every item that was presented against [him].” His legal team advised him that the BCMR had the ability to go back and fix errors and injustices in the record, so he had decided not to appeal this EER at the time.

Regarding his HYT request, the applicant asserted that the sexual harassment allegations did have an effect on the waiver denial and his ultimate separation from the Coast Guard. While he admitted he does not know for sure what PSC considered when making its decision, he stated that he could only imagine that when considering whether or not to grant his HYT waiver request

PSC looked at his record, which includes “the numerous negative/false items from all of the events going back to 2014.” He stated that he believed this was the reason the HYT waiver request was ultimately denied.

The applicant stated that the Coast Guard was also correct that he had not attempted to advance to the next rank until the May 2017 SWE, but he stated that a portion of this delay was due to not being “Recommended” for advancement as a result of the events at issue here. He stated that for transparency, he wanted to explain his career choices before that date to the Board. He stated that when the ME rate was created he was advised of the various billets that were created. One of those jobs was the aerial use of force (AUF) where members would be a precision marksman in a helicopter shooting at the boat engines of illegal drug runners. The applicant stated that he was eager to get this position. The biggest setback, he learned, was that this position was made almost entirely of E-5 billets and only a few E-6 billets. So, his goal became to get the job as an E-5 and to advance afterwards, thinking that once the Coast Guard paid to train him as an AUF he would be more likely to get the E-6 slot as an AUF as well. When he received his next duty assignment and it was not AUF, his goal remained the same. He continued to take on leadership roles and achieve qualifications to make him a good candidate for an AUF billet. Once the accusations against him began, he “was neither able to achieve [his] goal of an AUF billet, or muster the amount of focus [he] would have needed to study and advance off the SWE.” He stated that when he did take the SWE, he placed twenty-third. Based on the previous years, this would have placed him on the first cut for advancement. However, the advancements were cut drastically for his rate in 2017 and he did not advance before his Professional Growth Point and his HYT deadline.

The applicant updated the Board that as of September 1, 2018, he was separated from the Coast Guard. As of September 2, 2018, he began as an E-5 in the Coast Guard Reserve. He asked that in addition to his original requests that he be reinstated on active duty and be awarded all back pay and allowances.

### **APPLICABLE REGULATIONS**

The Discipline and Conduct manual, COMDTINST M1600.2, Article 2.A.2.c. discusses acceptable personal relationships. It states:

As people work together, different types of relationships arise. Professional relationships sometimes develop into personal relationships. Service custom recognizes that personal relationships are acceptable provided they do not, either in actuality or in appearance:

- (1) Jeopardize the members' impartiality,
- (2) Undermine the respect for authority inherent in a member's rank or position,
- (3) Result in members improperly using the relationship for personal gain or favor, or
- (4) Violate a punitive Article of reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended).

Article 2.A.2.f.(1) states that romantic relationships between members are unacceptable when the members “have a supervisor and subordinate relationship (including periodic supervision of duty section or watchstanding personnel).”

Article 2.B.1.c. states that illegal discrimination is prohibited in the Coast Guard. According to Article 2.B.1.a., illegal discrimination is defined as “any intentional action or omission that results in the adverse treatment of a person because of that person's race, color, religion, national origin, disability, handicap, age or gender, including sexual harassment or intentional actions or omissions in reprisal.”

Article 2.B.2.b. discusses sexual harassment. It states:

Commanding officers and officers in charge have a responsibility to look into all allegations of sexual harassment and to take prompt and effective action. They must be aware of all courses of action available to them to deal with sexual harassment allegations. They generally fall into three categories - discrimination complaint processes, administrative processes, and reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended), provisions. These actions are not mutually exclusive and two or all three of them may be pursued simultaneously. The actions taken by a command in a particular case will depend upon the severity of the conduct, the state of the evidence, the limits of the commander's authority, and other such factors. Specific questions regarding prosecuting offenders should be addressed to the command's servicing legal office.

(1) Sexual Harassment. Reference (1), Coast Guard Civil Rights Manual, COMDTINST M5350.4 (series), establishes the sexual harassment prevention system for the Coast Guard. It is intended to provide a single point of focus for the Coast Guard's efforts to prevent sexual harassment. ...

(3) Administrative Action. Prompt, appropriate administrative action should be taken simultaneously with discrimination complaint processes, with respect to sexual harassment offenders, when a command has sufficient information to reasonably believe an incident has occurred. It is not necessary to await the completion of the procedures set forth in the above paragraph. Commands have a wide variety of actions available which include but are not limited to informal or formal counseling, evaluation in performance reports, and formal performance reviews, which could lead to separation.

