DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2008-090

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xxxxxxxxxxxxx

FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case on March 17, 2008, upon receipt of the applicant's completed application, and assigned it to staff member [redacted] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated January 8, 2009, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant asked the Board to dismiss his conviction by special court-martial[1] with prejudice and to order the Coast Guard to reimburse him for his legal fees. He alleged that the conviction was unjust because the Coast Guard had failed to comply[2] with the order of the BCMR in Docket No. 2004-192. That order required the Coast Guard, in pertinent part, to remove from his record all documentation of non-judicial punishment (NJP) awarded at mast on October 1, 2001, and an associated Punitive Letter of Reprimand (PLR).

[1] Title 10 U.S.C. § 1552(f) states the following with regard to this Board's jurisdiction and courts-martial:

> With respect to records of courts-martial and related administrative records pertaining to court-martial cases tried or reviewed under chapter 47 of this title [10 USCS §§ 801 *et seq*.] (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)), action under subsection (a) may extend only to--
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> (1) correction of a record to reflect actions taken by reviewing authorities under chapter 47 of this title [10 USCS §§ 801 *et seq*.] (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)); or
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> (2) action on the sentence of a court-martial for purposes of clemency.

[2] Title 10 U.S.C. § 1552(a)(4) states that "[e]xcept when procured by fraud, a correction under this section is final and conclusive on all officers of the United States."

The applicant alleged that although the BCMR ordered the NJP and PLR removed from his record in July 2005, the Coast Guard failed to remove them from his record for more than a year. Therefore, the documents were still in his record when his command investigated another incident in May 2006. Because the NJP and PLR were still erroneously in his record in 2006, the command prosecuted him for alleged misconduct at a special court-martial even though it did not prosecute other members for similar alleged acts. Moreover, he alleged, when he decided to withdraw from a plea agreement prior to the trial, the Coast Guard vindictively preferred new charges against him.

The applicant explained that in May 2006 he was interviewed by agents of the Coast Guard Investigative Service (CGIS) after a female petty officer, second class (PO F) alleged that he and a senior chief petty officer (SCPO) had sexually assaulted her during a van ride. After he was transferred to another unit in August 2006, he was told by his commanding officer (CDR M) and a master chief petty officer that they had seen documentation of an NJP in his record, and they advised him to stay away from PO F because "they did not want to put any other negative paperwork in [his] records." After this discussion, he reviewed his Personal Data Record (PDR) and discovered that the Board's order in BCMR Docket No. 2004-192 had not been implemented because the NJP and PLR were still present. On August 23, 2006, he faxed the chief yeoman in charge of his PDR a copy of the Board's order, and she removed the NJP and PLR from his PDR. In support of these allegations, the applicant submitted a copy of the disclosure log for his PDR, which shows that CDR M reviewed part II of his PDR on August 18, 2006.[3] He also submitted a copy of an email in which a chief yeoman verified that she had received the applicant's fax of the Board's order and removed the documentation of the NJP and PLR from his record.

The applicant stated that on November 3, 2006, both he and the SCPO were charged with the sexual assault of PO F. In addition, the applicant was charged with "willfully failing to place [PO F] on report for violating an order to abstain from alcohol, as it was [his] duty to do." Then on Friday, February 2, 2007—one working day before his preliminary hearing under Article 32 of the Uniform Code of Military Justice (UCMJ)—he was charged with two more violations of the UCMJ. At the Article 32 hearing on Monday, February 5, 2007, several witnesses testified about what PO F had told them, and their testimony indicated that "each had a different version of events … told to them by [PO F]." On February 28, 2007, all of the charges against the SCPO were dismissed because they were deemed not credible, and yet all of the charges against the applicant were preferred to a general court-martial, which constituted selective prosecution. He further argued that he was selectively prosecuted because none of the other senior personnel who were present at the restaurant table when PO F flashed her breasts at them were punished for failing to place her on report, and PO F herself was not punished.

In June 2007, the applicant stated, his attorneys persuaded him to enter a pre-trial agreement under which he would plead guilty at a summary court-martial on June 8, 2007, to the charge under Article 92 of the UCMJ of dereliction of duty by failing to report PO F's violation of an order to abstain from alcohol and the Government would dismiss all the other charges

[3] Under Enclosure (3) to COMDTINST M1080.10G, the manual for maintaining members' PDRs, part 2 of the PDR maintained by a Servicing Personnel Office includes all letters and court memoranda.

against him. However, on June 7, 2007, he exercised his right to withdraw from the plea agreement. Two working days later, he was vindictively charged with two more violations of the UCMJ. In support of this allegation, he submitted copies of the charge sheets, which are summarized below. The applicant argued that these charges should be dismissed by the Board based on vindictive prosecution, and the Board should reverse the $3,000.00 fine he was assessed by the jury as a result of these charges. Moreover, if these two charges had not been made, he argued, it is highly unlikely that he would have been punished on the only other charge for which he was convicted. The applicant also asked the Board to amend an unspecified Letter of Reprimand to reflect the removal of the charges against him.

The applicant alleged that it is evident that the Coast Guard's failure to comply with the Board's order in BCMR Docket No. 2004-192 left inflammatory and erroneous paperwork in his record, which "clearly and unfairly prejudiced the [court-martial] Convening Authority as well as the MLCPAC Legal Office against [him]." He stated that his Executive Officer expressed concern over the fact that PO F was deemed not credible in her allegations against the SCPO but credible in her allegations against the applicant. He argued that this anomaly is not logically possible and is evidence of selective prosecution.

The applicant argued that if the Coast Guard had timely complied with the Board's order to remove the documentation of the NJP and PLR from his record, the PO F's charges of sexual assault against him would have been deemed not credible, just as they were for the SCPO. Moreover, he argued, had he not been charged with sexual assault, the other charges against him for not reporting the PO F's drinking and drunken behavior would not have been referred to trial and instead would have been handled by the command at mast. He argued that the Coast Guard charged him with sexual assault "simply because [he] had been found guilty at NJP for sexual harassment almost five years earlier [which] undoubtedly shows selective prosecution." In addition, because his assigned military lawyer had no experience with sexual assault charges, he had to hire civilian defense counsel.

Finally, the applicant argued that the review of his clemency request was unfair. He pointed out that his clemency request, dated November 18, 2007, was denied by the Convening Authority on December 3, 2007, even though the Convening Authority did not take final action on his case until January 2008. He alleged that this timing proves that the Convening Authority denied his clemency request without actually reviewing his entire case.

In a subsequent submission, the applicant asked the Board to dismiss the charge of which he as convicted because, he alleged, he was never designated the cutter's Collateral Duty Addictions Representative (CDAR) *in writing*, as required by Chapter 2.D.4.a. of the Health Promotion Manual, COMDTINST M6200.1A.[4] He stated that the "only document that lists CDAR as one of my collateral duties was HAMINST 1601.AA, COMMAND ASSIGNMENT LIST." In addi-

[4] The edition of the manual cited by the applicant was issued in July 2007. The edition of the Health Promotion Manual that was in effect in April 2006, COMDTINST M6200.1, did not contain the same language in Chapter 2.D.4.a. relied on by the applicant in these arguments. Instead, Chapter 2.D.3.a. of COMDTINST M6200.1 stated that the commanding officer of a unit shall "designate a E6 or above (when possible), as CDAR (active duty units only) and provide G-WKH-3 a request for CDAR training with a copy of a designation letter, which will include authority for access to necessary files and records to perform their duties. Units collocated with a Group or ISC may designate the Group/ISCs' CDAR as their representative, when appropriate."

tion, he stated that he was the only person listed as CDAR, whereas Chapter 2.D.4.a. of the latest edition of the Health Promotion Manual, states that commands with 50 or more members "shall designate, at a minimum, one primary and one alternate CDAR." In support of this allegation, the applicant submitted a copy of USCGC XXXXXX INSTRUCTION 1601.1AA," which was issued on December 2, 2005, and shows that he was the only person designated as a CDAR, although the XXXXXX has a crew of 173 members.

In support of his allegations about PO F's lack of credibility, the applicant submitted an email dated February 28, 2007, that the Executive Officer of the cutter sent to the Legal Office with comments about the investigating officer's report. He stated that he was concerned about the quality of the investigation and did not believe the assault actually occurred. He stated that PO F had been found unfit for continued service because of her psychological status and that he believed that, because of her drunken state, she

> conflated the events of the evening and transposed what occurred at the bar to the van ride home as she became concerned over the impact of her aftercare program violation. This resulted in allegations against [the applicant]. Further, I believe she then integrated the "CPO's Gone Wild" video to include [the SCPO] as an assailant since he is featured prominently in the video. This conflation of events is further confirmed by [PO3 X's] statement that she thought the assault occurred in the bar, not the van, and that initially she didn't think it was such a big deal. This conflation of events is also confirmed by [OS1 M's] statement when he reported that [PO F] received money from the CPO's for allowing them to put bills down her shirt when it was actually the fishermen in the bar that did this. This is consistent [with] a documented pattern of behavior demonstrated aboard the [cutter] that aligns with her current psychological evaluation. She fabricated incidents in the past and, based on her my.space.com profile, she is willing to embellish facts to portray herself in a favorable light. She took the basic facts that she was flashing and apparently being groped by fishermen for money and used that grain of truth to fabricate the incident. I am also convinced that she truly believes these things happened and could pass a lie detector test.

The Executive Officer further stated that he believed that

- PO F had not cooperated with the investigation until sometime after he told her that, if she had been assaulted, she would not be charged with an "alcohol incident" but only counseled about a "alcohol-related situation";[5]
- the chief petty officers had not collaborated on their stories;
- the liberty van driver's allegation that the chief petty officers had tried to intimidate him was not credible;
- PO F had a romantic relationship with PO3 X, who testified about PO F's statements about the assault after the fact;
- ET3 B, who claimed that the applicant had shown "romantic affection" for PO F earlier in the evening, was a "sexual predator" whose plans for PO F—his "prey" that evening—had been ruined when the chief petty officers arrived at the restaurant; and
- PO F was accusing him, the Executive Officer, of harassment because when he discovered that her arrest for drunk driving the year before had not been documented in her

[5] Under Articles 20.B.2.d., 20.B.2 h.2., 20.B.2.i., and 20.B.3.d.2. of the Personnel Manual, enlisted members may theoretically be counseled in writing about any number of "alcohol-related situations" without being discharged, but they are normally processed for discharge after two "alcohol incidents" or a violation of an aftercare program and must be processed for discharge after a third "alcohol incident."

record by the CDAR, he did so a year late and because when he discovered that she was skipping her counseling appointments, he required her to give him a weekly summary of her appointments so that he could ascertain her attendance.

