

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2021-097

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LTJG

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 August 25, 2021, and assigned the case to a staff attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated May 3, 2023,¹ 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 Lieutenant Junior Grade (LTJG/O-2), asked the Board to correct his record by removing documentation of Non-Judicial Punishment (NJP) that he received at mast on July 10, 2020, from his permanent military record. In the alternative, the applicant asked the Board to move documentation of NJP to the restricted section of his personnel record.

Shortly after he was assigned to a cutter as a Deck Watch Officer, the applicant claimed that another member of the crew, Culinary Specialist Second Class (CS2) D, initiated contact with him at a bar while the cutter was docked in August of 2019 and kissed him without consent. The facts show that the applicant and CS2 D met for dinner the evening after the kiss and apparently kissed again after leaving the restaurant. About a month later, in September of 2019, the applicant claimed CS2 D showed up at his apartment uninvited and engaged in unwanted sexual intercourse with the applicant. He acknowledged that he had drunk alcohol excessively and that he would not have consented to sexual contact with CS2 D if he had been sober. In April of 2020, the applicant

¹ The Board originally reviewed and deliberated this case on February 3, 2023, when the applicant's 30-day period for responding to the Coast Guard's advisory opinion had not yet expired. The 30-day period expired on February 23, 2023, and no response to the advisory opinion was received from the applicant. Therefore, the Board will not redeliberate the case, and the decision is approved and final.

was questioned by Coast Guard Investigative Services (CGIS) as the victim of the alleged sexual assault. The applicant and others who knew about the allegations were interviewed by CGIS. Following that investigation, the applicant was taken to mast and found guilty by his Commanding Officer (CO) for violating Uniform Code of Military Justice (UCMJ) Article 107, False Official Statement, for statements he made to the CGIS investigators, and Article 134, Fraternalization, for his actions with CS2 D that occurred prior to the alleged sexual assault.

The applicant argued, through counsel, that the imposition of the NJP and denial of his appeal was arbitrary and capricious and a manifest injustice to a victim of sexual assault and harassment. He asserted that all of the credible evidence showed that CS2 D kissed him without consent and that the evidence also supported his claim that he did not have a clear memory of what happened at the bar due to consumption of alcohol. The applicant also argued that the evidence demonstrated that the applicant did not invite CS2 D to his apartment and did not desire or encourage the sexual intercourse that occurred at his apartment in September of 2019. He claimed that the only evidence supporting the allegation that the sexual contact was consensual was CS2 D's assertion that it was.

The applicant also argued that subjecting him to the NJP was a manifest injustice because he should have been protected as a victim of sexual harassment. He asserted that his CO did not believe that the sexual harassment he allegedly endured from CS2 D was serious enough to give rise to victim protections. The applicant claimed that the CO would not have punished him if the gender rolls had been reversed and that decision not to recognize the applicant as a victim was based on gender bias because his CO concluded that a female could not take sexual advantage of a male.

The applicant also argued that it was improper and arbitrary for his CO to conclude that the conduct for which he was punished was too attenuated to be considered collateral misconduct to a sexual assault. He asserted that the sexual assault occurred "just a few weeks" after the unwanted kiss, and that all of the events involved the same female, unwanted advances, and a continuing course of conduct that could not be separated legally or within the narrative chain. The applicant claimed that CS2 D created a hostile environment by threatening to expose their interactions if the applicant did not continue their social and physical relationship. He argued that this "sexual coercion" demonstrated that it was unfair for his CO to require actual physical harm before extending victim protections to him.

The applicant also argued that his CO was arbitrary and capricious when charging and finding that his lack of memory was a false official statement under Article 107 of the UCMJ. He claimed that he cooperated with the CGIS investigation as best he could. The applicant also argued that his CO did not apply the proper legal standard. He asserted that he told the investigators that he did not remember two events, and that a mere lack of memory is insufficient to justify a charge for false official statement. The applicant argued that case law dictates that his CO was required to prove that he actually did remember the two events and that when the applicant said he did not remember during the investigation, he knew he was lying and that he lied with the intent to deceive government officials.² He claimed that the evidence clearly showed that he did not have a clear memory of the events when he was interviewed and that there was no evidence that he lied to the

² The applicant cited *United States v. Black*, 47 M.J. 146 (CAAF 1997).

CGIS investigators with an intent to deceive. The applicant argued that his lack of memory that was hampered by the passage of time and his consumption of alcohol at the time of the events could not form a sufficient legal basis for an Article 107 charge and the charge should be dismissed.

The applicant also appeared to argue that it was erroneous and unjust to charge and find him in violation of Article 107 based on statements he made during the CGIS investigation while being interviewed as a victim. Because he was considered a victim during the investigation, he alleged, his Article 31 rights were not administered to him. As a result, the applicant appeared to argue that the statements should not have been used against him at mast.

The applicant also appeared to argue that the imposition of the Alcohol Incident was erroneous and unjust. In his application, he stated that the Alcohol Incident was “egregiously” imposed for drinking at the bar, despite there being no issues of disruption, arrest, or other incident as required by the Coast Guard alcohol policy.

In support of his request before the Board, the applicant pointed out his achievements since the NJP. He noted that he completed 40 hours of training on alcohol and substance abuse. The applicant also stated that he passed a three-hour intensive Coast Guard substance abuse screening and assessment that determined he is not a risk. He also noted the marks he received on his most recent Officer Evaluation Report, his receipt of a Commendation Letter and Ribbon he received for his conduct aboard the cutter that he was reassigned to following the NJP.

SUMMARY OF THE RECORD

The applicant enrolled at the United States Coast Guard Academy on June 29, 2015, and commissioned as an Ensign (O-1) on May 22, 2019. On June 20, 2019, he reported to a cutter as the Deck Watch Officer (DWO).

On his first annual Officer Evaluation Report (OER) for the period May 22, 2019, to March 31, 2020, the applicant received six excellent marks of 6 and twelve above-standard marks of 5 in the various performance categories (on a scale from 1 (worst) to 7 (best)) for his service as DWO. On the Comparison Scale, his Reporting Officer (RO) assigned him a mark of “One of the many high performing officers who form the majority of this grade” in the fifth of seven possible marks on the scale ranging from “Unsatisfactory” to “Best officer of this grade.” The OER form did not include a Promotion Scale. However, his RO wrote “Must promote w/best peers” in the comments section.

Interactions with CS2 D

On August 2, 2019, during a port call, the applicant and multiple crew members, including enlisted members, went to a bar. While at the bar, the applicant consumed multiple alcoholic drinks and junior crew members reported that the applicant was visibly intoxicated. At some point while the crew was at the bar, the applicant and CS2 D engaged in a casual conversation and kissed. Before returning to the cutter, the applicant and CS2 D exchanged phone numbers and began texting each other.

The applicant and CS2 D arranged to meet for a private dinner the following evening. Through text messages, they planned to leave the cutter separately and meet up at a restaurant to avoid drawing attention. After dinner, the applicant and CS2 D returned to the cutter separately. CS2 D claimed that the two kissed again in the hallway near the applicant's stateroom once they were back on board.

