

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2024-077


AMT1/E-6

FINAL DECISION

This proceeding was conducted by the Board for Correction of Military Records of the Coast Guard (“Board”) according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on April 2, 2024, and assigned the case to a staff attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated March 13, 2025, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

INTRODUCTION

The applicant, an Aviation Maintenance Technician, First Class, (AMT1/E-6), asked the Board to correct his records by removing the following:

- Recommendation for Reassignment dated January 19, 2023;
- Negative administrative remarks on Form CG-3307 (“Page 7”) dated January 19, 2023, for sending a picture to a coworker;
- Page 7 dated January 20, 2023, for having an inappropriate conversation with a coworker; and
- Member Counseling Receipt dated March 20, 2023.

The records in question were issued following a complaint filed in December 2022 by the applicant’s coworker (hereinafter “complainant”) alleging he had sexually harassed her during the ride home from a week-long training course. At the time, the applicant and complainant were assigned as recruiters to the same Coast Guard Recruiting Office (RO). Following an investigation, the applicant was issued two Page 7s, and was eventually reassigned to a different duty station and billet.

In his submission to the Board, the applicant contends that the records in question should be expunged because the Coast Guard's investigation of his conduct was "defective, misapplied the law, and [sought] to punish [him] for wholly consensual and private communications between himself and a consenting adult."

SUMMARY OF THE RECORD

The applicant joined the Coast Guard on May 4, 2009. He became a recruiter on July 1, 2022.

In late November 2022, the applicant accepted a ride from the complainant, a fellow recruiter at his RO, to a multi-day "Recruiter School" training course several states away. The applicant also rode back with the complainant after the training was over.

Several days after returning, the complainant submitted a formal sexual harassment complaint to the RO's Recruiter-In-Charge (RIC). The complaint centered on conversations in which the applicant discussed his affinity for watching women urinate and smelling women's underwear, as well as his sending a picture of himself smelling his wife's underwear to the complainant.

On December 9, 2022, the Coast Guard Recruiting Command (CGRC) issued a Convening Order in which a Preliminary Inquiry Officer (PIO) was assigned to conduct a "single officer standard investigation" into the complainant's allegations. The PIO was requested to complete a report summarizing what, in his opinion, had "actually occurred," and to include a recommendation for corrective measures and appropriate disposition.

On December 13, 2022, the applicant signed a form acknowledging he had received notice of his "Miranda/Tempia" rights under Article 31(B) of the Uniform Code of Military Justice (UCMJ). On the same form, the applicant declined to consult a lawyer and elected to make a statement and/or answer the PIO's questions.

On January 9, 2023, the PIO issued an Investigative Report (IR). In its Preliminary Statement section, the IR stated that while the investigation was "inconclusive" as to whether the applicant violated the UCMJ or Coast Guard policies relating to sexual harassment, the PIO had concluded that the applicant violated UCMJ Article 134—Indecent Conduct. In this introductory section, the PIO also noted that the "servicing legal office" had provided advice and assistance and had approved the IR on January 5, 2023. The report then set forth the following Findings of Fact, Opinions, and Recommendations:

Findings of Fact

1. [The applicant] is a recruiter at Recruiting Office [where the complainant worked].

2. [The complainant] is a Recruiter at Recruiting Office [where the applicant worked].
3. [The complainant] is legally married.
4. [The applicant] is legally married.
5. [The complainant] and [the applicant] attended the same Recruiter School from 11/28/2022 – 12/2/2022.
6. [The complainant] drove her personal vehicle to Recruiter School; [the applicant] rode as the sole passenger with [the complainant].
7. During the drive to Recruiter School, [the complainant] and [the applicant] mutually engaged in conversation related to the female cervix; [the complainant] started the conversation by asking [the applicant] if he thought females could pee with a tampon in.
8. Shortly thereafter, during the same conversation, [the applicant] disclosed he enjoyed watching women pee after being asked by [the complainant] if he had an affinity for urine.
9. In response to [the applicant] informing [the complainant] that he enjoys watching a woman urinate, [the complainant] told [the applicant] that she was going to look at [the applicant] and laugh during their time at Recruiter school anytime she or another female needed to go to the bathroom to pee; [the complainant] and [the applicant] did share glances during recruiter school whenever anyone went to the bathroom and shared laughs.
10. [The applicant] asserts [the complainant] further discussed her fondness for seeing different guys' penises; [the complainant] asserts she and [the applicant] only discussed whether a woman could pee with a tampon in and the latter's affinity for seeing women pee.
11. During the drive back from recruiter school, both [the complainant] and [the applicant] dispute the context of their conversation; however, the two did discuss [the applicant]'s interest in smelling women's underwear.
12. [The applicant] claims the conversation started when [the complainant] asked him what kind of other things he is into besides his interest in watching women pee.
13. [The complainant] asserts [the applicant] started the conversation by informing her that he thought about smelling her underwear while he was in her room on a previous occasion during their time at recruiter school.
14. After the topic was brought up, [the complainant] did tell [the applicant] that she would be checking her laundry to ensure [the applicant] did not take any of her underwear.
15. [The complainant] did tell [the applicant] to smell his wife's underwear; however, [the complainant] and [the applicant] diverge in the context in which this statement was said.
16. [The applicant] claims [the complainant] told him that she wanted proof of his affinity in the form of a photo of [the applicant] with his wife's underwear when he got home.
17. [The complainant] asserts she told [the applicant] to go smell his wife's underwear as means to dissuade [the applicant] from trying to take her underwear.
18. Prior to reporting the incident to her command, [a third recruiter at the RO] asserts [the complainant] told her that she told [the applicant] to prove he likes to smell women's underwear.
19. Shortly thereafter, [the applicant] began to reach for [the complainant]'s luggage, which was placed behind both he and [the complainant] in the backseat of [the complainant]'s vehicle.

