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

Application for the Correction of
the Coast Guard Record of:

**BCMR Docket No. 2018-138**

[redacted] LT

## FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the application upon receiving the applicant's completed the application on April 20, 2018, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated February 15, 2019, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

### APPLICANT'S REQUEST

The applicant is a former lieutenant (LT/O-3) and Reserve Program Administrator (RPA) who was released from active duty on May 16, 2016, and subsequently resigned and received a general under honorable conditions discharge from the Coast Guard Reserve. He asked the Board to correct his record by removing or amending the following documents:[1]

1. **April 24, 2015, Page 7**: An Administrative Remarks form CG-3307 ("Page 7")[2] dated April 24, 2015, states that the applicant received an "alcohol incident"[3] on November 16, 2014, by getting drunk on his boat, providing alcohol to the underage babysitter of his

[1] The applicant originally also asked the Board to void his release from active duty, which resulted from a Special Board, reinstate him on active duty as an RPA, and promote him to lieutenant commander. However, through counsel, he subsequently withdrew these requests.

[2] 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 or positive or negative aspects of a member's performance or conduct in the member's military record.

[3] Article 1.A.2.d. of COMDTINST M1000.10 defines an "alcohol incident" as "[a]ny behavior, in which alcohol is determined, by the commanding officer, to be a significant or causative factor that results in the member's loss of ability to perform assigned duties, brings discredit upon the Uniformed Services, or is a violation of the Uniform Code of Military Justice, Federal, State, or local laws. The member need not be found guilty at court-martial, in a civilian court, or be awarded non-judicial punishment for the behavior to be considered an alcohol incident." Article 2.B.7. states that the first time a member is involved in an alcohol incident the CO must ensure that the member is counseled on a Page 7, which is entered into the member's military record.

children, who were also aboard the boat, and committing "illegal sexual intercourse." The Page 7 states that he was arrested by civil authorities and charged with having sexual intercourse with a minor and contributing to the delinquency of a minor and had violated Articles 92, 134, and 133 of the Uniform Code of Military Justice (UCMJ) by, respectively, being absent without leave (AWOL), obstructing justice, and committing conduct unbecoming an officer. It states that he had become intoxicated, driven his boat and vehicle, and endangered the lives of children. The Page 7 documents "alcohol incident" counseling and is signed by the District Commander and the applicant, who wrote that he "object[ed] to the convening authority to prejudging [sic] my guilt or innocence in this case."

2. **September 14, 2015, Page 7**: The second disputed Page 7 states that at the Base Exchange on August 18, 2015, the applicant approached a female enlisted member (YN1) from behind and placed a cold drink can on the back of her bare shoulder. The Page 7 states that his behavior was unwelcome and inappropriate and that he should thenceforth limit his interactions with personnel on matters pertaining to official business only and that he should not participate in working groups, formal presentations, or TDY travel until his case had been resolved. This Page 7 is signed by a captain who was the Division Chief and by the applicant, who noted that his signature was an acknowledgement of receipt and not an admission.

3. **October 25, 2017, Page 7**: The third disputed Page 7 states that it "supplements" the Page 7 dated April 24, 2015, and documents the applicant's guilty plea in a Florida State court on June 10, 2016. The applicant had pled guilty to the crime of Battery of a Child, in violation of Florida Statute 784.085, which states that it "is unlawful for any person, except a child as defined in this section, to knowingly cause or attempt to cause a child to come into contact with blood, seminal fluid, or urine or feces by throwing, tossing, projecting, or expelling such fluid or material." The Page 7 notes that the applicant had previously written an addendum to a derogatory Officer Evaluation Report (OER) dated May 31, 2015, in which he had maintained his innocence. The Page 7 states that the applicant had received a five-year felony probationary period and recited the requirements as direct orders. He was directed to complete a sex offender treatment program; to not have any unsupervised contact with a child except his own; to not work or volunteer at any place children congregate; to submit a DNA sample; to submit to random and warrantless searches; to report to a probation officer as directed; to not possess, carry, or own a firearm; and to not "use intoxicants to excess" or possess any drugs unless prescribed by a physician. This Page 7 is signed by a commander assigned to the Reserve Personnel Management Division (RPM). The applicant refused to acknowledge receiving it by signature.

4. **Derogatory May 31, 2015, OER**: The applicant's annual Officer Evaluation Report (OER) for the period June 1, 2014, through May 31, 2015, contains several low marks for performance dimensions such as Workplace Climate, Judgment, and Health & Well-Being and the lowest possible mark on the Comparison Scale, denoting unsatisfactory performance. Supporting comments note that he had received an alcohol incident, operated a vehicle and vessel after consuming alcohol, and placed children at significant risk. The first page does not state that it is derogatory or include below-standard marks, but the low marks on pages 2 and 3 of the OER made it derogatory. The OER includes an

addendum from the applicant, in which he maintained his innocence of the charges and wrote that the allegations against him were still pending and should not have been the basis for marks or comments in the OER under Coast Guard policy.

5. **First Continuity OER**:[4] A Continuity OER for the period June 1, 2015, to May 16, 2016, states that the occasion for the report was the applicant's detachment from active duty and transfer to the Individual Ready Reserve (IRR).
6. **Second Continuity OER**: A Continuity OER for the period May 17 to 31, 2016, states that the applicant was in the IRR; that he concurred with the decision to submit a Continuity OER; and that the reason for the OER was an upcoming board.
7. **Third Continuity OER**: A Continuity OER for the period June 1, 2016, through May 31, 2017, states that the applicant was in the IRR and that the reason for the OER was an upcoming board.