The Civil Rights Manual, COMDTINST M5350.4C, Article 2.C.2.b.3. defines sexual harassment as “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when ... [s]uch conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.”

Article 2.C.2.d. defines seductive behavior as “any unwanted, inappropriate, and offensive sexual advance. Unwelcome persistent requests for dinner, drinks, or dates, repeated unwanted sexual invitations, letters, phone calls, or other invitations, even though the respondent says ‘no,’ are examples of seductive behavior.” Touching a person in a way that makes them feel uncomfortable was also given as an example of unwanted sexual attention which creates an “intimidating, hostile, or offensive environment.”

The Military Separations manual, COMDTINST M1000.4, Article 1.B.17.b.(3)., discusses discharging a member for misconduct for commission of a serious offense. Discharge for this reason does not require that the member be tried at NJP or court-martial. In addition, an acquittal or finding of not guilty does not prohibit proceedings under this provision. However, to discharge a member for commission of a serious offense the underlying event must be proven by a preponderance of the evidence. The command may rely on police reports, CGIS reports and the like to determine that the member committed the offense.

Article 3.B.2. states that Professional Growth Point is defined as the “maximum amount of active military service a member can have for their current pay grade.” Article 3.B.3.b. explains that a member in pay grade E-5 always becomes a HYT candidate on December 31, regardless of when his actual active duty anniversary is. Article 3.B.4. states that a HYT Professional Growth Point waiver allows a member “to continue on active duty past the required separation or retirement date.” Article 3.C. states that the Professional Growth Point for an E-5 is sixteen years of active military service.

The Enlisted Accessions, Evaluations and Advancements manual, COMDTINST M1000.2, Article 3.A.4.b.(3), states that COs are responsible for execution of the advancement program. The CO’s “recommendation for advancement is the most important eligibility requirement in the Coast Guard advancement system. Although minimum performance factors have been prescribed to maintain overall consistency for participation in SWE, the CO ... will be personally satisfied that the member's overall performance in each factor has been sufficiently strong to earn the recommendation.”

Article 3.A.25.b. states that cutoff points for advancement are established for each enlisted rating based on anticipated vacancies. The Commander, PSC, announces the cutoff points in a message quarterly which provides the cut off number and advance sequence. “Only those members whose name appears above the cutoff and not a High Year Tenure (HYT) candidate are guaranteed advancement, if otherwise eligible.”

Regarding changing EER marks, Article 4.E.2. states that the approving official is “authorized to change any mark they assigned to members still attached to the unit if the approving official receives additional information that applies to the particular employee review period.”

### 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. The application was timely.
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.<sup>16</sup>
3. The applicant alleged that his April 2015 and 2016 EERs, the Page 7 in his record dated November 9, 2015, and his separation under HYT were erroneous and unjust. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant’s military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed

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<sup>16</sup> *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).



information is erroneous or unjust.<sup>17</sup> Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties “correctly, lawfully, and in good faith.”<sup>18</sup>

4. The applicant was discharged under HYT on September 1, 2018, because as of December 31, 2017, he had more than sixteen years of active service and had not advanced beyond E-5.<sup>19</sup> The applicant had numerous opportunities to take the SWE to try to advance from 2009 to 2015 but did not do so.<sup>20</sup> In particular, he could have taken the May 2015 SWE or the November 2015 SWE because he was recommended for advancement on his October 31, 2014, EER, and his original April 30, 2015, EER, which was not amended until the following year. His original October 31, 2015, EER was not completed with a non-recommended mark until December 2, 2015, after the date of the November 2015 SWE, but it prevented him from taking the SWE in May 2016 because his CO did not recommend him for advancement.<sup>21</sup> Although this mark was later changed to Recommended pursuant to the applicant’s EER appeal, the mark was not changed until after the February deadline for qualifying to take the May 2016 SWE. In addition, the applicant was not allowed to take the November 2016 SWE because his CO did not recommend him for advancement on his April 2016 EER.