BACKGROUND: BCMR DOCKET NO. 2004-192

In BCMR Docket No. 2004-192, the applicant had been awarded NJP on October 1, 2001; received a derogatory performance evaluation; and had his temporary commission as an officer vacated after he was charged with these offenses: fraternization (interrelating on terms of military equality; UCMJ Article 134; four counts), attempts at fraternization (UCMJ Article 80; seven counts), failure to obey an order or regulation (by soliciting inappropriate interpersonal relationships and using the email system to do so; UCMJ Article 92; thirteen counts), dereliction of duty (by committing sexual harassment; UCMJ Article 92; two counts), and conduct unbecoming an officer (by seeking inappropriate relationships with subordinates; UCMJ Article 133; seven counts). An investigation revealed that, although married, he had verbally solicited an inappropriate relationship with a subordinate female yeoman; had sexually harassed the yeoman and another female enlisted member; and had sought inappropriate personal relationships[6] in emails he sent to both of them. The applicant's commanding officer removed the applicant from the cutter by issuing him temporary orders to an assignment ashore during the investigation and, when the investigation was complete, decided to take him to mast on the charges. Several months after the mast, the applicant was issued permanent transfer orders to report to a new unit.

In advising the applicant of his rights prior to the mast on October 1, 2001, the cutter's command used a form for members subject to the "vessel exception" under Article 15 of the UCMJ—i.e., the form indicated that because he was "attached to" a vessel he did not have a right to refuse mast and demand trial by court-martial, as do military members who are assigned to shore units. The Board found that under the interpretation of the "vessel exception" provided in *United States v. Edwards*, 46 M.J. 41 (C.A.A.F. 1997), the exception did not apply to the applicant because he had been assigned to a shore unit for several weeks prior to the mast and was escorted back to the cutter solely for the purpose of attending the mast. Therefore, he should have been accorded the right to refuse mast and demand trial by court-martial. The Board ordered the Coast Guard to remove from the applicant's record all documentation of the NJP and also the PLR, which had been entered in his record as NJP. However, the Board did not require the Coast Guard to remove the applicant's derogatory performance evaluation because it was based on the findings of the investigation, rather than on the NJP, nor to reverse the vacation of his temporary commission. Because of that vacation, the applicant reverted to his enlisted status on October 26, 2002.

SUMMARY OF THE RECORD

In April 2006, the applicant was assigned to the USCGC XXXXXX, whose home port is Xxxxxx, [redacted] His primary duty was serving as the chief of the cutter's xxxxxxxxxxxx. One of his collateral duties was to serve as the cutter's Collateral Duty Addictions

[6] Under Article 8.H. of the Personnel Manual, romantic relationships between shipmates are prohibited.

Representative (CDAR).[7] On April 23, 2006, the XXXXXX was docked in Xxxx xxxx, Xxx, for about 24 hours. More than week later, when the cutter had returned to Xxxxxx, a counselor reported to CGIS that PO F had told her that she had been sexually assaulted by the applicant while on liberty in Xxxx xxxx. CGIS agents began interviewing PO F and other crewmembers in May 2006. On November 1, 2006, the applicant was charged with the following offenses:

> I. Violation of the UCMJ, Article 134 – Indecent Assault
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> SPECIFICATION:
> 1. In that [the applicant], U.S. Coast Guard, on active duty, did, while riding in a liberty van in Xxxx xxxx, Xxx, on or about 23 April 2006, commit an indecent assault upon [PO F], a person not his wife, by penetrating her [genitalia] with his finger, with intent to gratify his sexual desires.
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> 2. In that [the applicant], U.S. Coast Guard, on active duty, did, while riding in a liberty van in Xxxx xxxx, Xxx, on or about 23 April 2006, commit an indecent assault upon [PO F], a person not his wife, by groping her breasts with his hand, with intent to gratify his sexual desires.
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> II. Violation of the UCMJ, Article 92 – Dereliction of Duty
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> In that [the applicant], U.S. Coast Guard, on active duty, who knew of his duties on or about 23 April 2006, was derelict in the performance of his duties in that he willfully failed to place [PO F] on report for violating an order to abstain from alcohol, as it was his duty to do.

On February 2, 2007, the charge under Article 92 on the November 1, 2006, charge sheet was withdrawn and dismissed, and the following additional charges were prepared to address the

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[7] Under Chapter 2.C.17. of the Health Promotion Manual, COMDTINST M6200.1, CDARs are trained unit members who "serve as consultants and advisors to their parent command in the administration of the unit addictions program." Chapters 2.F. and 2.J. of the manual state that members awaiting alcohol rehabilitation treatment and members in aftercare programs must meet weekly with their sponsoring CDARs. In addition, Chapter 2.D.5. states that it is the duty of a unit CDAR to:

> a. provide information and assistance to the command regarding substance abuse treatment and prevention;
> b. establish unit training plans for alcohol awareness and conduct semiannual training for all hands;
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> • • •
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> f. provide initial screening using the screening form(s) required by the local screening facility for members identified as having possible alcohol related problems;
> g. make necessary referrals, including diagnostic screenings by an alcohol screening facility, a physician, or a psychiatrist/licensed clinical psychologist, as appropriate;
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> • • •
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> i. keep the commanding officer informed of the status of personnel undergoing treatment including expected date of completion/return, prognosis, and personal needs (pay, orders, etc.);
> j. assist and provide support for personnel undergoing or returning to duty from treatment;
> k. coordinate implementation and monitor the mandatory pre-treatment and aftercare programs with the commanding officer;
> l. ensure that health and service record entries and information are up-to-date;
> m. submit a CDAR Referral and Follow-up Report, enclosure (3) to MLC APR for all members:
> (1) interviewed by the unit CDAR;
> (2) referred to an approved screening, prevention, educational or addictions treatment program;
> (3) in the aftercare program;
> (4) in aftercare being transferred to another unit or discharged.

applicant's failure to act regarding PO F's failure to obey the order to abstain from drinking alcohol:

> Additional Charge I. Violation of the UCMJ, Article 92 – Dereliction of Duty
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> Specification: In that [the applicant], U.S. Coast Guard, on active duty, who knew of his duties as USCGC XXXXXX Collateral Duty Addictions Representative, at Xxxx xxxx, Xxx, on or about 23 April 2006, was derelict in the performance of his duties in that he willfully failed to assist and provide support to [PO F] who had undergone alcohol abuse treatment, as it was his duty to do.
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> Additional Charge II. Violation of the UCMJ, Article 134 – Soliciting Another to Commit an Offense
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> Specification: In that [the applicant], U.S. Coast Guard, on active duty, on or about 23 April 2006, did at Xxxx xxxx, Xxx, wrongfully solicit [PO F] to disobey a lawful order given on or about 20 March 2006, to wit: "For a period of 90 days, you will abstain from consuming alcohol," by encouraging [her] to consume alcohol on or about 23 April 2006.

At an Article 32 hearing on February 6 and 7, 2007, the applicant was represented by both military and civilian counsel. On the charges against the applicant and the SCPO, the following statements and testimony were entered into evidence by these witnesses: the primary CGIS agent; the secondary CGIS agent; PO F, the alleged victim; ET3 B, a friend of PO F; GMC X and BMC W, chiefs on the cutter; the duty van driver; OS3 T, a subordinate of PO F who spoke to her after the alleged assault; PO3 X, PO F's best friend and the first person to whom she spoke of the alleged assault; OS1 M, PO F's supervisor, to whom she spoke briefly of the alleged assault on the night in question; and the Executive Officer (XO) of the cutter. Neither the applicant nor the SCPO testified at the Article 32 hearing.

Statement of the Primary CGIS Agent in the Article 32 Investigation

The CGIS agent stated that he interviewed PO F on May 9, 2006, but she was hesitant about talking and ended the meeting quickly because she was concerned about her career. She would not make a written statement until after she spoke with the Executive Officer because she thought she might get discharged. At their first meeting, she first told him that she was intoxicated on the night of April 23, 2006, because she had been forced to drink by five chiefs, but then amended her story to say it had been four chiefs and later stated that she "could not recall being forced to drink." The CGIS agent stated that PO F seemed more confused than dishonest about what happened. She admitted to drinking five beers and claimed to have been "grabbed." He told her that "he could not guarantee that any administrative action would stop against her as a result of her reporting the assault."

At a second interview, she gave him more information and then wrote out a statement at home. She could not remember what happened during the bunker stop, but said that the assault happened before that stop. She could not remember which hand the applicant had used to touch her breasts but claimed that the SCPO had used his right hand. PO F never told him "how the touching occurred" but "her story remained consistent." She told him that she was "in shock" the night of the alleged assault and "froze" instead of moving, but she had memories come back to her later.

The CGIS agent stated that in his second interview with the applicant, the applicant admitted that PO F had sat on his lap at the [redacted] and that he had forgotten to tell this to the agent during their first interview. The applicant also told the agent that PO F had vomited on him "and he had pushed her away when she tried to hug him and apologize." In addition, PO F had brushed against him in the van at one point when they switched seats.

The CGIS agent stated that in his affidavit and in his interviews, the SCPO had never denied touching PO F's breasts. The SCPO told him that he did not know if the applicant touched PO F.

The CGIS agent stated that the Executive Officer had told him that the accused chiefs were "great chiefs and it would surprise the command if the allegations were true."

