DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2018-161

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on July 9, 2018, and assigned the case to the Deputy Chair to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated March 3, 2023, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, a former Airman Aviation Survival Technician (ANAST/E-3) who was honorably discharged on June 16, 2016, for serious misconduct, asked the Board to expunge the nonjudicial proceeding (NJP) dated June 23, 2015, from his military record. The applicant argued that he should be made whole as if the NJP had not occurred to include the following:

1) Expunge all references to him being involuntary discharged;
2) Expunge all Administrative Remarks forms ("Page 7s")[1] related to the NJP;
3) Expunge or correct his Enlisted Evaluation Report (EER) referencing the NJP;
4) Order the applicant's air station to remove all defamatory postings of him on the personnel informational site;
5) Upgrade his separation code from "JKQ" to "FBK," his narrative reason for separation from misconduct to service completed, and his reenlistment code from RE-4 to RE-1;
6) Reinstate his rank to E-4 as of June 23, 2015, and pay him back pay from the date of his reduction in rank to his reenlistment date of September 20, 2016;
7) Pay him all back pay from the date of his discharge to his reenlistment date;

[1] An Administrative Remarks record entry, form CG-3307, better known as a "Page 7," is used to document a member's notification of important information, achievements, or counseling about positive or negative aspects of a member's performance in the member's military record.

8) Pay him all back pay from his loss of hazardous pay from June 23, 2015, to September 29, 2016;
9) Pay him all back pay from his loss of flight pay from June 23, 2015, to September 29, 2016; and
10) Order the Coast Guard to issue him a Good Conduct award.

The applicant argued that the NJP that he received on June 23, 2015, was illegal. Accordingly, he argued that he should be made whole as if the NJP had not occurred. The applicant explained the basis for the NJP. He stated that he had been repeatedly asked by a female commissioned officer, Lieutenant Commander (LCDR) D, why he was so tired. The applicant replied that he was "out of fluids." He argued that because he is French-Canadian and also an EMT, he thought that the phrase "out of fluids" was proper for describing when someone was exhibiting signs of severe dehydration or heat stroke. He also stated that he and LCDR D routinely had similar conversations and that he was required to respond candidly.

The applicant put forth several arguments to support his argument that his NJP was illegal. First, the applicant argued that prior to his NJP, his command prejudiced him by illegally issuing numerous Page 7s. The applicant argued that his command issued these Page 7s to legitimize the upcoming NJP. He argued that these Page 7s were both false and lacked the specificity required by Coast Guard policy.

Second, the applicant argued that the command's procedure in processing the NJP violated his Fifth Amendment rights. Specifically, he argued that his command intentionally violated his Miranda rights. He stated that on May 13, 2015, he chose not to make a statement. The applicant argued that despite his decision not to make a statement, the NJP Preliminary Investigative Officer (PIO), LT Y, interviewed him on May 31, 2015. Next, he argued that his command violated his Fifth Amendment rights by refusing to allow his NJP representative to cross-examine witnesses. Notably, the applicant stated that the command refused to allow the applicant's representative to cross-examine LCDR D even though the questions were submitted to the command in advance and were fair and non-adversarial. The applicant argued that the questions were paramount to proving his innocence. The applicant also argued that the Coast Guard did not provide adequate legal notice of the words he was alleged to have said in violation of the Uniform Code of Military Justice (UCMJ). He argued that the Charge Sheet that he received on May 12, 2015, failed to put him on notice of what specific words he was alleged to have said to LCDR D.

Third, the applicant argued that he was illegally and capriciously charged with committing Disrespect Towards a Superior Commission Officer[2] and Indecent Language.[3] He argued that the Coast Guard did not have any prima facie evidence to proceed to NJP. The applicant stated that a violation of Article 89 requires five elements. He argued that in his case, three of the five elements were missing. Specifically, he argued that he did not use certain language to or concerning a certain commissioned officer, that such language was not directed toward the officer, and that such language was not disrespectful to the commissioned officer. The applicant also argued that LCDR D provided conflicting statements that were insufficient to prove that he violated Article 89. Instead, he argued that his words were innocuous and ambiguous and were not justiciable under

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[2] Article 89, UCMJ.
[3] Article 134, UCMJ.

Article 89. To support his argument, the applicant alleged that LCDR D did not request that charges be brought against him and that she did not request that he be relieved of his flight duty with her. The applicant also alleged that charging him of violating both Article 89 and Article 134 was illegal. He argued that his one statement should not have been “dog piled” into two separate charges and that by doing so, his command could only have intended malice.

Fourth, the applicant argued that his NJP was defective because serious crimes cannot be tried at NJP. He argued that NJP was only appropriate for minor offenses. The applicant argued that violating Articles 89 and 134 were serious crimes that should have been tried at Court Martial. He argued that if his actions were somehow considered a serious offense, then he could not have been tried at NJP and his NJP should be rendered void. On the other hand, he argued that if his actions were not considered a serious offense, then his discharge should be void.

Fifth, the applicant argued that the command’s response to his refusal to accept the results of the NJP proceeding were retaliatory, illegal, and “just plain mean.” The applicant argued that all of his NJP appeals did not meet the legal procedure for review and that his due process rights were violated. For instance, he argued that his command illegally ignored his Complaint of Wrongs under Article 138 of the UCMJ. He also argued that his command illegally fabricated his Disciplinary EER. Next, he argued that his command retaliated against his appeals by issuing multiple erroneous Page 7s. For instance, he stated that he received a negative Page 7 on October 19, 2015, that documented four separate incidents. He argued that all four incidents were false. Specifically, he stated that he did not take his shipmate’s boots without permission, that he overperformed rather than underperformed regarding painting a wall, that he never left work early, and that he did not violate Coast Guard policy by taking a video of himself in a golf cart and posting it on social media. The applicant also argued that his Command violated his privacy rights by posting erroneous information on the Base’s personnel informational site meant to cast him in a false light. Lastly, he argued that his command capriciously and inexplicably removed him from his Rescue Swimmer duties. The applicant stated that he was assigned to the Facilities Engineering Department from June 24, 2015, until he was discharged on June 16, 2016. There, he stated, he performed “menial tasks” such as raking leaves and painting. He argued that he repeatedly asked his command to return him to his Rescue Swimmer duties, but his requests were denied without an explanation. He argued that as a result, he lost Rescue Swimmer training, qualifications, and flight and hazardous duty pay.

Finally, the applicant argued that his discharge was illegal because he was never notified that NJP could lead to his discharge. In fact, he argued that he was told that NJP could not result in him being discharged from the Coast Guard.

Unrelated to the NJP, the applicant also asked the Board to order the Coast Guard to place a Page 7 in his record that documents his actions of saving the life of a fellow rescue swimmer, ANSAST N, during a training evolution that occurred on October 20, 2014. The applicant argued that his command had disregarded his stellar performance and refused to file a Page 7 after he saved ANAST N in the Pacific Northwest. To support this request, the applicant provided a letter written by ANAST N on November 21, 2015, regarding the incident. ANAST N stated that on that day, the applicant had him in a secure physical grip hoisting position when they were struck by an 18-foot wave. ANAST N stated that the applicant managed to hold onto him, but the wave had

held them underwater for approximately 10-15 seconds. He stated that the wave's impact also caused the rescue hook to collide into them, giving ANAST N a nose laceration, ripping his rescue harness, and dislodging some of his rescue gear. After resurfacing, he stated that the applicant immediately gave the ready for pick up signal. However, they both noticed another wave approaching of approximately the same size. ANAST N stated that he and the applicant assessed that they would not clear the second wave in time. ANAST N told the applicant to drop him, and the applicant let go of his physical grip which allowed them to avoid a second impact. The applicant was then hoisted into the cabin. For approximately ten minutes, ANAST N was left on scene, fighting to maintain his composure and "duck diving" into the waves. Then, he stated that the applicant made the decision to come back down and recover him. The applicant secured ANAST N in a physical grip and they were hoisted up, narrowly avoiding another large wave. ANAST N stated that the applicant was able to hold him above the water for 96 seconds while the pilots searched for a safer area to set them down. ANAST N stated that 96 seconds was the longest physical grip he had heard of and was definitely longer than standard physical grips during training evolutions. He described the applicant's conduct as "an impressive feat nonetheless." ANAST N stated that from the initial wave, he suffered a back injury that grounded him for nearly two months. He stated that he was very grateful and believed that the outcome could have been much worse had it not been for the applicant's quick decision to come back down and recover him. ANAST N stated that the applicant showed courage and described his actions as nothing short of admirable.

The applicant submitted numerous other documents to support his application. First, the applicant submitted an undated character reference from Aviation Survival Technician first class (AST1) L who stated the following:

> I have worked with [the applicant] for over a year. During this time, it has been a pleasure to work with him. He has made my job as a shop supervisor easier by volunteering for last minute duty swaps, and more deployments than anyone else in our shop. [The applicant] has also volunteered for tasks [sic] such as Boy Scout training, STAR base tours and funeral details.
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> As [the applicant's] Mast Rep, I believe some of the counseling documents presented to him, contain information regarding his character that is either false or exaggerated. Examples of this are statements claiming he has a bad attitude and doesn't care about his peers.
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> As his supervisor, [the applicant] has always shown me respect and done anything I have asked with a positive attitude. He is someone who cares for his shipmates and is always willing to lend a helping hand. I'd be happy to have him in any shop I'm ever a part of.

The applicant also submitted a character reference from AST3 W dated June 6, 2016. He stated that on May 12, 2016, he was preparing for the Emergency Medical Technician training on heat related emergencies. AST3 W stated that the handbook used by his ship had been donated by the applicant. He stated that during his preparation, he noticed a couple of handwritten notes in the manual related to heat stroke. Notably, AST3 W saw a handwritten note stating: "body out of fluids." He stated that he found this note "humorous" since it was exactly the miscommunication for which the applicant received NJP. AST3 W stated that he immediately took a picture of the note and shared it with the applicant.

Finally, the applicant submitted an affidavit from his father. In his affidavit, the applicant's father stated that he was born and raised in the United States for his entire life. However, he stated that the applicant was raised and educated in Quebec, Canada. As a result, he stated that his phraseology can be confusing because he mixes French and English. He stated that the applicant asked him to be his mast spokesperson at NJP and to speak of his "Frenchness." The applicant's father stated that throughout the NJP process, the CO treated him disrespectfully. For instance, he stated that his request to bring his computer was not permitted. He also alleged undue command influence by the CO. Specifically, he stated that prior to the NJP, he and the applicant wrote up questions for the CO to ask LCDR D. He stated that the CO acknowledged the questions but rejected several of them on the basis that they were adversarial. The applicant's father also stated that his request to directly examine his own witnesses was rejected. He concluded by stating that the Coast Guard unjustly terminated the applicant's career due to their "rush to prosecute based on ambiguous language and officer's [sic] acting like children rather than professionals."

The remaining documents submitted by the applicant are included in the summary of record below.

SUMMARY OF THE RECORD

On August 31, 2011, the applicant completed a Coast Guard Application for Recruitment. On the form, the applicant stated that he was 100% bilingual in French and English. Also on that day, the applicant sent a letter regarding his Coast Guard application. He stated the following regarding his language abilities: "I am 100% bilingual, speaking and writing both French & English without accents in either. Purely speaking from the US point of view, my foreign language is French."

The applicant enlisted in the Coast Guard on June 12, 2012. Shortly after completing recruit training, the applicant attended AST "A" School.

On July 7, 2014, the applicant received a Record of Counseling form. The applicant was counseled regarding his conduct, which was described as follows: "Inappropriate remarks communicated to a civilian employee and understanding the Coast Guard's Sexual Harassment Policy. Falsifying/forging another Coast Guard member's name on a civilian record using a derogatory name "Ben Dover." Consequently, he was removed from his Rescue Swimmer syllabus and tasked to daytime line crew for two weeks. The applicant was notified that he needed to demonstrate sound judgment, professionalism, and exemplify the Coast Guard's core values of honor, respect, and devotion to duty. He was also instructed to apologize for his conduct. Finally, the applicant was instructed to outline the Coast Guard's Sexual Harassment Policy and give shop training within his evaluation period.

On November 20, 2014, the applicant received another Record of Counseling form. He was counseled regarding his lack of customs and courtesies defined by the Enlisted Performance Evaluation form. According to the counseling form, the applicant had violated military formality and respect to rank on numerous occasions. He was notified that he would be observed by senior members and that, if his conduct continued, all counseling forms would be entered into his record which could affect promotions and/or reenlistment eligibility.

On May 11, 2015, LCDR D sent an email to the applicant's shop supervisor, ASTC O, regarding the applicant's conduct. She stated that earlier that day, she had gone to the swimmer shop to ask the applicant to repair her helmet. She explained that during the flight brief, the applicant had mentioned being pretty worn out. LCDR D followed up with the applicant and casually asked him if he was feeling well. She stated that the applicant had commented that he was extremely dehydrated because he and his girlfriend were having so much sex that he "lost all his fluids" and then proceeded to ask her "you know what I mean, right?" She stated that she has been in the Coast Guard for more than sixteen years, so she is used to subtle sexual harassment. However, she stated that this behavior is "not OK and it needs to be addressed." LCDR D stated that she was going to let ASTC O handle the situation. She stated that she would not bring this up to the Executive Officer unless ASTC O felt that it was necessary to do so.

