DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2015-058

[redacted]

FINAL DECISION

This proceeding was conducted under the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case upon receiving the completed application on March 12, 2015,[1] and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated December 15, 2016, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant asked the Board to remove from his record non-judicial punishment (NJP) that he received at mast on July 12, 2013, and all references to it; the adverse Enlisted Employee Review (EER) he received as a result of the NJP; and the documentation of an "alcohol incident." He alleged that they should be removed because "there were procedural and substantive errors preceding the mast, during the mast proceeding, and in the appeal process after punishment was imposed." He noted that because he was assigned to and embarked on a vessel at the time, he did not have the right to refuse mast and demand trial by court-martial pursuant to Article 15 of the Uniform Code of Military Justice (UCMJ).

The applicant explained that in the fall of 2012, his command initiated an investigation into allegations of sexual assault and harassment made by another member while their cutter was in port on September 30, 2012. A female FN/E-3 alleged that an MK2/E-5 had been harassing her and had assaulted her while at a bar with four other petty officers, including the applicant (then an [redacted] an ME1, an FS1, and an ET2. Months later, the Coast Guard Criminal Investigative Service (CGIS) questioned him about the events that evening. He alleged that they did not advise him of a suspect's rights under Article 31(b) of the UCMJ; that they told him that he was being interviewed as a witness and was not suspected of wrongdoing; and that they were trying to keep the MK2 out of jail. He alleged that during the interview, they were "extremely interested in the 'flirtatious nature' of [the FN], and how much she was drinking during the evening."

[1] The applicant requested and was granted several extensions of the time to reply to the advisory opinion.

[redacted]lleged that they asked him about his own activities that night, what he had observed, how much he had drunk, and his behavior with the FN. He also alleged that, when questioning him, the CGIS agents were already aware of the following: The applicant had been drinking alcohol at the bar; the FN had been flirting with him; he had moved around the bar to avoid her; the FN had pursued him; the FN had grabbed his head and put it against her chest; the FN had put her arms around him from behind; and he "had leaned in for a kiss but no kiss had taken place." However, they never warned him of his Article 31(b) rights.

The applicant alleged that while the cutter was underway on July 10, 2013, the Executive Officer (XO) of the cutter told him that he was being charged with violations of Articles 120 (wrongful sexual contact) and 134 (drunk and disorderly) based on the results of the investigation. That evening, he was told to select a mast representative, and he selected an OS1 to represent him at mast. He signed a CG-4910, Report of Offense and Disposition, and was advised of his rights. On July 11, 2013, he alleged, he was given redacted copies of witness statements from the investigation and told that the parts that were blacked out did not pertain to him. He was told that the mast would occur the next day. He stated that he wanted to consult counsel but "was advised that we were underway and it was not permitted."

The applicant stated that on July 12, 2013, two days after getting underway, his commanding officer (CO) held a mast for both him and the MK2. After reviewing the evidence, the CO dropped the Article 120 charge against him but added an Article 92 charge. He alleged that he had been unaware of the Article 92 charge and was "completely unprepared to respond to it." He stated that he "never kissed or inappropriately touched [the FN] on 30 Sep 12." He alleged that she became very intoxicated, kept telling him he was cute, and pursued him around the bar, and that when she became more "touchy," he told her that he had a serious girlfriend, but she hugged him from behind. The applicant stated that he did not behave disorderly that evening or do anything that reflected poorly on the Coast Guard, he was just having a good time and sharing comradery and fellowship with shipmates. He argued that it "makes no sense … that [he] was punished for being drunk and disorderly, and having an inappropriate relationship with [the FN]. This was never the case."

As a result of the mast, the applicant received an "alcohol incident," was reduced in rate from [redacted] to [redacted] and received 45 days of restriction to the cutter with extra duties. The applicant stated that he thought the NJP was unjust, retained counsel, and on July 16, 2013, requested a 15-day extension to appeal the mast. He also asked for copies of the documents considered by his CO. However, he alleged, the XO told him he had "never heard of an extension, doesn't know much about the law and as far as he knows everything needs to be in by 10 tomorrow." However, his counsel told him that he had "up until the 18th to submit my appeal under regulation." The applicant stated that when he asked the witnesses for statements in support of his appeal, they refused because they feared "backlash" and are still reluctant to provide statements.

The applicant stated that he submitted his request for an extension and production of documents on July 17, 2013. On July 26, 2013, the Admiral denied his request for an extension and for production of the requested documents. The applicant stated that his request for an extension was denied, and his request was treated as his appeal and denied as well.

[redacted]

The applicant argued that nine significant errors warrant the requested relief:

1. The applicant alleged that he should have been read his Article 31(b) rights by the CGIS agents before he was interviewed. He alleged that at the outset of the investigation, the agents were "aware of the fact that there was potential criminal misconduct" by the applicant and the FN, who had accused the MK2 of assault and harassment. He also alleged that they became aware that he had been drinking alcohol at the bar. Therefore, he argued, they were aware that he was suspected of violating orders, contrary to Article 92 of the UCMJ, and Article 134 (drunk and disorderly). Nevertheless, he was told he was being questioned "purely as a witness," and so he provided them with both verbal and written statements.
2. The applicant alleged that his unwarned statements to the CGIS agents were unfairly used by his CO as the basis for his punishment at mast. He argued that it was not "fundamentally fair" of his CO to consider his unwarned statements, as required by Article 1.D.1.g. of COMDTINST M5810.1E, the Military Justice (MJM); that no one ever told him that the CGIS agents had violated his Article 31(b) rights; and that he was given no "cleansing warnings" by the CO before being questioned at mast.
3. The applicant alleged that he was not allowed to "adequately examine" the evidence at mast, as required by Article 1.B.5.i. of the MJM. He alleged that he received only redacted statements and was allowed to review them for a few minutes before the mast. He alleged that the statements were "incomplete and did not provide a comprehensive picture of the events of that evening." In addition, he was prohibited from examining "other statements that were obtained during the course of the investigation that were considered" by the CO at the mast. Therefore, he argued, he was denied a substantial right by not being allowed to adequately examine the evidence and could not adequately respond to the allegations.
4. The applicant alleged that he was not adequately advised of the offenses for which he was punished at mast. At the end of the mast, a violation of Article 92 (failure to obey an order) was added to the Report of Offense and Disposition (CG-4910) by hand: "Article 92 – Failure to obey order or Regulation to Whit (sic) CG 3307 Regarding Inappropriate Relationships signed on arrival." The applicant argued that this "impromptu addition after the mast failed to provide <u>any</u> relevant facts to inform [him] of the basis of the charge. Therefore, he argued, he was unable to sufficiently respond to the allegations.
5. The applicant argued that the written specifications of the offenses were insufficiently detailed to allow him to respond, as required by Article 1.D.4. of the MJM. The first charge stated only "wrongful sexual contact" without further description and the second stated only that he "brought discredit to the United States Coast Guard through disorderly conduct/drunkenness, and neglected the prejudices of good order and discipline through his actions with [the FN] on or about 30 Sept 2012," without specifying "whether the charge was referring to intoxication, disorderly conduct, or drunk and disorderly conduct." He argued that the specification should have detailed what actions he was accused of committing that were prejudicial to good order and discipline or service-discrediting. Moreover, the applicant argued, the eyewitnesses all stated that he was not behaving in a drunk or disorderly manner. Therefore, he argued, he was provided with insufficient information in the written specifications to respond.