5. The applicant argued that his discharge under HYT was erroneous and unjust because he would have been allowed to compete for advancement earlier and would have advanced to E-6 and not been subject to HYT if his CO had recommended him for advancement on his EERs. He argued that the CO’s non-recommendations for advancement, which prevented him from taking the SWE for advancement in April 2016 and November 2016,<sup>22</sup> were based on erroneous information and prejudice and should be removed from his record. To recommend a member for advancement, a CO must consider not only past performance but “the member’s potential to perform satisfactorily the duties and responsibilities of the next higher pay grade, qualities of leadership, personal integrity, and adherence to the Service’s core values.”<sup>23</sup> The CO must find that the member “is fully capable of satisfactorily performing the duties and responsibilities of the next higher pay grade.”<sup>24</sup> And if a member is not recommended for advancement, the rating chain “must counsel the member on the steps necessary to earn a recommendation for advancement and prepare supporting remarks.”<sup>25</sup>

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<sup>17</sup> 33 C.F.R. § 52.24(b).

<sup>18</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

<sup>19</sup> COMDTINST M1000.4, Article 3.B.3.b. (“A member whose active military service time is greater or equal to their PGP [Professional Growth Point] each year on 31 December, beginning 2015. Regardless of the exact date a member passes their PGP during a calendar year, 31 December will be the cut-off that determines whether or not a member is a HYT candidate. The member shall become a candidate on 31 December. Members are responsible for knowing their ADBD and understanding when they become a HYT candidate.”); Article 3.C. (showing that the PGP for an E-5 is 16 years of active service).

<sup>20</sup> COMDTINST M1000.2, Article 3.A.14. states that to advance from E-5 to E-6, a member must have completed certain qualifications and 12 months of service in their current rating.

<sup>21</sup> *Id.* at Article 3.A.5 m.

<sup>22</sup> *Id.* at Articles 3.A.4.b.(3) and 3.A.5 m.

<sup>23</sup> *Id.* at Article 4.D.3.a.

<sup>24</sup> *Id.* at Article 4.D.3.b.1.

<sup>25</sup> *Id.* at Article 4.D.3.c.

6. The record shows that the applicant's CO did not recommend him for advancement on his original October 2015 EER because of text messages collected from a female BM3's phone by a CGIS investigator. The command decided that these texts and BM3's statement showed that the applicant had sexually harassed and sexually assaulted BM3 during a two-week period from November 20 to December 3, 2014, after he found her crying because her husband had been arrested due to domestic violence. The Board finds, however, that the CGIS investigator's spreadsheet compiling the texts is not a reliable record of their exchanged text messages for three reasons:

- a. First, the CGIS lead investigator who collected the texts was found to have been involved in an affair with BM3, which resulted in the dismissal of the criminal charges against the applicant. The exact date they became involved in their affair is unknown, but in a text to the applicant at 10:16 p.m. on November 19, 2014, BM3 stated that she had been interviewed by CGIS agents for a long time—presumably regarding her husband's arrest—and was told that she was “fascinating.” After questioning the CGIS investigator, the ASB found that he had “admitted to deleting his personal texts and emails related to the relationship prior to his CGIS investigation,” which indicates that their relationship began before he took the texts from BM3's phone on December 5, 2014.
- b. Second, the CGIS investigator informed BM3 that he would be taking her phone for evidence on December 4, 2014, but did not take it from her until December 5, 2014, which gave her a full day to delete any texts she did not want to be seen, just as the investigator had done. She could easily have deleted texts of her own that would have cast a different light on the applicant's texts to her.
- c. Third, the CGIS investigator's spreadsheet of the text messages between the applicant and BM3 is inaccurate. According to his spreadsheet, they discussed building a snowman on November 20 and 28, 2014, but according to NOAA, there had been no snow and there was no snow or rain in the forecast in that area on November 20, 2014.<sup>26</sup> The first appreciable snow occurred more than a week later on November 28, 2014. In addition, the investigator dated a comment of BM3's—“Yeah, I know how you feel. Some people are just happier in open relationships. Sometimes it takes other people to remind you how good you have it. Kids make it so much more difficult too.”—just after the misplaced discussion of the snowman on November 20, 2014, but BM3 and the applicant did not have this personal discussion about relationships until November 26, 2014. Finally, according to the spreadsheet, the applicant sent BM3 texts that appear to be responses to texts that are not in the spreadsheet.