During the first week of September 2019, a few weeks after the kiss at the bar, CS2 D went to the applicant's residence. The applicant had consumed approximately eight White Claw seltzer drinks that evening and was intoxicated. The applicant stated that he recalled that he and CS2 D kissed, but that he does not remember much else due to his level of intoxication. When the applicant woke up the following morning, CS2 D had left his residence. The applicant noticed dried vaginal fluid on his penis and knew from experience that he had had sex. The next day, CS2 D confirmed that they had slept together.

According to the Advisory Opinion prepared by a Coast Guard Judge Advocate General, the applicant spoke with other members of the crew about his relations with CS2 D. In early 2020, the applicant told Electrician's Mate Third Class (EM3) D that he had sex with CS2 D. EM3 D told the applicant that he saw the applicant and CS2 D kissing at the bar in August 2019. Additionally, in March 2020, while the applicant was standing watch with Boatswain's Mate Second Class (BM2) N, the applicant told BM2 N that CS2 D had kissed him at the bar and that he and CS2 D had had sex.

Between late 2019 and early 2020, a Defense Organizational Climate Survey (DEOCS) was conducted on board the cutter. The climate survey asked the crew to rate the command climate onboard the cutter and provided an opportunity for the crew to comment on specific command climate issues. The results of the DEOCS were published on March 18, 2020, and contained several comments about inappropriate relationships and fraternization onboard the cutter. One comment specifically identified CS2 D, and accused her of creating a toxic work environment on the cutter due to her inappropriate relationships and behavior towards others.

In April 2020, a Preliminary Investigating Officer (PIO) was designated to conduct an investigation into the circumstances surrounding the negative command climate allegations in the DEOCS. The PIO began interviewing witnesses on April 21, 2020. During the course of the investigation, the PIO learned that CS2 D had allegedly engaged in sexual activity with the applicant. The PIO also learned that the applicant had told others that he characterized the sexual encounter with CS2 D as being taken advantage of when he was drunk. Due to the allegations that came to light during the administrative investigation, the PIO was instructed by the Coast Guard District's legal advisors to suspend the investigation while CGIS pursued the allegations that the applicant had been taken advantage of sexually.

CGIS Investigation

The CGIS investigation began on April 22, 2020. On April 24, 2020, the applicant was interviewed by CGIS regarding allegations that he was sexually assaulted by CS2 D. According to the Initial Crime Report, the applicant recalled to CGIS Special Agents that he was "extremely drunk" at the bar and went outside to the patio when he was approached by CS2 D. He stated that

CS2 D continued to get closer to him until she had the applicant backed up against the corner of the building and that he did not remember what happened next due to his intoxication. The applicant told the investigators that he had a casual conversation with CS2 D while inside the bar but does not recall if they had a conversation outside in the patio area. He did not think CS2 D was drinking since she was underage at the time.

The applicant told the CGIS agents that he was approached by EM3 D the day after going to the bar and that EM3 D told him that he saw the applicant and CS2 D kissing while in the patio area of the bar. The applicant stated that he did not recall kissing CS2 D or if she touched him anywhere while she kissed him and felt that she took advantage of him due to his intoxicated state. The applicant also told EM3 D about being taken advantage of. The applicant also admitted that he and CS2 D began texting after the night at the bar, but that he did not remember what the messages were about and that they were mostly work-related. He also said that he sent CS2 D messages about what he thought she wanted to hear to prevent her from being mad at him, including telling her that she was pretty. However, the applicant said he deleted the messages between him and CS2 D from his phone and declined to give CGIS permission to retrieve the deleted messages.

As to the incident at the applicant's apartment, he stated that he had consumed more than eight White Claw seltzer drinks and was heavily intoxicated when CS2 D came to his residence. Due to his intoxication, he did not recall whether he invited her over. The applicant recalled kissing CS2 D, but said he was unable to remember anything else. He told the investigators that CS2 D told him the next day that they had had sex, but that he did not recall having sex with her. The applicant stated that he again felt like CS2 D had taken advantage of him because he was extremely intoxicated and CS2 D was sober. He claimed that he did not tell any crew members about having sex with CS2 D, but that he was approached by several crew members and so he assumed she had told everyone.

CGIS investigators also met with CS2 D on April 24, 2020, and advised her that she had been accused of having sexual relationships with members of the cutter and read her Article 31(b) rights. She denied having any sexual or romantic relationships with anyone on board the cutter. CS2 D also denied kissing anyone. When the investigators asked CS2 D why other members of the crew would make up the allegations, she stated that it was because she is a young, outgoing and attractive female. She admitted to previously receiving an Alcohol Incident for underage drinking. CS2 D also admitted to being taken to mast for having an inappropriate relationship with a crewmember, but noted that the mast was dismissed by the CO.

On April 28, 2020, CGIS investigators met with Electrician's Mate Third Class (EM3) D, a crew member of the cutter. EM3 D told the CGIS agents that he observed the applicant and CS2 D kiss inside the bar during a port call in the late summer of 2019. He recalled that the applicant was up against a wall and that CS2 D was in front while they were kissing. EM3 D said he knew that the applicant was drunk but was not sure how intoxicated CS2 D was at the time. He told investigators that he told the applicant that he saw the kiss with CS2 D, and that the applicant seemed shocked. EM3 D also said that the applicant told him that he texted CS2 D and that the applicant described the messages as a little flirtatious. EM3 D also stated that the applicant told

him that he was extremely intoxicated during the kiss and that he felt taken advantage of by CS2 D.

Also on April 28, 2020, CGIS investigators interviewed Machinery Technician Third Class (MK3) P, another crew member of the cutter. He stated that three or four months before the interview, he was on duty with the applicant when they began discussing the negative results of the climate survey. MK3 P told investigators that the applicant told him about CS2 D taking him home one night and that they went to his apartment. MK3 P could not provide any further information about why the applicant and CS2 D were together.

CGIS investigators met with BM2 N on April 28, 2020. He advised the investigators that he learned about the applicant and CS2 D's kiss from EM3 D who witnessed it at the bar. BM2 N stated that a few days later, he was onboard the cutter when CS2 D told him about kissing the applicant. He claimed to have told CS2 D not to get involved with the applicant because he is an officer.

On April 30, 2020, CGIS investigators were notified that the applicant had retained counsel. His attorneys participated in the second interview with the applicant on the same date. The applicant told investigators that between 12-15 members of the crew went out drinking during the port call and he described everyone as being intoxicated. At the last bar the group went to, CS2 D continued to get closer to him, but did not touch him inappropriately. The applicant stated that he vaguely remembered the kiss from CS2 D, but that he was extremely intoxicated. He told investigators that he and CS2 D exchanged numbers at the bar and began texting. The applicant recalled going to dinner with CS2 D thinking that she just wanted to be friends. He could not recall who paid for dinner and claimed that nothing happened with CS2 D and there was no physical touching. The applicant claimed that after dinner, he walked back to the cutter separately and then went out to a bar with some crew members and got heavily intoxicated again. He recalled CS2 D coming over to his apartment one night but could not remember if he invited her or if she should up on her own because he was drinking and very intoxicated. The applicant remembered sitting on the couch with CS2 D while he continued to drink. He became extremely drunk, but CS2 D was not drinking any alcohol. The applicant could not recall anything that happened after that point until he awoke the next morning and CS2 D was no longer there. He noticed dried vaginal fluids and was able to deduce based on prior experience that he had had sex. The applicant stated that he was very intoxicated and blacked out every night that he drank during the port call in August, and that he also blacked out the night that CS2 D was at his apartment.