[redacted]. The applicant argued that his punishment was unjust and disproportionate. The applicant stated that the investigation showed that the MK2/E-5 had "engaged in kissing" the FN, but the MK2/E-5 received only a suspended reduction in rate, 30 days' restriction, and 30 days of extra duties. He stated that the FN was drinking and "becoming overly friendly" with the applicant and other petty officers. The applicant alleged that he told the FN that he was "in a serious relationship and repeatedly broke off contact with her during the evening to avoid her flirtatious conduct" but she continued to pursue him. He "never engaged in conduct even remotely rising to the level of" the MK2/E-5 but received more punishment. Therefore, he argued, his punishment was disproportionate under the circumstances.

7. The applicant alleged that, at the end of his mast, the other petty officers who had been at the bar and served as witnesses were verbally reprimanded by the CO, who told them that they were lucky not to be punished for having failed to report the incident. The applicant stated that because of this reprimand, one of the witnesses "was intimidated and unwilling to provided evidence in support of [the applicant's] appeal." The applicant argued that the CO's reprimand constituted "unlawful command influence" as it discouraged the witnesses from providing evidence for the applicant's appeal.

8. The applicant alleged that the CO's denial of a 15-day extension of the time to appeal the NJP was "patently unreasonable" because the CO knew that the applicant had retained counsel and wanted to review the documents. He argued that it was unreasonable because the applicant had had no opportunity to consult counsel and wanted to consult counsel given that he was being reduced in rate and had been denied substantial rights. The applicant argued that members are allowed to consult civilian counsel regarding mast including when preparing an appeal, but his CO erroneously claimed that he had no right to consult counsel with regard to his appeal. Moreover, the applicant stated, it is not unusual for COs to grant extensions for "good cause." Given that he had had no chance to consult counsel and was underway on a cutter, the applicant argued, there was "good cause" for an extension.

9. The applicant argued that by denying his request for an extension of the appeal time, his CO unreasonably denied him counsel to assist with his appeal. He noted that under Article 1.F.1. of the MJM, an appeal must be submitted within 5 days of the mast, not including the day of the mast. However, he alleged, although his mast was held on July 12, 2013, the Executive Officer (XO) of his cutter told him that he had to submit his appeal by 10:00 a.m., instead of midnight, on July 17, 2013. The applicant alleged that the XO told him that the deadline was 10:00 a.m. on July 17, 2012, "as far as I know" while admitting that he did "not know much about the law." The applicant argued that the XO thus arbitrarily and unlawful abbreviated the period for his appeal.

In support of his allegations, the applicant submitted numerous documents, which are included in the summary below.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard in 1999. By the summer of 2012, when the applicant reported for duty aboard a large cutter, he had advanced to [redacted], first class

([redacted]/E-6). In November 2012, the XO of the cutter reported to the Coast Guard Investigative Service that a male MK2 assigned to the cutter had made a complaint of sexual assault and harassment against a subordinate female FN. The CGIS Report of Investigation (ROI) shows that CGIS agents interviewed numerous crewmembers in December 2012, including the applicant in this case, and one focus of the investigation was the behavior of the female FN at a bar on the night of September 30, 2012. The applicant and many other crewmembers gave CGIS verbal and written statements about what they had seen and done in the bar that night. When the FN was interviewed, she complained that the MK2 had assaulted and harassed her, and so CGIS began a parallel investigation of the FN's allegations and incorporated the witness interviews and statements that they had gathered for the investigation of the MK2's claims. The ROIs show that CGIS's parallel investigations were not completed for several months.

On July 8, 2013, after CGIS had completed its work, the Area Commander forwarded the two CGIS ROIs to the applicant's command for "appropriate disposition" of the misconduct revealed therein. A Report of Offense and Disposition, CG-4910, shows that on July 10, 2013, the XO charged the applicant with having violated Articles 120 (wrongful sexual contact) and 134 (bringing discredit to the Service "through disorderly conduct/drunkenness, and neglected [sic] the prejudices of good order and discipline through his actions with [the FN] on or about 30 September 2012"). A charge of violating "Article 92 – failure to obey order or regulation to whit [sic] CG 3307 regarding inappropriate relationships signed on arrival" appears handwritten below the other charges on the CG-4910.

On July 10, 2013, the CO assigned an ensign to serve as the preliminary investigating officer (PIO) for the command. The PIO reviewed the CGIS ROIs and made recommendations regarding disciplinary and administrative measures to be taken by the CO. Pursuant to the PIO's investigation, the applicant was informed of and acknowledged his UCMJ and Miranda/Tempia rights pursuant to Article 31(b) of the UCMJ. He was advised that the incidents being investigated were wrongful sexual contact with the FN and being drunk and disorderly to the prejudice of good order and discipline on September 30, 2012. He indicated that he did not desire to consult a lawyer before making a statement and/or answering questions for the investigation.

The CG-4910 shows that the PIO found that the applicant had not violated Article 120 becau[redacted] ap[redacted]ed that the contact was consensual. However, he wrote that the applicant's "actions with [the FN] combined with his drunkenness and disorderly conduct were to the prejudice of good order and discipline in the armed forces and were of a nature so as to bring discredit upon his unit." He wrote that the applicant's consumption of alcohol had been a "significant and causative factor" in his behavior, warranting an "alcohol incident." The PIO recommended that the charges against the applicant be disposed of at mast. The PIO also recommended that the MK2 be punished at mast and that the FN be tried by court-martial.