On May 12, 2015, a Report of Offense and Disposition form was completed regarding the applicant's conduct that occurred the previous day. The details of the offense were as follows:

> Article 89 (Disrespect Towards a Superior Commissioned Officer), Article 134 (General Article), and Article 134 (Indecent Language). In that (the applicant) did in the evening hours of 11 May 2015, while on duty at [redacted], communicate indecent language toward LCDR [D]. While seeking [the applicant's] assistance in fixing a flight helmet discrepancy, LCDR [D] inquired as to why [the applicant] appeared to be physically unsound. [The applicant] then graphically described his personal sexual exploits to LCDR [D].

On May 13, 2015, the applicant's Commanding Officer (CO), Commander (CDR) M, instructed LT Y to conduct a standard investigation into the allegations of misconduct by the applicant. Specifically, LT Y was instructed to investigate the facts and circumstances surrounding the applicant's misconduct on May 11, 2015, and whether his misconduct violated the UCMJ.

That same day, LT Y conducted an interview with LCDR D. LT Y's interview summary stated the following in part:

> In preparation for an upcoming NVG Training Flight, LCDR [D] sought assistance from [the applicant] in rectifying a flight helmet discrepancy that would facilitate the safe wear and employment of Night Vision Goggles. Shortly after [the applicant] consented to assist with the simple repair, LCDR [D] inquired as to the accused seemingly unsound physical disposition. [The applicant] then frankly stated that his apparent ill feeling was due to being excessively dehydrated from extended sexual activities with his female partner, and in an attempt to confirm mutual understanding of the conversation with [the applicant] and LCDR [D], [the applicant] then uttered something along the lines of, "you know what I mean, right?" Coupled with [the applicant's] subsequent facial expression of a wry smile, this statement made LCDR [D] feel uncomfortable. The accused's use of indecent language and graphic depiction as to the cause of his ill disposition resulted in LCDR [D] being caught off guard due to the off-color remark. Additionally, LCDR [D] expressed feelings of shock, surprise, embarrassment and an overall loss for words as to how to respond to his statement.
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> Due to the shock effect of the remark, LCDR [D] removed herself from his presence. LCDR [D] later reflected that perhaps an on-the-spot course correction addressing the inappropriate language would have been necessary, but due to the surprising effect of [the applicant's] words, it impressed her with a limited response in the immediate moment, and that departing from his presence would be the best course of action, although LCDR [D] did not, at any time feel threatened, coerced, or fear for her safety while in the AST Shop.

On May 14, 2015, the applicant received and signed a Miranda/Tempia Rights form. The applicant was informed that he was suspected of committing the following offenses: Article 89 (Disrespect toward a Superior Commissioned Officer), Article 134 (General), and Article 134 (Indecent Language). The form briefly described the matter being investigated as follows:

> The use of inappropriate language in the workplace. In that [the applicant] did in the evening hours of 11MAY15, while on duty at CGAS [redacted], communicate indecent language toward LCDR [D]. While seeking [the applicant's] assistance in fixing a flight helmet discrepancy, LCDR [D] inquired as to why [the applicant] appeared to be physically unsound. [The applicant] then graphically described his personal sexual exploits to LCDR [D].

The applicant acknowledged that he understood the following: he had the right to remain silent; he could consult with a lawyer; anything he said could be used as evidence against him; and that he could stop answering questions at any time. The applicant indicated that he desired to consult with a lawyer and refrained from making a statement or answering any questions.

Also on May 14, 2015, LCDR D submitted a statement regarding the incident. LCDR D stated that on May 11, 2015, while conducting the risk assessment portion of her duty brief, the applicant stated something to the effect that he had been feeling less than 100%. LCDR D stated that she took note of this because the last time she had duty with the applicant, he had admitted to falling out of bed onto a broken glass and had sustained an open wound. LCDR D stated that the applicant's wound required several staples to close and had affected his ability to stand duty. After LCDR D conducted the duty brief, she went to the swimmer shop to see if the applicant could assist in fixing her helmet. After her helmet was fixed, she and the applicant walked to the hanger. During their walk, she asked the applicant how he was feeling because she was worried that he was ill. The applicant stated that he was feeling pretty dehydrated because he had been having so much sex with his girlfriend that he had "lost all of his fluids... you know what I mean?" LCDR D stated that she was extremely taken aback and did not know what to say. She stated that she was "embarrassed, surprised, and annoyed" that anyone would say those things to her in a workplace setting. She stated that when she went back to her office, a fellow Coast Guard member recommended that she take action. She emailed three other officers regarding the incident. Before leaving for their scheduled flight, she also spoke with two other officers regarding the incident who both asked whether she wanted the applicant relieved from duty. She responded that she did not want the applicant removed from duty because she knew her station was short of qualified personnel and that she did not feel unsafe around the applicant.

On May 15, 2015, the applicant received three Page 7s. The first Page 7 documented the applicant's inappropriate remarks for which he was counseled on July 7, 2014. The second Page 7 documented the applicant's lack of professionalism for which he was counseled on November 20, 2014. The final Page 7 summarized the incident that occurred on May 11, 2015, and notified the applicant that he was being placed on probation.

On May 31, 2015, the applicant provided a written statement and voluntarily completed an interview with LT Y, both of which reflected a similar narrative. The applicant stated that on May 11, 2015, he was approached by LCDR D while he was working at the swimmer shop because she needed assistance with a helmet discrepancy. At that point, LCDR D asked the applicant why he

was so tired. The applicant responded that he was excessively fatigued and continued discussing the helmet discrepancy. He stated that LCDR D pressed him again as to the reason of his fatigue. The applicant stated that he interpreted her question and tone as being personal and he did not hesitate to answer truthfully. He responded by stating, "maybe had too much fun/sex with the girlfriend." The applicant stated that LCDR D did not express shock, surprise, or dismay in response to his comment. Instead, he alleged that LCDR D stated that "at my age, those days are behind me." At that point, he stated, he responded that the reason he was feeling ill was because "maybe I am just dehydrated, like am all out of fluids, you know?" He explained that at the time, his words were meant literally. However, in hindsight, he recognized that his words could have been interpreted differently. The applicant stated that his French background and upbringing often leads to confusion when communicating with others. He acknowledged that this is no excuse, and that he needs to adapt to American culture. The applicant apologized profusely for having offended and disrespected LCDR D.

On June 1, 2015, LT Y completed a standard investigation into the facts and circumstances surrounding the allegations against the applicant. The investigative report stated that after being given his Miranda/Tempia Article 31 rights, the applicant invoked his right to counsel without making a statement. However, the report noted that after conferring with counsel, the applicant submitted an official statement and requested an interview. According to the report, on May 11, 2015, LCDR D approached the applicant regarding a flight helmet discrepancy. During their conversation, the applicant communicated language towards LCDR D that she found offensive and sexually graphic in nature. At that point, LCDR D removed herself from the presence of the applicant and returned to her office to discuss the matter with her colleagues. The report noted that as of May 12, 2015, the applicant had no official record of misconduct in his record. However, the investigation revealed two Record of Counseling forms that addressed behavior inconsistent with Coast Guard core values, Coast Guard Sexual Harassment Policy, and a noted lack of professional military customs and courtesies in addressing senior officers. LT Y opined that the applicant's actions were a direct result of his inability to assimilate into the military culture and to adhere to the Coast Guard core values of honor, respect, and devotion to duty. He further opined that the applicant's sexually charged language was a direct violation of Article 89 (Disrespect Towards a Superior Commissioned Officer), Article 134 (General), and Article 134 (Indecent Language). Finally, LT Y determined that the applicant's trend of indecent communications qualifies as prohibited harassment and sexual harassment. He recommended that the applicant's command dispose of the charges at NJP in the interest of maintaining good order and discipline.

On June 11, 2015, the applicant was notified that his CO was considering imposing NJP based on the following alleged offenses: Article 89 (Disrespect Towards a Superior Commissioned Officer); 134 (General—Violation of Coast Guard Sexual Harassment Policy); and 134 (Indecent Language). The applicant was notified of the rights afforded to him at NJP. He was further notified that he had the right to demand trial by Court-Martial in lieu of NJP and that he could consult with an attorney concerning the right. The applicant was advised that the maximum punishment that could be imposed at a General Court-Martial for the offences charged against him included a bad conduct discharge, confinement for 12 months, hard labor without confinement not to exceed three months, restriction to specific limits, reduction to the lowest enlisted pay grade, forfeiture of all pay and allowances, fine, and reprimand. The applicant acknowledged that he understood his rights. After having consulted with an attorney, the applicant accepted NJP.

On June 16, 2015, the applicant provided a written statement regarding his upcoming NJP proceeding. He prefaced his statement by reserving the right to rescind his request for NJP and to instead choose Court Martial. In his written statement, the applicant asked his command to dismiss the charges against him and to delete the Page 7 in his record concerning the matter. Regarding the merits of the charges, he argued that LCDR D was not credible as a witness because she provided three conflicting statements about the incident. Accordingly, the applicant argued that the alleged words he said to LCDR D and her reaction to his words were ambiguous. Even if his words were unambiguous, the applicant argued that his words, without any action, were insufficient to convict him of the crime of being disrespectful to a superior officer. He also argued that a special defense applied to his case. The applicant argued that the unprotected victim defense should apply because LCDR D violated the officer/enlisted relationship and that she instigated the alleged derogatory conversation. He argued that he was obliged to answer LCDR D's question and that he did not have the discretion to cease the conversation after indicating that he was tired. Next, the applicant argued that there was no evidence that he committed sexual harassment. To support his assertion, he stated that LCDR D declined to have him replaced on the flight on the day of the incident. The applicant argued that this shows that LCDR D never felt threatened or in jeopardy since she was not concerned about being in a helicopter with him. Even if LCDR D had felt threatened, the applicant argued that legally, an E-4 cannot be found guilty of sexually harassing a Lieutenant Commander. Finally, the applicant addressed the Page 7. He argued that the Page 7 violated his due process rights since he was not able to contest the entry. The applicant also argued that the Page 7 was inappropriate since it implied that he had already been found guilty of the charges.

On June 17, 2015, the applicant's father sent the CO an email regarding logistics for the NJP proceeding. Specifically, the applicant's father asked questions about using his laptop computer and questions for the witness. Two days later, on June 19, 2015, the applicant's CO responded by stating the following:

> A laptop computer will not be allowed during the proceedings as the accused will be at attention. As his spokesman, I expect you to stand with him (not at attention), unless you have a medical concern that requires you to sit.
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> The accused submitted a long list of questions for the witness. Many of the questions submitted by the accused, signed and dated 17 June, were not relevant to the case or were clearly adversarial. I will allow several of the questions, which I will word differently, to extract the desired information. I will ask several of my own questions to ascertain the witnesses [sic] state of mind surrounding the events and specific questions related to the Unprotected Victim claim. I believe I have enough questions to address the situation… During the recess, you may use your laptop and also propose further questions. If the questions presented at that time are necessary and relevant and they are not adversarial in my opinion, I will further question the witness.

Also on June 19, 2015, the applicant CO's sent PSC a request to remove all three Page 7s issued on May 15, 2015, from the applicant's record. The CO determined that the timing of the documents could be taken as prejudicial.

On June 23, 2015, the applicant received NJP for violating Article 89 (Disrespect Towards a Superior Commissioned Officer) and Article 134 (Indecent Language). The details of the offense

stated that on May 11, 2015, the applicant communicated indecent language to a female officer when graphically describing his personal sexual exploits in response to being asked why he appeared to be physically unsound. The applicant's punishment was reduction to pay grade E-3, 30 days of extra duty, and forfeiture of $500 pay per month for two months.

Also on June 23, 2015, the applicant received a Member Counseling Receipt for his Disciplinary EER. The applicant received a mark of 2 (poor) in the competency of Respecting Others. The Reviewer's Comments for this mark stated that the applicant was found to have violated Articles 89 and 134 of the UCMJ for using disrespectful and inappropriate language in his interactions with a superior commissioned officer. The comment noted that the applicant's disregard for others' feelings was highly evident when he attempted to discuss obscene subject matter with a commissioned officer, resulting in that officer taking great offense and filing a report of offense. The applicant also received a mark of Unsatisfactory for his conduct. The Reviewer's Comments cited the applicant's violation of Articles 89 and 134 of the UCMJ. Finally, the applicant was not recommended for advancement. The Reviewer's Comments stated that the applicant demonstrated an inability to satisfactorily perform the duties and responsibilities of a petty officer as evidenced by him violating Articles 89 and 134 of the UCMJ.

On June 28, 2015, the applicant appealed his NJP. He argued that there was no prima facie evidence to proceed to NJP and that his due process rights and civil rights were violated. The applicant also argued that his defenses were "ill received, compromised, and treated with prejudice."

On July 1, 2015, the Executive Officer of the applicant's air station, CDR B, sent a memorandum to the applicant's District recommending denying the applicant's appeal of his NJP based on the following:

- The applicant had the opportunity to consult with counsel, present evidence, and question witnesses.
- CDR B noted that he granted the applicant's request to have his father serve as his mast spokesperson alongside his appointed mast representative.
- CDR B stated that he considered all evidence presented. Based on a preponderance of the evidence, he found that the applicant had violated Articles 89 and 134. Regarding Article 89, CDR B stated that he found that the applicant said words to the effect of "I was dehydrated. I had lots of sex with my girlfriend. She drained me of my fluids. You know what I mean?" CDR B found that the applicant directed his words toward LCDR D, who he knew to be his superior commissioned officer. He also found that the words were disrespectful because they showed a lack of respect toward the authority of and undue familiarity with LCDR D. Regarding Article 134, CDR B found that the applicant's statement was indecent under the circumstances because it offended modesty and decency and could reasonably incite libidinous thoughts. More importantly, CDR B found that the applicant's statement violated community standards, including the standards that Coast Guard members should not speak so candidly of their sexual behavior to superior officers or each other. CDR B noted that almost every witness at NJP agreed upon this point. Finally, CDR B stated that the

applicant's behavior was directly and palpably prejudicial to good order and discipline because a junior petty officer should not address a superior commissioned officer in the same manner that they would address their friends as the applicant did here.