CGIS agents re-interviewed CS2 D and again advised her of her rights under Article 31(b). She recalled that when she and the applicant kissed at the bar in August of 2019, it was mutual and that both had their hands on each other during the kiss. CS2 D stated that the following night, she met the applicant at a Mexican restaurant where the applicant drank a beer and bought her a margarita. She claimed that she and the applicant mutually kissed while in the restaurant and then departed separately to return to the cutter. CS2 D also claimed that the applicant talked about getting together with her when the cutter returned to its point of origin. She recalled one occasion where the applicant invited her over to his apartment and noted that he was drinking a White Claw seltzer and that he gave her one. CS2 D noted two other occasions where she went to the applicant's

apartment but did not go inside – once to drop of his cell phone that he left at a crew party, and another time to drive the applicant home after a crew party because he was “extremely drunk.”

Also on April 30, 2020, the investigators met with CS2 S, another crew member of the cutter and CS2 D’s roommate. She said she heard that CS2 D and the applicant kissed and that the applicant never came over to her and CS2 D’s apartment when she was home. CS2 S stated to investigators that CS2 D told her that she received a text from the applicant saying he would leave the Coast Guard so that he could date CS2 D and that he was the only one good enough for CS2 D.

Both the applicant and CS2 D consented to CGIS retrieving text messages from their phones. CGIS agents discovered two pictures of the applicant on CS2 D’s phone that, according to the images’ metadata, were taken using the phone’s front camera on August 19, 2019, at 7:32 p.m.

The CGIS Investigation was closed on May 18, 2020, and the case was referred to the cutter’s CO and the Coast Guard District for adjudication.

Non-Judicial Punishment

On June 9, 2020, the applicant’s case was recommended for disposition at Captain’s Mast. He was accused of violating three Articles of the UCMJ. The applicant was alleged to have violated Article 92 (3), Violation of a lawful general order or regulation, by providing alcohol to an underage military member, CS2 D, by purchasing a drink for her at a restaurant. He was also accused of violating Article 107, False Official Statements, for making official statements to CGIS agents with intent to deceive. Specifically, during the investigation, the applicant denied any memory of kissing CS2 D at a bar, denied recollection of the flirtatious nature of the text messages that he sent to CS2 D, and denied recollection of purchasing alcohol for an underage enlisted person. He was accused of knowing that those statements were false when he made them. Finally, the applicant was also accused of violating Article 134, Fraternization, for knowingly fraternizing with CS2 D, an enlisted person.

The applicant, through counsel, submitted a package to his CO, CDR N, for consideration as part of the Captain’s Mast. He included a personal statement along with character letters from members of the Coast Guard, officers, family members, and the applicant himself that were submitted in support of his argument before the NJP. The letters attested to the applicant’s character and described how much the applicant learned from the incident, how much potential he has as an officer, and how he represents the core values of the Coast Guard. The applicant also expressed concern about the decision to take him to mast since he had been identified as a victim of sexual assault throughout the course of the investigation and asserted that doing so would discourage victims from reporting sexual assault out of fear of retaliation. He also attached a 2015 Human Rights Watch report about retaliation against sexual assault survivors in the U.S. Military.

Pursuant to Article 15 of the UCMJ, the applicant was taken to mast by his CO, CDR N, on July 10, 2020, for two of the original charges: Article 107, Making a false official statement, and Article 134, Fraternization. CDR found that the applicant intended to deceive CGIS agents

during the preliminary interview and that he had fraternized with CS2 D in a way that prejudiced good order and discipline. The applicant was restricted to the cutter for five days and suspended for three months pending further administrative action. The applicant was also temporarily reassigned to a cutter docked at the same location.

The applicant also received a negative CG-3307 (“Page 7”) to document his first Alcohol Incident. CDR N stated that the administrative documentation was issued separate to the NJP proceeding and based solely on his admission that he had consumed alcohol to excess in front of junior members of the cutter, significantly undermining his ability to lead those junior members.

Applicant’s Appeal of the NJP

On July 15, 2020, the applicant, through counsel, appealed the NJP. He asked for the proceedings to be dismissed as legally insufficient and as against the public and Coast Guard policy of punishing sexual assault victims for collateral misconduct. The applicant also asked for the alcohol incident to be removed from his record. He argued that the statements used against him at mast were taken without Article 31 warnings because he was interviewed by CGIS agents as a victim. Following the first interview, the applicant obtained counsel who confirmed multiple times during the second interview that the applicant was being interviewed as a victim and not a suspect. The applicant alleged that charging him based on statements made during the interviews was “shockingly unconstitutional, fundamentally unfair, and against every principle the USCG has publicly announced protecting victims of sexual assault.” He also argued that he did not make a false official statement because he did not have a clear memory when he was interviewed.

The applicant also argued that he should not have been charged with fraternization because his conduct was consistent with that of a victim of sexual assault. He argued that he felt trapped and scared by CS2 D’s attempts to communicate and have dinner with him, and that attempting to be friendly with CS2 D was a known victim response. The applicant also claimed that a charge of fraternization required a showing that there was a direct and palpable effect on good order and discipline. He argued that there was no evidence that anyone knew of the dinner or any social interaction during work.

The applicant also asserted that it was grossly unfair to issue him a Page 7 for an alcohol incident. He argued that the Page 7 was not issued until a year after the applicant consumed alcohol at the bar during the port call. The applicant also pointed out that most of the crew was also drinking at the bar and that he was the only one cited. He argued that although he was significantly intoxicated, there was no evidence that there was a disruptive incident or negative effect on the mission. The applicant claimed that it was “uncontroverted” that he was a victim of sexual assault the night of the kiss at the bar. He argued that being cited for “collateral consequences” fostered an atmosphere of tolerance to sexual assault and put victims in fear of being subjected to such collateral consequences.

Finally, the applicant argued that gender bias played a role in his punishment. He asked that his case be viewed without the prejudice of preconceived ideas of victim behavior and gender biases. The applicant claimed that if he were female and CS2 D was male, CS2 D would have been court martialed for sexual assault of an incapacitated person, and the applicant never would have

been subjected to NJP. However, the applicant claimed that because he is male, he is being held responsible for events that he is not in fact responsible for.

The applicant's attorney drafted a Memorandum for the Record on July 15, 2020, documenting that counsel was present telephonically during the applicant's second interview with CGIS investigators and that they verified "no less than three (3) times that his status was as of victim and that CGIS did not intend to advise [the applicant] of his Article 31 rights."

CDR N negatively endorsed the appeal and submitted a detailed recommendation for denial on July 20, 2020. CDR N first noted that the applicant's appeal did not assert a basis for relief as provided by Article 15 of the UCMJ. She asserted that his appeal failed to argue that the punishment awarded was unjust or disproportionate.