Also on July 10, 2013, the applicant signed a form acknowledging his rights at NJP as an enlisted member attached to or embarked on a vessel. His rights included the right to have a "mast representative" or spokesperson, the right not to incriminate himself, the right to be told orally or in writing of the information against him, and the right to examine the documents considered by the CO, to question witnesses, to present his own evidence, to call his own witnesses, and to present matters in defense or mitigation. [redacted]

[redacted]

On July 12, 2013, the CO held a public mast for both the applicant and the MK2 with many crewmembers present. An OS1 served as the applicant's mast representative as he had requested. Before the mast, the applicant was shown redacted evidence from the ROI, specifically the parts that concerned his conduct with the FN. An ET2, an FS1, and an ME1 testified at the mast. Their statements for the CGIS investigation and that of the applicant, which were shown in redacted form to the applicant and considered by the CO at mast, state the following:

- In the applicant's own statement for the CGIS investigation, dated December 20, 2012, which was considered by the CO at mast, he wrote that after going to the bar with some shipmates, he "noticed that [the FN] was sitting by herself at the end of the bar, so I approached her and offered to buy her a drink since I was getting one myself. After ordering drinks, we talked about how her family was doing and how she was enjoying the boat thus far and how my girlfriend was doing at the time. I remember [the FN] telling me that she and her friends on board thought I was cute also and a little light arm touching from her. I moved around the bar the remainder of the night from group to group and poured people drinks with pitchers of beer I had purchased and also had a few cigarettes with some shipmates on the patio behind the bar. I remember seeing [the FN] around the bar/patio from that point on I don't recall anything until the next morning."

- The ET2 wrote that he saw the applicant "lean[] forward to kiss" the FN. He also saw the FN take the applicant's head and place it on her chest. Both of them were intoxicated and so the ET2 tapped the applicant on the shoulder. When he did so, the applicant lifted his head and continued his conversation with the FN.

- The FS1 wrote that the FN sat "unusually close to" the applicant and stretch[ed] her arm across the back of [the applicant]. This interaction appeared off-putting as neither of these crewmembers had any familiarity with each other. As a group we decided to send [the FN] and [the applicant] home as he would soon be too intoxicated to be on liberty and [the FN] appeared to be very intoxicated as well."

- The ME1 wrote that he saw the FN "hugging and leaning all over" the applicant in the [redacted] bar on [redacted] September 30, 2012, and that "[a]fter several attempts to separate the two, [the FN] kept returning to where [the applicant] was sitting at the bar [and] continuing the same actions as before." The ME1 stated that, "[t]o an outsider looking in it look[ed] like they were a couple."

The CGIS ROIs contain other statements gathered for the investigations and summaries of interviews, some of which mention flirtatious or affectionate behavior on the part of the FN, the applicant, or both. Because the FS1, the ME1, and the ET2 were chosen to testify at the mast, the CGIS agents' summaries of their interviews are summarized here, as is the applicant's:

- According to the CGIS agents' summary of their interview with the applicant, he admitted to being "pretty tipsy" on the night of September 30, 2012, and said that the FN got "flirty" with him and touched his arm and that he had bought her two beers.

[redacted]

[redacted] According to the CGIS agents, the ET2 told them that the FN had grabbed the applicant's head and pushed it into her chest. To stop "the inappropriate action," the ET2 walked over, tapped the applicant on the shoulder, and said "hey hey hey."

- The FS1 told CGIS agents that while at the first bar, the applicant and the FN had been sitting at the bar "off to the side talking." At the second bar, the FN was again beside the applicant with her back toward the BM1 making it hard to see. He said that "at one point it appeared that he leaned forward to kiss her. It wasn't like [he] forced himself upon her type of thing but more of a totally wasted drunk not really sure what's going on sort of deal. She visibly stepped back the few times it happened and after a lot of people really started to take notice, I walked up to her and told her it was time to go and guided her towards the door so as to not make a further scene of it." Later the FN told the FS1 that she and the applicant had been talking about his girlfriend and her husband and family when he started "making his move," and she "kept telling him to remember his girl-friend." According to the CGIS agents, the FS1 told them that the applicant was "showing signs of affection toward [the FN] in the bar on September 30, 2012, and "attempting to kiss her while at the second bar."
- According to the CGIS agents, the ME1 told them that because the FN was "hugging and leaning all over" the applicant, he and an OS1 tried to separate them and told the applicant "to stop his actions and [that] he needed to be separated from [the FN]. Despite several attempts to separate [them], [the FN] kept returning to where [the applicant] was sitting at the bar and continued the same actions as before."

The CG-4910 and a "Punishment Letter" issued by the CO to the applicant show that at mast on July 12, 2013, the CO found that the applicant had violated Article 134 of the UCMJ, dismissed the charge under Article 120, but added the charge under Article 92, and awarded the applicant an alcohol incident, reduction in rate to E-5, and 45 days of restriction with extra duties. The ship's log shows that the MK2 was also found to have violated Articles 134 and 92, but he received 30 days of restriction with extra duties and a reduction in rate that was suspended for six months on condition of good behavior.

A Court Memorandum also shows that the applicant was found to have violated Articles 92 an[redacted]4. T[redacted]pecifications state that he failed to obey the unit CG-3307 (unit-specific orders signed by each newly assigned shipmate) regarding inappropriate relationships and "brought discredit to the United States Coast Guard through disorderly conduct/drunkenness, and neglected [sic] the prejudice of good order and discipline through his actions with [the FN] on or about 30 September 2012."

In accordance with regulations, the command prepared a disciplinary EER for the applicant dated July 12, 2013. It includes mostly high marks of 5 and 6 in the various performance categories but a mark of 1 for "Setting an Example," "Human Relations," and "Judgment," a mark of 2 for "Health and Well-Being," an unsatisfactory conduct mark, and a recommendation against advancement. The supporting comments state that "[d]espite being warned three times by shipmates, [the applicant] continued inappropriate physical contact with a non-rate female. Violated the UCMJ while under the influence of alcohol, assigned an alcohol incident."

[redacted]

[redacted] On July 16, 2013, in an email to a civilian attorney, which the applicant submitted, he wrote that he was not given copies of the statements but saw them. He wrote that the statements "were blacked out showing only the information involving myself and [the FN]. The facts that were said was [sic]: 1) statement she was flirting with me, I was rememoved [sic] from the situation and went to another part of the bar where she ended up following me over there. 2) statement she grabbed my head and put it against her chest 3) statement she was being me and put her arm(s) around me 4) statement I leaned in for a kiss but no kiss took place. There was also my interview and statement in there and both were used against me in the mast." The applicant attached a copy of his own statement. He advised his attorney that the XO had been shocked when he asked for an extension and had "said as far as he knows and by the book the Appeal has to be in by 1000 tomorrow [July 17, 2013]."