- CDR B noted that he dismissed the Article 134 (General) allegation.
- CDR B stated that he did not find the applicant's defenses credible. Regarding the unprotected victim defense, CDR B stated that the evidence showed that LCDR D did not regularly inquire about crew member's sexual lives or that fellow crewmembers discussed their sex lives with each other. CDR B also stated that he did not find any evidence that LCDR D forced or ordered the applicant to talk about his sex life on the night in question. Regarding the applicant's defense that he could not effectively communicate in English, CDR B noted that the applicant did not deny that he said he had sexual intercourse with his girlfriend. He also noted that the applicant had told a recruiter in 2011 that he was "100% bilingual" in French and English and that in July 2014, he had written the term "Ben Dover" in a logbook at a civilian facility. Finally, CDR B noted that some witnesses had no idea that the applicant was French-Canadian.

On July 9, 2015, Rear Admiral (RDML) R, the Commander of the applicant's District, denied the applicant's appeal of his NJP. RDML R stated that in accordance with Chapter 1.F.1 of the Military Justice Manual, the standard of review for an NJP appeal is whether the punishment was "unjust" or "disproportionate." She determined that neither the proceedings nor the punishment against the applicant were unjust. RDML R stated that the applicant received ample opportunity to consult with counsel, request and present witnesses and evidence, and submit questions for witnesses. She stated that CDR B had carefully considered the evidence offered by the applicant in extenuation and mitigation, such as his French-Canadian background, the testimony of his crewmembers, and prior behaviors for which he was informally counseled. RDML R stated that during the course of the proceeding, CDR B carefully and properly considered the testimony from members of his chain of command to assist in making his findings and administering an appropriate punishment. Therefore, she determined that sufficient evidence existed to support the finding that the applicant had violated Articles 89 and 134 of the UCMJ. Further, RDML R stated that she did not find that the applicant's punishment was disproportionate to his conduct. She stated that as a Petty Officer and Rescue Swimmer, the applicant was expected to carry himself with professionalism and maturity. RDML R stated that the evidence showed that the applicant was previously given opportunities to modify his behavior, but that he had failed to do so. Further, she stated that the imposition of extra duty was appropriate to provide the applicant an opportunity to take heed of his responsibilities as a technical specialist and help him mature as a leader.

On August 22, 2015, the applicant's CO reviewed a Report of Offense and Disposition form regarding the applicant. The details of the offense were as follows:

> Article 92 (Dereliction of Duty): In that [the applicant] did allegedly fail to execute his extra duty assignments as prescribed by NJP proceedings and instead provided transportation to friends and that [the applicant] did allegedly post videos of "joy-riding" in government vehicles to social media, specifically "Snapchat."

On September 9, 2015, the applicant sent a memorandum to RDML R requesting a reassessment of his Disciplinary EER. He argued that the EER was an unfair assessment of his performance. The applicant first argued that his Supervisor on the evaluation had not overseen his work since he was transferred to the Facilities Engineering Department in May. He argued that his Supervisor was narrowly focused on his NJP, and that there was no input since he was transferred to the new department. The applicant also argued that the EER was improperly given to him 63 days after receiving NJP. He concluded by requesting that the reassessment of his EER include higher marks.

On September 18, 2015, the applicant received and signed a Miranda/Tempia Rights form. The applicant was informed that he was suspected of violating Article 92 (Dereliction of Duty and/or Failure to Obey a Lawful Order) of the UCMJ. The form briefly described the matter being investigated as follows:

> That, while completing extra duties assigned to you after your NJP on 23 June 2015, you either were derelict in your duties or failed to obey a lawful order. This includes, but is not limited to, the following behaviors: using a government vehicle to shuttle personnel, failing to work for the full assigned duty periods, failing to check in and out in the correct uniform, failing to seek out further tasking once work was completed, and using a cell phone to record a movie of yourself while operating a government vehicle.

The applicant acknowledged that he understood that he had the right to remain silent; he could consult with a lawyer; anything he said could be used as evidence against him; and that he could stop answering questions at any time. The applicant indicated that he desired to consult with a lawyer and refrained from making a statement or answering any questions.

On an unknown date, LT H, the PIO for the investigation, submitted a memorandum regarding the investigation into the applicant's conduct from June 30, 2015, to July 24, 2015. The investigation concluded that the applicant did violate Article 92 of the UCMJ. LT H provided a background of the incident. He stated that on June 23, 2015, the applicant was punished at NJP for violating Articles 89 and 134 of the UCMJ. As part of his punishment, the applicant was awarded 30 days extra duty. He was assigned to work directly for Damage Controlman first class (DC1) H at the Facilities Engineering Department for the duration of his extra duty work. DC1 H instructed the applicant to be in a working uniform performing extra duties from an established worklist. Further, DC1 H provided the applicant guidance on the proper use of the Facilities Engineering Department carts. The applicant was instructed that the carts were for work activities only – the carts were prohibited for personal activities. Further, the applicant was instructed that the carts were only to be taken off-road if so required for work projects. On June 30, 2015, the applicant stopped performing extra duty in order to provide a ride for a fellow Coast Guard member from the gym to the operations hangar. Then, on July 1, 2015, the applicant was seen leaving the air station in civilian clothing five minutes before the end of his extra duties. However, a Coast Guard member logged the applicant as checking out on time. On July 20, 2015, the applicant wore civilian clothing when checking out of extra duty. On an unknown date, the applicant took a video of himself off-roading with a Coast Guard owned facilities maintenance cart and uploaded the video to social media. LT H opined that the applicant violated Article 92 of the UCMJ in that he failed to obey an order or regulation. Specifically, he stated that the applicant was made aware that he was to work for the full period of extra duty on each assigned day and to not change out of work clothes and check out until that day's extra duty period was completed. LT H found that on at least

one occasion, the applicant had taken time out of his extra duty period in order to change out of work clothes and depart work prior to the completion of his extra duty period. He determined that the log showing that the applicant checked out at the correct time had been falsified. LT H also opined that the applicant violated Article 92 of the UCMJ in that he was derelict in the performance of duties. Specifically, he found that the applicant had used the Facilities Engineering Department carts for personal use. LT H recommended that the violations of Article 92 of the UCMJ be disposed of by counseling documented on a Page 7.

On October 19, 2015, the applicant received a negative Page 7 documenting four separate incidents. The first incident occurred on September 1, 2015, in which the applicant was directed to report to his CO's office for consideration of an appeal of his EER. The applicant was ordered to change from his coveralls into a presentable uniform for the meeting. He removed a pair of exceptionally well maintained boots from the locker of another Coast Guard member and wore the boots to the meeting. The applicant was notified that entering another person's personal locker without permission was not allowed and that maintaining serviceable uniforms was a requirement of service. The second incident occurred on July 1, 2015, in which the applicant departed early from the extra duty hours assigned to him. In a sworn statement, the Assistant Engineering Officer stated that the applicant had driven his car off Coast Guard property five minutes before the end of his duty. The third incident occurred on July 20, 2015, in which the applicant only completed the painting of 8 feet of a passageway wall and reinstalled a fire extinguisher during a full day of work. Moreover, the applicant did not clean up his workspace following this poor work effort. The applicant was notified that an able bodied young person could certainly complete more work. The applicant was further notified that his low level of effort and professionalism was not in keeping with the requirements and traditions of the Coast Guard. The fourth and final incident occurred on July 28, 2015, in which the applicant uploaded a video to social media of him joyriding in the unit's four wheel utility vehicle while in uniform. The joyriding occurred after the applicant had been given specific guidance from his supervisor to only use the vehicle for official business. The applicant was reminded to adhere to all lawful orders. He was counseled that his poor performance and repeated inability to understand clear cultural and service norms was further evidence of his CO's inability to trust him to perform the critical missions of the Coast Guard.

On October 19, 2015, the applicant received a second negative Page 7. The Page 7 informed the applicant that his behavior on July 7, 2014, was unsatisfactory and not aligned with the Coast Guard's core values. On that day, complaints were received by the command after the applicant had made inappropriate and suggestive remarks to a civilian employee at a public gym facility by falsifying the sign-in log using the derogatory name "Ben Dover." Two days later, on July 9, 2014, the applicant received a Record of Counseling form and he was removed from the Rescue Swimmer syllabus for two weeks. However, as additional incidents of unprofessional behavior had occurred, the original counseling form was now being recorded as a Page 7 for formal recording.

On October 19, 2015, the applicant received a third negative Page 7. The Page 7 informed that applicant that his behavior November 20, 2014, was unsatisfactory and was not aligned with the Coast Guard's core values. On that day, senior leaders raised concerns regarding the applicant's lack of a professional demeanor. Specifically, the Engineering Officer documented the applicant's disregard for rank and decorum during a phone conversation. Additionally, other senior leaders

highlighted the applicant's inappropriate comments and poor attitude while at work. In November 2015, the applicant received a Record of Counseling to document the incident. However, as additional incidents of unprofessional behavior had occurred, the original counseling form was now being recorded as a Page 7 for formal recording.

On November 19, 2015, the applicant sent a letter to his CO that stated the following in part:

> I don't know how to start this letter. I feel very alone. I realize nobody knows the real me. Everything I have done has either been a horrible mistake or an unintentional error of judgment. I often find myself very embarrassed at the unit and wish I could start everything over again. I realize people may have tried to help me here, but I have always had problems trusting those around me. I see now, it is not so much about the mistakes or bad judgment but more of how I handled this with my seniors above me. I have been too defensive and sometimes too abrasive. However, I really did not know what to do. Like I said. I felt very alone and often assumed I had no support. Even when I made honest mistakes. I wish I responded differently but I cannot change the past. I can only move forward… From your perspective, I understand I have given you little to give me one more opportunity to save my career, but I can honestly say things will be different. I desperately want to serve the Coast Guard and at times my desperation has caused me to take courses of action that were not in my best interest or the Commands. I am willing to do whatever it takes to turn myself around. I also understand that you will expect me to fix the relationship I have with my senior enlisted leadership. If you give me that opportunity I will not let you down.

On December 11, 2015, the applicant was notified that his CO had initiated action to discharge him from the Coast Guard by reason of Article 1.B. of the Military Separations Manual M1000.4. His CO indicated that the basis for his discharge was that the applicant was found guilty at NJP of violating Articles 89 and 134 of the UCMJ. He stated that he would be recommending the applicant receive an honorable characterization of service. The applicant was informed that he could submit a statement on his behalf within five days.

On December 17, 2015, the applicant submitted a statement in which he objected to his discharge. He stated that he accepted responsibility, but maintained that his actions were not in any way intentionally offensive or disrespectful. The applicant stated that he saw the value in accepting his punishment and had since worked hard to redeem himself with his command. He stated that despite his efforts to redeem himself, his command perceived his attempts as being too defensive. The applicant also stated that he attempted to mitigate his mistakes, but that these attempts were ignored. He argued that since the incident with LCDR D, he had experienced retaliation from his command in the form of constant persecution, humiliation, and loss of position. The applicant alleged that his command was bias against him and that the true reason for his discharge was retaliation for him appealing his NJP.

On December 21, 2015, the applicant's father wrote a letter to the Governor of his state and asked for immediate assistance regarding his son. The applicant's father first stated that the applicant had virtually saved the life of a fellow rescue swimmer during a training evolution. His father described the events of the training evolution that took place in October 2014. He also stated that the applicant was being persecuted for primarily being misunderstood as a French-Canadian. The applicant's father argued that the applicant's CO refused to recognize the applicant as a true hero and instead cast him in a false light, prejudiced him as a French-Canadian, publicly ridiculed and demeaned him, and denied him standing duty as a rescue swimmer.

On December 23, 2015, the applicant received another notification that his CO had initiated action to discharge him from the Coast Guard. His CO clarified that the applicant was not being separated for the convenience of the government due to an inability to perform his prescribed duties. Instead, he stated that the applicant was being separated by reason of misconduct for the commission of a serious offense. Specifically, the CO cited the applicant's NJP dated June 23, 2015, for which he was found guilty of violating Articles 89 and 134 of the UCMJ. The CO informed the applicant that he could submit an additional statement and that his rebuttal would be forwarded with his recommendation. That same day, the applicant acknowledged notification of his proposed discharge. He indicated that he would submit a statement on his behalf and that he objected to his discharge.

On December 31, 2015, the applicant submitted a supplement to his original objection to discharge. He argued that he had not been given a fair and equal opportunity by his command, that he was treated unjustly, and that the NJP held "no grounds whatsoever." The applicant argued that had he known that his CO held a preconceived notion of his guilt, he would have requested a Court-Martial. He argued that his CO's preconceived notion of his guilt was demonstrated in the Page 7 he received before the NJP in which he was threatened with being discharged. The applicant also contested his NJP by arguing that the comments he made to LCDR D were innocuous and ambiguous, that he was pushed by LCDR D to be candid and specific, and that his phrasing was due to his French-Canadian upbringing. He also argued that his CO ignored his affirmative defense of being a protected victim. In addition to the circumstances involving the incident, the applicant put forth several arguments to support his request to remain in the Coast Guard. For example, the applicant cited his young age, his limited experience and low rank, the lack of mentorship and training he received from his command, and his exemplary work performance.