Statement of Secondary CGIS Agent in the Article 32 Investigation

Another CGIS agent who conducted a few of the interviews stated that Ms. E, a senior female on the cutter, told him that PO F had told her about the alleged assault on the morning of April 24, 2006. PO F was upset and "told her about the van ride and the [redacted]" PO F told her that she had been drinking and that the applicant "was touching her breasts and making threats." PO F also talked about the "[genital] touching" but did not go into detail. PO F did not mention the SCPO to Ms. E.

Statement of PO F in the Article 32 Investigation

PO F, the alleged victim, stated that after she was arrested for driving under the influence of alcohol (DUI) in 2005, the applicant was her CDAR, and he made her screening and treatment appointments and conducted her counseling about the alcohol incident. She stated that he "was also designated to work her case and monitor her aftercare," but he did not set up any meetings to discuss her aftercare with her. On April 23, 2006, she rode the van into Xxxx xxxx and met ET3 B and some other members. She and ET3 B went to the [redacted] for lunch, where she ate fried rice and drank beer and sake. After lunch, she and ET3 B "bummed around downtown" but they returned to the [redacted] for dinner that evening. She, ET3 B, and another petty officer, OS2 D, split an appetizer and drank beer and sake. Shortly before 10:00 p.m., four chiefs from the cutter—the applicant, the SCPO, BMC W, and GMC X—entered the restaurant and sat at a nearby table. They quickly ordered about 24 beers because the restaurant stopped serving alcohol at 10:00 p.m. The applicant "smiled and waved her over in a friendly manner. …. He invited her to sit down and drink. She testified that she said she can't drink and then he and [the SCPO] said sit and drink." Therefore, she sat and drank one or more beers with the chiefs. ET3 B and OS2 D joined the chiefs' table as well, but they and GMC X left the restaurant before her and the chiefs.

PO F stated that she did not recall sitting on the applicant's lap but vaguely recalled flashing her breasts at the entire bar. She did not recall receiving money for flashing her breasts, and she did not recall vomiting. At about 11:00 p.m., she and the three remaining chiefs got in the liberty van. She stated that she sat in the same row as the applicant, with the SCPO in the row ahead of them and BMC W in the front row. On the trip back to the cutter, the applicant

began to touch her left thigh with his right hand. She was wearing pants and ignored him because she hoped he would stop. Then the applicant put his hand on her bare skin under her clothing. When she said something like "what the hell," he told her, "You can't say anything because you were drinking," or words to that effect. She felt trapped. When she did not say anything more, the applicant first put his hand under her bra and rubbed her breast or breasts (she could not recall), and then put his hand down her pants and inside her underwear and put his finger inside her. She stated that she leaned forward to try to make it harder for him to touch her, but she did not say anything. At this point, the SCPO briefly touched her breasts, but she did not speak to him. She stated that the applicant touched her for "a much longer time" but the van ride lasted only about ten minutes. She vaguely remembered getting out of the van at the bunker and could not recall where they sat when they got back in the van.

When the van returned to the parking lot, she went to the phone trailer. She ran past OS3 T, and called her best friend PO3 X because she was upset. She spoke to PO3 X for a long time and told her what had happened. OS3 T stayed with her in the trailer because he was concerned, and he walked her back to the mess deck. She thinks she told him what happened but asked him not to say anything. She "thinks she saw" BMC W in the trailer in a telephone stall to her right. On the mess deck, she saw OS1 M and another petty officer and "blew off steam about what happened." She also told three other petty officers about what had happened. One of them encouraged her to report the applicant's alleged actions to the command, but she did not do so because of other another female member's experience with reporting sexual harassment. In addition, she did not want to report an incident while the cutter was underway. She did not want to make any report because she "was scared of retaliation and a snowballing effect." She stated she knew of one female member who had reported being raped and was humiliated and told by the command that her claim was "bullshit" before positive results were received for a rape kit DNA test. She did not want to be treated like that or to be kicked out of the Coast Guard. However, a CGIS agent contacted PO F shortly after the cutter reached Xxxxxx, so she told the agent what had happened during the van ride.

Under cross-examination, PO F admitted that she may have been intoxicated before the chiefs arrived at the restaurant on April 23, 2006, and that she had flashed her breasts on previous occasions when intoxicated. She denied that the chiefs told her to drink water that night and could not remember how many drinks she had. She could not remember telling CPO K that she had vomited on the applicant at the restaurant. PO F further stated that during the van ride, she entered the van after the applicant and sat beside him. She admitted that there was room to move from her seat in the van.

The investigating officer noted that PO F admitted that she had received written counseling about lying and that she may have "told different stories to different people." She acknowledged not telling everyone that the SCPO had also touched her without her consent because she did not feel threatened by him. PO F said she could not remember why she told the CGIS statement that five chiefs had made her drink alcohol. She admitted that she did not tell her friends about the genital assault. The investigating officer further noted that she was uncooperative and "appeared evasive" with defense counsel.

PO F also stated that once when she was leaning over to open a low drawer, she was "rear ended" by CPO K, who bumped his front pelvis into her buttocks. She reported this assault, but her report went no higher than FSCS K, who "invited her and two other female crew-members to lay topless on his yacht and then described how he would have sex with each of them."

PO F stated that the Coast Guard had not initiated any action against her for drinking alcohol, but she had not been promised immunity or special treatment for testifying. She had been taken to mast for a three-day unauthorized absence, which she alleged resulted from harass-ment by the Executive Officer and FSCS K.

Testimony of ET3 B in the Article 32 Investigation

ET3 B stated that he was a friend of PO F and spent the day with her in Xxxx xxxx on April 23, 2006. He denied having rented a hotel room that day. He remembered drinking a beer with PO F at a bar before lunch and admitted that they may have gone to the hotel. They met OS2 D by chance at the [redacted] for supper, ordered an appetizer plate, and drank beer and sake. PO F did not order drinks herself but told him what she wanted to drink. She never told him that she was not allowed to drink alcohol. PO F "seemed to be feeling the effects of the alcohol but she was not heavily intoxicated." When the chiefs arrived at the [redacted], the chiefs invited them over to their table. PO F "had at least one beer from the chiefs" and he could not recall them telling her not to drink. Nor could he recall the chiefs pressuring anyone to drink.

ET3 B stated that he left the restaurant after PO F began sitting on the applicant's lap. When he saw the applicant caressing her thigh, he asked PO F to leave, but she said "no." He was angry that she would not leave "because she should have known better and left the situation; however, he let it go." PO F did not appear to react negatively to the applicant's caresses, but he thought she was intoxicated. He could not recall her flashing her breasts or vomiting. He walked back to the cutter. A few days later, PO F told him that CGIS would be contacting him, but she did not tell him why.

Upon cross-examination, ET3 B denied having ever been in a romantic relationship with PO F. He stated that he "was aware that [PO F] should not be drinking, but it is her call to make." Before the night of April 23, 2006, he had never been invited to drink with chief petty officers. He never saw the SCPO touch PO F. Finally, he stated that he had originally refused to make a statement to CGIS because PO F had told him not to say anything, but later agreed to provide a statement.

Testimony of GMC X in the Article 32 Investigation

GMC X, who went to the [redacted] with the applicant and the SPCO on April 23, 2006, stated that he could remember seeing PO F at the [redacted] bar earlier in the day and she appeared intoxicated "because she was having trouble with the words while singing karaoke." At the [redacted], he was with a civilian, and he and the other chiefs "ordered a table full of beer and food." He stated that he was intoxicated and did not remember seeing PO F at the [redacted]. On cross-examination, he stated that he might have seen PO F at the [redacted] bar on a different day.

Testimony of BMC W in the Article 32 Investigation

BMC W stated that on April 23, 2006, he "had a lot to drink that night. He was barely drunk at the [redacted] but got much drunker at the [redacted]." When he got to the [redacted], he saw the SCPO at a table full of beer and food, and the SCPO waved him over. The applicant and GMC X were also at the table, as was a civilian and PO F. He did not see ET3 B or OS2 D at the [redacted] He saw PO F flash her breasts twice that night and seemed to be enjoying herself. First she flashed the table, and then she flashed the entire bar. When she flashed her breasts, he knew "the evening was getting out of control" but no one scolded her or told her to stop drinking. He did not remember seeing her vomit. After PO F flashed her breasts, the restaurant management asked them to leave, "so the group 'drank up and headed out.'"

When the liberty van arrived, BMC W stated, he told the driver to finish his route and come back for them "because they still had beer to drink." When the van came back, he sat in the front passenger seat. The other three "all sat in the bench row directly behind him and the driver," with the applicant nearest the door, the SCPO in the middle, and PO F by the window behind the driver. During the ride, he talked and "cracked jokes" with the SCPO. "The van was driving around looking for [GMC X] and a red jeep." When they came to a bunker, they all jumped out and pretended to take a picture.

BMC W stated that the mood in the van "was light," and he did not hear any unusual noises or see anything inappropriate happen. He was very intoxicated and could not remember going to the phone trailer that night.

Statement of the Duty Van Driver in the Article 32 Investigation

A seaman who was driving the van at the time of the alleged assault stated that he knew the applicant, the SCPO, and PO F, but was not friends with any of them. His standard route consisted of starting from the harbor parking lot and passing by the airport, a small shopping area, downtown Xxxx xxxx, the gym, a few bars, and the library before reversing course back to the parking lot. On his last run on the night of April 23, 2006, he picked up the applicant, the SCPO, another chief petty officer (BMC W), and PO F at an [redacted]. The van had at least four rows of seats with an aisle down one side. BMC W sat in the first row; no one sat in the second row; the SCPO and PO F sat in the third row; and the applicant sat in the fourth row. Once seated, he could see only their heads and shoulders, and he did not pay attention to them because it was snowing and the road was icy. Loud music was playing, so he could not overhear their conversation. However, "the atmosphere in the van was loose and it was obvious that all of the passengers had been drinking." He could tell that PO F was intoxicated. As he continued the run, some of the passengers got out at one of the stops, and he does not remember where they sat when they returned to the van. He was not aware of any assault, did not notice any change in anyone's demeanor, and the run was short because there was little traffic. At the end of the run, he and BMC W went to the phone trailer because the BMC wanted to borrow his phone card to make a call. He did not see PO F enter the phone trailer. Since that date, he had spoken to PO F only once, and she told him that he should report anything he saw.