20. [The complainant] did tell [the applicant] to stop the activity of reaching in the back seat or else she would leave [the applicant] on the side of the road.
21. [The applicant] claims [the complainant] was laughing as she stated she would leave him on the side of the road; however, he also stated her comment was a threat.
22. [The applicant] asserts he was reaching for his water bottle in the back floorboard and not trying to get into [the complainant]'s luggage.
23. After [the applicant] stopped his activity in the backseat, [the complainant] pulled over and [the applicant] proceeded to drive.
24. After arriving home, [the applicant] did send [the complainant] a photo of himself smelling his wife's underwear, along with two text messages: "As requested," and "You Asked."
25. [The applicant] stated he did not know [the complainant] was bothered by their exchange until the next day.
26. Upon being told the exchange bothered [the complainant], [the applicant] did apologize to her, stating "I'm sorry. I was joking about grabbing them in the car and I thought you were too."
27. [The complainant] asserts the exchange has left her scared for her safety, as well as for the safety of other recruiters and female applicants.
28. After their TDY trip, [the applicant] tried to get his water bottle and headphones that he left in [the complainant]'s car; [the complainant] perceived this as an attempt to get her alone.
29. [The complainant] did make a post on Facebook stating that she had made a sexual harassment claim.
30. [The complainant] did use an emoji laugh to a comment to her Facebook post that depicted a cartoon of a figure with underwear on their head.
31. [The RIC] did tell [the complainant] that there would be an investigation and not to discuss the incident(s) prior to [the complainant] making a Facebook post.
32. The elements of Article 92, UCMJ, Failure to obey an order or regulation under element (2):
 - a. That there was in effect a certain lawful general order or regulation;
 - b. That the accused had a duty to obey it; and
 - c. That the accused violated or failed to obey the order or regulation.
33. The Coast Guard policy defines Sexual Harassment is defined (sic) as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:
 - a. Submission to such conduct is made either implicitly or explicitly a term or condition of employment.
 - b. Submission to or rejection of such conduct is used as a basis for employment decisions.
 - c. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. This definition also encompasses unwelcome display or communication of sexually offensive materials.
34. The elements of Article 134, UCMJ, Sexual Harassment:
 - a. that the accused knowingly made sexual advances, demands or requests for sexual favors, or knowingly engaged in other conduct of a sexual nature;

- b. that such conduct was unwelcome;
- c. that, under the circumstances, such conduct-
 - i. would cause a reasonable person to believe, and a certain person did believe, that submission to such conduct would be made, either explicitly or implicitly, a term or condition of that person's job, pay, career, benefits, or entitlements;
 - ii. would cause a reasonable person to believe, and a certain person did believe, that submission to, or rejection of, such conduct would be used as a basis for decisions affecting that person's job, pay, career, benefits, or entitlements; or
 - iii. was so severe, repetitive, or pervasive that a reasonable person would perceive, and a certain person did perceive, an intimidating, hostile, or offensive working environment; and
- d. that, under the circumstances, the conduct of the accused was-
 - i. to the prejudice of good order and discipline in the armed forces;
 - ii. of a nature to bring discredit upon the armed forces; or
 - iii. to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

35. The elements of Article 134, UCMJ, Indecent Conduct:

- a. That the accused engaged in certain conduct;
- b. That the conduct was indecent; and
- c. That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

Opinions

- 1. It is my opinion that both [the applicant] and [the complainant] displayed poor judgment and inappropriate behavior by engaging in sexually explicit conversations and sending sexually explicit and inappropriate text messages with each other as coworkers and as married personnel.
- 2. [The applicant] appeared sincere in his statement and gave no reason to suspect his version of the events to be false.
- 3. The evidence is inconclusive as to whether [the applicant] tried to take a pair of underwear or smell a pair of underwear on the drive home from Recruiter School; there are no other witnesses to corroborate either side of the story.
- 4. [The complainant]'s statements regarding whether she asked [the applicant] to send her a photo of him smelling his wife's underwear are inconsistent; however, her and [the applicant]'s previous conversations and running joke during their TDY to recruiter school, and the statement made by [the third recruiter] support the inference that she likely did request the photo.
- 5. It is my opinion that due to the difference in statements between [the applicant] and [the complainant], the sexually explicit conversations they shared, and the lack of witnesses, it was reasonable for [the applicant] to think it was ok to take and smell a pair of [the complainant]'s underwear.
- 6. The evidence is inconclusive as to whether [the applicant] violated UCMJ article 92-Failure to Obey an Order or Regulation.
- 7. The evidence is inconclusive as to whether [the applicant] [violated] Article 134, UCMJ, Sexual Harassment.

8. It is my opinion that regardless of whether [the complainant] asked for the picture or not, [the applicant] did display a prejudice to the good order and discipline of the armed forces, did bring discredit upon the armed forces, and did violate UCMJ article 134—Indecent Conduct.

Recommendations

1. I recommend [the applicant] be given a performance and discipline CG-3307 to record his indecent conduct.
2. I recommend [the applicant] and [the complainant] both be removed from their Recruiter duties and assigned to another billet.

Exhibits attached to the IR included written statements from the applicant, the complainant, two other recruiters from the applicant's RO, and the RIC.

On January 19, 2023, the applicant's Commanding Officer (CO) sent a memorandum to the Commander of the Coast Guard Personnel Service Center, Enlisted Personnel Management Division (CG PSC-EPM-2) titled "Recommendation for Reassignment Due to Unsuitability for Special Duty Assignment for [the applicant]." In the memorandum, the applicant's CO stated that in accordance with Article 1.E.4. of Military Assignments and Authorized Absences, COMDTINST M1000.8A, the applicant was no longer considered suitable for special duty assignment as a result of his own actions. The CO explained that the applicant had "displayed poor judgment and inappropriate behavior by engaging in sexually suggestive and explicit conversations with a coworker and also sent inappropriate text messages including an indecent picture." The applicant's CO stated that these actions "went beyond mere immaturity" and were "entirely inappropriate under the circumstances." The CO went on to inform CG PSC-EPM-2 that the incident had been documented in a Page 7 and that it would also be documented on an unscheduled transfer Enlisted Employee Report (EER) to mark the applicant as not recommended for advancement.

Also on January 19, 2023, the applicant's CO issued a Page 7 which noted that the applicant had been the subject of an investigation related to allegations of harassment based on his sending a picture of himself smelling a pair of female underpants via text message to a coworker. The Page 7 stated that the applicant's coworker reported feeling harassed by these actions. The CO stated that he had reviewed the IR and all evidence collected by the investigator and had found it inconclusive as to whether the applicant had committed sexual harassment but had also found that the applicant's actions conflicted with the Coast Guard's Core Values. The applicant was advised that as a result of the incident, his CO was rescinding his recommendation for the applicant's selection to Chief Warrant Officer and advancement to Chief Petty Officer. The Page 7 concluded with the CO stating that the applicant's actions were not consistent with the high standards expected of a First Class Petty Officer in the Coast Guard, nor the high level of trust expected from officers and senior enlisted personnel.