Also on December 31, 2015, RDML R endorsed the recommendation to discharge the applicant for the commission of a serious offense. RDML R stated that the applicant had committed two offenses that qualified as the basis for his discharge. She noted that while the applicant's statements objecting to his discharge purport to accept responsibility for his actions, the record reveals his lack of remorse and a failure to respond to corrective measures. She stated that the applicant's continued obstinance was unfortunate and merited separation.

On January 4, 2016, the applicant's CO sent a letter to the Advancements and Separations Branch of the Personnel Service Center in response to the applicant's objection to his discharge. He stated that during the applicant's time at the unit, he regularly exhibited a lack of maturity and accountability. The CO highlighted some specific instances. First, he stated that the applicant had written an offensive joke of a sexual nature in an official log maintained at a civilian facility by writing the words "Ben Dover." The CO stated that while the command was deeply embarrassed by the incident, it was allowed to be handled via a signed counseling sheet and was treated as a mistake of youth that would not be made again. Next, he stated that the applicant had failed to maintain military decorum on the phone with his Department Head. The CO noted that military decorum demands that members maintain professionalism. Again, the CO stated that this matter was handled via a signed counseling sheet. Finally, the CO cited the incident that led to the applicant receiving NJP on June 23, 2015. He stated that as a result of the offenses committed in that incident, the command determined it was necessary to document the previously recorded

counseling sheets as negative Page 7s. The CO stated that such decision was in accordance with Article 8.j. of COMDTINST 1000.14C since the applicant's conduct indicated potential recidivism despite receiving counseling. He noted that the possibility of converting signed counseling sheets to Page 7s is obvious to any seasoned Coast Guard member. The CO then stated that after receiving his NJP in June 2015, the applicant continued to demonstrate behavior inconsistent with Coast Guard service. He stated that such conduct was documented in subsequent negative Page 7s. The CO noted that the applicant refused to acknowledge the Page 7s with a signature even after admitting that the entries were accurate. He argued that the applicant simply did not want to take responsibility for his actions. Instead, the applicant blamed his victims for his behavior, presented information that was not factual, disparaged his shipmates, and manufactured baseless defenses for his poor conduct. The CO stated that there was no evidence that the applicant was progressing toward improving his integrity or behavior. He concluded by stating that the applicant's inability to recognize the fault in his behavior, combined with the commission of serious offenses, compel his discharge from the service.

On January 20, 2016, the Governor of the state in which the applicant's father resided wrote a letter to the Commandant of the Coast Guard. He requested a review of the information regarding the applicant's rescue efforts and the difficulties he had experienced with his Sector's Aviation Base Commander.

On January 26, 2016, the applicant's CO sent the applicant a memorandum. In the memorandum, the applicant was notified that he met the eligibility requirements under the Commandant's Second Chance Program. He was further notified that his previous written statements and entire discharge package would be submitted to the first Flag Officer for consideration.

On February 2, 2016, the applicant submitted an addendum to his objection to discharge. He argued that his CO abused his discretion in recommending that he be discharged for the commission of a serious offense. First, the applicant argued that he did not commit a serious offense. To support his assertion, the applicant stated that serious crimes cannot be tried at NJP. He argued that members can only receive NJP for minor offenses. The applicant argued that if his actions were in fact serious offenses, he would have had to be tried at Court-Martial. Further, the applicant argued that even at Court-Martial, the violations for which he was found to have committed at NJP are not categorized as serious because the maximum punishments do not include a bad conduct discharge or confinement for longer than one year. The applicant concluded by arguing that if he committed a serious offense, then his NJP should be rendered void and invalid. On the other hand, if he did not commit a serious offense, then his discharge notification should be rendered void and invalid.

On February 8, 2016, the applicant was directed to serve on Temporary Duty (TDY) at an air station on the east coast for 60 days. The TDY was an opportunity for the applicant to demonstrate his commitment to the Coast Guard core values and to show that he had learned from his previous misconduct.

On February 10, 2016, the applicant received a negative Page 7. The Page 7 stated that on June 23, 2015, the applicant received NJP for inappropriate language in the presence of a senior

officer contrary to the Coast Guard's Sexual Harassment Policy. The applicant was notified that since receiving NJP, his conduct had been unsatisfactory when compared to his peers. Consequently, the applicant was placed on a six-month probation. The applicant was encouraged to display a more respectful attitude and to reflect on his actions that caused this situation to develop. He was advised that his probation would run through August 10, 2016. The applicant was notified that for the first 60 days of his probation, he would serve on TDY at another air station. While on TDY, the applicant would be given the opportunity to work in the Rescue Swimmer shop. He was advised that during this probationary period, he would be observed, counseled, and mentored to ensure that he had the necessary tools available to him to successfully complete probation. The applicant was notified that if he failed to successfully complete the probationary period, he would be processed for separation from the Coast Guard.

On February 20, 2016, RDML R responded to the Governor's request. She first addressed the training evolution that took place in October 2014. RDML R stated that the weather was not unusual for the mission, and was well within the safety parameters of the Advanced Helicopter Rescue Swimmer training program. She stated that the applicant's first attempt to rescue his "training survivor" was unsuccessful. However, after following established protocols, the applicant re-entered the water and completed the training evolution. RDML R stated that based on direct communication with the training command, the training event was not unusual and did not warrant special recognition of the applicant. She next addressed the difficulties the applicant experienced with his Sector's Aviation Base Commander. RDML R stated that in June 2015, the applicant was found to have committed two offenses under the UCMJ. She noted that the applicant had appealed the NJP findings, and that RDML R herself had upheld the findings. Subsequent to the NJP proceedings, the applicant filed a complaint against the command. RDML R stated that the applicant's CO specifically requested that a member outside of the command conduct a thorough investigation into all aspects of the complaint. She also stated that the applicant's station provided the applicant with an opportunity to be reevaluated at a similar aviation unit in another location. The applicant was notified that he was placed on a performance probation that specifically outlined the performance and conduct expected of him.

On April 27, 2016, Captain (CAPT) P sent a memorandum to the applicant's District. CAPT M was stationed at the air station in which the applicant completed his TDY. CAPT M stated that on April 21, 2016, the applicant had completed his 60 days of TDY. During his time, the applicant had worked in the Rescue Swimmer shop. CAPT M stated that the applicant had displayed a level of knowledge below what was expected for an AST "A" school graduate. On multiple occasions, the applicant had forgotten required survival gear and used unsafe practices in and around the aircraft. CAPT M acknowledged that many of these problems could be attributed to the applicant's long period of time away from aviation, but stated that he did not feel the applicant was ready to act in the capacity of a duty-standing Rescue Swimmer. CAPT M also stated that the applicant had exhibited many characteristics undesirable in a 3rd class petty officer. Specifically, he noted that the applicant had displayed arrogance and tended to be untrustworthy or unwilling to take responsibility for his actions. CAPT M reported that these personality traits had had a deleterious effect on the cohesiveness of the Rescue Swimmer Shop. He noted that the Rescue Swimmers did not want the applicant permanently stationed at this unit. Finally, CAPT M acknowledged that in the applicant's last two weeks at the unit, he had shown a significant improvement in attitude and performance. However, CAPT M stated that the applicant's shift in

behavior was not enough to alter his opinion of him, especially when considering the notable challenges he had created over the evaluation period.

Enclosed in CAPT P's memorandum dated April 27, 2016, was ASTC V's review of the applicant. ASTC V stated that within days of meeting the applicant, she had had to counsel him on appropriate behavior regarding military customs and courtesies. Further, she stated that within weeks of his arrival, she had had to counsel the applicant regarding field concerns about his behavior with driving and duck flights. ASTC V stated that as soon as she had conducted negative counseling with the applicant, he had shown no interest in taking personal responsibility for his actions and was not willing to learn from his mistakes. She stated that the applicant had been described as young and immature, but she stated that she had also found him to be arrogant and spoiled. ASTC V acknowledged that she had seen an improvement in the applicant's behavior in his last two weeks of TDY. Specifically, she stated that the applicant had been open to acknowledging his part in response to the last few incidents that required counseling. Along with her review, ASTC V attached a log of incidents involving the applicant. She noted that she had found herself spending an exorbitant amount of time dealing with, talking about, and counseling the applicant, more than the rest of her shop combined. ASTC V concluded her review by stating the following:

> His request to extend his TAD tour to complete his RS [Rescue Swimmer] syllabus was because "he was working on Captain W's schedule." It was actually because he failed his EMT skill sheets with Captain W and needs to retest them. I feel that is a perfect example of the issues with both [the applicant's Sector] and [the applicant's TDY Sector] have had with [the applicant]. It can be low-grade background noise annoyance, but it is all the time. He hides behind what he considers a fool-proof plan, that English is his second language, so any issues are miscommunication. As a foreigner myself, I find this excuse unacceptable as he speaks English perfectly with no accent and is smugly setting himself up for this defense when things don't go his way.

On April 29, 2016, the applicant received a negative Page 7. The Page 7 stated that the counseling document had been regenerated from a negative Page 7 submitted on October 19, 2015. The Page 7 documented two incidents. First, on July 1, 2015, the applicant departed early from his extra duty assignment. According to a sworn statement by the Assistant Engineering Officer, the applicant drove his car off Coast Guard property five minutes before the end of his extra duty assignment. Second, on July 28, 2015, the applicant was seen on a social media video while driving the unit's four wheel utility vehicle across the recreation field. This incident occurred after specific guidance from his supervisor to only use the vehicle for official business. The applicant was reminded to adhere to all lawful orders for the use of government equipment and to consider the perception of the public more wisely when posting to social media in the Coast Guard uniform.

On May 5, 2016, the applicant sent a memorandum to his CO. In the memorandum, the applicant asked his CO to rescind the notice of probation dated February 10, 2016. According to the applicant, the notice of probation relied on sexual harassment as the reason for his probation. However, the applicant stated that he had only received NJP for indecent language and disrespect toward a superior commissioned officer. Accordingly, the applicant argued that any mention of sexual harassment was erroneous and prejudicial. He also contested the assertion that his behavior in the Facilities Engineering Department was unsatisfactory when compared to that of his peers.

Also on May 5, 2016, RDML R sent a memorandum to the applicant denying his request for the Second Chance Program. To support her decision, RDML R stated that the applicant had continued to fail to take responsibility for his actions and reform his behavior. She stated that upon receiving the applicant's request for a second chance, she ordered that he be sent to TDY for 60 days to allow him the opportunity to demonstrate his commitment to the Coast Guard's core values. RDML M stated that the applicant continued to show little interest in taking personal responsibility for his actions and to learn from his mistakes. Specifically, she noted that the applicant repeatedly blamed others for his shortcomings. RDML R concluded by stating that she was recommending the applicant be separated from the Coast Guard with an honorable characterization of service.

On May 13, 2016, the applicant sent a memorandum to his CO requesting the recission of his discharge. The applicant first objected to his discharge because his NJP did not include discharge as part of the punishment. He also objected to his discharge because the phrase "out of fluids" could not be considered a serious offense. To support his assertion, he stated that his misconduct was not equal to murder or rape and so it could not be categorized as a serious offense. In addition to the objections to his discharge, the applicant also argued that he had never been notified as to the reason he failed the terms of his probation. He argued that his supervisors never made him aware that his performance while on TDY was unsuitable. The applicant requested that all discharge proceedings against him be revoked and all relevant records be expunged from his record. He also requested a full investigation regarding the falsifications of Page 7s and his illegal assignment to the Facilities Engineering Department which led to his discharge.

On June 16, 2016, the applicant was administratively discharged from the U.S. Coast Guard. His DD-214 shows an honorable discharge, a separation code of JKQ (misconduct), and a reenlistment code of RE-4. The narrative for the separation is "misconduct." At the time of his discharge, the applicant was an E-3. The applicant signed his DD-214.

On June 23, 2016, the applicant sent an email to a Staff Judge Advocate (SJA) of the Coast Guard requesting responses to several filings. Specifically, the applicant requested responses to the following: a Statement of Objection to Discharge dated December 17, 2015; a Supplement to Original Objection to Discharge dated December 31, 2015; an Addendum to Opposition of Discharge dated February 2, 2016; a Request for Rescission of the 10FEB16 PD-21 Probation dated May 9, 2016; a Request for Rescission of Discharge dated May 13, 2016; an Article 138 Complaint dated May 18, 2016; an Objection to Reenlistment Ineligibility dated May 25, 2016; and a Request to Revoke 23JUN15 NJP by New Evidence & Lack of Due Process.

On June 24, 2016, a SJA responded to the applicant's email. The SJA stated that the applicant's arguments were misplaced. According to Article 1.B.17.b.(3). of the Military Separations Manual, a member can be separated for the commission of a serious military offense when the specific circumstances of the offense warrant separation and the maximum penalty for the offense under the UCMJ includes a punitive discharge. In fact, the SJA stated that for the applicant to be administratively separated for the commission of a serious offense, the Coast Guard was not required to have adjudicated his case at NJP, although it did. Instead, the Coast Guard only needed to determine that the applicant's conduct warranted separation since Article 89 is punishable by a Bad Conduct Discharge. The SJA stated that the Coast Guard regulations are clear that the decision to separate the applicant was not constrained by whether or not he was held

accountable under the UCMJ. The SJA also informed the applicant that his Complaint of Wrongs under Article 138 of the UCMJ was still pending. Regarding all other matters, the SJA informed the applicant that the appropriate avenue for redress was the BCMR.