Testimony of OS3 T in the Article 32 Investigation

OS3 T stated that he saw PO F in the phone trailer on the night of April 23, 2006. He is her coworker, but they are not friends and do not "hang out" together on liberty. OS3 T stated that he was on watch until midnight that night and went to the phone trailer to call his wife when he got off watch. He saw and overheard PO F in the phone room as he waited for the phone that BMC W was using to be free because that was the one phone that accepted incoming calls. She "appeared upset and was yelling in the phone. He heard her say that she did not like the Coast Guard, she had been through 'all sorts of bullshit,' that chiefs had 'touched her in the van,' she wanted out of the Coast Guard, and this was 'the last straw.'"

OS3 T also stated that BMC W appeared very intoxicated and had trouble pressing all the numbers to complete his call. The applicant and the SCPO were sitting on the floor at the end of the trailer used as a "library area" about 25 feet away from PO F. They appeared to be waiting for BMC W. When BMC W left the phone, OS3 T spoke to his wife for about 30 minutes. When he heard PO F end her conversation, he quickly got off the phone with his wife because he was worried about PO F and wanted to make sure that she got back to the cutter safely. When he asked her if she was okay, she told him that the chiefs had started touching her breasts on the van ride and did not stop when she told them to stop. She said that when the van stopped, "they tried to 'go further' and she ran out of the van to the phones." He interpreted her statement to mean that the chiefs had tried to "go down her pants." She did not name the chiefs who had touched her. She told him she did not want to report the incident because she could get in trouble for drinking alcohol. He escorted her to the mess deck, and they did not speak to anyone.

OS3 T stated that he did not speak to PO F again about what happened that night, but he had recently received a long email from her, which she sent to several people. In this email, she complained about being wrongly treated because of the incident on April 23, 2006.

Statement of PO3 X in the Article 32 Investigation

PO3 X stated that she is a close friend of PO F, had previously served aboard the XXXXXX, and was at home in [redacted] when the PO F called her late one night in April 2006. She stated that PO F "was hysterical" and said she wanted to leave the Coast Guard and not go back to the ship because "the chiefs were bothering her." PO3 X stated that she could tell PO F was intoxicated, anxious, and "freaked out." PO F had difficulty talking. PO3 X stated that she could not remember whether PO F stated that one or two chiefs had been touching her or how they touched her. PO3 X remembered only the applicant's name being mentioned. PO3 X stated that she later discussed with her the reaction of the cutter's command to the incident and had read PO F's written statement for the CGIS investigation the day before the hearing.

On cross-examination, PO3 X stated that during the telephone call in April 2006, PO F had said she had to "stay with them" that night, which PO3 X interpreted to mean that PO F could not leave the chiefs and had had to have sexual relations with them already that evening. In addition, PO3 X had thought after the telephone call that the assault had occurred in the bar rather than the van and had been less severe than indicated in PO F's statement. PO3 X testified that PO F told her she had been sexually assaulted but did not tell her the details.

Testimony of OS1 M (PO F's Supervisor) in the Article 32 Investigation

OS1 M stated that he was PO F's supervisor on the cutter and he spoke her on the mess deck following the alleged assault on April 23, 2006. When PO F arrived on the mess deck that night, she told him that "the chiefs had given her money to grab her." She pulled money out of her bra and showed it to him. She said that the chiefs had been shoving money down her shirt, but he did not remember whom she named. She also told him that the chiefs had grabbed her in the van. OS1 M stated that PO F appeared intoxicated and was upset about the incident and asked him what she should do. Their conversation lasted only about five minutes, and the next day she told him she did not want to talk about it, and he did not question her. She appeared to be concerned about her career. He had never been told that she was not allowed to drink alcohol, and he never reported the incident.

Testimony of the Executive Officer (XO) in the Article 32 Investigation

The XO of the cutter stated that the applicant was the unit CDAR as "designated in writing by the unit instruction." Both the applicant and another petty officer "were in charge of monitoring members who needed alcohol care" and were expected to inform the command of any violation of an aftercare program. The XO stated that the applicant did not inform him that the PO F had been drinking in violation of her aftercare program. The XO first heard about her violation when PO F told him that she had been contacted by the CGIS and was afraid to admit that she had been drinking because she might be discharged. The XO stated that knowledge of who is in an aftercare program is "kept closely held by those who need to know." He stated that he was "unaware of what support and assistance [the applicant] failed to provide [PO F]" and was surprised that the applicant had not reported that PO F had been drinking alcohol at the [redacted] He stated that if a CDAR encouraged a member in aftercare to drink alcohol "it would be a serious violation."

With regards to PO F's statement about fearing to make a report, the XO stated that a prior female crewmember had accused another member of rape but then recanted her story. When the DNA test corroborated her story, the alleged rapist was prosecuted for perjury.

The XO stated that PO F had previously complained about another chief on the cutter making inappropriate comments. She had also made allegations about crewmembers using cocaine and drinking alcohol while underway, which he did not think were true. The XO stated that he believed PO F had "a pattern of making allegations against those that she works with." In addition, she had once returned to the cutter highly intoxicated but the command had decided not to report it.

Article 32 Investigation Report

On February 23, 2007, the investigating officer issued a report to a Rear Admiral, the Commander of the Maintenance and Logistics Command for the Pacific Area, who was also the Officer Exercising General Court-Martial Jurisdiction (OEGCMJ) for the applicant, on the Article 32 investigation/hearing on February 6 and 7, 2007, on the charges against the applicant. He reported that he found that reasonable grounds existed to believe that the applicant committed the alleged indecent assaults and recommended that the charges be referred for trial by court-martial. He cited the testimony of the alleged victim, PO F; the CGIS investigator; another petty officer who was a friend of the victim; the liberty van driver; the Executive Officer of the cutter; and two other petty officers. The investigator noted that PO F was drunk and that she was "not a strong witness and her testimony contained numerous discrepancies, which raise questions about the validity of these allegations. However, her demeanor and appearance during the investigation led me to believe that her story was not a fabrication. Her inability to recall the specific details of this assault does not mean that an assault did not occur. I found [PO F] and her version of the assault both credible and believable. I found it particularly noteworthy, and extremely suspicious, that [the applicant] made no mention of [her] drinking that evening to his Executive Officer, as was his duty as her sponsoring CDAR." He also noted that one witness stated that the applicant had shown "romantic affection" for PO F earlier in the evening.

The investigating officer also recommended that the charge of dereliction of duty for failure to report PO F's consumption of alcohol, the charge of solicitation to commit an offense, and the general charge regarding the applicant's continuing to socialize with PO F after she had exposed her breasts in the restaurant be referred for trial by court-martial based on the testimony of the same witnesses and other members who were at the restaurant.

The charges against the SCPO were not referred for trial.

On June 7, 2007, the applicant's attorney informed the Legal Office that the applicant had "reconsidered and has decided to exercise his rights under RCM 1303 to object to trial by summary court-martial."

On June 11, 2007, a Charge Sheet was prepared with the following additional charges:

> Additional Charge III. Violation of the UCMJ, Article 92 – Dereliction of Duty
>
> Specification: In that [the applicant], U.S. Coast Guard, on active duty, who should have known of his duty on or about 23 April 2006, was derelict in the performance of those duties in that he negligently failed to report to the proper authority [PO F's] violation of a lawful order to abstain from drinking alcohol after observing her violate the order, as it was his duty to do.
>
> Additional Charge IV. Violation of the UCMJ, Article 134 – General Article
>
> Specification: In that [the applicant], U.S. Coast Guard, on active duty, on or about 23 April 2006, did not take corrective action and continued to socialize with [PO F], a subordinate, after [she] exposed her naked breasts to persons at the [redacted] in Xxxx xxxx, Xxx, and that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces.

Trial by Special Court-Martial

The applicant was tried at a special court-martial convened from August 27 to 31, 2007. He was represented by both military and civilian counsel. He pled not guilty to all the charges, including the two original specifications of indecent assault under Article 134, as well as additional charges I, II, III, and IV. He was tried by a panel of four members, including two officers and two enlisted members. The following witnesses testified at the trial: PO F, ET3 B, PO3 X, BMC W, the van driver, OS3 T, the XO, the CO, the primary CGIS agent, a senior chief health services technician with expert knowledge of the training and duties of a CDAR, and GM2 S—a crewmember who was not a friend of PO F but who testified that the applicant had threatened to abuse his power as CDAR against him.

At the start of the trial, the applicant's defense counsel noted that PO F was aware of the NJP at issue in BCMR Docket No. 2004-192 and asked that she be instructed not to mention it. The prosecution agreed, and the judge told the prosecutor to instruct PO F before she entered the room not to mention the NJP.

In his opening statement, the applicant's attorney stated that in the [redacted], as soon as the applicant invited the junior petty officers to the chiefs' table, PO F sat in his lap, so he quickly found her a chair. When she vomited on him, he went to the bathroom to clean up, so he did not witness her flashing her breasts in the bar. By the time he left the men's room, the group had been asked to leave and so he went outside to meet them and catch the van back to the cutter. He also stated that there were at least three different versions of which person sat where in the van before and after the "bunker" stop and that PO F's version of where everyone sat and how she was assaulted is not supported by any other person in the van. He also stated that PO F was motivated to lie about the assault and the applicant's actions because she wanted to be transferred from the XXXXXX and she did not want to be discharged for violating her aftercare plan.

The attorney also argued that the applicant had not been properly designated as the CDAR, that a CDAR is not an "alcohol cop" or therapist but someone who processes paperwork; and that the applicant was being selectively prosecuted because none of the other chiefs at the restaurant were charged with dereliction of duty for failing to report PO F's actions. He noted that not every violation of one's duties results in a UCMJ charge and that such leniency is often considered a matter of discretion and leadership.