7. Therefore, in finding that the applicant had sexually harassed BM3, his command relied on the CGIS investigator's unreliable spreadsheet of their text conversations. His command also concluded from the BM3's statement that the applicant had sexually assaulted her by holding her too long during a demonstration of a lifesaving technique in the pool after she told him that she understood the training and that he later tickled her. Although four other members who were

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<sup>26</sup> See <https://www.ncdc.noaa.gov/cdo-web/quickdata> (last visited November 16, 2018).

watching the demonstration stated that the applicant did not hold BM3 too long or inappropriately touch or tickle her, the command relied entirely on BM3's statement regarding the alleged assault because they concluded that she had no reason to lie. BM3, however, was both married and involved in an affair with the CGIS agent who was investigating her case and viewing her flirtatious texts with the applicant. In addition, the ASB found that BM3's testimony at the hearing was inconsistent. Therefore, the Board finds that the applicant has proven by a preponderance of the evidence that in concluding that he had sexually assaulted BM3 at the pool, his command relied on unreliable evidence.

8. The record shows, however, that the applicant sent the BM3 several inappropriate and suggestive texts when they were both married and her husband had recently been arrested for domestic violence. The ASB found that BM3 had been "targeted due to her vulnerability by both [the CGIS investigator and the applicant]" and that the applicant was romantically interested in BM3 and "attempted to take advantage of her situation for his own personal benefit" via text message. Even as presented in the CGIS investigator's spreadsheet, "the overall totality of the text messages [the ASB concluded] read like a consensual two-way conversation. Coast Guard policy related to sexual harassment states that if a member believes he/she is being harassed they shall tell the harasser that the behavior is unwelcome and request it cease. There were several opportunities for BM3 ... to tell [the applicant] to cease, but she failed to do so. In several text exchanges she welcomes continued conversation of a personal nature. Both members authored texts that the board considered inappropriate. [The applicant] ceased all personal communication with BM3 ... upon her first request." Therefore, the ASB recommended that the applicant be retained on active duty.

9. The ASB's recommendation and the Final Reviewing Authority's decision not to discharge the applicant, however, are not evidence that he should have been recommended for advancement by his command. As noted above, to recommend a member for advancement, a CO must consider both past performance and "the member's potential to perform satisfactorily the duties and responsibilities of the next higher pay grade, qualities of leadership, personal integrity, and adherence to the Service's core values."<sup>27</sup> The applicant argued that the CGIS investigator's spreadsheet of the texts so prejudiced his command against him that they were unable to properly reassess the credibility of the evidence after the affair between the CGIS investigator and BM3 was discovered. Based on the evidence of record showing that the command was prejudiced by the unreliable evidence compiled by the CGIS investigator and failed to maintain appropriate and accurate records, the Board agrees:

- a. The record shows that after the first administrative investigation concluded largely in the applicant's favor, the command decided that the investigation was insufficient and, instead of directing the first investigating officer to do a more thorough job, appointed a second officer as PIO to conduct a second administrative investigation based essentially on the same evidence that was addressed by the first investigating officer. Nothing in the Administrative Investigations Manual prevented the command from directing a second PIO to conduct a second administrative investigation, but the command's actions indicate that the CO wanted the

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<sup>27</sup> COMDTINST M1000.2, Article 4.D.3.a.

PIO to reach a different conclusion so that in charging the applicant, the CO would not have to making findings contrary to the administrative investigation.

- b. The command, apparently intent on criminal proceedings against the applicant, failed to timely document his inappropriate conduct with BM3 in his April 2015 EER and allowed it to be entered in his record with good marks and a recommendation for advancement even though the CGIS investigation and both administrative investigations had been completed for many weeks.
- c. In charging the applicant, his command wrote on the Report of Offense and Disposition that he had had “inappropriate interactions with a junior member in his direct chain of command.” The applicant was not, however, in BM3’s direct chain of command and saying so was prejudicial to him. The applicant was in charge of Water Survival training and qualification at the unit, but Coast Guard records show that he was assigned to a different division of the unit than BM3.
- d. Although the command was permitted to document the applicant’s 2014 misconduct on a Page 7 in 2015 and should have documented it on his April 2015 EER, the preparation of the November 9, 2015, Page 7 and of the derogatory October 31, 2015, EER (with numerical marks erroneously based on conduct during the prior reporting period) so quickly after the criminal charges against the applicant were dismissed in October 2015 does suggest that it was dismay about the dismissal of the criminal charges that inspired the command to prepare the Page 7 and derogatory EER.
- e. In preparing the comments to support the non-recommendation for advancement on his October 31, 2015, EER, the command wrote that the applicant was actually “not capable of performing the duties and responsibilities of the next higher pay grade”—not that he had not shown himself to be ready for those responsibilities. In addition, the command failed to include comments telling the applicant how his performance needed to change to earn a recommendation for advancement, as required by Article 4.D.3.c. of COMDTINST M1000.2.
- f. The CO mischaracterized certain facts on important documents in ways that were prejudicial to the applicant. For example, when the CO negatively endorsed the applicant’s appeal of his October 31, 2015, EER, the CO stated that BM3 had “initiated a preference statement requesting that the case not proceed to court-martial and be handled administratively.” While this may be true, she would have done so after she was involved in a motorcycle accident with the CGIS lead investigator and it was discovered that they had been having an adulterous affair, calling into question their integrity and much of the evidence. None of this was mentioned by the CO in his endorsement. In addition, the CO stated in a comment on the changed April 30, 2015, EER (as revised on April 19, 2016) that because the applicant supposedly swam underwater to watch BM3 she “removed herself from the evolution thereby delaying her qualification.” The swim portion that BM3 had engaged in was unscored that day, as she herself noted in her statement to CGIS,