On July 16, 2013, the applicant's attorney advised the CO that he had been retained to represent the applicant with regards to his NJP appeal; asked for a 15-day extension to submit the appeal; and asked for copies of all correspondence regarding the NJP, as well as "all documents and evidence that was considered during the NJP."

On July 17, 2013, the applicant submitted a memorandum to the Area Commander titled "Appeal of Imposition of Nonjudicial Punishment," in which he "appeal[ed] the nonjudicial punishment imposed upon me on 12Jul2013." He noted the charges and the punishment imposed. He wrote that his basis for the appeal was that he "would like to submit an appeal but the command has denied my right to do so pursuant to law and regulation."

The CO forwarded the applicant's memorandum to the Area Commander and recommended denial of the appeal. The CO stated that he had considered the applicant's good record, statements from three witnesses who had been at the bar, and statements from the applicant's supervisory chain and that both the applicant and his representative had spoken. He wrote that "No matters were disputed during NJP"; that the applicant had admitted to being drunk during the incident; that the applicant had "ignored at least three appeals from shipmates to cease his inappropriate contact with [the FN]"; and that the applicant had "culminated his repeated inappropriate contact with [her] by placing his head on [her] bosom in a public bar."

[redacted]so [redacted]ly 17, 2013, the CO signed a Page 7 for the applicant's record stating that the applicant had incurred an alcohol incident on July 12, 2013, because his "abuse of alcohol was determined to be a significant and/or causative factor in [his] misconduct while at a bar in San Francisco. [He] demonstrated a level of intoxication that led to [his] poor judgment concerning inappropriate public behavior."

On July 26, 2013, the Acting Area Commander, a rear admiral, responded in writing to the applicant's memorandum dated July 17, 2013. He stated that he had reviewed the applicant's appeal of his NJP, and the CO's endorsement. He noted that he had referred the applicant's submission to a judge advocate for legal advice and was denying the applicant's request and appeal. He stated that "[t]here is no right to consult with a civilian or military counsel with regard to NJP appeals. Under the current facts, I find no basis to grant your extension." He stated that the only two bases on which NJP can be appealed are unjust or disproportionate punishment. Although the applicant had not submitted arguments about his punishment, the Acting

A[redacted] Commander stated that after reviewing the supporting documentation, he found that the punishment imposed was neither unjust nor disproportionate.

According to the ROI, in October 2013, the FN was tried by special court-martial for her conduct toward the MK2 on or about September 29 and 20 and November 4, 2012. She was charged with four counts of assault and two counts of drunk and disorderly conduct.

On December 4, 2014, the ME1 who was in the bar with the applicant on the night of September 30, 2012, wrote a statement on his behalf. He stated that they were drinking beer and socializing among themselves and other patrons when the FN became extremely intoxicated and overly friendly and touchy with the applicant. She was following the applicant around while he tried to avoid her, but she was persistent and touched and hugged him repeatedly throughout the evening. He wrote that the applicant was "not reciprocating with her contacts and was merely engaging in conversation with her." He stated that the applicant "never became loud or obnoxious or behaved in a way that would embarrass himself or the Coast Guard" and was not the type to do so. He stated that he was shocked to learn that the applicant had been charged because of his conduct that night. He stated that at the mast on July 12, 2013, he tried to explain to the CO what had occurred but the CO "would not allow me to explain my answers in order to better describe what had happened that night and was looking only for information that would support his conclusion." He alleged that other witnesses concluded the same and that he did not feel comfortable providing the applicant with a statement to support an appeal "since we were going [to be] aboard ship with the Command for a while."

VIEWS OF THE COAST GUARD

On September 30, 2015, the Judge Advocate General of the Coast Guard (JAG) submitted an advisory opinion in which he recommended that the Board deny relief.

Regarding the applicant's claims (##1 and 2 above) that his unwarned statements for the CGIS investigations should not have been considered but were in violation of Article 31(b) of the UCMJ, the JAG stated that the CGIS agents did not warn him of his rights because he was not a subject of the investigations but was a witness to the alleged sexual assaults and harassment. [redacted]e J[redacted]tated that the fact that the applicant's statement to CGIS was unwarned "does not have any bearing on the propriety of its use in the NJP or any bearing on the adequacy of the NJP." The JAG stated that the Military Justice Manual states that COs should follow a rule of fundamental fairness during NJP but also explicitly states, "Judicial exclusionary rules involving rights warnings and search and seizure do not apply at mast, and the [CO] may consider evidence that would be inadmissible at court-martial." Therefore, even if the applicant had been a suspect and had not been read his rights by the CGIS agents, his statement could have been used at mast. In addition, the JAG noted that even if the applicant's statement had been excluded, the preponderance-of-the-evidence standard of proof used at mast was "easily met" by the other evidence available to the CO.

Regarding the applicant's claim (#3 above) that he was not permitted to adequately examine the documents considered by the CO, the JAG stated that he was allowed to examine his own statement and the three other witnesses' statements relied on by the CO in accordance [redacted]

v[redacted]Article 1.B.5.i. of the MJM. Because of the sensitive, protected nature of the CGIS investigations, however, the CGIS reports were redacted to protect irrelevant, sensitive information about the alleged sexual assaults by the FN and MK2. The JAG stated, "We have carefully reviewed the statements provided to the applicant … and have determined that all relevant information was presented to him and that the redaction of sensitive information relating to unrelated allegations of sexual assault and harassment was proper. The PIO [unit's investigator's] report used three statements besides the applicant's and the applicant was able to examine those three statements. The applicant has not provided any proof beyond his own statement that other extraneous evidence was considered by the [CO]."