CDR N addressed the applicant's argument that the statements he made during the CGIS should not have been used against him at mast since he was not given Article 31 warnings. She noted that the CGIS agents did not suspect the applicant of any misconduct at the time of the interviews, and they did not anticipate eliciting any incriminating response. Therefore, CDR N stated that CGIS approached the interviews with the idea that the applicant was a potential victim and that obviated the need for a rights advisement. As to the applicant's argument that he did not make a false official statement, CDR N stated that she found by a preponderance of the evidence that the applicant had a clear memory of kissing CS2 D, the subsequent dinner date, and the overtly romantic nature of the text messages, and that the applicant lied to investigators with an intent to deceive. She did not find by a preponderance of the evidence that he made a false official statement about providing CS2 D alcohol. CDR N believed that the applicant had a motivation to lie because he had been engaging in a prohibited relationship with CS2 D.

CDR N also addressed the applicant's assertion that the NJP was against Coast Guard policy as it should be considered collateral misconduct to the alleged sexual assault. CDR N argued that even if the kiss at the bar was nonconsensual, the act did not meet the definition of an abusive sexual contact as defined within the UCMJ. As a result, the applicant's conduct at the bar, at dinner the following day, and throughout the flirtatious text messages was not connected to abusive sexual contact. Additionally, CDR N noted that Coast Guard policy defines collateral misconduct as misconduct that the victim may have committed prior, during, or following the reported sexual offense, with a connection to the sexual offense.³ CDR N explained that she consulted with the legal division for her District and was advised that events that occurred weeks before the alleged sexual assault were simply too attenuated to be considered collateral. Furthermore, CDR N noted

³ CDR N did not cite to the policy she described here, and the Board was unable to locate such a definition in the Coast Guard Manuals and Directives. However, in 2019, the Joint Service Committee defined "collateral misconduct" as "any allegation of misconduct that is punishable under the UCMJ and is directly related to the incident which formed the basis of the sexual assault allegation. Additionally, the collateral misconduct must have been discovered as a direct result of the investigation into the sexual assault. Examples include, but are not limited to: underage drinking, fraternization, adultery, illegal drug use or possession, etc." Dep't of Defense Report on Collateral Misconduct (Oct. 3, 2019).

that the Coast Guard promulgated a policy that provides commanders with full discretion in dealing with the disposition of collateral misconduct.⁴

Regarding the fraternization charge, CDR N explained that the CGIS investigation revealed that many members knew of the sexual relationship between the applicant and CS2 D. EM3 D observed CS2 D and the applicant kissing at the bar and then told BM2 N. BM2 N shared that information with his girlfriend, another crewmember and CS2 D's roommate. CS2 D also independently told both BM2 N and his girlfriend the details of her relationship with the applicant. Finally, while on watch onboard the cutter, the applicant told BM2 N and another enlisted crewmember about the kiss at the bar, and further stated that if the results of the DEOCS exposed the relationship, he would allege that the interactions were nonconsensual. CDR N argued that even if no one else was aware of the relationship, a junior officer in a romantic or flirtatious relationship with an enlisted crew member undermines the chain of command that exists onboard a military vessel.

CDR N also asserted that gender bias played no role in the NJP proceedings and that she based the findings and punishment on both the oral and written evidence and the credibility of the members interviewed.

On July 22, 2020, Rear Admiral (RADM) S denied the applicant's appeal because his punishment was neither unjust nor disproportionate. A person punished under Article 15 of the UCMJ may appeal a NJP when they consider the punishment to be unjust or disproportionate. However, RADM S noted that the applicant did not allege that CDR N's punishment was either unjust or disproportionate. Therefore, according to RADM S, the applicant failed to conform to the requirements of Article 15. RADM S also addressed the applicant's argument that the NJP findings were legally insufficient and that the punishment was against public and Coast Guard policy. RADM S reviewed the record and concluded that the evidence was lawfully obtained and sufficient to support the NJP findings. RADM S also determined that the punishment awarded was not excessive and that the underlying misconduct at issue at the NJP was not collateral misconduct.

Derogatory OER

On July 31, 2020, the applicant received a derogatory OER after having been removed from primary duties as a result of the findings from the NJP. He received one outstanding mark of 7, six excellent marks of 6, and seven above-average marks of 5. The applicant also received below-average marks of 3 in the "Workplace Climate", "Judgment" and "Health and Well-Being" categories. The OER noted the applicant's capabilities, strengths and potential. However, the OER also explained that the applicant exercised poor judgment by engaging in a prohibited relationship with an E-5 in his own department. The OER also noted that the applicant lost his ability to attend to duties as an officer through excessive alcohol consumption in the presence of junior crewmembers and that he displayed questionable ethics during the course of the resulting investigation which significantly undermined his leadership authority and lost the trust of his command.

⁴ CDR N pointed to paragraph 5 of ALCOAST 003/20, issued in January 2020, which states in relevant part, "[u]nder current policy, commanders have discretion on dealing with collateral misconduct, and recent data indicates that commanders rarely take adverse action for collateral misconduct – only in about 2 percent of the cases."

On September 1, 2020, the applicant submitted an addendum to the derogatory OER in which he took full responsibility for his actions through the entire process. He stated that he would carry the lessons he learned throughout the rest of his Coast Guard career. The applicant also noted that despite the situation that he put himself in, he continued to ensure that the missions of the Coast Guard were carried out daily. He stated that he believed the scores on the derogatory OER were “extremely fair and appreciated.” The applicant’s Supervisor for the derogatory OER noted on September 8, 2020, that he reviewed the applicant’s addendum and stated that the derogatory OER would stand.

On September 10, 2020, CDR N submitted a response to the applicant’s addendum in which she acknowledged the applicant’s strong performance during his temporary reassignment onboard a different cutter. She also acknowledged the applicant’s acceptance of responsibility for his actions in the written addendum. CDR N stated that the outcome may have been different if the applicant had “taken a similar tact” during the NJP proceeding. She recommended that the applicant remain in his temporary reassignment until Assignment Year 2021.

Temporary Reassignment

While serving as a DWO during his temporary reassignment on board a nearby cutter, the applicant received an OER for the period August 1, 2020, to March 31, 2021. He received one outstanding mark of 7, four excellent marks of 6, twelve above-standard marks of 5, and one average mark of 4 (on a scale from 1 (worst) to 7 (best)) in the various performance categories. On the Comparison Scale, his RO assigned him a mark of “One of the many high performing officers who form the majority of this grade” in the fifth of seven possible marks on the scale ranging from “Unsatisfactory” to “Best officer of this grade.” The RO noted in the comments section that the applicant had already earned selection to a LTJG billet.

On June 14, 2021, the applicant received a Letter of Commendation and authorization to wear the Command’s Letter of Commendation Ribbon Bar for his performance of duty from August 2020 to June 2021.

VIEWS OF THE COAST GUARD

On January 21, 2022, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which they 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).