On January 20, 2023, the applicant's CO issued a second Page 7. Therein, the applicant was advised that his actions were prejudicial to good order and discipline and had negatively impacted the performance of his RO at a time when the Coast Guard had a critical recruiting need. The Page 7 stated that effective on the date of its issuance, the applicant had been found unsuitable as a Production Recruiter at his current duty station, and his CO had chosen to remove him from the Special Assignment, per COMDTINST M1000.8 (series). The applicant was advised that CG PSC-EPM-2 would be notified of this decision, and the applicant should prepare for reassignment.

In a February 8, 2023, memorandum directed to the applicant's CO, CG PSC-EPM-2 approved the recommendation to reassign the applicant. The applicant was subsequently reassigned to a new billet and duty station in a different state.

On March 20, 2023, a Member Counseling Receipt was issued to the applicant documenting an unscheduled transfer EER. This document included ratings for various competencies. Reviewer comments were included for the following four competencies: Military Bearing; Decision Making Problem Solving; Future Potential; and Advancement Potential. In sum, the comments stated that the applicant had displayed inappropriate behavior and poor judgment by engaging in sexually explicit conversations with, and sending sexually inappropriate text messages to, a coworker, that this resulted in an administrative investigation, and that the applicant's actions were not equal to the high level of trust expected of a Chief Petty Officer.

Sometime later, the applicant submitted a complaint to the Equal Employment Office (EEO) alleging that his unduly harsh treatment was a result of discrimination based on his race and sex. The full record documenting the EEO complaint and its disposition have not been presented to the Board. However, the applicant submitted certain materials from the EEO investigation. These include an affidavit from the applicant's CO, and summaries of interviews the EEO investigator conducted with the applicant and one of the same recruiters from his RO who submitted a statement during the December 2022/January 2023 investigation. The EEO investigation documents provided by the applicant are all dated in August 2023. The disposition of the EEO complaint is not before the Board.

APPLICATION TO THE BOARD

In his April 2024 submission to the Board, through counsel, the applicant asserted that his requested record corrections were warranted because the investigation leading to their issuance was "defective, misapplies the law, and seeks to punish the applicant for wholly consensual and private communications between himself and another consenting adult."

The applicant argued that such conduct, including sending pictures, and regardless of marital status, was not impermissible or in violation of any law or regulation. Therefore,

he contested the PIO's determination that his conduct had violated UCMJ Article 134—Indecent Conduct. On this point, the applicant cited to the Military Judges Benchbook section addressing indecent conduct, which states, in part: "This provision is not intended to regulate wholly private consensual sexual activity. In the absence of an aggravating circumstance, private consensual sexual activity is not punishable as indecent conduct."

The applicant argued that his conduct was not alleged to be obscene or indecent as defined by the UCMJ, and that the photograph he sent to the complainant did not contain pornography. He also argued that because no other servicemembers or members of the public observed the conduct, it could not be service discrediting, and that because he and the complainant were of the same rank, the conduct was not contrary to good order and discipline, and thus, Article 134 was not violated.

The applicant contended that the comments made by his CO in the Page 7s, his removal from recruiting, and the Member Counseling Receipt he received were based on the false conclusion that he had violated the law by making an indecent communication. He also noted that these documents referenced him being married, which he argued further demonstrated that his CO had improperly imposed his own personal view of what conversations a married person should have onto the applicant, without considering that the U.S. Constitution protects free speech.

The applicant cited in particular his CO's statement in the EEO investigation that "The reason [the applicant] was treated as he was, was because of the photo and he admitted in his statement of having inappropriate conversations...." In this regard, the applicant contended that he had never admitted that his comments were indecent or criminally inappropriate or in violation of the UCMJ.

Finally, the applicant argued that the record showed the complainant had reported his conduct to two female friends whose statements indicated the complainant was not trustworthy, and that the complainant had requested the photograph he sent to her. The applicant noted that this was the reason the sexual harassment claim against him was "unsubstantiated."

VIEWS OF THE COAST GUARD

On December 18, 2024, a Judge Advocate (JA) for the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the applicant's request for relief. The JA adopted the findings and analysis provided in a memorandum prepared by the Coast Guard's Personnel Service Center (PSC). The PSC memorandum, dated November 4, 2024, was enclosed.

The PSC, and by extension the JA, argued that the investigation, issuance of Page 7s, and removal of the applicant from his special assignment (recruiting) had followed all appropriate procedures found in the relevant Coast Guard policies.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On February 5, 2025, the Board received the applicant's response to the Coast Guard's views. Through counsel, the applicant argued that the JA had failed to explain how the applicant's "[CO] can make a conclusion of indecent conduct under the UCMJ definitions when the only conduct at issue is consensual private sexual messages between two adults . . . protected constitutionally." The applicant also emphasized the investigation's finding that the sexual harassment allegations were "unsubstantiated," and he took issue with the advisory opinion's characterization of the investigation as "inconclusive" on this point. The applicant also argued, again, that his treatment was a result of his CO imposing his own morals onto the conduct of the applicant.

APPLICABLE LAW AND POLICY

Board Proceedings

The Board may correct errors or remove injustices in a service member's records pursuant to 10 U.S.C. § 1552(a). "Error" means a mistake of a significant fact or law and includes a violation by the Coast Guard of its own regulations. *See Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976) ("Error" means legal or factual error.); *Ft. Stewart Schools v. Federal Labor Relations Authority*, 495 U.S. 641, 654 (1990) ("It is a familiar rule of administrative law that an agency must abide by its own regulations."). Injustice, when not also error, is treatment by the military authorities that "shocks the sense of justice." *Sawyer v. United States*, 18 Ct. Cl. 860, 868 (1989) citing *Reale v. United States*, 208 Ct. Cl. 1010, 1011, cert. denied, 429 U.S. 854, 50 L. Ed. 2d 129, 97 S. Ct. 148 (1976). The Board has authority to determine whether an injustice exists on a "case-by-case basis." Docket No. 2002-040 (DOT BCMR, Decision of the Deputy General Counsel, Dec. 4, 2002).