PO F's Testimony at Trial

PO F, the first witness, stated that the applicant served as her CDAR following her first "alcohol incident" when she was arrested for DUI in 2005. After she completed rehabilitative treatment on March 20, 2006, the applicant as her CDAR presented her with a CG-3307 acknowledging her completion of the program and ordering her to abstain from alcohol for 90 days, to meet with the CDAR weekly, and to attend two Alcoholics Anonymous meetings. A copy of the CG-3307 was entered into evidence. PO F testified that the applicant did not require her to meet with him weekly and "brushed [her] off" when she asked about it.

PO F stated that while at the [redacted] on the night of April 23, 2006, she was sharing a big appetizer and drinking beer and sake with ET3 B and OS2 D when four chiefs—the applicant, the SCPO, BMC W, and GMC X—entered with two civilians who were friends of GMC X. When she saw them enter, she worried because she had been drinking alcohol and the applicant was her CDAR. The chiefs sat at another table and ordered a lot of beer—about two cases or 24 large beers—and at some point the applicant waved her, ET3 B and OS2 D over to the chiefs' table and invited them to help finish the beer. When she reminded him that she was not supposed to drink alcohol, he invited her to sit and drink anyway, and the SCPO told her to sit down, shut up, and drink. The applicant slid one of the beers on the table in front of her and she drank it because he had offered it to her and because she felt privileged to have been invited to the chiefs' table. She has no specific of OS2 D leaving, but she remembered ET3 B asking her to leave and her refusing to leave with him. She did not remember being seated in the applicant's lap. Sometime thereafter, she flashed her breasts, and the group was told to leave the restaurant.

In the liberty van, she sat beside the applicant on one of the bench seats near the back and the SCPO sat on the bench seat in front of them. BMC W sat in the passenger seat beside the driver. During the ride back to the cutter, the applicant began rubbing her leg and when he put his hand up her shirt, she said something like "What the hell are you doing?" He told her that she could not say anything because she was not supposed to be drinking alcohol and she would get kicked out of the Coast Guard. This made her feel "trapped, scared." He put his hand on her breast underneath her sports bra and then put his hand down her pants. He put his finger inside her. She did not say anything but she leaned forward to try to make it more difficult for him. When she leaned forward, the SCPO, who had his arm around the back of the seat, touched her breasts. The van got back to the parking lot but one of the chiefs asked that it go back out, so the van driver drove them to the [redacted] which was closed. PO F stated that she could not remember at what point the touching stopped. BMC W got out to look for someone, and when he came back the van stopped at a [redacted] before returning to the parking lot.

PO F stated that when the van stopped, she went to the phone trailer because she wanted to be on the phone and talking to her friend so that one of the chiefs would not try to talk to her. She was upset and scared and did not want to be alone with them. After talking to her friend about what had happened, she hung up and saw OS3 T. He approached her expressing concern, and she told him what had happened. She could not remember how many details she gave him. He walked her to the mess deck, where she saw OS1 M and told him a little of what had happened before going to her bunk. She did not report the matter to her chain of command because nothing had been done when she had previously reported sexual harassment. Instead, she waited until the cutter had returned to Xxxxxx and then told a substance abuse counselor.

On cross-examination, PO F admitted that for about one month in 2004, she had had a romantic relationship with a female crewmate, PO3 X, who was the woman she called after the van ride on the night of April 23, 2006. Since that month, they had remained close friends but had not had any further romantic involvement.

Testimony of ET3 B at Trial

ET3 B stated that at the [redacted] on April 23, 2006, after the chiefs invited him, OS2 D, and PO F to join them, the chiefs offered them all beer, and he saw PO F sitting beside the applicant and drinking beer for more than an hour. At some point he saw that PO F appeared intoxicated, and she was sitting on the applicant's lap. The applicant had his hand on her thigh and was caressing her thigh with his thumb. ET3 B was angry about this and decided to leave a few minutes later. He asked PO F to leave with him, but she refused to leave with him. He did not see her again that night and he has "barely talked with her" since that day.

Testimony of BMC W at Trial

BMC W stated that when he entered the [redacted] on April 23, 2006, he saw the applicant and PO F sitting at a table with the SCPO, GMC X, and a civilian. They invited him to sit with them and offered him beer. There were 20 or 30 beer cans on the table. The applicant and PO F were sitting beside him, but he faced away from them, toward the SCPO. He stated that he does not remember whether PO F was drinking alcohol but that at one point she stood up and flashed her breasts at their table. He was not paying attention to her so he could not say whether she was intoxicated. PO F then went to another table and flashed her breasts at two fishermen. When she came back she smiled and told them that they had given her $20.00. He could not recall whether the applicant witnessed the flashing or whether anyone said anything to PO F about it. Shortly thereafter, they were told to leave. By that point, he was "loaded" and the SCPO was "wobbly legged."

In the liberty van, he sat in the front passenger seat. He believes that PO F sat directly behind the driver and that the SCPO sat beside her. BMC W asked the duty driver to drive around to look for GMC X because GMC X had left the restaurant with someone in a red Jeep. While driving around, they saw something that looked like a [redacted] so they got out of the van and he pretended to take a picture. When they returned to the parking lot, he believes he went straight to his bunk and cannot remember phoning anyone.

Testimony of the Van Driver at Trial

The seaman who drove the van stated that the chiefs and PO F were all intoxicated when he picked them up at the [redacted] on April 23, 2006. He stated that BMC W sat beside him in a passenger seat. When he looked back to make sure the door was closed, he saw no one sitting on the first bench seat; PO F and the SCPO sitting on the second bench seat; and the applicant sitting on the third bench seat. There was loud music playing on the radio and people were joking. He stopped the van at another bar to see if there would be anyone waiting, and both PO F and BMC W got out of the van. Except for BMC W, who returned to the passenger seat beside him, he could not recall where the other passengers were sitting after this stop. They also stopped at a [redacted], and some of the passengers got out and took a picture with a disposable camera. When he drove back to the cutter, BMC W asked to borrow his phone card, so they went to the phone trailer. He stood outside the trailer to smoke before going inside to retrieve his phone card from BMC W, and then he went to his bunk. He was not in the trailer more than ten seconds. He could not recall seeing anyone other than BMC W in the trailer.

Testimony of OS3 T at Trial

OS3 T stated that on the night of April 23, 2006, he got off duty at midnight, retrieved his phone card from his bunk, and went to the phone trailer. As he approached the trailer, several people who had just arrived in the duty van got into the trailer ahead of him, so he had to wait for a phone. When he entered the trailer, he saw BMC W trying to make a phone call; the applicant and the SCPO sitting on the floor at one end of the trailer in the "library" and talking to each other; GMC X sitting on the floor on another side of the "library." Because the BMC was using the only phone that OS3 T could use to have his wife call him back so that he would not have to use up his phone card, he decided to wait. PO F and another petty officer (DC3 G) were also making phone calls in the trailer. PO F was not his friend; she was his supervisor. PO F was crying and screaming in a high-pitched voice into a phone. She was talking fast, but her words were slurred. She was repeatedly saying that she hated the Coast Guard, that this was the "last straw," and that she "just wanted out." She was crying and her words were slurred. After a while, he "tuned her out." When BMC W finished his call and rose to leave, he could barely walk so OS3 T moved his chair to get it out of his way. However, BMC W yelled at him for moving the chair, so he moved it back. Then BMC W tried to walk away but tripped over the chair, fell, and got angry, so OS3 T moved out of the way. The chiefs all left the trailer together and DC3 G left too. OS3 T then called his wife on the telephone that BMC W had been using, so that she could call him back. After talking to his wife for about 30 minutes, he saw PO F hang up. He knew she was intoxicated and upset, so he told his wife he needed to help her and hung up as well.

OS3 T stated that he met PO F at the door of the trailer. As he walked PO F back to the cutter, she was still upset, crying, and loudly repeating the sorts of things he had heard her say on the phone. He told her to calm down and tell him what was wrong. She told him that the applicant and the SCPO had been touching her in the van, that they had put their hands up her shirt and then tried to put their hands down her pants. She told him that they did not succeed in getting in her pants because the van stopped and she jumped out. She told him that she could not report what the chiefs had done because she had been drinking alcohol and would get in trouble. He told her a couple of times that she should report it, and she told him that he should wait and that she would take care of it. Because she had said she would take care of it and was transferred off the cutter a few weeks later, he did not report what she had told him that night until he received an email from her in December 2006. PO F had sent the email to many members of the crew complaining of mistreatment and asking any witnesses to the events of that night to come forward.

Testimony of GM2 S at Trial

GM2 S stated that on the morning of April 24, 2006, he saw the applicant and GMC W in their stateroom with two other chiefs: YNC L and ETC W. GM2 S stated that he was called into the stateroom because the applicant, ETC W, and YNC L were trying to find out who had posted a [redacted] video on the cutter's server that had been shot in a Xxxx xxxx bar the day before. When the applicant's counsel objected to this testimony as irrelevant and unduly prejudicial, the judge held an Article 39(a) meeting with the attorneys to determine whether the

video and GM2 S's testimony should be entered into evidence. The trial counsel stated that he needed GM2 S's testimony because, in the stateroom that night, the applicant had said that he was the CDAR. The applicant's attorney responded, "we'll stipulate to that." The judge decided that GM2 S should testify but could not mention what the video depicted. The applicant's attorney responded to this decision by saying the following:

> Your Honor, there have got to be 50 ways to prove that [the applicant] is the CDAR or a CDAR. He's got documentation. The XO has been called as a witness. The CO is going to be here. He doesn't deny it. I don't understand why we've got to get--I think he's a third class petty officer--to say, "Oh, yeah, [the applicant] admitted to me he was the CDAR." There's just no question about that. … Everybody agrees he was a CDAR. Now, we also could test the way the appointment was done, to a degree. It wasn't as official as we'd like to see it, but in terms of him being the acting CDAR, he was doing CDAR duties. He's the guy who put [PO F] in therapy. He put her in the SARP. He was performing CDAR duties for a number of crew members. [The XO] will testify to that.