Regarding the allegation that the applicant was not adequately advised of the charges against him (##4 and 5 above), the JAG stated that when the applicant acknowledged his rights on July 10, 2013, he was informed that he was suspected of wrongful sexual contact (Article 120) and being drunken and disorderly (Article 134) with the FN on or about September 30, 2013, and he signed the form waiving his right to counsel and acknowledging that he understood the information on the form. In addition, the applicant was notified on the form that the allegations were based on statements in the CGIS investigation. The JAG stated, regarding the Article 92 charge, that the applicant signed a Page 7 when he reported aboard the cutter acknowledging that he had been counseled about having inappropriate relationships with shipmates and that the PIO's report clearly details behavior and conduct between the applicant and the FN that was inappropriate. The JAG argued that adding the Article 92 charge during the mast did not violate the applicant's rights because he was aware of the prohibition against having an inappropriate relationship with a shipmate and was aware that he was "being brought to mast for inappropriate contact between him and [the FN] as evidenced by the witness statements. There is no prohibition on the [CO] adding or dismissing charges as appropriate at NJP. Here, not even the fundamental fairness weights in favor of dismissing the Art. 92 charge or saying it was inappropriate because the member was well aware that he was at mast for inappropriate contact between himself and the [FN]."

Regarding the applicant's claim (#6) that his punishment was unjust and disproportionate, the JAG disagreed. He stated that the evidence showed that the applicant, an E-6, got drunk at a bar, ignored his shipmates' appeals to cease contact with the FN, and had repeated contact with her "d[redacted]ina[redacted]n his placing of his head on the chest of the [FN]." The JAG stated that the punishment imposed by the CO did not exceed his authority and was not disproportionate. In addition, the JAG argued, the evidence supported the finding that the applicant had incurred an "alcohol incident."

Regarding the applicant's claim (#7) that the CO had intimidated the witnesses by verbally reprimanding them for their own failures at the end of the mast, the JAG stated that one of the purposes of a "public" mast is to deter other members of the unit from committing similar offenses to maintain good order and discipline. The JAG stated that the reprimands occurred at the end of the mast and so had no effect on the witnesses or NJP proceeding during the mast. The JAG stated that there is no evidence that the CO threatened to punish witnesses and any reprimands that he made at the end of the mast would have helped establish good order and discipline within the unit as masts are intended to do.

[redacted]

[redacted] Regarding the applicant's complaint that he was denied an extension of the time to appeal (##8 and 9), the JAG stated that members may only appeal NJP based on the punishment being "unjust," which is defined as the punishment exceeding the CO's authority to impose, or "disproportionate," and the applicant memorandum of appeal failed to explain why he thought his NJP was unjust or disproportionate and only requested an extension to consult counsel. However, the Acting Area Commander considered the bases for appeal anyway and denied the appeal. The JAG stated that appeals must be submitting in writing within five calendar days "or the right to appeal shall be waived in the absence of good cause shown." Because the applicant's NJP occurred on July 12, 2013, his appeal period was July 13 through 17, 2013. When he submitted his notice of appeal, he did not address the issues but complained about being denied an extension and production of documents. The JAG argued that the applicant was not denied his right to appeal as the guidelines are set out in the MJM and he failed to follow them.

The JAG concluded that the applicant has failed to overcome the presumption of regularity by submitting evidence of error or injustice with regard to his NJP. He argued that the "CGIS investigation leading up to the NJP, the report of the NJP, imposition of NJP and appeal process were all conducted in accordance with Coast Guard policy. The applicant has not provided any additional information to support his claims that substantive and procedural errors occurred with regard to his NJP." Therefore, the JAG recommended denying relief.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 7, 2015, the Chair sent the applicant a copy of the views of the Coast Guard and invited a response within thirty days. The applicant requested and was granted numerous extensions and submitted his response on November 16, 2016.

The applicant argued that because he was on a vessel and did not have the right to refuse mast, was not allowed to consult counsel, was not permitted to review all of the documents considered by the CO, pled not guilty and mast, but was found guilty and punished in excess of others who were found guilty of more egregious offenses and was denied his right to appeal, the Board should grant relief.

[redacted]e a[redacted]ant complained that the JAG "made it sound like [the applicant and the FN] went to a local bar together along with other members of the cutter," when in fact the FN was already at the bar when the applicant arrived. In addition, the applicant stated, contrary to the JAG's claim, he did not admit in his statement to CGIS that the FN had flirted with him, stared seductively at him, or touched him in a flirtatious manner. The applicant stated that the claim by the JAG that he had bought the FN two beers at the bar "is an exaggerated statement" that does not reflect what he wrote in his statement. The applicant also stated that at mast, the FS1 had corrected her statement to the CGIS by denying that she had seen the applicant lean forward as if to kiss the FN and instead testified under oath that "they were just talking." The applicant also complained that the JAG made it sound like he had put his head against the FN's chest, whereas witnesses stated that she had grabbed his head and put it there. The applicant alleged that he did not consent to this contact, and the evidence shows that no one concluded that he had.

[redacted]

[redacted] The applicant repeated his allegations regarding Article 31(b), which prohibits unwarned statements from being used as evidence in a trial by court-martial. He argued that the CGIS agents were or became aware of potential criminal misconduct by him and should have warned him.

The applicant stated that his repeated attempts to obtain statements from witnesses in support of his BCMR case had failed because the witnesses feared reprisal, which stemmed directly from the CO's reprimanding them at the end of the mast, creating a chilling effect.

The applicant also noted that his CO's endorsement of his appeal erroneously claimed that the "matters" were not in dispute, which was not true because he pled not guilty and "has always maintained that there was never any inappropriate conduct on his part." He alleged that the investigation showed that all of the inappropriate conduct was committed by the FN, not him.

The applicant stated that he never saw the investigation into the FN's allegations and was only shown the redacted investigation into the MK2's allegations. He alleged that the CO relied on the investigation of the FN's allegations at mast, but he was not shown it.

The applicant repeated his allegation that his NJP was disproportionate because the MK2 had kissed the FN and was her supervisor but received a suspended reduction in rate, whereas the applicant's reduction in rate was not suspended.

The applicant repeated his allegation that he was not timely warned about being charged with a violation of Article 92. He alleged that he was not told the basis for the charge or shown all the evidence on which it was based, which was a violation of Coast Guard policy.

The applicant repeated his allegation that the denial of his request for an extension was unreasonable because he was aware that the applicant had retained counsel. The applicant noted that his CO and the Area Commander had counsel, but he did not. The applicant argued that the right to consult counsel about mast is especially important when a member does not have the right to refuse mast and that extensions of the time to appeal are normally granted for "good cause." Because the applicant's counsel was not physically located where the applicant was locate[redacted]nd [redacted]unfamiliar with the facts, he argued, the denial of the extension was clearly unreasonable.