"It is the responsibility of the Applicant to procure and submit with his or her application such evidence, including official records, as the Applicant desires to present in support of his or her case." 33 C.F.R. § 52.24 (a). "The Board begins its consideration of each case presuming administrative regularity on the part of the Coast Guard and other Government officials. The Applicant has the burden of proving the existence of an error or injustice by the preponderance of the evidence." 33 C.F.R. § 52.24 (b). 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." *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

Coast Guard Policies

1. Coast Guard Recruiting Manual, COMDTINST M1100.2G (August 2021)

2.B.1. Assignment to Recruiting Duty

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

2. Military Assignments and Authorized Absences, COMDTINST M1000.8A (October 2013)

1.E.2.a. Minimum Standards for All Special Duty Assignments

The standard minimum qualifications [for all special duty assignments] are as follows:

- (1) Must consistently exhibit mature judgment, even temperament, tact, diplomacy, and discretion,
- (2) Have the abilities to correspond with and address the public pleasantly and confidently and to speak and write clearly,
- (3) No court-martial or felony convictions (federal, state or local) in the past six years,
- (4) No non-judicial punishment during the past four years,
- (5) No misdemeanor convictions (federal, state, or local) in the past four years,
- (6) No alcohol incident during the past four years,
- (7) Candidates must have no mark of unsatisfactory in conduct for four years prior to submission of requests,
- (8) Must be eligible for the security clearance required for the assignment requested,
- (9) Have more than four years' active duty in the Coast Guard,
- (10) Qualify to operate a motor vehicle, hold a valid state-operating license, and have no history of repeated traffic violations,
- (11) A history of demonstrated financial responsibility; no record of excessive indebtedness or indication of non-payment of just debts,

(12) Have sharp military bearing and a smart appearance. Must comply with weight standards contained in reference (1), Coast Guard Weight and Body Fat Standards Program Manual, COMDTINST M1020.8(series). Must not have been on probation for exceeding maximum allowable weight or body fat standards anytime in the past two years,

(13) Must obligate service for a full tour in position assigned, and

(14) Must serve at least two years in position commencing on the reporting date prior to voluntary retirement.

1.E.7. Recruiting Duty

1.E.7.b. Key Element to Providing Human Resources

The recruiter is the key element in providing human resources for the Coast Guard. The recruiter is the first contact with the service for the vast majority of Coast Guard military members. The selection, motivation, and training of a recruiter is a top priority to the success of the Coast Guard's mission.

1.F.4. Reassignment from Positions Requiring Special Screening

Screening procedures for various assignments throughout Chapter 1 of this Manual are designed to select only the highest caliber of individuals capable of fulfilling the demanding duties associated with the assignment. Despite the most stringent screening processes, isolated cases of assignment of members who are unsuited for such duty will occur. Members considered unsuitable (as identified and determined by the command, program manager, or Commander (CG PSC-EPM-2)) for such duty fall into one of two distinct categories indicated below:

- (a) Those members considered unsuitable for continued duty through no fault of their own (e.g., a physical defect or speech impediment, lack of confidence or inability to project in front of audiences, or other deficiencies that would hamper effective performance).
- (b) Those members considered unsuitable for continued duty as a result of their own actions (e.g., poor performance, lack of leadership, misconduct, lack of interest, poor attitude, or other similar reasons).

1.F.4.a. Recommendation for Reassignment

When a member is considered unsuitable for special duty, they will be so advised and required to sign an Administrative Remarks, Form CG-3307, entry. A recommendation letter (or message in time-critical, operational situations) for reassignment from such duty will be submitted to Commander (CG PSC-EPM-2) via the chain of command, and must include this information:

- (5) Specific, detailed reasons, to include all documentation (e.g., command counseling remarks on an Administrative Remarks, Form CG-3307, an unscheduled enlisted

employee review indicating in which category the member is considered unsuitable, along with any other useful information to determine the next assignment),

(7) When the reason for reassignment is due to the member's own action, report any disciplinary or administrative action taken or pending. See Articles 3.A.30. of reference (i), Enlisted Accessions, Evaluations and Advancements, COMDTINST M1000.2 (series) and 1.B.9., 1.B.12., and 1.B.17. of reference (b), Military Separations, COMDTINST M1000.4 (series),

(8) When members are considered unsuitable for continued duty due to their own actions, a statement of rebuttal from the member concerned is required. If the member desires not to make a statement, so indicate in writing, and

1.F.4.c. Commanding Officer Responsibilities

If reassignment is directed, the commanding officer will:

- (1) Complete the appropriate enlisted employee review (EER) on Direct Access,
- (2) Complete an Administrative Remarks, Form CG-3307, entry to indicate reassignment from the specific duty and a brief explanation of the circumstances,
- (3) Revoke qualification codes if applicable,
- (4) Advise the member that they may be ordered to an interim unit for an unscheduled EER prior to reassignment in accordance with Article 1.F.4. of this Manual, and
- (5) Advise members that upon reassignment, the member may be ordered to another unit for an unscheduled EER in accordance with Article 1.F.5. of this Manual.

1.F.4.d. Unscheduled Evaluation Resulting from Reassigning Members Unsited for Special Duty

- (1) Guidelines for Completing an EER. This Article establishes guidelines for conducting unscheduled EERs for enlisted personnel who have been reassigned due to unsuitability for duty under the provisions of Article 1.F.4. above
 - (a) When directed by Commander (CG PSC-EPM-2), enlisted members may undergo an unscheduled EER to determine suitability for rate retention, retention in the service, and for future independent duty after being relieved under Article 1.F.4. of this Manual.
 - (b) Commander (CG PSC-EPM-2) will determine the type and duration of the evaluation and will include such information in the member's original message orders. Members will be assigned in excess of the units normal complement pending reassignment.

- (2) Final Disposition.

Send copies of all Administrative Remarks, Form CG-3307, entries and the final

enlisted employee review to Commander (CG PSC-EPM-2) within 15 working days after the evaluation period. The command must attach a command recommendation clearly stating whether the member is suitable for retention in rating, retention in the service, or future leadership positions. Additionally, the command should attach the member's rebuttal statement, if applicable, and updated e-Resume.

3. Discipline and Conduct, COMDTINST M1600.2 (September 2011)

2.A.1.a. Coast Guard Values

The Coast Guard attracts and retains highly qualified people with commonly shared values of honor, respect and devotion to duty. These values anchor our cultural and Service norms and serve as a common foundation for our interpersonal relationships within the Coast Guard.

2.A.1.b. Mission Success

We interact, communicate and work together as teams to accomplish our missions. Indeed, mission success depends on cultivating positive, professional relationships among our personnel. An environment of mutual respect and trust inspires teamwork, assures equal treatment, and grants Service members the opportunity to excel.

2.A.2.a. Professional Work Environment

Coast Guard policy is to sustain a professional work environment which fosters mutual respect among all personnel....

2.B.2. Sexual Harassment

2.B.2.b. Administrative and Criminal Sanctions

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 process, administrative processes, and [UCMJ] provisions. 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.