The PSC concluded that the applicant had not provide any new evidence to overcome the presumption of regularity. In response to the applicant’s claim that CDR N did not legally prove that he made a false official statement, the PSC pointed to CDR N’s endorsement of the applicant’s appeal of the NJP. Specifically, CDR N articulated that the applicant’s statements to the CGIS agents in the first and second interview, and responses provided by the applicant at mast established that he had independent memory of kissing CS2 D. CDR N also stated that she had sufficient evidence to find by the appropriate standard that the applicant violated Article 107. The PSC found that determination to be within CDR N’s discretion pursuant to Article 15.

The PSC also addressed the applicant's claim that he reluctantly agreed to have dinner with CS2 D out of fear that she would speak publicly about their relationship. The PSC pointed to applicant's statement during his second interview, when he had counsel, that he attended dinner under the assumption that CS2 D just wanted to be friends. Additionally, the PSC concluded that the applicant had not provided compelling evidence to overcome the presumption of regularity with CDR N's finding that the kiss at the bar, subsequent text messages, and mutual dinner were attenuated enough from the alleged sexual assault, and therefore were not collateral misconduct. The PSC highlighted that the Coast Guard does not have a collateral misconduct policy, and that at the time of the applicant's sexual assault, ALCOAST 003/20 applied and affirmed CDR N's discretion to deal with collateral misconduct. That policy was still in place at the time of the PSC's recommendation. The PSC also noted that CDR N complied with Coast Guard policy that requires Commanding Officers to, "[c]onsult with the servicing legal office before taking action on collateral misconduct."⁵ Therefore, the PSC recommended denying relief.

The JAG made several additional arguments. First, the JAG argued that absent proof that the CO's findings were clearly erroneous, or that a substantial right of the applicant was materially prejudiced by clear procedural error, the NJP should be upheld. The JAG noted that CDR N and RADM S had the opportunity to review all of the evidence, including the demeanor of the applicant and the other witnesses, and that the NJP and appeal findings are entitled to substantial deference. The JAG also claimed that because Article 15 proceedings have a statutorily and regulatory defined appeal process, the Board should deem any issue not raised in the applicant's direct appeal of the NJP to be waived, absent proof of compelling circumstances that prevented the applicant from raising such issues within the military justice system. The JAG also argued that pursuant to the applicable regulations, non-compliance with any procedural provisions for imposing NJP does not invalidate a punishment unless the error materially prejudiced a substantial right of the applicant.⁶ The JAG also stated that because an NJP is administrative in nature, the constitutional rights applicable to criminal trials do not apply to NJP proceedings.⁷ Therefore, the JAG argued that the applicant must prove a clear legal or factual error, or a clear abuse of the broad discretion afforded to the CO, and material prejudice to the applicant's substantial rights in order to claim error or injustice in the imposition of the NJP.

The JAG also argued that the applicant failed to point to a Coast Guard policy prohibiting CDR N from making a distinction between the events that occurred in August from the alleged sexual assault in September. The JAG also stated that there is no policy that required CDR N, as the finder of fact, to accept the applicant's characterization of the events in August as non-consensual when CDR N, as she described in her endorsement of the applicant's appeal, had evidence before her to make an informed decision that the events were consensual. The JAG also noted that the journal articles cited by the applicant, while possibly informative, are not binding on the Coast Guard. Therefore, the JAG argued that the applicant's argument regarding Coast Guard policy fails and it was not procedural error for CDR N to impose the NJP for the applicant's participation in the kiss, dinner, and text message conversations, and his statements to CGIS regarding those events.

⁵ Article 2.C.10, Sexual Assault Prevention and Response Program, COMDTINST M1754.10E.

⁶ The JAG pointed to the Manual for Courts-Martial United States (2019 ed.), part V, para. li.

⁷ The JAG cited *Dumas v. United States*, 620 F.2d 247, 252 (Ct. Cl. 1980) (finding that the rights afforded by the Fifth and Sixth Amendments do not apply to Article 15 proceedings).

The JAG also argued that CDR N had sufficient evidence before her to determine that the first chain of events, including the kiss, texts and dinner, were separate from the later sexual assault, and that the events were consensual. Therefore, the JAG argued that CDR N's findings were not clearly erroneous, arbitrary, or against policy, and they did not shock the sense of justice. The JAG also argued that the applicant's allegations of gender bias were unsupported. The JAG stated that the applicant's argument was founded in his subjective perception of the circumstances, and that in light of the presumption of regularity afford the Coast Guard and its members, the applicant has not substantiated gender bias.

The JAG also asserted that the applicant's argument concerning the lack of Article 31 warnings is without merit. The JAG claimed that Coast Guard policy expressly permitted CDR N in imposing the NJP to consider evidence that would be inadmissible at court-martial.⁸ Therefore, the JAG argued that the applicant failed to prove a clear procedural error with regard to CDR N's consideration of the statements made during the CGIS investigation.

The JAG also argued that the applicant's reliance on the case law set out in *U.S. v. Black*, 47 M.J. 146 (C.A.A.F. 1997) is misplaced. The JAG stated that *Black* highlights some of the difficulties in prosecuting Article 107 offenses premised on a statement about lack of memory, but that *Black* does not completely foreclose the possibility of providing the charge, as the applicant suggests. In fact, the JAG argued that *Black* highlights various evidence that could be sufficient to prove an Article 107 charge based on a statement about lack of memory.⁹ The JAG also flagged what they believed to be a key distinction in that *Black* discussed the prosecution of an Article 107 violation, where the Government would have a much higher burden of proof. The JAG highlighted that the same exclusionary rules of evidence are not applicable at NJP, and for that reason, *Black* is not on point for the issue at hand.

The JAG stated that assuming, *arguendo*, that the Board found *Black* to be on point, the case law would not render CDR N's findings clearly erroneous. The JAG argued that there was sufficient evidence for CDR N to prove that the applicant had a clear memory of the events and that he had an intent to deceive. The JAG pointed to prior and contemporary statements that the applicant made about the events, as well as statements from persons with knowledge that were available to CDR N at NJP. As to the applicant's claim that the time between the events and the CGIS investigation contributed to his lack of memory, the JAG pointed to the applicant's conversation with BM2 N while they were on watch together approximately one month prior to his interview with CGIS. In that conversation, the applicant told BM2 N about the kiss at the bar. The JAG also noted that the applicant himself admitted during his second CGIS interview that he had a vague memory of the kiss. Both statements were available evidence to CDR N during NJP.

The JAG also pointed out that the applicant was also found to have made a false official statement about the nature of the text messages between CS2 D and himself. The JAG noted that

⁸ Military Justice Manual, COMDTINST M5810.1G, Section K.8.c (January 2019).

⁹ *Black*, 47 M.J. at 148 ("There may well be situations where the Government can offer sufficient circumstantial evidence to prove, for purposes of Article 107, that the accused lied about the existence of this memory. Such circumstances might include a contemporaneous statement of memory, a subsequent admission that the denial of memory was a lie, or proof that the matter under inquiry involved a military duty of such significance that it would be implausible for the accused not to remember the details.").

there were both prior and contemporaneous statements to support that finding. First, the applicant told EM3 D a few months prior to the CGIS interview that he texted CS2 D and that the messages were flirty. Additionally, the applicant initially told CGIS agents that he did not remember the nature of the text messages and that they were mostly about work, but eventually the applicant mentioned that the texts included a message that CS2 D looked pretty. The JAG noted that this information was included in the evidence before CDR N during NJP. Additionally, CDR N was also aware of CS2 S's statement that described the applicant's pursuit of a relationship with CS2 D. Consequently, the JAG argued that the totality of the evidence before CDR N at the time of her determination supported her finding by a preponderance of the evidence that the applicant violated Article 107.