Upon further inquiry, trial counsel admitted that GM2 S would testify that during their conversation in the stateroom, the applicant accused GM2 S of assisting the person who shot the video [redacted] by blocking the chiefs' view of whoever held the video camera. GM2 S told them that he did not know who had the video camera because he had been drinking and he had not known that someone was making a video of the chiefs over his shoulder. Then the applicant threatened to cite him for an "alcohol incident." In response, GM2 S told the applicant that if the applicant gave him an "alcohol incident," he would have to cite the three chiefs in the video who were much more intoxicated than he was. The applicant replied, "I'm the fucking CDAR. I will do whatever I want." GM2 S was initially "pretty upset" about the applicant's threat but then decided that it was an empty threat and that the applicant was just trying to scare him. GM2 S further stated that the video was of a party at the [redacted], also known as the [redacted]. He was sitting at a table with other junior petty officers and one lieutenant junior grade, and someone took a video of the chiefs, who were with a local girl and acting wildly at the bar behind their table. GM2 S identified the three drunk chiefs at the bar as GMC X, the SCPO, and the applicant. In the video, the SCPO raised his shirt while the local girl rubbed his stomach and GMC X was "making out" with her. Trial counsel further stated that he wanted GM2 S to testify to show how the applicant used his authority as the CDAR. The judge decided that GM2 S could testify as long as he did not explain the details of what was depicted in the video unless the applicant's own attorney asked him to do so. GM2 S did testify as stated above, and the details of the chiefs' behavior were not revealed.

Testimony of the XO at Trial

The XO stated that aboard the XXXXXX, everyone's collateral duties were listed in one instruction, which was reissued about every six months, and that the applicant was the cutter's CDAR. The instruction memorandum itself served as notice for most personnel, but for some collateral duties a separate letter of appointment was required. In 2005, the applicant would occasionally delegate his duties to PO E, who was also trained as a CDAR. However, the instruction dated December 2, 2005, was still in effect on April 23, 2006, and on that date, the applicant was the cutter's only designated CDAR. The XO stated that the applicant drafted the CG-3307 dated March 20, 2006, in which PO F was ordered to abstain from alcohol for 90 days. He stated that these matters are handled with discretion. The XO stated that the applicant never

told him that PO F had violated her aftercare program. However, he stated that he thought the applicant performed very well as the CDAR and was very proactive.

Regarding PO F's problems, the XO stated that she had not been placed on report when her crewmates brought her back to the ship drunk and topless in [redacted] because the command does not want to deter drunk members from returning to the cutter in foreign ports. In addition, PO F did not miss any work hours on that occasion. After PO F's first arrest for DUI in 2005, PO E performed some of the CDAR duties for PO F. In 2006, the applicant was serving as the CDAR and prepared the CG-3307 for PO F. The XO stated that because of her allegations, PO F was transferred off the cutter in June 2006 on temporary orders. With regard to PO F's character, the XO stated that he did not trust her because she had been untruthful to him and did not trust her claim that the applicant offered her alcohol on April 23, 2006.

The XO stated that the applicant's designation as CDAR did not make him any more obliged to report an "alcohol incident" committed by another member than anyone else. He also stated that because alcohol problems are handled with discretion, he does not know whether any of the chiefs at the [redacted] that night, other than the applicant, knew that PO F was under orders to abstain from alcohol. However, the XO expects crewmates to look out for each other and so he believes none of the chiefs would have offered her more alcohol if they had known she was already inebriated.

The XO stated that CGIS informed him that PO F had complained about a sexual assault about a week after the cutter arrived in Xxxxxx. The next day, PO F came to his office and stated that she was concerned about reporting the assault because she had been drinking and violated her aftercare program. The XO made her no promises but told her that under Coast Guard policy, the victim of a sexual assault is not charged with an "alcohol incident." He also urged her to cooperate with the investigation.

Testimony of a Senior Chief Health Services Technician at Trial

A senior chief health services technician (HSCS) testified about the training and role of a CDAR. She stated that a CDAR who gave a member a CG-3307 about their aftercare orders would be considered the member's "case manager." She stated that CDARs are considered "case managers" because "they're working the case from step one to step 100 and making sure that no—none of those steps are missed, because that's really crucial for the command and really crucial for the member to give the—to ensure that the command is doing what they're expected by commandant's policy and to make sure the member is given every opportunity to make changes that they need to make."

The HSCS explained that the purpose of the weekly aftercare meetings between the CDAR and the member is for the member to have someone with whom to consult about resources to overcome their internal and external factors and to ask the member, "'Hey, are you doing what you're supposed to be doing? Are you going to your two support meetings a week?' If not, to encourage them, to say, 'Well, how come you didn't make two this week? You only made one.' It's to make sure that they're doing what they're supposed to be doing, and it's also there to help--for the CDAR to inform the command of any other things needed by the person."

She further explained that the member is supposed to be incorporating positive behavioral changes during the 90-day abstinence period, and the CDAR is supposed "to help foster that environment and give them all the tools that they can give them to help them make those decisions that they need to make."

The HSCS stated that when a cutter enters a port, the CDAR is not supposed to be the "alcohol police," reporting on any members who enter bars and drink too much, but is supposed to set an example for other members and to encourage members in aftercare during the weekly meetings to attend meetings of Alcoholics Anonymous while on liberty and to participate in activities other than drinking in bars. She stated that allowing a member who has been violating her aftercare program to remain in a bar would absolutely not be considered acceptable leadership by a CDAR. In such a situation, the CDAR should remove the member from the bar and handle the violation the next day by talking to the member and informing the command of what the member needs. She stated that CDARs are taught the Coast Guard policy of processing for separation members who fail aftercare. She also stated that if a member in aftercare admitted that she had drunk alcohol, the CDAR might have some discretion as to whether to report the member's violation up the chain of command or to get member more resources. She explained that in deciding whether a member's violation of an abstinence order had to be reported, the CDAR's knowledge of the member's progress in aftercare, based on their weekly meetings, would be critical.

The HSCS stated that each command must have at least one CDAR but might have others, depending upon the needs of that command.

Testimony of the Primary CGIS Agent at Trial

The CGIS agent, who is a reservist and a member of the [redacted], stated that when he interviewed the applicant on May 24, 2006, he explained his rights to him and the applicant agreed to answer his questions without consulting an attorney. After an interview of about 30 minutes, the applicant signed an affidavit for him. The applicant stated that he saw PO F flash her breasts at two fishermen, for which she received $20, and then she came back to their table and sat back down. He did not say anything to her about her behavior. At some point she vomited on him, and he went to the restroom to clean off the vomit. The agent first stated that he could not remember any of the other members at the restaurant reported having seen PO F vomit on the applicant. However, upon reviewing another agent's interview notes, he stated that a mention of vomiting had arisen in the interview with the SCPO. The applicant also told the agent that in the duty van on the trip back to the cutter, PO F sat down beside him on the second-row bench seat.

On cross-examination, the agent stated that on May 24, 2006, the applicant was only suspected of indecent assault and so was only warned about potential indecent assault charges and questioned about those charges. The agent did not warn him or question him about additional charges I, II, III, and IV, which concerned dereliction of duty, solicitation to commit an offense, and failing to take corrective action. He also reported that whereas the applicant was willing to make a detailed statement, PO F was not willing to do so until she had spoken to the XO.

Testimony of PO3 X at Trial

PO3 X stated that she could remember getting a very late night telephone call from PO F on a Sunday night in April 2006. PO F was very upset. PO3 X remembered PO F talking about some misconduct but she did not recall PO F mentioning that it occurred in a van. PO3 X remembered PO F saying that she had been drinking and implied that she had been assaulted and that at some point, when PO F wanted to leave, the applicant made her stay. PO F was crying, hysterical, and very emotional and said that she did not want to be in the Coast Guard because of what had happened that night. She remembers PO F saying that the applicant had been touching her. PO3 X admitted that it is hard to remember and differentiate between what PO F told her on the night of April 24, 2006, and what PO F told her during subsequent conversations.

Testimony of the CO of the CGC XXXXXX at Trial

The CO, who completed his tour as captain of the XXXXXX in June 2006, stated that he designated collateral duties in a single instruction to obviate the numerous individual designation letters that would otherwise be needed.

The CO stated that he believes that PO F "has a propensity to lie or shade the truth" and that he agreed with the applicant's attorney that the applicant was an excellent, upstanding chief. He stated that he had never punished or court-martialed a CDAR for failing to place a person in his or her care on report and that to his knowledge, none of the other chiefs who were in the [redacted] on April 23, 2006, were punished for any dereliction of duty with regard to PO F's misconduct. He also noted that the facts about what had happened that night were revealed after his departure from the cutter.

Because of the applicant's attorney's question about the applicant's character and the CO's testimony, in an Article 39(a) meeting with the judge and the applicant's attorney, the trial counsel argued that his character had been brought into issue by the applicant's counsel and was therefore subject to examination. The applicant's counsel disagreed and stated that trial counsel simply wanted to bring into evidence the NJP that was the subject of BCMR Docket No. 2004-192 to impugn the applicant's character. The trial counsel stated that the applicant had been "vindicated or at least acquitted or reversed." The judge stated that he had heard them mention it before but did not know what they were talking about and asked for a copy of the decision. The applicant's attorney claimed the BCMR had decided that the applicant should not have been charged with 37 counts of sexual harassment. The trial counsel argued that the NJP was over-turned on a technicality; that the BCMR found that the underlying evidence justified revoking the applicant's commission; and that he wanted to bring into evidence not the NJP but the underlying conduct as reported in the applicant's performance evaluation in his official military record. Counsel's argument over whether the applicant's character should be at issue because of the CO's testimony went on for some time, and the judge ultimately decided that he would "move the case along" by instructing the members to ignore the testimony about the applicant's character.

Verdict and Sentencing

The members found the applicant not guilty of both specifications of indecent assault under Article 134 of the UCMJ. They also found the applicant not guilty of Additional Charge II (soliciting an offense under Article 134 by encouraging PO F to consume alcohol), the members found the applicant not guilty.