APPLICABLE REGULATIONS

The rules for NJP appear in the Military Justice Manual (MJM). Article 1.A.1. of the MJM states that under Article 15 of the UCMJ, COs may "impose NJP without resort to the judicial form of a court-martial." The purpose is to "meet the needs of good order and discipline" in response to minor offenses, and imposing NJP "does not constitute a judicial finding of guilt and is not a 'conviction.'" Art. 1.A.5.a. and 1.A.6.a.

Article 1.B.1. states that a command "may receive an allegation of misconduct from any source." A Report of Offense and Disposition is completed and reviewed to determine if NJP is appropriate. The XO may designate a preliminary inquiry officer (PIO) to conduct an inquiry. [redacted]

A[redacted]1.B.3. The PIO may correct the charges to ensure they are supported by evidence. Art. 1.B.4. The PIO may not question the accused without informing him of his Article 31(b) rights. Art. 1.B.4.e. Article 1.B.4.f. states that the accused may request an attorney at any time while being questioned by the PIO. The PIO makes a recommendation regarding the disposition of the charges and any other administrative measures warranted. Art. 1.B.4.h.

Article I B.5. states that the XO reviews the PIO's report, amends the Report of Offense and Disposition if necessary, and makes a recommendation regarding the disposition of the charges. If the XO decides a mast is warranted, the member is notified and a mast representative is appointed.

Article 1.B.5.e. and f. state that a member who is not attached to or embarked on a vessel has the right to demand trial by court-martial in lieu of NJP, but a member who is does not have that right. The CO of a vessel "may, in its sole discretion and if it will not unreasonably delay the proceedings, arrange for the member to consult with a military attorney or provide the member the opportunity to consult with a civilian attorney at his or her own expense prior to imposing NJP to allow the member to obtain information about the NJP process."

Article 1.B.5.i. states the following about examining evidence:

> Prior to imposition of NJP, the member must be allowed to examine documents and other evidence that the NJP authority will examine and consider in determining whether to impose NJP. To avoid delays during the mast itself, the member and his or her designated mast representative should be provided the opportunity to review such materials, including the PIO's report and witness statements, prior to the mast if the case will be forwarded recommending NJP. This may have been accomplished at some commands by the PIO [see, subparagraph 1.B.4.i above]. Alternatively, the commanding officer may review the documents and evidence with the member during the mast hearing [see, enclosure (1b) or (1c)]. The regional CGIS office should be consulted prior to disclosure of a CGIS Report of Investigation.

Article 1.C.1. states the following about representation at mast:

> A mast is not an adversarial proceeding. It is different from courts-martial; a member has no right to be represented by an attorney at mast. No military attorney will be detailed to represent a member at [redacted] unless the mast authority is a flag officer and he or she requests an attorney for the member. It is possible, however, that the member may obtain the services of an attorney or any other person, at no expense to the government, to appear as his or her spokesperson.

Article 1.C.4.b. states that a spokesperson "is an individual selected and arranged for by the member who, at the member's election, speaks for him or her at those times during the mast when the member's responses are invited by the commanding officer. A spokesperson may be anyone, including an attorney retained by the member." Article 1.C.4.d. states that a mast "need not be delayed to permit the presence of a spokesperson." Article 1.C.4.e. notes that a spokesperson may not examine or cross-examine witnesses" except at the CO's discretion.

Article 1.C.2.b. states that a member attached to or embarked on a vessel "has no right to demand trial by court-martial in lieu of NJP or, consequently, to consult with a military or civilian attorney prior to NJP regarding the option to demand trial by court-martial. … A commanding officer, at his or her sole discretion, and if it does not unduly de[redacted]may permit

t[redacted]member to consult with an attorney similar to the right provided in subparagraph 1.C.2.a above [which authorizes a legal consultation for members when they are deciding whether to refuse NJP and demand trial by court-martial]."

Article 1.C.3. provides that at mast, a member may be represented by another member designated as a "mast representative," who is normally chosen by the accused. Article 1.C.3.c. states that a mast representative helps the member prepare to present his side of the matter and to speak for the member if the member desires. The mast representative may also "question witnesses, submit questions to be asked of witnesses, present evidence, and make statements inviting the commanding officer's attention to those matters he or she feels are important or essential to an appropriate disposition of the matter. In addition, the mast representative may make a plea for leniency, and to that end, may solicit and submit statements regarding the reputation of the member at the unit as well as other matters in extenuation or mitigation."

Article 1.D.1.f. states that at mast, the CO uses a "preponderance of the evidence" burden of proof and must determine whether it is "more likely than not" that the member committed the offense. Article 1.D.1.g. states that a member may not be forced to speak at mast and privileged communications (spouse, attorney, clergy) are protected, but the "[o]ther rules of evidence applicable to courts-martial do not apply at mast. … Judicial exclusionary rules involving rights warnings and search and seizure do not apply at mast, and the [CO] may consider evidence that would be inadmissible at court-martial. The [CO] should apply a rule of fundamental fairness: under all of the circumstances, is it fair to the member to consider this evidence?"

Article 1.D.8. provides that that at mast the CO "calls and questions each witness," after which the member or his mast representative may question the witness and call their own witnesses. "The [CO] may control the proceedings as necessary to ensure that any questioning helps to discover the truth of the allegations against the member, avoids wasting time, and protects a witness from harassment or unnecessary embarrassment."

Article 1.D.15. states that in making findings, if the CO "determines, based on a preponderance of the evidence, that the member committed one or more offenses, the [CO] should announce, in layman's terms, what offenses the member committed." If the CO determines that the m[redacted]er c[redacted]mitted the offense and NJP is appropriate, the CO should announce the punishment "that is most appropriate for the member, the offense(s), and the good order and discipline of the unit." The CO may also dismiss unsupported charges or dismiss charges "with a warning" based on insufficient proof of "a determination that punishment is not appropriate even though the member committed the offense(s)." Articles 1.D.9. and 1.D.17.