4. U.S. Coast Guard Civil Rights Manual, COMDTINST M5350.4E (October 2020)

- 3.E.1. Anti-Harassment Hate Incident Complaint Procedures. The procedures discussed below apply to AHHI complaints, which is a command-directed process. See article C.2. of this chapter for the difference between the AHHI and EEO complaint process. All Coast Guard personnel must refrain from harassing behavior in the Coast Guard. The CO/OIC, managers, and supervisors shall ensure their conduct sets an example and is not such that they may be vulnerable to claims of harassment. Everyone is encouraged to tell any person engaging in unwelcome harassing conduct to stop, even if they are a third-party witness to the behavior.

- 3.E.2. Procedures Overview.

b. Once aware of prohibited harassment, supervisors and managers are required to:

- (1) Ensure the harassing behavior stops, which may include taking interim measures such as issuing a cease and desist letter to the alleged harasser, and/or separating the alleged harasser from the alleged victim while the matter is investigated, to decrease the possibility that the harassment can reoccur;
- (2) Take or assist with appropriate recourse to address the matter, to include initiating a preliminary inquiry/investigation within 10 days of notification; and
- (3) Report such activities via the procedures outlined in this policy.

c. Investigating Officers (I/O) assigned to conduct investigations into reports of harassment must have undergone DHS/Coast Guard investigative training in investigating harassment allegations, including the legal requirements for claims of harassment, interviewing, and report writing triennially. The training is available in the Coast Guard Learning Management System. I/Os should also refer to the Investigator Techniques, Tactics, and Procedures (TTP) for best practices on how to conduct the investigation.

- 3.E.3. CO/OIC Harassment Procedure Requirements. All CO/OICs shall take prompt action to address reports of harassment under the AHHI policy. All CO/OICs shall take the following steps to adjudicate complaints upon notification of a report of prohibited harassment:

- f. Unless CGIS has initiated an investigation, or the command has decided to initiate a preliminary inquiry as appropriate in accordance with the Administrative Investigations Manual, COMDTINST M5830.1 (series) (AIM), within 10 calendar days of notification of a report of harassment, CO/OIC must initiate an investigation. Typically, a standard investigation is appropriate to investigate an AHHI allegation. In addition to the procedures found in the AIM, the following requirements apply to Anti-Harassment and Hate Incident (AHHI) investigations. If the requirements of this chapter conflict with requirements in the AIM, this chapter shall take precedence.

- 3.E.4. Convening Orders. Written convening orders are required for all command-directed AHHI investigations....

- 3.E.7. Requirement for legal review. Prior to routing the completed investigative report to the Convening Authority, the I/O must route it through the Servicing Legal Office for a legal sufficiency review. The Servicing Legal Office will be listed on the "Thru" line of the report. A signature endorsement on the report by the Servicing Legal Office signifies the report is legally sufficient. The I/O must account for the time needed for legal review in order to ensure that the deadline for completion is met.

- 3.E.8.e.(5). If an investigation substantiates prohibited harassment or shows that other misconduct occurred, the CO/OIC will initiate, in appropriate cases, administrative or disciplinary actions that may include punishment under the Uniform Code of Military Justice (UCMJ) for military personnel. In the case of civilian employees, if the administrative or disciplinary action involves a personnel action, management must consult with the servicing Human Resources Specialist (CG124).

- 3.I. Sexual Harassment Prevention Policy.

11. Responsibilities of the CO/OIC, Managers, and Supervisors. CO/OIC, managers, and supervisors are required to follow the steps outlined in the Harassment Complaint Procedures in this chapter when they become aware or are notified of sexual harassment allegations....

5. *Administrative Investigations Manual, COMDTINST M5830.1A (September 2007)*

1.A. **PURPOSE AND SCOPE**

This manual provides a standard procedure for investigating incidents in the Coast Guard. The primary purpose of all administrative investigations is to provide the convening and reviewing authorities with information upon which to base decisions and take actions about matters investigated.... The guidance in this manual may be followed when a commander wishes to investigate and document an incident, even where no investigation is otherwise required, but where inquiry into a matter may serve the purposes identified above.

1.C. PURPOSES OF ADMINISTRATIVE INVESTIGATIONS

1. Decision-making. The Investigative Report gives the Convening and Reviewing Authorities, and others who receive the report, information upon which to make decisions about the matters investigated....

1.D. DEFINITIONS

- 1.D.1.a. Standard Investigations. Formerly referred to as “Informal Investigations,” Standard Investigations are convened to investigate the vast majority of minor and major incidents requiring an Administrative Investigation. These investigations are normally conducted by a single individual known as the Investigating Officer (I.O.). A Standard Investigation uses informal evidence-gathering procedures, and usually does not conduct hearings. It does not have authority to designate Parties or to subpoena witnesses. (*See* Chapter 4).

1.F. INITIAL COMMAND ACTIONS

- 1.F.4. Conduct a Preliminary Inquiry, If Necessary. In many cases, a command does not initially have sufficient information to make informed decisions about whether to investigate, what type of investigation is necessary for a particular incident, or the specific matters that need to be investigated. A Commanding Officer may direct a preliminary inquiry to answer these initial matters . . .

4.C. STANDARD INVESTIGATION PROCEDURES

- 4.C.1. Duties of an Investigating Officer. The primary duties of an Investigating Officer are: to ascertain and consider the evidence on all sides of an issue; to be thorough and impartial; to make findings of fact; to offer opinions and recommendations by the facts; and to comply with the instructions of the Convening Authority....

- 4.C.6. Comparison to Other Administrative Investigations.

b. Since no Parties are designated in the Standard Investigation, no one is entitled to the rights of a Party, such as notice of the proceedings, an opportunity to participate, representation by counsel, or the right to call and cross-examine witnesses. The Investigating Officer in a Standard Investigation may, however, make relevant findings of fact, opinions and/or recommendations concerning individuals, even where those findings of fact, opinions and/or recommendations are adverse to the individual or individuals concerned.

- d. The Standard Investigation may report its findings of fact, opinions and

recommendations in the typical Investigative Report (IR) format or, if so directed, in the form of a Letter Incident Report (LIR).

4.E.4. Rights Advisement for Witnesses.

- a. All military personnel suspected of criminal misconduct must first be advised of their rights. *See* Article 31, UCMJ....