On Additional Charge I (dereliction of duty under Article 92 for willfully failing to perform his duties as CDAR on behalf of PO F), the members substituted the word "negligently" for "willfully" and found the applicant guilty with the charge as amended by the substitution. The members also found the applicant guilty of Additional Charge III (dereliction of duty for failing to report PO F's violation of the order to abstain from alcohol) and Additional Charge IV (failure to take corrective action—to the prejudice of good order and discipline—by continuing to socialize with PO F after she exposed her breasts in the [redacted]).

During the sentencing phase, the trial counsel moved to enter into evidence the applicant's PDR (personnel military record), which would include the performance evaluation showing that he had sexually harassed and sought inappropriate relationships with subordinate shipmates in 2001 and that his commission had been vacated in 2002. The applicant's counsel argued that those service record entries should not be admitted because they reflect acts that could not be considered relevant to the negligence crimes of which the applicant was convicted. The judge noted that in BCMR Docket No. 2004-192, the BCMR had purposefully left the performance evaluation and the vacation of commission in the applicant's service record while redacting all evidence of the NJP and found that under Rule 1001(b)(2) of the Rules for Courts-Martial, Congress and the President made a member's entire service record admissible as relevant in the sentencing phase. Therefore, he allowed the members to consider the applicant's PDR, including the performance evaluation and the vacation of commission.

Later during sentencing, however, the trial counsel noted that while the Headquarters version of the applicant's PDR contained no evidence of the 2001 NJP, the local, Servicing Personnel Office copy of his PDR, which the defense counsel had asked to be admitted, had not been properly purged and still contained evidence of the NJP. Neither the trial counsel nor the applicant's counsel had noticed. The evidence of the NJP was purged before the PDR was published for the members.

PO F testified at the sentencing. The applicant was allowed to make an unsworn statement. The applicant stated that with respect to his CDAR duties, he "would take responsibility for not following up with [PO F] CDAR to ensure that the meetings were being made." He alleged that PO E was actually PO F's CDAR and that he had told PO F to meet with PO E. Because PO F and PO E were friends and he often saw them together, he assumed that PO F was giving PO F the proper support. The applicant alleged that when he saw PO F drinking on the night of April 23, 2006, he started to wonder whether he had forgotten to give PO F the CG-3307 with the order to abstain from alcohol. Therefore, he summoned her to his table and told her to sit down and drink a glass of water. Sometime thereafter, she vomited on him. When he returned from the restroom where he had cleaned up, everyone had gone outside, so he left with them. He planned to check PO F's PDR the next day to see if the CG-3307 with the order to

abstain from alcohol was in it, but he was approached by the chief of the boat and asked to investigate who had put a video of some chiefs on the cutter's server. The investigation took precedence for three days. During that time, he received an email from his wife saying that his [redacted] and between that, his regular duties, and other problems on the cutter, he was distracted from checking the PO F's file. After the port call in Xxxx xxxx, he had an "extremely busy two weeks" and he was contacted by the CGIS agent about PO F's allegations of sexual assault before he found time to review PO F's record. After he was informed of the charges against him, he thought it would be inappropriate for him to place PO F on report for violating the abstinence order. The applicant stated that he realizes he should have handled things differently and that he was guilty of the charges of which he had been convicted.

Following the applicant's statement, the judge informed the members that the maximum sentence they could impose for the applicant's crimes was confinement for 9 months or restriction with hard labor; forfeiture of two-thirds pay for 9 months or a fine in an amount not to exceed the total amount of forfeitures that could be adjudged; reduction to the lowest enlisted pay grade of E-1; and a bad conduct discharge from the Coast Guard. The judge stated that a letter of reprimand could also be awarded.

Trial counsel advised the members to consider the applicant's vacation of commission in 2002 as a result of sexual harassment and argued that the applicant had wasted the second chance he was given to serve as an enlisted member at that time. He asked the members to reduce the applicant in rank to E-3 and award him a bad conduct discharge so that he could not abuse his authority over subordinates again.

The applicant's counsel argued that the applicant was guilty only of negligence and that he had already suffered 16 months of stress and turmoil. He argued that the applicant should have received only a warning or reprimand. He further argued that if they punished the applicant harshly for his negligence, the Coast Guard would have great difficulty getting members to serve as CDARs. He pointed out that the applicant now had a felony conviction in his record, whereas the other chiefs at the table were not punished. The members awarded the applicant a reprimand, forfeiture of $500 pay per month for six months, and hard labor without confinement for 60 days.

Request for Clemency

On November 18, 2007, the applicant submitted a request for clemency to the Convening Authority in which he asked that "the fine and hard labor without confinement adjudged be suspended." In his request, the applicant stated that many circumstances led to his failure to report PO F's misconduct:

- Less than 12 hours after the events in the restaurant on April 23, 2006, his wife told him that their [redacted] This news devastated him and distracted him throughout the cutter's week-long transit from Xxxx xxxx to Xxxxxx. He arranged for her to receive counseling and ultimately moved her to his parents' house in another state to separate her from her friends.

- On the job, the cutter's MK-92 Fire Control System had "recently suffered a major casualty and [he] was working closely with [his] junior personnel for nearly 16 hours per day to identify the problem in order to have any necessary parts waiting for [the cutter] at the pier [in Xxxxxx].
- He was preparing to take a [redacted] class that was to begin the day the cutter docked in Xxxxxx.
- His family had gone to settlement on a house three weeks earlier on April 5, 2006, and were preparing to move.
- As the watch coordinator for personnel E-5 and below, he had to coordinate their leave and training and prepare a 90-day in-port duty schedule for more than 120 crewmembers.

The applicant stated that he had never denied responsibility for failing to report PO F's misconduct but that he had not made the same mistake in the 19 subsequent months. He noted that during a recent patrol he had reported another member's violation of an aftercare program to the captain and was told not to worry about it. Therefore, he sought guidance on how to tactfully tell the captain that he should follow Commandant policy, which required the member's separation. After several discussions, the captain changed his mind and initiated the member's discharge.

The applicant asked that the fine be suspended because of the financial strain he was facing because of his new mortgage and property taxes, his and his wife's student loan payments, and his attorney's fees "in excess of $10,000 associated with the defense of the charges that I was found not guilty of committing."

The applicant asked that the hard labor without confinement be suspended because of his good work habits as shown in his performance evaluations. He noted that he had received an Achievement Medal "for [his] work performance aboard XXXXXX, attesting to [his] devotion to duty as a Collateral Duty Addictions Representative (CDAR) as well as performing the E-5 and below Watch Coordinator duties for over 120 crewmembers from August 2004 until August 2006." He also noted that he had recently received a bachelor of science degree in business administration, wanted to attend law school, had recently attended one "C" School class and would attend two more in the next few months, and was "diligently learning legacy Electronic Technician systems to better perform [his] job."

The applicant stated that if he had never been charged with the offenses of which he was acquitted, the charges of which he was convicted would have been handled at mast under Article 15 and the penalties would have been less severe.

On December 3, 2007, the Rear Admiral who was the Convening Authority and the OEGCMJ for the applicant sent the applicant's attorney a memorandum stating that he had reviewed the applicant's clemency request and was "not inclined to grant any clemency at this time, but [would] revisit your request and any additional matters you may submit when I take action on this case."

On January 18, 2008, the Rear Admiral approved the sentence as issued.

VIEWS OF THE COAST GUARD

On August 12, 2008, 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.

The JAG stated that the applicant's request regarding the dismissal of his conviction by special court-martial "must fail, because under '10 U.S.C. § 1552(f), Congress denied the Board the power to overturn a conviction by court-martial but authorized the Board to take "action on the sentence of a court-martial for purposes of clemency."' CGBCMR DKT 2005-045." In addition, the JAG argued that, if the Board does consider the merits of the application, it should deny relief "because the information and evidence submitted by the applicant does not demonstrate substantial error or injustice."

The JAG stated that the applicant was tried by special court-martial from August 28 to 31, 2007. During this trial, the applicant was afforded all of his constitutional and statutory rights and was "fully and aggressively represented throughout the proceedings by fully qualified defense counsel." Moreover, the JAG stated "the court-martial conducted an Article 39(a) hearing regarding the admissibility of evidence involving Applicant's NJP proceedings [in 2001]. The trial judge reviewed the BCMR Order 2004-192 and determined that any reference to the underlying conduct regarding the incident would be excluded from evidence." The JAG stated the applicant was found not guilty of the indecent assault charges but guilty of the Article 92 dereliction of duty and Article 134 general article charges. He was sentenced to forfeiture of pay of $500 a month for six months, 60 days of hard labor without confinement, and a letter of reprimand. Thereafter, the convening authority denied his request for clemency and approved the sentence on January 18, 2008.

Regarding the Board's clemency authority, the JAG argued the following:

> d. Applicant presents no substantial reason for clemency. When assessing the appropriateness of a punishment, the Board must be particularly deferential to the broad discretion of military authorities, which are best able to assess appropriate punishments in light of unit missions and the concomitant needs of good order and discipline at their units. The Board's clemency power should be reserved for those unusual cases where unanticipated circumstances cause the lawful sentence of a court-martial to have an effect that shocks the sense of conscience or conflicts with notions of fundamental fairness. The Attorney General suggests that a Board must consider whether it can more fairly determine the equities in a case than the court-martial that originally imposed the sentence. *See, e.g.*, 40 Op. Atty. Gen. 504 (February 24, 1947). In addition, prudence and justice suggest that this Board should not consider clemency absent evidence of compelling reasons to do so.
>
> e. The applicant posits many reasons for dismissing his Special-Court Martial convictions to this Board: (1) Failure to comply with BCMR Order 2004-192; (2) Selective Prosecution; and (3) Vindictive Prosecution. However, this Board's authority is limited and has no authority to undertake legal review of the findings and sentence of a court-martial, but may correct records to accurately reflection action taken by military courts and officials, and action on the sentence for purposes of clemency. 10 U.S.C. § 1552(f); S. Rep. No. 98-53, at 36 (1983). A review of the record reveals that Applicant's punishment was fair, fitting, appropriate, and anything but unjust. There is absolutely no justification for granting clemency in this case.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 15, 2008, the Board received the applicant's response to the JAG's advisory opinion. The applicant acknowledged the limitation on the Board's authority under 10 U.S.C. § 1552(f), and argued that the Board should grant clemency by waiving his $3,000.00 total forfeiture and reimbursing him for his legal fees because the Coast Guard "was selective and malicious in [its] prosecution." The applicant submitted a copy of an attorney retainer agreement showing that he agreed to pay $2,500.00 for pre-trial work and another $5,000.00 for representation at a special court-martial.