Article 1.F.1. states the following regarding NJP appeals:

> A member punished under Article 15, UCMJ, may appeal if he or she considers the punishment imposed "unjust" or "disproportionate" to the acts of misconduct for which punished. … The appeal must be submitted in writing within 5 calendar days of the imposition of the punishment, or the right to appeal shall be waived in the absence of good cause shown. The day the punishment is awarded does not count in the computation. … An appeal is "submitted" when it is received by the member's supervisor or any more senior individual in the member's unit chain of command. The appeal must be temperate and factual. [redacted]

Article 1.F.1.a. notes that for the purpose of appeal,

> (1) The term "unjust" denotes illegality. For example, the act of misconduct for which punishment was imposed was not a punishable offense under the UCMJ; the member was not subject to the jurisdiction of the commanding officer who imposed punishment; the commanding officer who imposed punishment was without power or authority to act in the member's case; or, the punishment exceeded legal limitation based upon the status of the member and/or the commanding officer who imposed the punishment. Similarly, the illegality may result from the denial of a substantial right of the member at any stage of the proceedings (e.g., investigation, preliminary inquiry, interrogation, or mast). Illegality may result from the failure to comply with procedural provisions applicable to mast punishment. Finally, illegality may result from a lack of sufficient evidence to establish that, more likely than not, the reported misconduct, the member's involvement in the misconduct, or both, occurred.
>
> (2) The term "disproportionate" indicates that although the punishment imposed was legal, it was excessive or too severe considering all of the circumstances, (e.g., the nature of the misconduct involved; the absence of aggravating circumstances; the prior good record of the member; or, any other circumstances that tend to lessen the severity of the misconduct or explain it in a light more favorable to the member). Adverse administrative consequences of NJP such as delay in advancement or inability to reenlist are not punishment and are not a proper basis for NJP appeal.

Article 1.F.3. states that an appeal "shall be in writing, shall be temperate and factual, and shall set forth a summary of the prior proceedings in the member's case; a detailed explanation of the basis for the appeal stating that the punishment imposed was either unjust or disproportionate, or both, and why, and the specific action that the superior officer to whom the appeal is made is requested to take."

Article 1.F.2. provides that the first flag officer in the member's chain of command decides an appeal of NJP.

FINDINGS AND CONCLUSIONS

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

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

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.[2]

3. The applicant asked the Board to expunge from his record all documentation of and references to an NJP dated July 12, 2013, and an associated disciplinary EER and Page 7 documenting an alcohol incident, which he alleged are error and injustice. In considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in his record, and the applicant

[2] *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.[3] Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."[4]

4. The applicant alleged that his NJP was unjust because he was not advised of his rights pursuant to Article 31(b) of the UCMJ during the CGIS investigation and so incriminated himself not knowing that he would be charged, but the Board disagrees. Whether or not the CGIS agents should have advised him of his rights pursuant to Article 31(b) is arguable since he admitted only that he got "pretty tipsy" that night; that the FN got "flirty," told him he was cute, and touched his arm; and that he bought her two drinks—none of which is, by itself, an offense. However, as the JAG noted, Article 1.D.1.g. of the MJM states that "[j]udicial exclusionary rules involving rights warnings … do not apply at mast, and the [CO] may consider evidence that would be inadmissible at court-martial." Therefore, the fact that the applicant was not advised of his Article 31(b) rights during his interview with the CGIS agents, because they considered him only a witness, did not prohibit his CO from considering his statement to the CGIS agents at mast. The Board notes that the PIO advised the applicant of his rights on July 10, 2013, two days before the mast.

5. Although the applicant argued that the consideration of his statements was not "fundamentally fair," as required by Article 1.D.1.g. of the MJM, the Board is not persuaded that it was fundamentally unfair in light of the inapplicability of the exclusionary rules at mast and the fact that the applicant did not expressly admit to committing an offense to the CGIS agents even if some of his statements corroborate other evidence supporting some of the elements of the charges against him, such as his consumption of alcohol at the bar. In addition, the Board is not persuaded that the applicant would not have received NJP even if the CO had not considered the applicant's statement to the CGIS agents. The record shows that the written and verbal testimony of the other witnesses at mast could have provided the CO with sufficient evidence to conclude that the preponderance of the evidence showed that the applicant had committed the offenses.

6. The Board finds that the applicant has not proven by a preponderance of the evidence that he was not allowed to examine the evidence considered by the CO as required by Article 1.B.5.i. of the MJM. The record shows that after the Area Commander forwarded the two ROIs to the cutter, the command designated a PIO to investigate the allegations in the ROIs. The PIO apparently selected some of the witnesses' statements for the CO to read and the applicant was allowed to review them in redacted form. The record shows that three witnesses also testified at the mast. While it is true that the ROIs contain a lot of other evidence, the vast majority of which does not pertain to the applicant, the applicant has not shown that the CO considered evidence against him that he was not allowed to examine.

7. The Board finds that the applicant has not shown that the CO's decision to dismiss the charge of violating Article 120 of the UCMJ (wrongful sexual contact) but add the

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[3] 33 C.F.R. § 52.24(b).

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

charge of violating Article 92 (disobeying an order or regulation by having an inappropriate relationship with a shipmate) during the mast was fundamentally unfair. Engaging in any sexual or romantic conduct was forbidden not only by the orders on the cutter's Page 7 but also by Coast Guard regulations because the applicant and the FN served on the same cutter.[5] The applicant was charged with violating Article 120, meaning that he was accused of "engag[ing] in sexual contact with another person without that other person's permission,"[6] and the record shows that he knew that he was being accused of engaging in this nonconsensual sexual contact with the FN, a shipmate, in the bar on or about September 30, 2012. Consensual sexual contact between shipmates constitutes an inappropriate relationship and is a clear violation of orders and regulations,[7] and the applicant knew it. Therefore, the Board does not believe that the CO's decision to reduce the charge from Article 120—for having nonconsensual sexual contact with a shipmate—to Article 92—for violating an order and/or regulation by having consensual sexual contact with a shipmate (an inappropriate relationship)—renders the mast proceeding or the NJP erroneous or unjust. In essence, by finding that the applicant had engaged in consensual sexual contact with a shipmate contrary to regulations, instead of nonconsensual sexual contact with a shipmate, the CO found that the applicant had committed a sort of lesser included offense (consensual instead of nonconsensual). Therefore, and because the applicant was on notice that he was being accused of engaging in sexual contact with a shipmate in the bar on September 30, 2012, the Board finds that the applicant has not proven by a preponderance of the evidence that the change in how the misconduct was charged from Article 120 to Article 92 constitutes an error or injustice or warrants removing the NJP.

8. The Board finds that the applicant has not proven by a preponderance of the evidence that the written charges were insufficiently detailed to allow him to respond at mast. The Miranda/Tempia rights form that he signed on July 10, 2013, and the Report of Offense and Disposition both placed him on notice that he was being charged with engaging in wrongful sexual contact with the FN and being drunk and disorderly to the prejudice of good order and discipline on or about September 30, 2012. In addition, he was allowed to examine the witness statements considered by the CO, which described the alcohol-fueled, inappropriate sexual contact. The Board finds that the applicant was sufficiently informed of the allegations against him to allow him to respond at mast.