The JAG also argued that the applicant failed to prove any error in CDR N's determination that the applicant violated Article 134. The JAG claimed that the applicant attempted to ignore or diminish the nature of his interactions with CS2 D while also attempting to argue that CS2 D coerced him into kissing, texting, and meeting for a private dinner. However, the JAG stated that the applicant failed to point to any evidence to support his claims. Instead, CDR N was presented with evidence that the applicant's actions were consensual, including the applicant's own statement to CGIS investigators that he went to dinner with CS2 D because he thought she wanted to be friends. The JAG noted that CDR N had the authority to assess the credibility of the evidence before her at NJP and that when the totality of the evidence is considered, CDR N's determination was not clearly erroneous. Therefore, the applicant failed to prove that CDR N's finding that the applicant violated Article 134 was erroneous or unjust.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 24, 2023, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. As of the date of this decision, no response was received.

APPLICABLE LAW AND POLICY

Article 15 of the UCMJ (10 U.S.C. § 815) provides Commanding Officers with the authority to impose Non-Judicial Punishment and proscribes certain disciplinary punishments for specific offenses without the intervention of a court-martial.

Article 31 of the UCMJ (10 U.S.C. § 831) provides the following, in relevant part (emphasis added):

- b. No person subject to this chapter may interrogate, or request any statement from, *an accused or a person suspected of an offense* without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him *in a trial by court-martial*.

...

- d. No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him *in a trial by court martial*.

Article 2 of the Military Justice Manual (MJM), COMDTINST M5810.1G, provides policy and guidance for Non-judicial Punishments (NJP). Article 2.A.2.a. of the MJM, in effect in 2020, stated the following about the purpose of NJP proceedings in relevant part:

Maintenance of Discipline. Each commanding officer is responsible for maintenance of discipline within his or her command...When a minor offense has been committed and lesser administrative measures are considered insufficient to meet the needs of good order and discipline, a commanding officer should consider invoking his or her authority to impose NJP. This disposition discretion rests within the sound discretion of the commanding officer and must be made on an individual basis considering the nature of the offenses, any mitigating or extenuating circumstances, any recommendations made by subordinate commanding officers, the interest of justice, military exigencies, and the effect of the decision on the member and the command.

Article 2.B.1. of the MJM, in effect in 2020, stated the following about the imposition of NJP in relevant part:

B.1. Commanding officers and officers-in-charge of Coast Guard units. All commanding officers may impose NJP upon personnel assigned to their units.

Article 2.G.6 of the MJM, in effect in 2020, stated the following about Article 31(b) rights warnings, in relevant part:

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 [preliminary inquiry officer] must advise the person named as the suspect of the investigation of his or her rights under Article 31(b), UCMJ, before asking that person any questions.

Article 2.K. of the MJM, in effect in 2020, stated the following about the nature and the proof and evidentiary burdens applicable to NJP proceedings, in relevant part:

K.1. Nonjudicial in nature. A commanding officer's decision to impose NJP does not constitute a judicial finding of guilt and is not a criminal conviction...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 all elements of an offense as defined by the UCMJ.

K.7. Burden and standard of proof. The standard of proof required in order to award punishment at NJP is a preponderance of the 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 defined by the UCMJ. Each element of each offense as defined in the [Manual for Courts-Martial] must be supported by a preponderance of the evidence (i.e., it is "more likely than not" that the element occurred). This standard is more rigorous than a "probable cause" standard of proof used by law enforcement to obtain a warrant, but a lower standard of proof than the "beyond a reasonable doubt" standard used at a court-martial.

K.8. Fundamental fairness and the Rules of Evidence. The Rules of Military Evidence, except as noted below, do not apply at NJP. The commanding officer should apply a rule of fundamental fairness: Under all circumstances, is it fair to consider this evidence? The commanding officer should consult the servicing legal office with any questions about whether or not to consider specific evidence.

K.8.a. Exceptions: Rules of Evidence that apply at NJP. A member retains the right against self-incrimination and may not be forced to make a statement or answer incriminating questions. See

Article 31(b), UCMJ. Privileges arising from communications with a spouse, an attorney, a member of the clergy, a psychotherapist, or a victim advocate apply, with certain exceptions. See MCM, Part III, Section V.

K.8.b. Hearsay statements. The commanding officer may consider hearsay, or statements made outside the proceeding, such as police reports and oral or written statements made to an investigator, whether or not the person who made the statement appears in person. When deciding whether a hearsay statement is credible and the weight it should be given, the commanding officer should carefully evaluate the circumstances under which the statement was made.

K.8.c. Judicial exclusionary rules. Judicial exclusionary rules involving rights warnings and search and seizure do not apply, and the commanding officer may consider evidence that would be inadmissible at court-martial.

Article 2.U. of the MJM, in effect in 2020, stated the following about appealing an NJP, in relevant part:

U.1. Basis and time limit to appeal. A member who received NJP may appeal if he or she considers the punishment imposed “unjust” or “disproportionate” to the acts of misconduct for which punished.

U.2.a. Unjust. The term “unjust” denotes illegality. Examples of unjust punishment include: the act of misconduct for which punishment was imposed was not a punishable offense under the UCMJ; the member was not subject to the jurisdiction of the commanding officer who imposed punishment; the commanding officer who imposed punishment was without power or authority to act in the member’s case; or the punishment exceeded legal limitation based upon the status of the member and/or the commanding officer who imposed the punishment. Similarly, the illegality may result from the denial of a substantial right of the member at any stage of the proceedings (e.g., investigation, preliminary inquiry, interrogation, or mast). Illegality may result from the failure to comply with procedural provisions applicable to mast punishment...Finally, illegality may result from a lack of sufficient evidence to establish that it was more likely than not, that the member committed the misconduct.

U.2.b. Disproportionate. The term “disproportionate” indicates that although the punishment imposed was legal, it was excessive or too severe considering all of the circumstances (e.g., the nature of the misconduct involved; the absence of aggravating circumstances; the prior good record of the member; or any other circumstances that tend to lessen the severity of the misconduct or explain it in a light more favorable to the member). Adverse administrative consequences of NJP such as delay in advancement or inability to reenlist are not punishment and are not a proper basis for NJP appeal.

The Manual for Courts-Martial (MCM), in effect in 2020, includes the following, in relevant part:

UCMJ Article 107 (10 U.S.C. § 907), “False official statements; false swearing,” makes punishable, among other things, false official statements made with the intent to deceive. MCM, paragraph 31, on page IV-46, states that the elements for a charge of false official statement in Violation of Article 107 are as follows:

b. *Elements*.