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

4.F. **CONCLUDING THE INVESTIGATION**

1. Preparing the Finding of Facts, Opinions and Recommendations. After all the evidence is collected, the Investigating Officer must review it and make findings of fact. The Investigating Officer should consider the evidence thoroughly and impartially, and make factual findings, opinions, and recommendations that are supported by the facts and comply with the particular instructions of the Convening Authority. Every factual finding must be supported by statements or documentary or physical evidence attached as an exhibit to the Investigative Report.
 - a. Findings of Fact. To the extent possible, the Investigating Officer should fix dates, places, persons, and events, definitely and accurately. The Investigating Officer should be able to answer questions such as: What occurred? When did it occur? How did it occur? Who was involved, and to what extent? Exact descriptions and values of any property at issue in the investigation should be documented.
 - b. Opinions. Opinions are clear and concise statements that can be deduced from the evidence in the record, and not merely the “finding of fact” which the Investigating Officer deduced from the evidence. In developing opinions, Investigating Officers must rely on the facts and may rely on any reasonable inferences that may be drawn from those facts. In stating opinions, Investigating Officers shall refer to the exhibit or exhibits relied upon in forming each opinion. Opinions (including opinions of no fault, no loss, or no wrongdoing) must be supported by the documented evidence that is part of the report. The Investigating Officer should comment on factual disputes among witnesses and on witness credibility, but should support those opinions with specific references to facts in evidence. An Investigating Officer’s “hunch,” supported by evidence may be useful to the Convening Authority, whereas an Investigating Officer’s pure speculation or unsupported “gut feeling” should be omitted from a report of investigation.
 - c. Recommendations. Recommendations should take the form of proposed courses of action consistent with the findings of facts and opinion, which flow logically from the evidence in the record. Recommendations may include disciplinary action, imposition of financial liability, or other administrative corrective action. Each recommendation shall cite at least to the specific findings of fact that support the recommendation, and preferably to the exhibit providing evidentiary foundation for the recommendation. To the extent that any recommendations flow from opinions, the related opinions shall be referenced as well.

2. Preparing the Submission to the Convening Authority. After developing the findings of fact, opinions, and recommendations, the Investigating Officer should prepare an Investigative Report using the format discussed in Chapter 5 of this manual and assemble the packet in the following order: the Convening Order and endorsements, if any; initial information collected; rights warning statements and Privacy Act statements, if any; the investigator's chronology or other suitable summary; and the exhibits (with an index). If, however, the Convening Order or subsequent communication from the Convening Authority authorizes a Letter Incident Report, the Investigating Officer may follow the Letter Incident Report format discussed in Chapter 5.
3. Legal Review Prior to Convening Authority Action.
 - a. The Convening Authority shall seek a legal review of all investigations of serious or complex matters, such as when the incident being investigated resulted in death or serious injury. Legal review should be obtained in other investigations where the findings of fact, opinions and recommendations may result in adverse administrative action, or will likely be relied on in actions by superior authorities. Other manuals may also require a legal review following a specific type of Administrative Investigation. Generally, a legal review will determine: whether the investigation complies with the requirements of the Convening Order and other regulations; the effects of any apparent defects in the investigations; whether the findings of fact, opinions and recommendations are supported by sufficient credible evidence; and whether the recommendations are consistent with the findings of fact and opinions.
 - b. Legal review should be conducted before the Convening Authority approves the findings of fact, opinions and recommendations. After receiving a completed investigation, the Convening Authority may approve, disapprove, or modify the findings of fact, opinions and recommendations, or may direct further action, such as the taking of additional evidence, or making additional findings. Thus it is logical to seek legal review before the Convening Authority acts on the investigation.

6.B. DESIGNATION OF FINAL REVIEWING AUTHORITIES

6.B.2. Other Authorities.

- a. Except as specified in paragraph 1 above, Area Commanders, District Commanders, MLC Commanders, the Commanding Officer of the Deployable Operations Group and Units with a Staff Judge Advocate assigned have authority to take Final Action on all Administrative Investigations that are required by this manual and that were convened by themselves or by subordinate units. See Article 2.B, D, and E.
- b. This authority to take Final Action may be delegated to officers or civilian officials equivalent or senior in the command hierarchy to the Convening Authority.

6.C. RESPONSIBILITIES OF THE CONVENING AUTHORITY

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

action on the investigation at a higher level of command is appropriate, the Convening Authority shall review the investigation as described below, and forward the report via the chain of command to the appropriate level of command for Final Action.

6.D. RESPONSIBILITIES OF REVIEWERS

1. Review the Report.

- a. Upon receipt, each reviewer in the chain of command shall review the report to determine whether it complies with this manual and otherwise adequately addresses the needs of the Coast Guard. If it does not, the Reviewer may either return the report to a subordinate command for further investigation or other corrective action, or may independently gather evidence to ascertain additional relevant facts.

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

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

6. Manual for Courts-Martial (2019 Ed.)

Article 134—(Indecent conduct)

b. *Elements.*

- (1) That the accused engaged in certain conduct;
- (2) That the conduct was indecent; and
- (3) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

c. *Explanation.*

- (1) "Indecent" means that form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.
- (2) Indecent conduct includes offenses previously proscribed by "Indecent acts with another" except that the presence of another person is no longer required. For purposes of this offense, the words "conduct" and "act" are synonymous. For child offenses, some indecent conduct may be included in the definition of lewd act and preempted by Article 120b(c). See subparagraph 91.c.(5)(a).

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction over this matter under 10 U.S.C. § 1552(a) because the applicant is requesting correction of an alleged error or injustice in his Coast Guard military record. The Board finds that the applicant has exhausted his administrative remedies, as required by 33 C.F.R. § 52.13(b), because there is no other currently available forum or procedure provided by the Coast Guard for correcting the alleged error or injustice that the applicant has not already pursued.

2. The application is timely, as it was filed within three years of the applicant's discovery of the alleged error or injustice in the record, as required by 10 U.S.C. § 1552(b).

3. The applicant declined a hearing before the Board and requested his case be decided based on the records and evidence submitted.

4. Under 33 C.F.R. § 52.24(b), the applicant bears the burden of proving an error or injustice by a preponderance of the evidence. The Board presumes the regularity of Coast Guard actions in the absence of evidence to the contrary. *See Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

5. The applicant has requested the removal of four records associated with his reassignment from recruiting duty on the basis that the Coast Guard's investigation of his conduct was flawed and misapplied the law. Specifically, he contends that his conduct did not violate UCMJ Article 134—Indecent Conduct because it involved private, consensual communications. As such, he argues, the Coast Guard's reliance on the investigation was improper. For example, in his February 2025 response to the Coast Guard JA's advisory opinion, the applicant states that the Coast Guard "fail[ed] . . . to explain how it thinks that the commander can make a conclusion of indecent conduct under the UCMJ definitions when the only conduct at issue is consensual private sexual messages between two adults." As explained below, however, the applicant's command reached no such conclusion, and its actions were supported by Coast Guard policy separate from any UCMJ-related determination. Nevertheless, the Board has determined that partial, alternative relief is warranted in this case as detailed below.