and BM3 could not have gained any qualification by swimming six laps. The only portion being scored that day was the water rescue portion, which she successfully completed.

10. Based on the CGIS investigator's spreadsheet compiling the texts between the applicant and BM3 and BM3's statement, the command was convinced that he had sexually harassed and assaulted her. As noted above, however, the spreadsheet is unreliable, the BM3 may have had reason to lie about what the applicant did at the pool, and—knowing that—the ASB found that there was insufficient evidence of sexual harassment or assault and that the inappropriate flirting went both ways. The Board agrees with the ASB:

- a. Regarding the Water Survival training incident, BM3 had stated that the applicant swam between her and the pool wall while wearing goggles, held her too long during a demonstration, and tickled her leg twice. There is no corroborating evidence that the applicant swam inappropriately close to BM3 at the pool or watched her with goggles on. The witnesses who watched the demonstration were asked by the investigators if the applicant had done "anything that would warrant investigating" and all answered in the negative. In addition, BM3 herself told the applicant in a text on November 20, 2014, at 7:34 p.m. that a different member had been "watching the whole time" when she was trying to sink. In fact, she and the applicant texted steadily after the Water Survival training from 6:27 p.m. until 12:34 a.m.
- b. BM3 claimed that she was unable to finish the swim portion of the training because of how uncomfortable the applicant had made her feel by swimming next to her, which she said was unnecessary. But in her text messages to the applicant on that same evening she stated "I'm sooo weak that I can't even swim without shaking like crazy and I'm always on the brink of bursting out in tears."
- c. As far as holding or tickling BM3 inappropriately, all of the witnesses also stated that they did not see these actions occur. The members watching the demonstration presumably would have noticed if the applicant had held BM3 unnecessarily long for the purpose of the demonstration as many eyes would have been on them.
- d. Regarding the text messages, the command's PIO found that the applicant had engaged in sexual harassment, as did the command. Sexual harassment is defined as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when ... [s]uch conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."<sup>28</sup> The PIO pointed out that the applicant sent BM3 over two hundred text messages from November 19 to December 3, 2014. What he did not point out, however, is that BM3 also sent the applicant many text messages in return. In addition, he was apparently unaware that BM3 was given the opportunity to delete any texts to the applicant that she did not want the command to see.

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<sup>28</sup> Civil Rights Manual, COMDTINST M5350.4C, Article 2.C.2.b.3.