Article 138 Complaints

On January 21, 2016, the applicant submitted a Complaint of Wrongs under Article 138 of the UCMJ. He stated that the reason for his complaint was that his CO abused his discretion. The applicant requested that he stop being harassed and that he be given the same opportunities as other members of his unit. He argued that the harassment included constant persecution, humiliation, threats, a loss of rate, and now attempted discharge. He also alleged that he was being selectively prosecuted and retaliated against for his appeal of his NJP. The applicant requested that he be returned to his rating at full status, that his record be cleared of all negative Page 7s that were created prejudicially and in violation of policy, that he be given positive Page 7s, that he be allowed an opportunity with the Second Chance Program, and that his Discipline EER be removed from his record and replaced with a new one. In his complaint, the applicant objected to RDML R's review of his complaint, citing a conflict of interest.

On February 4, 2016, the applicant's CO convened an administrative investigation into the applicant's Article 138 complaint.

On March 9, 2016, the PIO sent an Administrative Investigation Report to the applicant's air station regarding the applicant's complaint. The PIO made the following findings:

- A Complaint of Wrongs under Article 138 of the UCMJ was not the place to address many of the applicant's concerns and requests. He stated that the following complaints were not cognizable under Article 138: NJP and the results of the proceeding (to include the Discipline EER), Administrative Separation review, removal and creation of Page 7s, and his removal from flying status.
- A complainant only had 90 days to file a Complaint of Wrongs under Article 138. The most recent incident the applicant brought up was the Page 7s presented on October 19, 2015, which was 94 days from the day he filed his complaint.
- The applicant needed to accept responsibility for his actions.
- The negative Page 7s documenting the incidents that occurred on July 5, 2014, and November 14, 2014, were valid because the incidents occurred and were documented within the required two year timeframe.
- The negative Page 7 issued on October 19, 2015, which documented four separate incidents, should be removed from the applicant's record because two of the incidents should not have been documented. First, the incident concerning the boots was not accurate because the applicant had permission to borrow the boots. Further, the incident dated July 20, 2015, was subjective because the exact events surrounding the work completed on that day was unclear. Based on five separate interviews with co-workers and supervisors, the applicant's work ethic was always praised and never once called into question. Accordingly, documenting the incident was not necessary. However, the two remaining

incidents were determined to be accurate. Regarding the incident dated July 1, 2015, the applicant more than likely departed early from work that day. Further, interviews confirmed that the social media video from July 28, 2015, was valid and should be documented.

- The applicant's air station made some administrative errors. Specifically, the timing of the Page 7s issued on May 15, 2015, was badly chosen due to the pending NJP proceeding. However, the applicant's CO corrected this mistake by diligently pursuing the removal of the documents from the applicant's record.
- It was appropriate to keep the applicant out of the Rescue Swimmer shop and off the hanger because of a lack of trust. Without trust, aircrews cannot function at the high level needed to safely complete the missions. However, the air station should have provided the applicant with specific guidance on a path toward regaining his AST3 rating.
- There was no evidence of prejudice against the applicant by his command. Any known administrative errors had been rectified in accordance with Coast Guard policy. Further, beginning with the first incident that occurred on July 5, 2014, the applicant's command attempted to correct his behavior through counseling and mentoring. As improper behavior continued, the applicant's command had no choice but to document all occurrences. Despite such improper behavior, the applicant's command continued to respect the applicant and meet with him to listen to his concerns. For instance, the applicant's CO removed the Page 7s dated May 15, 2015. Further, the applicant's command met with him regarding his NJP appeal, EER appeal, and discharge.
- Throughout the investigation, there have been no instances of retaliation or humiliation by the applicant's command against him. Several members of the unit were interviewed, and all of them believed that the applicant had been treated fairly. The applicant was misinterpreting the broken trust between himself and his command as retaliation.

The PIO offered several recommendations. First, he recommended that the applicant be counseled on the importance of taking responsibility for his actions. Next, the PIO recommended that the Page 7 dated October 19, 2015, which documented four separate incidents, be removed from his record and reconciled with a new Page 7 covering his early departure and social media video. Finally, the PIO recommended that the applicant be placed on probation for a period of six months to determine if his conduct and behavior could be corrected and if he was suitable for continued service.

On March 23, 2016, the applicant received a response to his Complaint of Wrongs under Article 138 of the UCMJ from CDR M. First, CDR M stated that he did not have the authority to exclude RDML R from handling his complaint. He stated that the applicant would have to submit his request to the District for such a determination. Second, CDR M addressed the applicant's request to be returned to his rating at full status and be allowed to maintain all of his qualifications. He stated that the applicant would have been allowed to return to an active flight status if he had met all of the requirements and completed the required training during a 60-day TDY. However, after careful consideration, CDR M denied the applicant's request to restore his rate based on his conduct and continued failure to take ownership of his actions. Third, CDR M addressed the applicant's request to have all negative Page 7s removed from his record. Regarding the Page 7

dated October 19, 2015, CDR M acknowledged that the facts surrounding the applicant's work performance and the borrowing of a shipmate's boots were refuted in the investigation. Accordingly, he stated that this Page 7 would be removed and a new one would be drafted to only document the video which captured the applicant's misuse of government property and early departure from duty. CDR M also noted that the Page 7s dated May 15, 2015, had already been removed from his record. Regarding the remaining negative Page 7s, he stated that the investigation them to be factual, relevant, and properly completed. Fourth, CDR M addressed the applicant's request to have his air station provide him with positive Page 7s to document that he had contributed time to train auxiliarists, volunteered in the community, and looked out for shipmates. CDR M stated that these actions are expected from every member of the Coast Guard. Further, he stated that the applicant's chosen rate puts him at the forefront of operations and the expectation is that he gives his best "so others may live." CDR M stated that he would not provide Page 7s to document expected behavior. Fifth, he denied the applicant's request to void his NJP, but noted that the applicant's request for an opportunity with the Second Chance Program was pending with his District. Sixth, CDR M stated that the investigation found no evidence to support the applicant's assertion that he was being harassed or that acts of retaliation were being carried out against him. Finally, he addressed the applicant's requested to have his EER marks changed. CDR M stated that he would work with the Enlisted Personnel Management Division of the Personnel Service Center to ensure that a correct Discipline EER was completed to properly indicate his rank as an E-4 prior to being reduced at NJP to an E-3.

On May 19, 2016, the applicant filed a second Complaint of Wrongs under Article 138 of the UCMJ. First, he alleged that his CO made false official statements. To support his allegation, the applicant stated that the investigation into his previous Complaint of Wrongs under Article 138 found that two incidents documented on a Page 7 dated October 19, 2015, should be removed because they had been disproved. He argued that someone should be held accountable for making false statements about the incidents. The applicant also reiterated his request to remove the remaining negative Page 7s from his record, as well as add positive Page 7s to his record. Next, he argued that his CO abused his discretion when the applicant was banned from the Rescue Swimmer shop without any reason, documentation, or due process. The applicant argued that his rate should only have been changed if he was found to be incompetent in his duties. However, he argued, he had never been found incompetent in performing his duties. The applicant also argued that he was "brow beaten" by his CO to rescind his EER appeal. He asked that his EER either be reevaluated or completely voided because the CO's intimidation was inappropriate and the evaluation was untimely. He specifically addressed the mark in the performance dimension of Accountability. The applicant argued that he could not take accountability for false allegations. Finally, he argued that the continuous harassment by his command was unprecedented, prejudicial, and capricious. The applicant concluded by requesting that his complaint be reviewed by an unbiased party. Specifically, he requested that RDML R disqualify herself due to a possible conflict of interest.

On June 8, 2016, CDR M responded to the District regarding the applicant's complaint. First, he stated that the remaining Page 7s in the applicant's record were accurate and important to maintaining good order and discipline. Specifically, CDR M addressed the Page 7 that documented the applicant's conduct of uploading a video to social media that showed him driving a government vehicle. He stated that the applicant admitted to taking the video while in uniform driving a government vehicle and posting it to his social media account, and that such conduct was a

violation of policy. Next, CDR M addressed the applicant's request to add a positive Page 7 to his record. He stated that contrary to the applicant's assertion, the training evolution that occurred in October 2014 was not a "near death" experience. To support this assertion, CDR M stated that there was no mishap message for the event. Further, he stated that since the school did not recommend an award for the applicant's conduct, CDR M did not recommend that the applicant receive a positive Page 7. Next, he addressed the applicant's request to be restored to his "rate." CDR M stated that the applicant had not been removed from his rate. Instead, the applicant was reduced in rank at NJP. CDR M stated that he did not recommend restoring the member to his previously held rank. Next, he addressed the applicant's request to appeal his EER. CDR M stated that on September 14, 2015, the applicant withdrew his appeal by email correspondence. Further, CDR M stated that the applicant failed to ask for any specific form of redress in regard to his EER. Finally, he addressed the applicant's request for an end to the harassment. CDR M stated that the applicant was not being harassed and that he had been treated fairly. To support this assertion, he cited the opinions of the applicant's shipmates and supervisors. CDR M concluded by stating that since the applicant received NJP, he had been unable to recognize or take responsibility for the fact that his conduct failed to meet the expectations of the Coast Guard.

On July 1, 2016, RDML R responded to the applicant regarding his complaint. First, RDML R stated that the applicant's request to remove Page 7s from his record and his request regarding his NJP were not cognizable under Article 138. She noted, however, that the applicant's unit had already removed the Page 7s issued on May 15, 2015. Next, RDML R addressed the applicant's request to be returned to his rate as an Aviation Survival Technician. She stated that the applicant had been reduced to the pay grade of E-3 as a result of his NJP. Further, she stated that the applicant had been removed from his primary duties because his chain of command lost confidence in his ability to complete his duties. RDML R stated that none of these actions removed the applicant from his rate. Next, she addressed the applicant's request regarding his EER. RDML R argued that the applicant's request to have his EER reevaluated or voided was not cognizable under Article 138. Regardless, she stated that there was no evidence to substantiate the applicant's claim that he was "brow beaten" or otherwise intimidated into abandoning his EER appeal. RDML R also addressed the applicant's claim that he was harassed by his air station. She stated that the investigation revealed no evidence to substantiate such claim. Finally, RDML R addressed the applicant's request that she recuse herself from reviewing his complaint. She stated that her only direct action regarding the applicant was to send him on TDY to a different air station to ascertain whether he possessed the necessary abilities to remain a member of the service. RDML R stated that her actions were in no way influenced by any of the air station's previous actions. She stated that she wanted to provide the applicant with an opportunity to succeed. However, due to the applicant's actions while on TDY, RDML R determined he was no longer a good candidate for the Second Chance Program. She stated that the applicant's attitude towards women and his continued behavior were incongruent with the Coast Guard's policy on sexual harassment.

EEO Complaint

On October 6, 2016, the applicant filed a formal complaint of discrimination against the Coast Guard. The relief sought was similar as in the present case before the BCMR, along with damages and attorney's fees.

On November 30, 2016, the Civil Rights Directorate of the Coast Guard responded to the applicant's complaint of discrimination. The applicant was notified that his claim that he had been discriminated against based on his national origin and that he had experienced reprisal based on his appeals and his father's letter to the Governor were accepted for investigation based on incidents that occurred between May 2016 and July 2016. Those incidents included the following: On May 5, 2016, the applicant's request to be accepted into the Second Chance Program and reenlist was denied; on May 6, 2016, the applicant's request for specific information regarding his failures was denied; on May 9, 2016, the applicant was banished from his air station and his request to rescind his probation was denied; on May 23, 2016, the applicant's request to rescind his proposed discharge was ignored; on June 16, 2016, the applicant was discharged from the Coast Guard; on June 24, 2016, the applicant's request to have his NJP revoked was denied; and on July 7, 2016, his Complaint of Wrongs under Article 138 of the UCMJ was denied. The remaining claims based on incidents that had occurred between March 2014 and April 2016 were denied because the claims were beyond the statutory time limitations.

On June 15, 2017, the Assistant Director of the Coast Guard signed a Final Agency Decision regarding the applicant's complaint of discrimination. The decision included the following:

- The decision first addressed the applicant's complaint that he was improperly discharged. RDML R testified that the applicant was discharged based on his repeated instances of sexual harassment and his failure to improve when provided the opportunity to do so. Specifically, she testified that the applicant had made sexual remarks to a senior officer in May 2015. Despite the applicant's conduct, RDML R agreed to provide the applicant with an opportunity to improve his conduct on a TDY to a different air station. In April 2016, RDML R received a report of the applicant's failure to improve his conduct while on TDY. She determined that the applicant should not be provided with another opportunity through the Second Change Program and that his discharge was just and appropriate considering his offenses. This testimony was corroborated by other members of the applicant's command.

- The decision determined that the applicant had failed to prove by a preponderance of the evidence that his command's legitimate, nondiscriminatory reasons for his discharge were pretexts for discrimination based on his protected class. To prove pretext, the applicant provided subjective testimony reflecting his belief that RDML R issued his discharge due to discriminatory motives. However, the decision found that the applicant did not provide objective evidence to support his subjective testimony. Further, the decision found that the applicant did not provide sufficient evidence to refute RDML R's testimony regarding his misconduct issues and failure to improve. Specifically, the decision found that the applicant did not provide sufficient evidence to show that the RDML R's testimony was untrue, inaccurate, or otherwise not credible.