- (1) That the accused sign a certain official document or made a certain official statement;
- (2) That the document or statement was false in certain particulars;
- (3) That the accused knew it to be false at the time of signing it or making it; and
- (4) That the false document or statement was made with the intent to deceive.

UCMJ Article 134 (10 U.S.C. § 934), “General Article,” makes punishable, “all disorders and neglects to the prejudice of good order and discipline.” MCM, paragraph 83, on page IV-133, states that the elements for “Fraternization” in violation of Article 134 are as follows:

b. *Elements.*

- (1) That the accused was a commissioned or warrant officer;
- (2) That the accused fraternized on terms of military equity with one or more certain enlisted member(s) in a certain manner;
- (3) That the accused then knew the person(s) to be (an) enlisted member(s);
- (4) That such fraternization violated the custom of the accused’s service that officers shall not fraternize with enlisted members on terms of military equity; and
- (5) That, under the circumstances, the conduct of 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.

Article 2.C.10. of the Sexual Assault Prevention and Response (SAPR) Program Manual, COMDTINST M1754.10E, in effect in 2020, provides the following direction to commands with sexual assault victims, in relevant part:

COs shall:

10. Consult with the servicing legal officer before taking action on collateral misconduct.

The Coast Guard published a Sexual Assault Prevention, Response and Recovery Program Update (Bulletin) on January 8, 2020, ALCOAST 003/20. Paragraph 5 of the Bulletin states the following regarding “Collateral Misconduct,” in relevant part:

The prosecution of sexual assault – a felony offense – takes priority over any discipline for minor collateral misconduct. However, the fear of being punished for collateral misconduct continues to cause hesitation or prevent some from reporting sexual assault. Under current policy, commanders have discretion on dealing with collateral misconduct, and recent data indicates that commanders rarely take adverse action for collateral misconduct – only in about 2 percent of the cases.

Article 4.D. of the Military Drug and Alcohol Policy, COMDTINST 1000.10A, sets forth policy and guidance concerning alcohol incidents. Article 4.D.1., in effect in 2020, says the following about what qualifies as an alcohol incident,

Any behavior, in which the CO/OIC determines by a preponderance of the evidence after considering the relevant facts (i.e., police reports, eyewitness statements, and member’s statement if provided) that alcohol was a significant or causative factor that resulted in the member’s loss of ability to perform assigned duties or is a violation of the UCMJ, Federal, State, or local laws. The military member need not be found guilty at court-martial, in civilian court, or be awarded non-judicial punishment for a behavior to be considered an alcohol incident.

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. The application was timely.

2. Pursuant to 10 U.S.C. § 1553(d)(1), the applicant requested that the panel established to review his application include as a member a clinical psychologist, psychiatrist, or physician. The applicant also requested priority consideration of his application pursuant to 10 U.S.C. § 1553(d)(2). However, sections 1553(d)(1) and (d)(2) apply to former members of an armed force who request review of a discharge or dismissal before the Discharge Review Board and whose applications include matters related to post-traumatic stress disorder or traumatic brain injury. The applicant is on active duty and has requested correction of his military record, not review of a discharge or dismissal. Furthermore, the applicant has not made any claims related to post-traumatic stress disorder or traumatic brain injury. Therefore, sections 1553(d)(1) and (d)(2) are not applicable to this matter.

3. The applicant alleged that the imposition of the NJP was erroneous and unjust. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed evaluation in an applicant's military record is correct and fair, and the applicant bears the burden of proving by a preponderance of the evidence that it is erroneous or unjust.¹⁰ Absent specific 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."¹¹

4. The applicant alleged that on July 10, 2020, he was wrongfully awarded NJP for false official statement and fraternization because all of the credible evidence showed that CS2 D kissed him and engaged in sexual conduct with him without his consent. The applicant also asserted that the evidence supported his claim that he did not have a clear memory of the events. However, the record demonstrates that CDR N was presented with sufficient evidence to conclude that the applicant consented to the kiss at the bar, the text messages, and the private dinner. The applicant himself told CGIS investigators during his second interview, in the presence of counsel, that he had a vague memory of the kiss, and that he agreed to go to dinner with CS2 D under the assumption that she wanted to be friends. EM3 D told CGIS investigators that the applicant admitted to him that he texted CS2 D and described the messages as a little flirtatious. Therefore, the applicant has failed to demonstrate by a preponderance of the evidence that the NJP was wrongfully awarded based on the evidence of consent.

5. The applicant also argued that subjecting him to the NJP was a manifest injustice because CDR N would not have punished him if he were female. However, in her endorsement of the applicant's appeal, CDR N expressly denied gender having any impact in the outcome of the NJP and stated that her findings were based entirely on the evidence. The applicant, on the other hand, did not identify any evidence to support his allegation of gender bias. Additionally, CDR N's actions and statements do not demonstrate bias or even malice towards the applicant. Instead, CDR N's actions and statements show that she was fulfilling the role of a Commanding Officer, which is to assume responsibility "for maintenance of discipline within his or her command."¹² By taking the applicant to mast and awarding NJP, CDR N demonstrated that she was concerned with and critical of the applicant's ability to meet the needs of good order and discipline. Therefore, the

¹⁰ 33 C.F.R. § 52.24(b).

¹¹ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

¹² Article 2.A.2.a. of the Military Justice Manual, COMDTINST M5810.1G.

applicant has failed to demonstrate that CDR N's actions or statements were unwarranted or based on the applicant's gender.

6. The applicant also argued that it was improper and arbitrary for CDR N to conclude that the conduct for which he was punished was too attenuated to be considered collateral misconduct to a sexual assault. He asserted that the sexual assault occurred "just a few weeks" after the unwanted kiss, and that all of the events involved the same female, unwanted advances, and a continuing course of conduct that could not be separated legally or within the narrative chain. However, the JAG argued that CDR N had sufficient evidence before her to determine that the first chain of events, including the kiss, texts and dinner, were separate from the later sexual assault, and that the events were consensual. The Board agrees. Coast Guard policy affords the Commanding Officer with discretion in dealing with collateral misconduct.¹³ Commanding Officers are also required to consult with the servicing legal officer before taking action on collateral misconduct.¹⁴

Here, the record reflects and CDR N attested that she reviewed the evidence before her at NJP and concluded that the kiss at the bar, flirtatious text messages, and private dinner were not connected to the subsequent sexual assault. According to the record, the kiss, text messages, and dinner occurred during the first week of August 2019. The sexual assault allegedly occurred sometime in early September 2019. Even if that conduct had been determined to be collateral misconduct, it was within CDR N's discretion to award NJP having found by a preponderance of the evidence that the applicant's conduct violated the UCMJ. Additionally, in her endorsement of the applicant's appeal, CDR N confirmed that she consulted with the legal division for her District before awarding NJP, as required by Coast Guard policy. The applicant has failed to demonstrate that CDR N abused her discretion by awarding NJP.