6. Upon receipt of a sexual harassment complaint, the applicant's command initiated an investigation, as was required by Coast Guard policy.¹ Even had an

¹ Civil Rights Manual, COMDTINST M5350.4E § 3.E.2.b.; Discipline and Conduct, COMDTINST M1600.2 § 2.B.2.b.

investigation not been required, commanders retain broad authority to initiate investigations in order to investigate and document incidents.²

7. The investigation concluded that based on conflicting witness statements, sexual harassment was not substantiated under Coast Guard policy or the UCMJ. It determined, however, that a violation of UCMJ Article 134—Indecent Conduct was substantiated. In this regard, the Board notes that a “standard investigation,” is not a criminal proceeding, and substantiation of an offense in this context requires only a preponderance of the evidence, not proof beyond a reasonable doubt.³ Thus, a standard investigation is not a final determination with respect to criminal or other culpability and, as was the case here, such findings need not lead to a criminal prosecution. Instead, the primary purpose of a standard investigation is to provide commanders with information upon which to base decisions.⁴

8. Entirely separate from the applicant’s command’s obligation to investigate all sexual harassment complaints was its responsibility to ensure that recruiters continued to meet the requirements for special duty assignment. Recruiting, like all special duty assignments, is reserved for the “highest caliber” individuals, who must exhibit “mature judgment, even temperament, tact, diplomacy, and discretion.”⁵ Determinations as to whether members have become “unsuitable” for continued special duty are committed to the discretion of the command.⁶ Importantly, there is no requirement in law or Coast Guard policy that a finding of unsuitability be predicated on a UCMJ violation or formal finding of misconduct. Instead, a finding of unsuitability for special duty may be based on “poor performance, lack of leadership, misconduct, lack of interest, poor attitude, or other similar reasons.”⁷

9. Reassignments from special duty based on unsuitability are governed by specific procedures. First, the member is to be advised of command’s decision and required to sign a Page 7 reflecting such.⁸ In addition, a memorandum recommending reassignment is to be submitted to CG PSC-EPM-2 via the chain of command.⁹ Once reassignment has been directed, the CO must issue an additional Page 7 and ensure an unscheduled EER is completed.¹⁰

² Administrative Investigations Manual, COMDTINST M5830.1A § 1.A.

³ *Id.* § 4.E.8.

⁴ Discipline and Conduct, COMDTINST M1600.2 § 1.C.

⁵ Military Assignments and Authorized Absences, COMDTINST M1000.8A §§ 1.E.2.a., 1.F.4.

⁶ *See id.* § 1.F.4. (Providing that unsuitability is “identified and determined by the command, program manager, or [CG PSC-EPM-2]”).

⁷ Military Assignments and Authorized Absences, COMDTINST M1000.8A § 1.F.4.(b).

⁸ *Id.* § 1.F.4.a.

⁹ *Id.*

¹⁰ *Id.* § 1.F.4.c.-d.

10. In this case, the applicant's CO determined that the applicant was unsuited for continued recruiting duty. Once he had made that decision, the CO issued appropriate Page 7s advising the applicant of the basis for the decision and counseling him regarding the specific underlying conduct. The CO also directed a memorandum to CG PSC-EPM-2 recommending the applicant be reassigned. Reassignment was then approved by CG PSC-EPM-2. Subsequently, the applicant was given an unscheduled EER, for which he received a Member Counseling Receipt, dated March 20, 2023. These actions were all required by, and consistent with, the relevant Coast Guard policies summarized above.

11. The applicant has not pointed to any way in which the Coast Guard meaningfully deviated from its procedures for reassigning recruiters, including the requirements that Page 7s, a recommendation memorandum, and an EER be completed, as was done in his case.¹¹ Instead, the applicant contends that issuance of these documents was improper because they relied on the investigation's erroneous conclusion that he had violated UCMJ Article 134—Indecent Conduct. The Board need not address this argument, however. That is, the Board does not need to determine whether the applicant's conduct, in fact, violated the UCMJ. This is because, as the applicant appears to overlook, the actions taken by the Coast Guard in this case were not based upon a finding that he violated the UCMJ.

12. A brief review of the four documents at issue shows that none of them endorsed, or even referenced, the PIO's determination that the applicant violated the UCMJ. The CO's memorandum to CG PSC-EPM-2 dated January 19, 2023, states only that the applicant "displayed poor judgment and inappropriate behavior by engaging in sexually suggestive and explicit conversations with a coworker and also sent inappropriate text messages including an indecent picture." It went on to state that these actions "went beyond mere immaturity and were entirely inappropriate under the circumstances." The Page 7 dated January 19 states only that the applicant's CO found his actions conflicted with the Coast Guard's Core Values, that he had displayed poor judgment and inappropriate behavior, and that his actions were not consistent with the high standards and level of trust that were expected. The Page 7 dated January 20 states that the applicant was found unsuitable as a recruiter because his conduct was "entirely inappropriate under the circumstances" and had "negatively impacted the performance of the recruiting office." The Member Counseling Receipt dated March 20, 2023, states only that the applicant displayed inappropriate behavior and poor judgment, was subject to an administrative investigation, and took actions that were not up to the expected level of trust. While the

¹¹ The Board acknowledges and will briefly address the applicant's suggestion that the Coast Guard's actions violated his constitutional right to free speech. The First Amendment is inapplicable to this case for several reasons. First, the Supreme Court has long held that free speech protections are more limited for members of the military than civilians due to the military mission's requirements for obedience and discipline. *See Parker v. Levy*, 417 U.S. 733, 758 (1974). Perhaps more importantly, even in cases involving civilian public employees, speech is only protected when it relates to a matter of public concern. *See Connick v. Myers*, 461 U.S. 138 (1983). The applicant's statements in this case certainly did not relate to any matter of public concern. Consequently, the applicant's constitutional argument is unavailing.

reassignment recommendation references an “indecent” picture, it does not endorse, refute, or even mention the investigator’s finding of a UCMJ violation, and neither the memorandum, nor either of the Page 7s, nor the EER receipt include any conclusion regarding the UCMJ.