- The decision also determined that the applicant had failed to demonstrate that the alleged examples of unwelcomed conduct constituted an unlawfully hostile work environment. The decision stated that the applicant had only presented his own uncorroborated subjective testimony that RDML R took actions against him based on discriminatory and retaliatory

motives. The decision determined that the applicant had not presented sufficient evidence to refute RDML R's testimony in which she denied acting on discriminatory or retaliatory motives. Further, the decision found that the evidence supports RDML R's testimony in which she stated that the incidents identified in the applicant's complaint were due to his misconduct, failure to take responsibility for his misconduct, and failure to improve his conduct when provided the opportunity to do so. In fact, the decision found that each incident associated with the applicant's harassment claim had been shown to be linked to the applicant's misconduct. Accordingly, the decision found that none of the incidents in the applicant's complaint were linked to his national origin or constituted acts of reprisal.

VIEWS OF THE COAST GUARD

On March 1, 2019, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which she recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC argued that the applicant failed to show that the Coast Guard committed an error or injustice in his discharge processing. First, PSC argued that the applicant had been properly afforded his due process rights related to the NJP. On May 14, 2015, the applicant was properly advised of his Miranda/Tempia Rights and elected to consult with an attorney without making a statement. As a result of this election, the applicant was not questioned. After having consulted with an attorney, the applicant provided an official statement and requested an interview. Additionally, on June 11, 2015, the applicant voluntarily elected NJP. On June 23, 2015, NJP was held and the applicant was awarded his punishment.

PSC also argued that the applicant properly received a Discipline EER in accordance with Chapter 4.C.2. of the Enlistments, Evaluations, and Advancements Manual. PSC argued that the EER properly included information regarding the applicant's NJP. PSC noted that the Discipline EER rendered the applicant ineligible for the Good Conduct Medal for that period.

Finally, PSC addressed the applicant's assertion that he improperly received negative Page 7s to legitimize his NJP. PSC argued that all of the applicant's Page 7s were issued in accordance with the Commandant's Instructions on Page 7s, which states "Authorized personnel may issue Administrative Remarks, Form CG-3307, documentation for incidents within two years of the date of the incident, or within two years of the date that the command knew, or should have known, about the incident."

The JAG argued that the Coast Guard did not commit an error or injustice in awarding the applicant NJP. First, the JAG argued that the applicant had been properly afforded all of his due process and Fifth Amendment rights:

- The JAG began by stating that since NJP is not a criminal proceeding, many of the "due process" rights demanded by the applicant are inapplicable.

- The JAG argued that the applicant's complaint that he was not given adequate legal notice of the words he was charged to have said to LCDR D is without merit. The JAG argued

that the charging document, Form CG-4910, notified the applicant of the following: 1) the date and approximate time of when the offense occurred; 2) the individuals/victims/ witnesses to the offense; 3) where the offense occurred; and 4) the indecent language— "graphic detail of his personal sexual exploit" that constituted the offense. The JAG argued that while the charging sheet did not contain the exact language that he used, such specificity is not required prior to proceeding with the NJP. Further, the JAG argued that about a week before he received NJP, the applicant was afforded an opportunity to review all of the evidence. According to the JAG, the evidence included the exact language that the applicant was alleged to have said to LCDR D.

- The JAG argued that the Coast Guard did not violate the applicant's Miranda rights. The JAG stated that on May 14, 2015, the applicant was properly presented with a copy of the Miranda/Tempia Rights form. The applicant elected to consult with a lawyer and declined to make a statement. About two weeks later, the applicant voluntarily, and without any prompting, provided the PIO with a written statement and stated that he wanted to complete an interview. The JAG argued that as evidenced by the chronological record of events, the applicant's Fifth Amendment rights were never violated. The JAG noted that there is no requirement that a member must be re-advised of his rights at each interaction with an Investigating Officer. According to the JAG, the applicant's statements were voluntarily given after he was properly advised of his rights.

- Finally, the JAG argued that the applicant's rights were not violated because his NJP representative was not allowed to cross examine the witnesses. The JAG stated that in accordance with Coast Guard policy, the applicant and his representative were permitted to submit questions in writing for the commanding officer to ask the witnesses. The JAG stated that while many of the applicant's questions were asked, the commanding officer properly exercised his discretion to decline to ask those questions he believed would turn the mast into an adversarial proceeding. Further, the JAG argued that the applicant could not point to any unasked questions that would have revealed information material to the determination of whether he committed the offenses alleged.

The JAG also argued that there was sufficient evidence to support the finding that the applicant violated Articles 89 and 134 of the UCMJ. First, the JAG noted that the standard of proof applicable to NJP, a preponderance of the evidence standard, is lower than that of a criminal trial. Second, the JAG stated that the applicant did not dispute that he told LCDR D that he had sexual intercourse with his girlfriend and that he made a comment to the effect that he was "out of fluids." Instead, the applicant disputed the intent behind the comment and whether it was taken out of context due to the eccentricities of his national origin. However, the JAG argued that the applicant's comments constituted an offense because they were directed towards a superior officer and showed a lack of respect for the superior officer.

The JAG acknowledged that NJP is not ordinarily used to adjudicate serious offenses. However, the JAG argued that this general rule does not prohibit imposing NJP for offenses that do not meet the definition of minor. The JAG argued that CDR M's decision to proceed with the charged offenses at NJP was to the applicant's benefit because it preserved his record from the stigma of conviction while still giving his command a prompt and efficient tool to maintain good

order and discipline at the unit. Further, the JAG noted that the applicant could have demanded a trial by Court Martial. However, the applicant, after consulting with legal counsel, failed to do so.

Next, the JAG addressed the applicant's complaint that he was improperly removed from Rescue Swimmer duties. The JAG stated that the applicant was removed from Rescue Swimmer duties because his chain of command lost confidence in his ability to complete the requisite duties. According to the JAG, Rescue Swimmers hold a position of special trust and are frequently called upon to exercise judgment and discretion in intense and dangerous situations. The JAG argued that the applicant's command was justified in their concerns about having the applicant operate as a Rescue Swimmer based on his repeated demonstrations of misconduct, unwillingness to accept personal responsibility, and immature attitude. Further, the JAG argued that contrary to the applicant's arguments, his reassignment to the Facilities Engineering Department was an assignment commensurate with his rank and capabilities at the time. Finally, the JAG noted that the applicant was given a chance to resume his Rescue Swimmer duties when he was sent on TDY to a different air station for the express purpose of rehabilitation. However, the JAG argued that the applicant failed to take advantage of that opportunity.

The JAG also addressed the applicant's complaint that his former command violated his privacy rights by posting information about him on the air station's personnel informational site. The JAG argued that without more specific information regarding what information was published, it is impossible to fully address the applicant's complaints. However, the JAG noted that Article 1.D.22. of the Military Justice Manual permits publication of NJP results.

Finally, the JAG argued that the Coast Guard did not commit an error or injustice in administratively separating the applicant for misconduct. First, the JAG noted that the applicant was not discharged at NJP. Instead, the applicant was discharged approximately one year after he received NJP. The JAG argued that there is nothing in Coast Guard policy that precludes an administrative separation following NJP. The JAG stated that in the year between the applicant's NJP and his discharge, the Coast Guard attempted to correct his attitude that led to the NJP offense in the first place. However, rather than absorbing the lessons imparted by the NJP process, the applicant continued to engage in conduct that did not conform to the standards of the Coast Guard. The JAG stated that the applicant's failure to take advantage of these opportunities for correction, combined with the underlying serious misconduct, led his to discharge. The JAG also addressed the applicant's assertion that he had not committed a serious offense. The JAG stated that in accordance with the Military Separation Manual, both Article 89 and Article 134 are considered "serious" offenses for purposes of an involuntary administrative discharge for misconduct in that both carry the possible punishment of a punitive discharge.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 7, 2019, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. After the Board granted him several extensions, the applicant submitted a response on March 30, 2020. In his response, the applicant reiterated his request for the Board to expunge his NJP and all subsequent negative documents from his record.

The applicant argued that his NJP was unsupported and illegal. He argued that there was insufficient evidence to show that he had violated the UCMJ. Specifically, the applicant argued that words alone are not sufficient to be found guilty of Articles 89 and 134 at NJP. Moreover, regarding the incident with LCDR D, the applicant argued that no one knows the actual words that were said. He argued that LCDR D had "many ever changing versions" of what he was alleged to have said to her that day. He argued that the ambiguity of what was said that day makes his words nonjusticiable at NJP. The applicant also contests the JAG's assertion that NJPs are exempt from many due process rights protected by the Fifth Amendment. He reiterated that his Miranda rights were violated, that he was not properly notified on the charge sheet to what words he allegedly said, that he was denied the right to ask non-adversarial questions, and that he was denied the opportunity to assert an affirmative defense.

The applicant also argued that his command was prejudiced against him. First, the applicant argued that his CO's prejudice against him resulted in his improper removal from the Rescue Swimmer shop. He argued that the Coast Guard failed to show that he was incapable of his work as a Rescue Swimmer. The applicant also argued that in accordance with the report of the investigation into his Complaint of Wrongs under Article 138 of the UCMJ, his air station should have provided him with specific guidance on a path to returning to his primary duties. Moreover, he argued that his command refused to reinstate him to his primary duties because of the fabricated events described in the Page 7 dated October 19, 2015, which was eventually removed from his record.

Next, the applicant argued that his CO's prejudice against him contributed to his wrongful NJP. For example, the applicant argued that his CO issued him erroneous Page 7s on May 15, 2015, which contributed to his wrongful NJP. The applicant noted that the Page 7s were eventually removed from his record.

The applicant also argued that his CO's prejudice against him contributed to his wrongful discharge. He argued that his CO did not remove the rescinded Page 7s in a timely manner. Consequently, he alleged, the Page 7s were used as evidence to support his discharge. The applicant also argued that his command erroneously alleged that he was convicted of, or at least accused of, sexual harassment. According to the applicant, there is nothing in his record to show that he had committed sexual harassment. Nevertheless, he argued, his probation was based on him committing sexual harassment.

Finally, the applicant argued that he should not have been involuntarily discharged from the Coast Guard. He stated that he was discharged for the commission of a serious offense based on his NJP. However, the applicant argued that he never committed a serious offense. To support his assertion, he argued that serious crimes are not appropriate for NJP. Moreover, the applicant argued that words alone are not sufficient to commit a serious offense.

The applicant concluded by arguing that the JAG acted in bad faith in issuing its advisory opinion. Specifically, he stated that the JAG referenced documents in the advisory opinion that were ordered to be removed from his record. For example, the JAG referenced Page 7s that had been removed from his record. The applicant argued that the JAG submitted these documents to bolster its recommendation to deny his request. He asked the Board to consider the JAG's conduct,

which he described as "either manufacturing evidence or not diligently removing the documents from this file or at the very least explaining why the documents were proffered," to be a form of fraud.

APPLICABLE LAW AND POLICY

Article 89 of the Manual for Courts-Martial defines Disrespect Toward a Superior Commissioned Officer as follows:

> a. *Text.*
>
> "Any person subject to this chapter who behaves with disrespect toward his superior commissioned officer shall be punished as a court-martial may direct."
>
> b. *Elements.*
>
> (1) That the accused did or omitted certain acts or used certain language to or concerning a certain commissioned officer;
> (2) That such behavior or language was directed toward that officer;
> (3) That the officer toward whom the acts, omissions, or words were directed was the superior commissioned officer of the accused;
> (4) That the accused then knew that the commissioned officer toward whom the acts, omissions, or words were directed was the accused's superior commissioned officer, and
> (5) That, under the circumstances, the behavior or language was disrespectful to that commissioned officer.
>
> c. *Explanation*
>
> …
>
> (3) *Disrespect*. Disrespectful behavior is that which detracts from the respect due the authority and person of a superior commissioned officer. It may consist of acts or language, however expressed, and it is immaterial whether they refer to the superior as an officer or as a private individual. Disrespect by words may be conveyed by abusive epithets or other contemptuous or denunciatory language. Truth is no defense. Disrespect by acts includes neglecting the customary salute, or showing a marked disdain, indifference, insolence, impertinence, or undue familiarity, or other rudeness in the presence of the superior officer.
>
> …
>
> (5) *Special defense—unprotected victim.* A superior officer whose conduct in relation to the accused under all the circumstances departs substantially from the required standards appropriate to that officer's rank or position under similar circumstances loses the protection of this article. That accused may not be convicted of being disrespectful to the officer who has so lost the entitlement to respect protected by Article 89.
>
> e. *Maximum punishment.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

Article 134 of the manual defines Indecent Language as follows:

> B. *Elements*.
>
> (1) That the accused orally or in writing communicated to another person certain language;
> (2) That such language was indecent; and
> (3) That, under the circumstances, the conduct or the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.
>
> C. *Explanation*. "Indecent" language is that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts. The language must violate community standards.

e. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

Part V of the manual discusses NJP in relevant part:

1.e. *Minor offenses.* Nonjudicial punishment may be imposed for acts or omissions that are minor offenses under the punitive articles (*see* Part IV). Whether an offense is minor depends on several factors: the nature of the offense and the circumstances surrounding its commission; the offender's age, rank, duty assignment, record and experience; and the maximum sentence imposable for the offense if tried by general court-martial. Ordinarily, a minor offense is an offense which the maximum sentence imposable would not include a dishonorable discharge or confinement for longer than 1 year if tried by general court-martial. The decision whether an offense is "minor" is a matter of discretion for the commander imposing nonjudicial punishment, but nonjudicial punishment for an offense other than a minor offense (even though thought by the commander to be minor) is not a bar to trial by court-martial for the same offense.