- e. In accusing the applicant of sexual harassment, the PIO and the command did not accuse him of “requests for sexual favors.” Therefore, in light of the Coast Guard’s definition of “sexual harassment,” the question is whether the applicant’s text messages were “*unwelcome* sexual advances ... and other verbal ... conduct of a sexual nature” and whether that conduct unreasonably interfered with BM3’s work performance or created “an intimidating, hostile, or offensive working environment” (emphasis added). BM3 claimed that the applicant made her feel uncomfortable. She stated that the applicant asked several times if she had the Find My Friends application so that “he would know exactly where [she] was, and then he could come there,” which she found “pretty creepy.” What the applicant said to BM3 was “you could add me and then be able to see where I’m at. That way you could know where I’m at if you needed me or just wanted to come to my place.” BM3 stated that the applicant kept asking her out to eat and that she kept coming up with excuses to say no because she felt that it was inappropriate to go out to eat alone with someone who was in charge of her qualifications. She claimed that the applicant had misunderstood her when she told him that she loved flirting because she had meant it in a general sense and not towards the applicant. She also stated, “He said he would come to my house and help out, even after I said that I didn’t need it.” However, several of the applicant’s invitations included his wife, and on November 20, 2014, when the applicant offered to help with yard work and BM3 replied, “I’ve raked soooo many leaves already, I only have a few more bags to go. I appreciate it though! I’m sure I will have more projects come up where I’ll definitely need two people and I’ll definitely let you know if so.”
- f. As soon as BM3 asked the applicant to stop texting her on personal issues, he did so. BM3 acknowledged in her statement for CGIS and in her text message to the applicant asking to keep their messages professional that she should have said “stop” earlier in their conversations. And there were not only multiple opportunities in their conversations for BM3 to ask the applicant to stop, there were multiple times where she indicated willing participation and even encouraged the applicant’s behavior. For example, on November 19, 2014, she stated “I know I’m really quiet and shut off and stuff but it doesn’t mean I don’t need to hear stuff like that. So thank you so much.” Later on that evening she stated “I don’t mean to make things weird and I’m sorry that I made ya nervous. I’m a cool girl, though, I won’t bite.” On November 21, 2014, the applicant had said he felt like he was smothering BM3, to which she replied “Don’t feel like that, I’m just stubborn and it’s hard for me to talk. I appreciate that you check in.” On November 23, 2014, in response to an invitation to the aquarium, BM3 went so far as to say “I hate that it feels like I say no a lot” to his invitations. Some of the applicant’s text messages are clearly inappropriate given that they were both married and he was in charge of determining one of her qualifications. However, he was not her supervisor, and based on her replies, it is not clear to the Board how he could have known that his texts were “unwelcome” until she told him to stop on December 3, 2014. Then he stopped as soon as she told him.

11. The applicant asked the Board to revert his April 30, 2015, EER back to the marks he received before his command retroactively changed it. The applicant argued that his EER was changed as a form of retribution and because his command was out to get him. The Coast Guard argued that, given the timing, it was likely that the command was waiting on the results of the investigation and of the SCM. The timeline in reference to the April 30, 2015, EER is as follows:

- December 4, 2014: CGIS investigation begins.
- December 15, 2014: CGIS investigation is complete.
- January 8, 2015: The first administrative investigator submits his report.
- Sometime around January 27, 2015: The PIO submits the second administrative investigation.
- April 30, 2015: The original semiannual EER for the reporting period in which the inappropriate texting occurred is completed with good marks.
- June 2 and August 24, 2015: The applicant is charged with UCMJ violations.
- October 23, 2015: All charges are dropped.
- December 2, 2015: The applicant receives his semiannual EER dated October 31, 2015, with poor marks and comments based on the alleged sexual harassment and assault during the previous reporting period.
- March 23, 2016: On appeal, the applicant's October 31, 2015, EER is changed in his favor.
- April 19, 2016: The applicant's command informs him that his April 30, 2015, EER is being retroactively changed.

12. When the applicant's command ultimately changed his April 2015 EER marks on April 19, 2016, almost a full year later, the command had not received any new information about his performance during the reporting period since it had ended on April 30, 2015. The only additional information they had received was that the criminal charges against him had been dropped because of the affair between the CGIS investigator and BM3. The command had already received the CGIS investigation and both administrative investigation reports months before the EER reporting period ended on April 30, 2015. While an approving official may retroactively change an EER's marks and comments, the rule states that the approving official may change an EER "if the approving official receives additional information that applies to the particular employee review period,"<sup>29</sup> which was not true in this case. Therefore, the Board finds that the applicant has proven by a preponderance of the evidence that his CO retroactively changed his April 30, 2015, EER marks a year later without receiving any new information about the applicant's performance and conduct during that rating period, contrary to regulation. Because the record before the Board includes the marks and comments that the applicant was originally assigned on his April 2015 EER, his record should be corrected by reverting the marks to what they were before the changes were made on April 19, 2016.

13. The applicant requested that the November 9, 2015, Page 7 be removed from his record. He argued that the Page 7 was another form of retribution after the criminal charges against him were dismissed in October 2015. Although nothing prevents a command from documenting misconduct on a Page 7 a year after the fact, for the reasons stated above, the Board finds that the

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<sup>29</sup> COMDTINST M1000.2, Article 4.E.2.

text of this Page 7 characterizing his conduct as sexual harassment and sexual assault is based entirely on the CGIS investigator's unreliable compilation of the texts and on BM3's unreliable statements to that investigator. Therefore, the applicant has proven by a preponderance of the evidence that the November 9, 2015, Page 7 is erroneous and unjust, and it should be removed from his record in its entirety.