13. In this case, the applicant’s command properly initiated an investigation into his conduct after receiving a sexual harassment complaint. Based on the facts developed by the investigation, command determined that the applicant’s conduct was inappropriate and unprofessional, and that he had demonstrated poor judgment which negatively impacted the operation of his RO. Employing its broad discretion, command determined that the applicant had failed to meet the high standard of conduct and judgment required of recruiters and that he was no longer suitable for special duty assignment. Importantly, this decision was based on the applicant’s conduct and how it reflected on the RO and Coast Guard, *not* the investigator’s opinion that the conduct violated an article of the UCMJ. The command then followed the required administrative steps to reassign the applicant, including by issuing Page 7s and directing a memorandum to CG PSC-EPM-2. Upon receipt of all required documentation from the applicant and his CO, CG PSC-EPM-2 reviewed the case and approved the CO’s recommendation to reassign the applicant. Command then ensured the applicant underwent an unscheduled transfer EER, as required, for which he received a receipt.

14. The applicant does not dispute the core facts of this case. He engaged in multiple conversations with a female coworker about his sexual preferences, including involving urine and smelling women’s underwear. He referenced obtaining a pair of his coworker’s underwear, and sent her a picture of himself smelling his wife’s underwear. The applicant questions the complainant’s credibility, and the record shows that the investigator did find the complainant “likely did” request the picture sent by the applicant. The applicant has also maintained that his conduct was all part of an ongoing, shared joke which the complainant received in good humor. The record indicates that the complainant did willingly participate in conversations of a sexual nature with the applicant, to some degree. But at some point, the applicant’s conduct made the complainant feel harassed, uncomfortable, and unsafe. Regardless of the complainant’s level of participation, or the reasonableness of her perception of events, the applicant engaged in sexually explicit conversations that, at the very least, risked crossing a line and damaging his relationship with a coworker and making her feel uncomfortable at work. The command determined that this demonstrated poor judgment and a lack of professionalism, and that the applicant was no longer suitable for assignment to a position which acts as the “face” of the Coast Guard, and “first contact” with potential members and leads, many of whom are young women. The Board finds that command’s assessment was reasonable, supported by the evidence, and in accordance with Coast Guard policy.

15. It is important to note that the Board’s role is not to reweigh all of the evidence, or to substitute its judgment for that of the Coast Guard command. Instead, the

Board's role is to determine whether a factual or legal error occurred, or the Coast Guard's treatment of the applicant "shocks the sense of justice."¹² In this case, the applicant has pointed to no violation of the Coast Guard's policies with respect to conducting administrative investigations or reassigning members from special duty, aside from his contention that the Coast Guard's actions were predicated on an improper finding of a UCMJ violation. For the reasons discussed, however, the Board finds the Coast Guard's actions were fully supported by the evidence and carried out consistently with the relevant policies, and did not require or rely on any finding with respect to the UCMJ.

16. For these reasons, the Board finds that the applicant has not met his burden to show that the Coast Guard committed an error or injustice by issuing the reassignment recommendation memorandum, two Page 7s, or EED receipt.

17. The Board does find, however, that partial relief is warranted. Specifically, in the Board's opinion, the contested documents do not provide the level of context necessary to ensure the applicant is not unduly prejudiced. For example, in the IR, the PIO noted the complainant admitted to initiating conversations with the applicant about women and urine. The PIO concluded that the complainant had been a willing participant in the applicant's conduct to some extent and had also exercised poor judgment. The PIO also noted the complainant made inconsistent statements, and he concluded it was "likely" she had requested the applicant send a picture to her along the lines of the one he did send. This context is not included in the contested documents, nor was it required to be in order to conform with the procedures applicable to reassignment from special duty. However, under the unique facts of this case, the Board finds the records as they stand do constitute an injustice, as they pose an undue risk that future reviewers of the applicant's records will misinterpret the circumstances involved in his reassignment. Accordingly, the Board will direct the Coast Guard to redact certain portions of each of the four documents at issue.

18. The Board in no way diminishes the complainant's allegations, or her perception of events. It is not the Board's role to reconduct the investigation or readjudicate the applicant's discipline. The Board also emphasizes that in its opinion, the applicant's reassignment from his recruiting role was fully supported by the evidence and Coast Guard policy. The issue before the Board is a narrow one, and in this case, the Board finds that redactions of portions of the applicant's record provides a balanced outcome, correcting an injustice while affirming the correctness of the Coast Guard's overall decision-making.

19. For the reasons outlined above, the applicant has not met his burden, as required by 33 C.F.R. § 52.24(b), to overcome the presumption of regularity afforded the Coast Guard that its administrators acted correctly, lawfully, and in good faith in the issuance of the contested documents.¹³ The Board finds, however, that the applicant has

¹² See *Sawyer v. United States*, 18 Cl. Ct. 860, 868 (1989).

¹³ *Muse v. United States*, 21 Cl. Ct. 592, 600 (1990) (internal citations omitted).

met that burden with respect to the content of those documents, and the Board will order partial, alternative relief.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of AMT1 [REDACTED], USCG, for correction of his military record is denied. Partial, alternative relief is granted, however. The Coast Guard is directed to redact the applicant's records as follows.

In the January 19, 2023 memorandum from the applicant's CO recommending reassignment, redact the following language from paragraph 5: "by engaging in sexually suggestive and explicit conversations with a coworker and also sent inappropriate text messages including an indecent picture."

In the Page 7 dated January 19, 2023, redact the following from the paragraph describing the applicant's conduct:

1. Beginning on line 1 of that paragraph, "You were subject to an investigation for allegations of harassment made against you after you sent a picture of yourself smelling a pair of female underpants via text message to another coworker. The coworker reported feeling harassed by your actions. I have reviewed the report of the investigation and all evidence collected and I find it inconclusive as to whether you committed sexual harassment, but".
2. Beginning on line 4, "documented in the investigation"
3. Beginning on line 5, "when you engaged in sexually explicit and suggestive conversations with another married coworker while on travel orders and sent sexually suggestive and inappropriate text messages to that same coworker."

In the Page 7 dated January 20, 2023, redact the following starting on line 1 of the paragraph beginning "20JAN2023": "You engaged in sexually suggestive and explicit conversations with another married coworker".

On the EER receipt issued March 20, 2023, redact the following from the Reviewer Comments section:

1. Under the Military Bearing competency, "by sending sexually explicit and inappropriate text messages to another coworker"
2. Under the Decision Making Problem Solving competency, "by engaging in sexually explicit conversations and sending sexually explicit and inappropriate text messages to another coworker"

3. Under the Advanced Potential competency, “by engaging in sexually explicit conversations and sending sexually explicit and inappropriate text messages to another coworker. Member was subject to an administrative investigation.”

The Coast Guard should also take any other necessary action to give effect to this final decision by the Board.

March 13, 2025