. . .

4.a. *Notice*. If, after a preliminary inquiry (see R.C.M. 303), the nonjudicial punishment authority determines that disposition by nonjudicial punishment proceedings is appropriate (*see* R.C.M. 306: paragraph 1 of this Part), the nonjudicial punishment authority shall cause the servicemember to be notified. The notice shall include:

> (1) a statement that the nonjudicial punishment authority is considering the imposition of nonjudicial punishment;
>
> (2) a statement describing the alleged offenses—including the article of the code—which the member is alleged to have committed;
>
> (3) a brief summary of the information upon which the allegations are based or a statement that the member may, upon request, examine available statements and evidence

4.c. *Nonjudicial punishment accepted*.

> (1) *Personal appearance requested; procedure.*
> Before nonjudicial punishment may be imposed, the servicemember shall be entitled to appear personally before the nonjudicial punishment authority who offered nonjudicial punishment, except when appearance is prevented by the unavailability of the nonjudicial punishment authority or by extraordinary circumstances, in which case the servicemember shall be entitled to appear before a person designated by the nonjudicial punishment authority who shall prepare a written summary of any proceedings before that person and forward it and any written matter submitted by the servicemember to the nonjudicial punishment authority. If the servicemember requests personal appearance, the servicemember shall be entitled to:
>
> (A) Be informed in accordance with Article 31(b);
>
> (B) Be accompanied by a spokesperson provided or arranged for by the member unless the punishment to be imposed will not exceed extra duty for 14 days, restriction for 14 days, and an oral reprimand. Such a spokesperson need not be qualified under R.C.M. 502(d); such spokesperson is not entitled to travel or similar expenses, and the proceedings need not be delayed to permit the presence of a spokesperson; the spokesperson may speak for the servicemember, but may not question witnesses except as the nonjudicial punishment authority may allow as a matter of discretion.
>
> . . .
>
> (3) Evidence. The Military Rules of Evidence (Part III), other than with respect to privileges, do not apply at nonjudicial punishment proceedings. Any relevant matter may be considered, after compliance with subparagraphs 4c(1)(C) and (D) of this Part.

Article 1.B.17. of the Military Separations Manual, COMTINST M1000.4, states the following regarding misconduct:

> 1.B.17.a. Policy
> Except as specifically provided here, only Commander (CG PSC) may direct a discharge for misconduct and the type of discharge (under other than honorable, general, or honorable) as warranted by the particular circumstances of a given case. (See Article 1.B.2. of this Manual.) Disability evaluation processing will be terminated as described in Article 1.B.1.e. of this Manual for members discharged for misconduct. See Article 1.B.1. of this Manual when recommending the discharge of a first-term performer for misconduct.
>
> 1.B.17.b. Reasons to Discharge for Misconduct
>
> …
>
> 3) Commission of a Serious Offense. Commission of a serious offense does not require adjudication by non-judicial or judicial proceedings. An acquittal or finding of not guilty at a judicial proceeding or not holding non-judicial punishment proceeding does not prohibit proceedings under this provision. However, the offense must be established by a preponderance of the evidence. Police reports, CGIS reports of investigation, etc. may be used to make the determination that a member committed a serious offense.
>
> > (a) Members may be separated based on commission of a serious military or civilian offense when:
> >
> > > (1) The specific circumstances of the offense warrant separation; and
> > >
> > > (2) The maximum penalty for the offense or closely related offense under the UCMJ and Manual for Courts-Martial includes a punitive discharge. The escalator clause of Rule for Courts-Martial 103(d) shall not be used in making this determination.

Article 1 of the Military Justice Manual, COMDTINST M5810.1E, discusses NJP in relevant part:

> 1.A.5. Offenses For Which NJP May Be Imposed
> NJP may be imposed for minor offenses made punishable by the UCMJ as defined in Part IV, MCM. Factors to be considered to determine whether an offense is minor: the nature of the offense and the circumstances surrounding its commission; the offender's age, rank, duty assignment, record and experience; and the maximum sentence permitted for the offense if tried by general court-martial [see, paragraph l.e., Part V, MCM]. Ordinarily, an offense should be considered minor if the maximum sentence that could be awarded at a general court-martial does not include a dishonorable discharge or confinement for more than 1 year. This general rule, however, does not prohibit imposing NJP for offenses that do not meet the definition of "minor" in this subparagraph. Questions whether an alleged offense is minor can be directed to the servicing legal office.
>
> …
>
> 1.A.6.a. Nonjudicial in Nature
>
> Punishment imposed under Article 15, UCMJ is called "Nonjudicial Punishment" to distinguish it from punishment imposed by court-martial, which is "judicial punishment." Nonjudicial punishment may also be referred to as "NJP," "Captain's Mast," "Mast," or "Article 15 Punishment." A commanding officer's decision to impose NJP does not constitute a judicial finding of guilt and is not a "conviction." A member does not have a "criminal record" as a result of the imposition of NJP. This distinction preserves a member's record from the stigma of conviction while still giving a commanding officer a prompt and efficient tool to maintain good order and discipline at the unit. It is equally important to note that while NJP is an administrative process, as opposed to

a criminal process, in order to punish an individual under Article 15, UCMJ the mast authority must determine that the member committed an offense (or crime) as defined by the UCMJ.

…

1.A.7.a. Multiple Offenses

All known offenses determined to be appropriate for disposition by NJP and ready to be considered at the time, including all such offenses arising from a single incident or course of conduct, shall be considered together at a single mast. They shall not be made the basis for multiple punishments. If one or more offenses are determined to be appropriate for trial by courts-martial, NJP should not be imposed and all pending charges should be referred for trial. Charges and offenses may not be split for adjudication without conferring with the command's servicing legal office. A commanding officer is not required to delay NJP to complete an investigation into unrelated conduct.

…

1.B.1.a. Initial Report
A command may receive an allegation of misconduct from any source. Another member of the command may inform a superior that he or she witnessed an act of misconduct, the command may receive a report from another command or local authorities, or a member of the public may report an offense. Any report of misconduct may serve as the basis for initiating a preliminary inquiry [see, subparagraph 1.B.3.c below].

1.B.1.b. Report of Offense and Disposition, CG-4910
Completion of a Report of Offense and Disposition, (CG-4910) (often called a "booking" or "report" chit) is often the first step in the NJP process. Completion of a Report of Offense and Disposition, CG-4910 is not required to initiate a preliminary inquiry [see, subparagraph 1.B.3.c below]. Report of Offense and Disposition, CG-4910 provides a step-by-step approach to document the actions taken by the command. A copy of a completed Report of Offense and Disposition, CG-4910 is provided in enclosure (2a). This form is available on the standard workstation, or the blank copy provided in enclosure (2b) may be reproduced locally. Once the member has been placed on report, the procedure to be followed may vary with the size and type of unit and the desires of the commanding officer.

…

1.B.3.a. Review of Report of Offense and Disposition, CG-4910

The Report of Offense and Disposition, CG-4910 should be forwarded for review. Normally, it is reviewed by the executive officer (and will be discussed using that title throughout this section), but, depending on the command's organization, this function (as well as the final review, see paragraph 1.B.5 below) may also be performed by the command's chief of military personnel, administrative officer, or any officer or petty officer designated by the commanding officer. If designated, a civilian employee in a supervisory position may also perform this ministerial function. If the Report of Offense and Disposition, CG-4910 involves a serious offense of the type for which NJP is not normally imposed, action should be taken as discussed in subparagraph 1.B.1.d above. If the executive officer determines that NJP may be appropriate, he or she should advise the member of the general nature of the offense that he or she is suspected of committing and that the command is considering imposition of NJP. The executive officer should designate a preliminary inquiry officer to conduct a preliminary inquiry. If appropriate, the executive officer may dismiss the matter, if delegated this authority by the commanding officer.

…

1.B.4.e. Rights Warning

Under Article 31(b), UCMJ a military member suspected of an offense may not be questioned unless he or she is informed of the nature of the offense, advised that he or she does not have to make a statement, and informed that any statement made may be used as evidence. The PIO must advise the person named as the suspect on the Report of Offense and Disposition, CG-4910 of his or her rights under Article 31(b) before asking that person any questions. Enclosure (5) should be used. The PIO should have another person sign the rights advisement and any written statement given by the suspect as a witness. Other military members must also be advised of their rights before questioning if they are suspected of any offenses.

…

1.C.3.c. Role of the Mast Representative

The mast representative serves primarily to assist the member in preparing for and presenting his or her side of the matter and to speak for the member, if the member desires. It is Coast Guard policy that the mast representative may 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.

…

1.C.4.e. Not An Adversarial Proceeding

A mast is not an adversarial proceeding. A spokesperson is not permitted to examine or cross-examine witnesses [see, paragraph 4.c.(1)(B), Part V, MCM]. The commanding officer may, as a matter of discretion, permit a spokesperson to examine or cross-examine witnesses. A spokesperson is always permitted to speak for a member when the member is otherwise entitled to speak. The purpose of precluding a spokesperson from examining witnesses is to avoid having the mast hearing become an adversarial proceeding.

…

1.D.1.f. Burden of Proof

The burden of proof required in order to award punishment at NJP is a preponderance of evidence. This standard means that before NJP may be awarded, the commanding officer must determine it is "more likely than not" that the member committed an offense(s) defined by the UCMJ. Each element of each offense as defined in the Manual for Courts-Martial [MCM] must be supported by a preponderance of the evidence (i.e.*,* it is "more likely than not that the element occurred). This is a lower standard of proof than the "beyond a reasonable doubt" standard used to find the member guilty at a court-martial.

…

1.D.8.d. Questioning by Member

After the commanding officer finishes questioning a witness, the member or his or her mast representative should be allowed to question the witness. The commanding officer 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. The commanding officer may also require the member or his or her mast representatives to submit questions in writing prior to the mast or orally at the mast for the commanding officer to ask a witness. The commanding officer may prohibit a spokesperson from questioning witnesses if in the commanding officer's opinion such questioning would turn the mast into an adversarial proceeding.

Article 7.A. of the manual discusses UCMJ Complaints in relevant part:

1. Statutory Provision

"Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdictions shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon." [Article 138, UCMJ, 10 U.S.C. § 938.]

…

2.g. Examination into a Complaint

> An investigation consisting of either a formal or an informal inquiry into all facts material to the complaint. The specific inquiry conduct depends on the nature of the alleged wrong, but will normally be of a type recognized by Coast Guard directive.

FINDINGS AND CONCLUSIONS

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

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

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.[4]

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

4. The applicant alleged that his NJP dated June 23, 2015, along with all subsequent related documents in his military record, including his discharge, should be expunged from his record because they are erroneous and unjust. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in the military record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.[5] 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."[6]

5. The applicant put forth several arguments in support of his request to expunge his NJP dated June 23, 2015, from his military record. First, the applicant argued that his NJP should be expunged because his command prejudiced him by illegally issuing numerous Page 7s before the proceeding. He argued that these Page 7s were both false and lacked specificity required by Coast Guard policy. On June 19, 2015, the applicant CO's requested that all three Page 7s issued on May 15, 2015, be removed from the applicant's record. The CO determined that the timing of the documents could be taken as prejudicial. All three Page 7s have since been removed from the applicant's record. Although the Page 7s were in his record at the time of his NJP, the applicant failed to explain how the Page 7s prejudiced him at the proceeding. In fact, two of the three Page 7s that were issued on May 15, 2015, documented incidents that had already been documented on separate Record of Counseling forms. According to the Manual for Courts-Martial, all relevant matter can be considered at NJP, and the applicant failed to show how documenting the incidents on Page 7s was any more prejudicial than the initial Record of Counseling forms. The third Page 7 documented the incident for which the applicant received NJP. However, the applicant did not

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[4] *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).
[5] 33 C.F.R. § 52.24(b).
[6] *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

provide any evidence that the Page 7 was in fact used prejudicially against him during his NJP proceeding, which included eyewitness testimony.

6. The applicant also argued that the Page 7 should be expunged because his due process rights were violated. The Board notes that NJP is an administrative proceeding rather than a criminal one. When a CO makes the decision to impose NJP, this does not constitute a judicial finding of guilt and is not a conviction.

(a) The applicant first argued that his Miranda rights were violated. He argued that despite exercising his right not to make a statement, LT Y interviewed him about the incident with LCDR D. According to the record, the applicant was given Miranda rights on May 13, 2015. He signed a form that acknowledged that he understood that he had the right to remain silent, that he could consult with a lawyer, that anything he said could be used as evidence against him, and that he could stop answering questions at any time. He also invoked his right to counsel without making a statement. At that point, the applicant was not interviewed. Then, on May 31, 2015, the applicant provided a written statement and voluntarily completed an interview with LT Y. According to the applicant, LT Y should have again informed the applicant of his Miranda rights before he was interviewed on May 31, 2015. However, there is nothing in the Manual for Courts-Martial to support the applicant's assertion. Instead, Rule 305 of the Military Rules of Evidence states that "spontaneous or volunteered statements do not require warnings under Rule 305." In this case, the applicant voluntarily completed an interview with LT Y, and so, further warnings about his rights were not required.