The applicant argued that "the mere fact that an Article 39(a) hearing had to be conducted regarding the admissibility of the previous NJP that this very Board ordered removed" indicates that he was treated unfairly and subject to selective prosecution. He stated that he was questioned about the 2001 NJP by the CGIS agent who investigated the allegations about his conduct on April 23, 2006. He argued that the trial would not have occurred had the Coast Guard timely implemented the Board's order in BCMR Docket No. 2004-192 because the charges "would have been dismissed, as they were against [the SCPO]." He noted that the Article 32 hearing held on February 6 and 7, 2007, was a joint hearing for both himself and the SCPO, yet the charges against the SCPO were dismissed because the PO F's allegations against him were found not to be a credible. The applicant alleged that every witness told "a different version of events as told to them by [PO F]. That coupled with her diagnosis of mental instability by a psychologist was why all charges were dropped against [the SCPO]." The applicant pointed out several inconsistencies in the witnesses' testimony about the events on the night of April 23, 2006, PO F's demeanor that night, and the witnesses' testimony about what they thought had happened that night because of what she told them.

The applicant also alleged that in addition to the SCPO, there were two other members senior to him in rank at the restaurant, but they were not charged with any violations of the UCMJ. The applicant stated that the Coast Guard focused solely on prosecuting him "and not one other Chief received any form of reprimand or was brought up on charges for failing to take corrective action." The applicant also alleged that the Legal Office protected PO F by removing documentation of her first "alcohol incident"—an arrest for DUI in December 2005—from her record so that her second arrest for DUI in June 2007 counted as only her first "alcohol incident." In support of these allegations, the applicant submitted police reports and court documents dated December 19, 2005, and June 2, 2007, showing that PO F had been arrested for DUI.

The applicant argued that he was clearly maliciously prosecuted for exercising his right not to enter a pre-trial agreement because additional charges were preferred against him within hours of his withdrawal from an agreement to plead guilty to one charge of dereliction of duty as the CDAR. He also stated that the Legal Office was aware he was never designated the CDAR but claimed that he was the CDAR simply because it was listed as his collateral duty in the cutter's instruction.

The applicant further stated that after the alleged assault, he and PO F were transferred to units located in the same place, even though there were twelve other units in the Xxxxxx area where one of them could have been assigned. He was responsible for maintaining the electronics

at her new unit and had to visit her new unit almost daily. Therefore, he argued, the Coast Guard clearly did not believe that an assault actually occurred or PO F would not have been transferred to a unit co-located with his new unit. In addition, he argued, if the assault had actually occurred, she would not have agreed to be transferred to that unit.

FINDINGS AND CONCLUSIONS

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

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

2. The applicant asked the Board to dismiss the charges against him and to dismiss his conviction by special court-martial. Under 10 U.S.C. § 1552(f), the Board has no authority to do so. The Board may only grant clemency on a sentence awarded by court-martial.

3. The applicant asked the Board to grant clemency on his sentence. His sentence included a letter of reprimand, forfeiture of $500 pay per month for six months, and hard labor without confinement for 60 days, which the applicant has already performed. He argued that he should receive clemency because he was subject to selective prosecution since none of the other chiefs was prosecuted for any alleged misconduct on April 23, 2006. However, the record shows that PO F accused only the applicant and one other member (the SCPO) of assault, and there was significantly more evidence against the applicant than there was against the SCPO. In addition, the record indicates that the applicant was the only chief at the table in the [redacted] who clearly knew that PO F had been ordered to abstain from alcohol and was violating her aftercare orders. The testimony of the other members at the restaurant indicates that she was drinking alcohol purchased by the chiefs while she sat close beside the applicant and, at one point, on his lap before she first flashed her breasts at the chiefs' table and then the fishermen. According to the applicant's own statement to the CGIS agent, he was sitting beside PO F during the van ride around town and back to the cutter. Given the amount of evidence against the applicant in the record, in comparison with the amount of evidence against the other chiefs, the Board cannot conclude that he was selectively prosecuted. The fact that the investigating officer found insufficient evidence to refer charges against the SCPO for trial by court-martial does not mean that there was insufficient evidence to refer charges against the applicant. The Board is not persuaded that the applicant is entitled to clemency because of any selective prosecution.

4. The applicant argued that he should receive clemency because he was the subject of malicious or vindictive prosecution when two additional charges were preferred just two working days after he exercised his right not to enter a plea agreement. The record does show that a charge sheet with two additional charges was prepared on June 11, 2007, after the applicant's attorney informed the Coast Guard of the applicant's decision to withdraw from the plea agreement on June 7, 2007. The Board is not persuaded by the timing alone, however, that the additional two charges were laid maliciously or vindictively. The elements of Additional Charges III and IV are distinct from the prior charges, and he was found guilty on both counts. The applicant's attorney argued at trial that these charges were multiplicious, and the judge

found that they were not. The applicant's counsel had ample time to prepare a defense against these charges. The Board finds that the date of the last two charges against the applicant does not prove malicious or vindictive prosecution or warrant clemency in this case.

5. The applicant argued that the charges would not have been referred for trial if the Coast Guard had timely and completely implemented the Board's order in BCMR Docket No. 2004-192 by removing all evidence of the NJP from his record in 2005. He submitted evidence showing that the local copy of his PDR still contained documentation of the NJP, which the Board had ordered removed from his record, up until August 2006 and that his command saw that documentation. The record indicates, however, that charges were made against both the applicant and the SCPO and that both were investigated at the Article 32 hearing in February 2007. There is no evidence that documentation of the NJP was in the record reviewed and considered at the Article 32 hearing which resulted in the referral of the charges to trial by court-martial. At the special court-martial, the judge expressly excluded the documentation of the NJP and BCMR proceedings from the record considered by the members. The record of trial further shows that during the sentencing phase, only the documents that the BCMR had expressly left in the applicant's record—the performance evaluation and the vacation of commission—were seen by the members along with the rest of his service record in accordance with RCM Rule 1001(b)(2).[8] Therefore, the Board is not persuaded that the applicant's criminal conviction or sentence were caused or influenced in any way by documentation that the Board had ordered removed from his record in 2005.

6. The applicant argued that clemency is warranted because he was guilty only of simple negligence at a time when he was under a great deal of stress both at work and in his personal life. He argued that if he had not been falsely accused of indecent assault, he would have received at most a warning or NJP and would not have been convicted at a special court-martial or awarded such a large forfeiture. The applicant was not convicted on the indecent assault charges, but the record does not show that those charges were frivolous or malicious. At NJP, the burden of proof is a simple "preponderance of the evidence" rather than "beyond a reasonable doubt," and so the Board will not speculate about what punishment he might have received had all of the charges against him been disposed of at mast. Moreover, the record contains ample evidence that the applicant ignored his duty as the cutter's CDAR to support PO F in her aftercare and took no action when he knew that she had violated her order to abstain from alcohol and become drunk enough to flash her breasts in a public restaurant. The applicant's misconduct in Xxxx xxxx reflects a failure to understand and accept his duties as a senior enlisted member and CDAR which is strongly reminiscent of his misconduct and failure of understanding of his duty that resulted in the vacation of his commission in 2002. The Board finds insufficient grounds for awarding clemency in this case.

7. The applicant asked the Board to reimburse him for his civilian attorney's fees. As his civilian attorney's fees were not a part of his sentence, this request for reimbursement is not a request for clemency under 10 U.S.C. § 1552(f). Instead, the Board's consideration of this

[8] RCM Rule 1001(b)(2) states that during the sentencing phase, trial counsel may introduce documents from the defendant's personnel record, including "copies of reports reflecting the past military efficiency, conduct, performance, and history of the accused and evidence of any disciplinary actions including punishments under Article 15." MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995 ed.), Part II-120.

request falls under the Board's general authority to correct errors and remove injustices under 10 U.S.C. § 1552(a). The record shows that the applicant received free military counsel from a qualified attorney and chose to hire his civilian counsel. There was significant evidence supporting all of the charges that were laid against him and none of the charges were frivolous, vindictive, or multiplicious. The Board finds that the applicant's civilian attorney's fees cannot be considered the result of any error, injustice, or mistreatment by the Coast Guard.[9] Therefore, the applicant is not entitled to this relief.

8. The applicant alleged that the timing of the Rear Admiral's response to his clemency request proves that it was not properly considered. However, the record shows that on December 3, 2007, the Rear Admiral stated that he had reviewed the clemency request and was "not inclined to grant any clemency at this time, but [would] revisit your request and any additional matters you may submit when I take action on this case." There is no evidence in the record that the Rear Admiral had not reviewed the applicant's request for clemency as stated in his response or that he did not reconsider the clemency request, as promised, when he took final action on the case. Absent evidence to the contrary, the Board presumes that Coast Guard officials have carried out their duties "correctly, lawfully, and in good faith."[10]

9. The applicant made numerous allegations with respect to the actions and attitudes of various members involved in this case. Those allegations not specifically addressed above are considered to be without merit and/or not dispositive of the case.[11]

10. Accordingly, the applicant's requests for clemency and for reimbursement of his civilian attorney's fees should be denied for lack of merit.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

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[9] For the purposes of the BCMRs, "injustice" may be defined as "treatment by the military authorities that shocks the sense of justice, but is not technically illegal." *See Sawyer v. United States*, 18 Cl. Ct. 860, 868 (1989), *rev'd on other grounds*, 930 F.2d 1577 (citing *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976)).

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

[11] *See Frizelle v. Slater*, 111 F.3d 172, 177 (D.C. Cir. 1997) (noting that the Board need not address arguments that could not affect the Board's ultimate disposition of a case).

ORDER

The application of xxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is denied.