14. The applicant requested that his mark of "Not Recommended" on his April 30, 2016, EER be changed to "Recommended." The applicant's marks were overall average and above average on this EER, except for one below average mark of 3 in Respecting Others. The comments explain that the applicant received this mark because of the incident documented in the December 15, 2015, Page 7. The comment supporting the "Not Recommended" mark explains why he was not recommended and what he needed to do to be recommended: "[The applicant has] not demonstrated the requisite tact and judgment required of a more senior Petty Officer ... [He] needs to channel his conviction in a positive and productive manner to gain the vital leadership and professional skills necessary to succeed at the next higher paygrade." The conduct described in the Page 7 also supports the mark of "Not Recommended" for advancement on the April 30, 2016, EER. As noted before, to be recommended for advancement a member must show that he "is fully capable of satisfactorily performing the duties and responsibilities of the next higher pay grade"<sup>30</sup> based not only on knowledge but on his "qualities of leadership, personal integrity, and adherence to the Service's core values."<sup>31</sup> The Board finds that the applicant has not proven by a preponderance of the evidence that the "Not Recommended" mark on his April 30, 2016, EER is erroneous or unjust.

15. The applicant alleged that he would have advanced to E-6 and not been subject to HYT but for the CGIS investigator's malfeasance, the resulting criminal proceedings against him, and his command's resulting prejudice against him. The record shows that the applicant did not try to take the SWE in May 2015 or November 2015, even though he was apparently eligible to do so because on both occasions his most recent EER advancement mark was "Recommended." As the applicant alleged, the proceedings may well have consumed his time and energy and prevented him from competing even though he knew about HYT and must have wanted to advance. But he had shown extremely poor judgment and leadership in late 2014 and the fact that there were consequences and criminal charges that consumed his time and attention in 2015 is not erroneous or unjust. The applicant also stated that he was not able to compete because of erroneous "Not Recommended" marks, and this claim could be true with respect to the May 2016 SWE. At that time, he was ineligible to take the SWE because his appeal of his October 31, 2015, EER prevailed only after the February 2016 cut-off date for qualifying for the May 2016 SWE. (Although he was not recommended for advancement on his April 2016 EER, that EER was not completed until June 13, 2016, and that EER prevented him from taking the SWE in November 2016.<sup>32</sup>) Therefore, the preponderance of the evidence shows that the applicant may have been unable to take the SWE in May 2016 because his command had documented his inappropriate conduct on his October 31, 2015, semiannual EER instead of timely documenting it on his April 30, 2015, EER. Whether his command would have recommended him for advancement on his October 31, 2015, EER if they had timely documented his inappropriate conduct on his April 30, 2015, EER is doubtful, however.

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<sup>30</sup> *Id.* at Article 4.D.3.b.1.

<sup>31</sup> *Id.* at Article 4.D.3.a.

<sup>32</sup> *Id.* at Article 3.A.4.b.(3).



Although the “Not Recommended” mark was changed on appeal, that change made by PSC was actually prohibited and erroneous because, unlike other EER marks, recommendations for or against advancement on an EER are not subject to appeal.<sup>33</sup> The applicant had shown extremely poor leadership and judgment in his texts with BM3 in late 2014, and based on that conduct, his command did not recommend him for advancement in late 2015. A “Recommended for Advancement” mark is not a default mark, and nothing in COMDTINST M1000.2 states that in deciding whether to recommend a member for advancement on an EER, the command is limited to considering only his performance and conduct during the current six-month rating period.<sup>34</sup> In fact, the command is encouraged to consider both past performance and the member’s potential to perform satisfactorily in the higher grade in the future.<sup>35</sup> Given the extremely poor leadership and judgment the applicant had shown in late 2014, the Board cannot conclude that he would or should have been recommended for advancement in late 2015 and so eligible to take the May 2016 SWE.

16. The Coast Guard claimed that the sexual harassment allegations did not have an impact on the applicant’s ultimate HYT discharge from the Coast Guard. The JAG argued that over the applicant’s approximately ten years as either an ME2 or BM2, he had roughly fourteen opportunities to sit for the SWE. He was “Not Recommended” for advancement five times in this period. The applicant has shown that just one of those “Not Recommended” marks—the one on his original October 31, 2015, EER—was possibly erroneous because the command *might* have recommended him for advancement on this EER if it had timely documented his inappropriate conduct on his April 30, 2015, EER. But less than a year earlier, the applicant had shown extremely poor judgement and leadership, and the fact that PSC erroneously changed the “Not Recommended” mark to “Recommended” on appeal is not evidence that the “Not Recommended” mark was actually erroneous because advancement marks are not subject to appeal. Therefore, the Board finds that the applicant has not proven by a preponderance of the evidence that he was erroneously not recommended for advancement on his original October 31, 2015, EER and so erroneously prevented from advancing to ME1/E-6 based on his ineligibility to take the SWE in May 2016.