(b) The applicant also argued that his CO violated his due process rights by refusing to allow his NJP representative to cross examine the witnesses. Specifically, the applicant stated that his command refused to allow his representative to cross-examine LCDR D even though the questions were submitted to the command pre-NJP and were fair and non-adversarial. He argued that the questions were paramount to his due process rights to prove his innocence. According to Article 1.D.8.d. of the Military Justice Manual, the CO can control NJP 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 any unnecessary embarrassment." Accordingly, while the member or his representative should be allowed to question witnesses, they can be required to submit questions for the CO to ask to the witnesses. Moreover, the CO can prohibit a representative from questioning witnesses if such questioning would turn the mast into an adversarial proceeding. In this case, the CO apparently determined that the applicant's questioning of the witness would have turned the mast into an adversarial proceeding. According to the manual, such determination was within the CO's discretion.

(c) Next, the applicant argued that his command did not provide him with adequate legal notice of what he was alleged to have said in violation of Articles 89 and 134 of the UCMJ. According to the Manual for Courts-Martial, if the nonjudicial punishment authority determines that disposition by nonjudicial punishment proceedings is appropriate, the authority will notify the servicemember. The notice shall include "a

statement describing the alleged offenses—including the article of the code—which the member is alleged to have committed and a brief summary of the information upon which the allegations are based." In this case, the applicant received a Report of Offense and Disposition form on May 12, 2015. First, the form stated that the applicant was alleged to have violated the following: Article 89 (Disrespect Toward a Superior Commissioned Officer), Article 134 (General Article), and Article 134 (Indecent Language). Next, the form included a brief summary of the information upon which the allegations were based by stating: "In that (the applicant) did in the evening hours of 11 May 2015… communicate indecent language toward LCDR [D]… LCDR [D] inquired as to why [the applicant] appeared to be physically unsound. [The applicant] then graphically described his personal sexual exploits to LCDR [D]." Accordingly, the Board finds that the Report of Offense and Disposition form dated May 12, 2015, was sufficiently detailed to notify the applicant of the charges against him in accordance with the Manual for Courts-Martial.

7. The applicant also argued that his NJP should be expunged because he was illegally and capriciously charged with violating Articles 89 and 134 of the UCMJ.

(a) The applicant first argued that he could not have been found guilty of violating Article 89 because three of the five elements had not been proven at NJP. Specifically, he argued that he did not use certain language to or concerning a certain commissioned officer, that such language was not directed toward the officer, and that such language was not disrespectful to the commissioned officer. Despite the applicant's assertion, he failed to prove that his CO was erroneous or unjust in finding by a preponderance of the evidence that he had violated Article 89. According to the CDR B's memorandum recommending denying the applicant's appeal of his NJP, he stated that he first found that the applicant had said words to the effect of "I was dehydrated. I had lots of sex with my girlfriend. She drained me of my fluids. You know what I mean?" Next, CDR B determined that the applicant directed his words toward LCDR D, who he knew to be a superior commissioned officer. Finally, the CDR B determined that the applicant's words were disrespectful because they showed a lack of respect toward the authority of and undue familiarity with LCDR D.

(b) The applicant also argued that his words were nonjusticiable because they were innocuous and ambiguous. Specifically, he alleged that LCDR D provided conflicting statements that were insufficient to prove what he had actually said. In her initial report of the incident on May 11, 2015, LCDR D emailed the applicant's shop supervisor. She stated that the applicant had commented that he was extremely dehydrated because he and his girlfriend were having so much sex that he had "lost all his fluids" and then proceeded to ask her "you know what I mean, right?" In her second report of the incident, LCDR D was interviewed by LT Y on May 13, 2015. According to LCDR D, the applicant had stated that he was excessively dehydrated from extended sexual activities with his female partner, and then asked something along the lines of, "you know what I mean, right?" In LCDR D's final report of the incident, she provided a written statement on May 14, 2015. She stated that the applicant had told her that he was feeling pretty dehydrated because he had been having so much sex with his

girlfriend that he had "lost all of his fluids… you know what I mean?" The Board finds that the argument that LCDR D did not repeat verbatim the applicant's words in three separate instances over the course of four days does not support a finding that the applicant's words were innocuous and ambiguous. According to the Military Justice Manual, to award punishment at NJP, the CO must determine it is "more likely than not" that the member committed the offense defined by NJP. The applicant failed to show that the CO was erroneous or unjust in finding that LCDR D's statements more likely than not proved that the applicant had violated Articles 89 and 134.

(c) In his response to the advisory opinion, the applicant argued that words alone are not sufficient to be found guilty of violating Articles 89 and 134 at NJP. Contrary to the applicant's assertion, the elements of Article 89 make it clear that language alone is sufficient to behave with disrespect toward a superior commissioned officer. Similarly, Article 134 (Indecent Language) simply requires indecent language, either communicated orally or in writing.

(d) Finally, the applicant argued that he was denied the opportunity to assert affirmative defenses at NJP. However, the applicant did not provide any evidence to show that he was denied such opportunity. In fact, in his memorandum recommending denying the applicant's appeal of his NJP, CDR B directly addressed the defenses that the applicant had put forth at NJP. He stated that he had not found either of the applicant's defenses credible. Regarding the unprotected victim defense, CDR B stated that the evidence showed that LCDR D did not regularly inquire about crew member's sexual lives or that fellow crewmembers discussed their sex lives with each other. Regarding the applicant's defense that he could not effectively communicate in English, CDR B cited the fact that the applicant had told a recruiter in 2011 that he was "100% bilingual" in French and English and that some witnesses had no idea that the applicant was French-Canadian.

8. The applicant argued that his NJP was defective because serious crimes cannot be tried at NJP. Alternatively, he argued that if he was properly awarded NJP, his discharge for the commission of a serious must be void. The applicant's argument rests on the presumption that that a member could only receive NJP for minor offenses. However, according to Article 1.A.5.a. of the Military Justice Manual, while NJP should be imposed for minor offenses, this is a general rule that does not prohibit imposing NJP for offenses that do not meet the definition of "minor." Further, contrary to the applicant's argument, a serious offense for purposes of being discharged for misconduct and a minor offense for purposes of NJP are not mutually exclusive. According to Article 1.B.17.b.3. of the Separation Manual, a member can be separated based on the commission of a serious offense if the maximum penalty for the offense includes a punitive discharge. According to Article 1.A.5.a. of the Military Justice Manual, an offense should be considered minor if the maximum sentence that could be awarded does not include a dishonorable discharge or confinement for more than one year. In this case, Article 89 is both a serious offense for purposes of being discharged for misconduct and a minor offense for purposes of NJP because the maximum punishment includes a bad-conduct discharge and confinement for one year. However, Article 134 (Indecent Language) is not a minor offense for purposes of NJP since the maximum punishment includes a dishonorable discharge and confinement for five years. Nevertheless, as discussed

above, the applicant's CO was not prohibited from imposing NJP for Article 134 (Indecent Language) despite not meeting the definition of being a "minor" offense.

9. The applicant argued that his command's response to his refusal to accept the results of the NJP proceeding were retaliatory, illegal, and "just plain mean."

(a) First, the applicant argued that all of his NJP appeals failed to meet the legal procedure for review and that his due process rights were violated. Specifically, the applicant argued that his command illegally ignored his Complaint of Wrongs under Article 138 of the UCMJ. According to Article 7.A.2.g. of the Military Justice Manual, an investigation into a Complaint of Wrongs under Article 138 of the UCMJ must include either a formal or an informal inquiry into all facts material to the complaint. However, the specific inquiry conducted depends on the nature of the alleged wrong, but would normally be of a type recognized by Coast Guard directive. In this case, after the applicant submitted his first Complaint of Wrongs under Article 138 of the UCMJ, his CO convened an administrative investigation into the matter. On March 9, 2016, an Administrative Investigation Report was issued. The report recommended that the Page 7 dated October 19, 2015, which documented four separate incidents, be removed from his record and reconciled with a new Page 7 only covering his early departure from duty and the social media video. Further, the report recommended placing the applicant on probation to determine if the applicant's behavior could be corrected. The applicant's command implemented the report's recommendations. Then, on May 19, 2016, the applicant filed a second Complaint of Wrongs under Article 138 of the UCMJ. On June 8, 2016, CDR M sent a memorandum to the applicant's District addressing the applicant's complaint. Then, on July 1, 2016, RDML R responded to the applicant regarding his complaint. Therefore, the Board finds that the applicant did not prove by a preponderance of the evidence that his command failed to properly inquire into the facts of his Complaint of Wrongs under Article 138 of the UCMJ.

(b) Second, the applicant argued that his command illegally fabricated his Disciplinary EER. However, the applicant failed further elaborate on his claim by identifying the alleged fabrications, and a Disciplinary EER is required by policy when the member receives NJP.[7]

(c) Third, the applicant argued that his command issued him multiple erroneous Page 7s. Specifically, the applicant alleged that the Page 7 dated October 19, 2015, which documented four separate incidents, was erroneous. He argued that all four incidents were false. However, the applicant failed to provide evidence to support his assertion. Instead, the record shows that two of the incidents should not have been documented. In response to the applicant's Complaint of Wrongs under Article 138 of the UCMJ, an administrative investigation was convened. The report of the investigation determined that the Page 7 should be removed from the applicant's record. Specifically, the report found that the incident concerning a pair of boots was not accurate and the incident

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[7] Article 5.E.2.c. of the Enlisted Accessions, Evaluations, and Advancements Manual, COMDTINST M1000.2.

documenting the applicant's performance was subjective. However, the report determined that the two other incidents documented in the Page 7 were accurate. Regarding the incident dated July 1, 2015, the report stated that the applicant more than likely departed early from work that day. Further, interviews confirmed that the social media video from July 28, 2015, was valid and should be documented. Although the applicant is correct in that the original Page 7 dated October 19, 2015, was erroneous, it has already been removed from his record. A new Page 7 was issued that only documents the two incidents that were determined to be accurate.

(d) Fourth, the applicant argued that his command posted erroneous information about him on the Base's personal informational site. However, the applicant did not provide any evidence of defamatory postings of him on any Coast Guard websites.

(e) Finally, the applicant argued that his command capriciously removed him from his Rescue Swimmer duties. Consequently, he lost his Rescue Swimmer qualifications and flight and hazardous duty pay. The applicant first argued that his command failed to show that he was incapable of his work as a Rescue Swimmer. However, according to RDML L, the applicant was removed from his primary duties because his chain of command lost confidence in his ability to complete his duties. The Administrative Investigation Report into the applicant's Complaint of Wrongs under Article 138 of the UCMJ determined that it was appropriate to keep the applicant out of the Rescue Swimmer shop because of a lack of trust. The report noted that without trust, aircrews cannot function at the high level needed to safely complete missions. The applicant also argued that his command failed to provide him with specific guidance on a path forward to returning to his primary duties. On March 9, 2016, the Administrative Investigation Report agreed that the applicant's air station should have provided him with specific guidance on a path to returning to his primary duties. However, by that point, the applicant had already been notified that he had been placed on probation. The Page 7 documenting the applicant's probation notified him that for the first 60 days of probation, he would serve on TDY at another air station. The applicant was further notified that while he was on TDY, he would be given the opportunity to work in the Rescue Swimmer shop. He was encouraged to display a more respectful attitude and to reflect on his actions that caused the situation to develop. Therefore, the Board finds that the applicant failed to prove by a preponderance of the evidence that his command capriciously removed him from his primary duties.

10. The applicant argued that his discharge was erroneous and unjust because he was never notified that NJP could result in his discharge. However, contrary to the applicant's assertion, he was not discharged at NJP. On June 23, 2015, the applicant received NJP for violating Articles 89 and 134 of the UCMJ. His punishment included reduction to pay grade E-3, 30 days extra duty, and forfeiture of $500 pay per month for two months. The applicant's punishment did not include being discharged. Then, on December 11, 2015, the applicant was notified that his CO had initiated action to discharge him from the Coast Guard by reason of misconduct for the commission of a serious offense. According to Article 1.B.17.b. of the Separations Manual, the commission of a serious offense does not require adjudication by non-judicial or judicial proceedings. In fact, the manual states that an acquittal or finding of not guilty at a judicial

proceeding or not holding non-judicial punishment proceeding does not prohibit a member from being separated for the commission of a serious offense. In this case, even if the applicant had not received NJP, he could still have been administratively discharged for the commission of a serious offense if his command had established that he committed the offenses by a preponderance of the evidence.

11. The applicant made numerous allegations with respect to the actions and attitudes of various officers involved in his NJP and subsequent discharge. Those allegations not specifically addressed above are considered to be unsupported by substantial evidence sufficient to overcome the presumption or regularity and/or are not dispositive of the case.[8]

12. Finally, the applicant argued that a Page 7 should be placed in his record to document an incident in which he saved the life of a fellow rescue swimmer, ANSAST N. However, the applicant did not provide sufficient evidence to support his assertion. In fact, even the letter written by ANSAST N fails to show that the applicant saved his life. In his letter, ANSAST N described the applicant's conduct during a training evolution in October 2014. He stated that he was very grateful to the applicant and that he believed the outcome could have been much worse had it not been for his quick thinking. Although ANSAST N praised the applicant, he did not allege that the applicant saved his life. This was confirmed by RDML R's statement regarding the training evolution. She stated that based on direct communication with the training command, the training evolution was not unusual and did not warrant special recognition of the applicant. Therefore, the applicant failed to prove by a preponderance of the evidence that he should have received a Page 7 documenting his conduct during a training evolution in October 2014.

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

(ORDER AND SIGNATURES ON NEXT PAGE)

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[8] 33 C.F.R. § 52.24(b); *see Frizelle v. Slater*, 111 F.3d 172, 177 (D.C. Cir. 1997) (noting that the Board need not address arguments that "appear frivolous on their face and could [not] affect the Board's ultimate disposition").

ORDER

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

March 3, 2023

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