7. The applicant also argued that CS2 D created a hostile environment that connected the kiss at the bar, text messages and private dinner with the sexual assault. He claims that he only continued to interact with CS2 D because she threatened to expose their involvement. However, the applicant did not provide any evidence to support his assertion. In fact, according to the CGIS investigation, the applicant himself discussed his involvement with CS2 D with other members of the crew. CS2 S also stated that CS2 D told her about text messages that the applicant sent to her saying he would leave the Coast Guard to be with her, and that he was the only one good enough for her. Therefore, the evidence in the record does not support the applicant's argument that he felt threatened by CS2 D and that is why he continued to engage with her.

8. The applicant also argued that CDR N acted arbitrarily and capriciously when charging and finding that his lack of memory constituted a false official statement in violation of Article 107. He argued that *United States v. Black*,¹⁵ dictates that CDR N was required to prove that he actually did remember kissing and texting CS2 D, and that when the applicant told CGIS investigators that he could not recall the events, he knew he was lying and did so with an intent to deceive government officials. The applicant argued that the evidence showed that he did not have a clear memory of the events when he was interviewed due to the amount of time that had passed

¹³ ALCOAST 003/20, para. 5.

¹⁴ Article 2.C.10. of the SAPR Program Manual, COMDTINST M1754.10E.

¹⁵ 47 M.J. 146 (CAAF 1997).

and his consumption of alcohol. He also argued that there was no evidence he lied to CGIS investigators with an intent to deceive.

However, as the JAG correctly pointed out, *Black* addresses the criminal conviction of a member of the armed forces and the Government's elevated burden of proof at general court-martial.¹⁶ Coast Guard policy dictates that at NJP, each element of each offense as defined in the MCM must be supported by a preponderance of the evidence.¹⁷ In her endorsement of the applicant's appeal, CDR N expressly stated that she found by a preponderance of the evidence that the applicant had a clear memory of kissing CS2 D, the overtly romantic nature of the text messages, and the subsequent dinner date, and that the applicant lied to investigators with an intent to deceive. It is clear that CDR N considered each element of the offense because she did not find that the applicant had made a false official statement about providing CS2 D alcohol. She also stated that she concluded that the applicant had a motivation to lie because he had been engaging in a prohibited relationship with CS2 D. The nature of the applicant's various statements to other members of the crew as detailed in the record support CDR N's finding that the applicant was aware that his involvement with CS2 D was prohibited.

Even if *Black* were applicable here, the court's holding would not render CDR N's findings arbitrary or capricious. In *Black*, the court stated that,

There may well be situations where the Government can offer sufficient circumstantial evidence to prove, for purposes of Article 107, that the accused lied about the existence of his memory. Such circumstances might include a contemporaneous statement of memory, a subsequent admission that the denial of memory was a lie, or proof that the matter under inquiry involved a military duty of such significance that it would be implausible for the accused not to remember the details.¹⁸

The Board agrees with the JAG that the applicant made prior and contemporaneous statements to support CDR N's finding that the applicant had a clear memory of the events and that he had an intent to deceive. The applicant told EM3 D a few months prior to the CGIS interview that he texted CS2 D and that the messages were flirty. While on watch approximately one month prior to the CGIS interview, the applicant also told BM2 N about kissing CS2 D at the bar. Additionally, the applicant initially told CGIS agents that he did not remember the nature of the text messages and that they were mostly about work, but eventually the applicant mentioned that the texts included a message that CS2 D looked pretty. He also told investigators that he had a vague memory of kissing CS2 D. Those statements provided circumstantial evidence that the applicant lied about the existence of his memory during the CGIS investigation, and the applicant has failed to prove by a preponderance of the evidence that CDR N's finding that he violated Article 107 was erroneous or unjust.

9. The applicant also appeared to argue that it was erroneous and unjust to charge and find him in violation of Article 107 based on statements he made during the CGIS investigation

¹⁶ *Id.* See also Article 2.K.1. of the MJM, COMDTINST M5810.1G (“A commanding officer’s decision to impose NJP does not constitute a judicial finding of guilt and is not a criminal conviction.”); Article 2.K.7. of the MJM (explaining that the preponderance of the evidence standard at mast is a lower standard of proof than the “beyond a reasonable doubt” standard used at a court-martial).

¹⁷ Article 2.K.7. of the MJM.

¹⁸ 47 M.J. at 148.

without receiving Article 31(b) warnings. However, as the applicant himself acknowledges several times in his application, he was interviewed as a victim during the CGIS investigation. On its face, Article 31(b) expressly applies to persons accused or suspected to have committed an offense. It was not until after the CGIS investigation concluded that the applicant was considered to have potentially violated the UCMJ. This is evidenced by the record of the CGIS investigation where it is noted that CGIS agents provided CS2 D with her Article 31(b) rights prior to each interview. Therefore, Article 31(b) did not apply to the applicant either time he met with CGIS agents.

Furthermore, even if the statements the applicant made during the CGIS investigation were obtained in violation of Article 31(b), Coast Guard policy expressly allowed CDR N to consider evidence at mast that would be inadmissible at court-martial. Article 31 clearly states that statements obtained in violation of the section are inadmissible at court-martial. The MJM extends some of the protections afforded by Article 31(b) to NJP proceedings by providing that members retain their rights against self-incrimination and may not be forced to make a statement or answer incriminating questions.¹⁹ However, the MJM goes on to provide that judicial exclusionary rules involving rights warnings, meaning Article 31(d), do not apply, and the Commanding Officer may consider evidence that would be inadmissible at court-martial.²⁰ Therefore, it was not erroneous or unjust to consider the statements that the applicant made during either of his interviews with CGIS agents.

10. Finally, the applicant also appeared to argue that the imposition of the Alcohol Incident was erroneous and unjust. He stated that the Alcohol Incident was “egregiously” imposed for drinking at the bar, despite there being no issues of disruption, arrest, or other incident as required by the Coast Guard alcohol policy. However, the applicant misunderstands Coast Guard policy. The Military Drug and Alcohol Policy states that an alcohol incident consists of any behavior in which the Commanding Officer determines by a preponderance of the evidence after considering the relevant facts (i.e., police reports, eyewitness statements, and member’s statement if provided) that alcohol was a significant or causative factor that resulted in the member’s loss of ability to perform assigned duties or a violation of the UCMJ.²¹ The record here shows that CDR N had ample evidence, including EM3 D’s eyewitness account that the applicant was intoxicated at the bar as well as the applicant’s own repeated statements concerning his level of intoxication at the bar, to find by a preponderance of the evidence that alcohol was a significant or causative factor in undermining the chain of command onboard the cutter and the applicant’s violation of Article 134 for fraternizing with an enlisted member.

11. The applicant has not proven by preponderance of the evidence that awarding the NJP or imposition of the Alcohol Incident was erroneous or unjust. Accordingly, the applicant’s requests should be denied.

¹⁹ Article 2.K.8.a. of the MJM.

²⁰ Article 2.K.8.c. of the MJM.

²¹ Article 4.D.1. of the Military Drug and Alcohol Policy, COMDTINST 1000.10A.

ORDER

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

May 3, 2023

[REDACTED] [REDACTED] Digitally signed by [REDACTED]
Date: 2023.05.03 12:36:46 -04'00'

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Date: 2023.05.04 08:54:39 -04'00'

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