17. When the applicant did finally sit for the SWE in May 2017, he placed twenty-third on the advancement list, which was not above the cut-off for guaranteed advancement. As a result, he did not advance before his Professional Growth Point and because he did not receive a HYT waiver, he was discharged on September 1, 2018. A member’s position on an advancement list, however, is based in part on the member’s EER marks, and the Board has found that the retroactive change to the applicant’s April 2015 EER was prohibited and that those marks should be raised to their original positions. Therefore, the Board finds that after correcting the marks on the April 2015 EER, as indicated above, the Coast Guard should recalculate the applicant’s position on the ME1 advancement list resulting from the May 2017 SWE. After it is determined what position he would have held on the May 2017 advancement list if his April 2015 EER marks had not been erroneously retroactively changed, the Coast Guard should determine whether the applicant would

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<sup>33</sup> *Id.* at Article 4.D.3.e., which states, “The approving official’s decision on the advancement recommendation is final and may not be appealed.”

<sup>34</sup> *Id.* at Article 4.D.1.a., which states that “competency marks” in the various performance categories must be based on the member’s performance during the rating period but does not limit the advancement recommendation mark in this way.

<sup>35</sup> *Id.* at Article 4.D.3.

have been authorized to advance to ME1/E-6 before his discharge in September 2018 based on whether the member whose name was at that position—or any member whose name was below that position on the list—was authorized to advance by the date of the applicant’s discharge, and if the applicant would have advanced to ME1/E-6, the Coast Guard should correct his record to show that he did.

18. The record shows that PSC denied the applicant’s request for a waiver of HYT when it became apparent that he would not reach his PGP by December 1, 2017. At the time, however, the erroneous Page 7 dated November 9, 2015, and the erroneously retroactively changed April 2015 EER were in the applicant’s record, which could have greatly influenced PSC’s decision. Therefore, in the interest of justice and given the unreliability of the CGIS investigator’s spreadsheet and BM3’s claims and the CO’s reliance on that unreliable evidence in preparing those documents, the Board finds that if pursuant to finding 17, above, the applicant is advanced to ME1/E-6 on or before his final day on active duty, the Coast Guard should correct his record to show that he received a waiver of HYT and was not discharged in September 2018 and the Coast Guard should return him to active duty and correct his record to show that he was not discharged.

19. Accordingly, partial relief should be granted by reversing the erroneous retroactive amendment of the marks on the applicant’s April 30, 2015, EER; and removing the November 9, 2015, Page 7 in its entirety. Then the Coast Guard should determine what the applicant’s position on the May 2017 SWE ME1 advancement list would have been had the April 30, 2015, EER not been erroneously amended and if the member at that position (or a member below that position) advanced to ME1 before the applicant’s date of discharge, the applicant’s record should be corrected to show that he advanced on that date; his discharge should be voided; he should be reinstated on active duty; and he should receive all appropriate back pay and allowances. However, if the applicant would not have advanced to ME1 before his date of discharge if the marks on his April 30, 2015, EER had not been retroactively lowered, he is not entitled to advancement, reinstatement on active duty, or back pay and his discharge should stand as issued.

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

**ORDER**

The application of former ME2 [REDACTED], USCG, for correction of his military record is granted in part. The Coast Guard shall correct his record as follows:

1. The Coast Guard shall revert his April 30, 2015, EER to the marks and comments he originally received before the EER was retroactively amended on April 19, 2016;
2. The Coast Guard shall remove the November 9, 2015, Page 7 in its entirety from his record;
3. After correcting his April 30, 2015, EER marks, the Coast Guard shall determine what position he would have held on the ME1 advancement list resulting from the May 2017 SWE given the improved marks, and if the member who held that position (or any member below that position) on the ME1 advancement list advanced to ME1 by the date of discharge, the Coast Guard shall correct his record to show that he advanced to ME1/E-6 on the same date.
4. If he is advanced to ME1/E-6 pursuant to paragraph 3, above, the Coast Guard shall correct his record by voiding his discharge, reinstating him on active duty, and paying him all due back pay and allowances. If he is not advanced pursuant to paragraph 3, above, his discharge shall not be voided and he is not entitled to reinstatement or back pay and allowances.

November 21, 2018