9. The Board finds that the applicant has not proven by a preponderance of the evidence that his punishment was unjust or disproportionate. The applicant argued that his punishment was disproportionate because the MK2, who had kissed the FN, committed worse misconduct but received less punishment than he did. The Board is not persuaded, however, that the MK2's misconduct was clearly worse than the applicant's, whose head ended up on the FN's chest. Although the MK2 apparently supervised the FN's work, there is evidence that he was actively trying to stop the FN from getting into trouble on September 30, 2012. Also, the MK2 filed the initial harassment and assault complaint to try to stop the FN. Therefore, the MK2 had arguably acted more responsibly than the applicant with respect to the FN. Moreover, the applicant was a first class petty officer, rather than a second class petty officer, and so could properly

[5] COMDTINST M1600.2, Chapter 2.A.2.

[6] Manual for Courts-Martial United States (2008), IV-69.

[7] COMDTINST M1600.2, Chapter 2.A.2.d. and f.

held to a higher standard of conduct than the MK2 and be awarded more punishment for similar misconduct.

10. The Board finds that the applicant has not proven by a preponderance of the evidence that his CO committed an error or injustice by—at the end of the mast—giving a verbal warning to the other members who had been present in the bar on September 30, 2012. The CO apparently warned them about their own conduct in failing to mitigate and/or report the others' misconduct. When a group of members together commit varying degrees of misconduct—which is not an uncommon occurrence when sailors visit bars—the CO must respond to maintain good order and discipline, including giving warnings to the least of the offenders. As the JAG noted, masts are often made public so that other members will learn from them. In this case, the command received the CGIS reports on July 8, 2012, and the CO chose to verbally warn the least of the offenders at the end of the mast on July 12, 2012, while everyone was gathered and focused on the incident. Although one of the witnesses stated in 2014 that the CO's warning and attitude deterred him and others from writing a statement for the applicant's appeal, the Board is not persuaded that the CO committed an error or injustice in timing his verbal warning for the end of the mast, after the witnesses had testified. COs must maintain good order and discipline and so cannot avoid timely criticizing bad behavior by subordinates in order to ensure that those criticized do not feel deterred from supporting another subordinate accused of misconduct.

11. The Board finds that the applicant has not proven by a preponderance of the evidence that he was entitled to an extension of the five-day period for appealing his mast, that his command and the Acting Area Commander abused their discretion in refusing to grant him an extension, or that his command erred in failing to produce copies of the evidence for the applicant's attorney to review. There is no provision for requesting and granting an extension of the five-day appeal period to consult counsel in the MJM; nor is there a provision for document production during the appeal process. Article 1.F.1. of the MJM states that an "appeal must be submitted in writing within 5 calendar days of the imposition of the punishment, or the right to appeal shall be waived in the absence of good cause shown." Although the applicant argued that his desire to consult an attorney constituted "good cause," the Board in not persuaded that the command and the Area Commander abused their discretion in this case. The applicant has not shown that his command committed any procedural error or denied the applicant a legal right pursuant to the mast that his attorney could have identified and addressed for him in the appeal. (Although he has made many allegations of procedural errors in this BCMR application, he has not actually shown that the command committed any errors in conducting the mast.)

12. The applicant has not proven by a preponderance of the evidence that his XO arbitrarily shortened his deadline to appeal. Even assuming the applicant's allegation about what the XO said is true, which is unproven, by telling the applicant that the deadline was 10:00 a.m. on July 17, 2012, "as far as I know" and admitting that he did "not know much about the law," the XO in essence told the applicant that he was unsure of the deadline. The applicant, however, had retained a lawyer, could read the appeal regulations himself, and could have called a military lawyer to verify the deadline. There is no evidence that the applicant tried to submit a substantive appeal after 10:00 a.m. on July 17th but was denied. Instead, the applicant submitted a memorandum titled "Appeal of Imposition of Nonjudicial Punishment" but failed to include any arguments about injustice or disproportionate punishment in it. Therefore, the Board finds that

t[redacted]pplicant has not proven by a preponderance of the evidence that he was denied a full five days to submit his appeal or a fair opportunity to appeal his NJP. The Board notes that despite the lack of arguments in the applicant's appeal memorandum, the Area Commander stated that he considered whether the NJP was unjust or disproportionate and decided it was not.

13. The applicant has not proven by a preponderance of the evidence that his CO committed error or injustice by finding that he had incurred an alcohol incident and had been drunk and disorderly to the prejudice of good order and discipline. The applicant argued that his conduct in the bar was not drunk and disorderly or prejudicial to good order and discipline and did not meet the definition of an "alcohol incident." The evidence shows however, that the applicant—then a first class petty officer—got sufficiently drunk that night that he either actively participated in sexual misconduct with a non-rate shipmate just out of training camp or at least failed to act responsibly and use his authority to stop her flirtatious, "touchy" misconduct and instead continued to converse and drink with her. The evidence shows that at one point, his head ended up on her chest and that he only lifted it off after an ET2 decided to intervene, tapped him on the shoulder, and said "hey hey hey." The CO found that the applicant had ignored three warnings by crewmates to separate himself from the FN. The Board finds that such behavior by a first class petty officer with a non-rate shipmate is clearly "drunk and disorderly," "to the prejudice of good order and discipline" among shipmates, and an "alcohol incident," which Article 1.A.2.d. of COMDTINST M1000.10 defines as "[a]ny behavior, in which alcohol is determined, by the commanding officer, to be a significant or causative factor that … brings discredit upon the Uniformed Services, or is a violation of the Uniform Code of Military Justice, Federal, State, or local laws. The member need not be found guilty at court-martial, in a civilian court, or be awarded non-judicial punishment for the behavior to be considered an alcohol incident." The applicant has not proven by a preponderance of the evidence that his CO erred in concluding that the applicant's misconduct with the FN on the night in question was alcohol-fueled, discreditable to the Coast Guard, and in violation of the UCMJ by violating an order or regulation regarding inappropriate relationships.

14. Accordingly, the Board finds that the applicant has not proven by a preponderance of the evidence that the disputed NJP, EER, and alcohol incident in his record are erroneous or unjust. No relief is warranted.

[redacted] [redacted]

(ORDER AND SIGNATURES ON NEXT PAGE)

[redacted]

ORDER

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

December 15, 2016

[redacted]