## APPLICANT'S ALLEGATIONS AND ARGUMENTS

The applicant alleged that for approximately a three-year period from December 2014 through November 2017, the Coast Guard sought to court-martial him for the alleged misconduct described in the Page 7 dated April 24, 2015. He stated that the Coast Guard expanded the charges listed on the Page 7 to include rape and communication of a threat. Twice the Coast Guard preferred charges against him for trial by general court-martial in 2016 and 2017 but twice the charges were withdrawn and dismissed, and he was ultimately separated without trial. The applicant alleged that the Coast Guard failed to successfully prosecute him because "it could not prove its case" despite numerous investigations.

In January 2016, the applicant stated, the Coast Guard already had criminal charges pending against him and yet also convened a Special Board to determine whether he should lose his RPA designation and be separated based on the alleged misconduct described in the Page 7s dated April 24, 2015, and September 14, 2015. Despite the applicant's objections and contrary to regulations, as a result of the Special Board, he was deprived of his RPA designation and released from active duty on May 16, 2016, with a general discharge. The applicant argued that, having joined the Reserve on November 12, 1991, he should have been retired with 20 years of satisfactory service, instead of being discharged, but his requests were ignored.

The applicant stated that while his first court-martial was pending in 2016, his counsel made numerous objections to the proceedings, including a motion to dismiss based on unlawful command influence in violation of Article 37 of the UCMJ. The applicant alleged that on June 3, 2016, "a military judge found enough evidence raising the issue of unlawful command influence over defense witnesses who would provide favorable testimony on behalf of [the applicant]." He stated that the judge found that a LCDR L, who at the applicant's Article 32 hearing[5] had provided testimony that contradicted one of the charges against him, had been informed shortly afterward that he was under investigation for perjury as a result of his testimony. The applicant stated

[4] A Continuity OER includes a description of the officer's position or status but no performance marks or comments.
[5] An Article 32 hearing is a required, impartial investigation of criminal charges, including an "inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition," before charges may be preferred for trial by general court-martial. 10 U.S.C. § 832.

that no action was taken against LCDR L, but on advice of counsel, LCDR L invoked his right against compulsory self-incrimination and "refused to speak with the Defense while under investigation." The applicant stated that as the applicant's immediate supervisor, LCDR L "was also instrumental in providing favorable military character testimony" for the applicant, but his "testimony was no longer available to the Defense due to what was to be a completely fabricated charge designed to inhibit [LCDR L's] free and unimpeded testimony for [the applicant]." The applicant alleged that the judge also found that the command had "exerted unlawful command influence over other favorable USCG witnesses relevant to the defense, including a boat crew who had contact with [the applicant] on the date of the alleged assault."

The applicant stated that on January 3, 2017, the Coast Guard recalled him to active duty to try him by court-martial, but two days later, withdrew and dismissed the charges. Then on April 4, 2017, just one of the previous four criminal charges was again preferred against him. He alleged that the Coast Guard preferred only one of the charges because they realized that that many of the charges were unsubstantiated. But at the second court-martial, in October 2017, the Coast Guard withdrew and dismissed the charges and abandoned all efforts to prosecute him. Instead, the Coast Guard placed the disputed Page 7 in his record dated October 25, 2017.

The applicant argued that the disputed Page 7s should be removed from his record because the Coast Guard failed to provide him with notice or opportunity to rebut the allegations in them. He alleged that their entry in his record therefore violated his due process rights. He argued that the Administrative Procedure Act requires the removal of these Page 7s and that the burden of proof (production and persuasion) should not lie on him because his command failed to convene an investigation into some of the allegations against him. He stated that because his command's charges against him were not proven through an adversarial process, the Page 7s "are merely unsubstantiated allegations of serious criminal misconduct."

The applicant stated that the Board should find that the "unlawful command influence" by his command overcomes the presumption of regularity applied in BCMR cases. He argued that "the judicial finding of unlawful command influence calls into question the basis for all the [Coast Guard's] actions now challenged and undermines, if not eviscerates, any claim of 'regularity' and the presumption of correctness in the records under review. … While the military judge was able to provide prophylactic and remedial measure to ensure that unlawful command influence did not infect [the applicant's] court-martial," the Board must ensure that the unlawful command influence does not infect his military record. He submitted a copy of ALCOAST 117/15, issued on March 27, 2015, in which the Commandant emphasized the importance of members involved in the military justice system being impartial and exercising independent judgment, as well as the importance of eliminating sexual assault within the ranks and ensuring that the accused have their cases fairly and impartially heard.

The applicant also made separate arguments about each of the disputed Page 7s and two of the OERs, as summarized below.[6]

[6] The applicant also included allegations and evidence about medical conditions, including evidence that he underwent a lumbar fusion on February 16, 2016; that he was subsequently placed on convalescent leave through late June 2016; and that on May 16, 2016, he was referred for physical therapy and a doctor noted that he should not sit for longer than 15 minutes and that his medication might cause drowsiness or impair driving or decision-making.

***Applicant's Arguments about the First Disputed Page 7***

Regarding the first disputed Page 7, dated April 24, 2015, the applicant stated that the allegations therein "remain unproven and unsubstantiated and are thus unjust and contrary to regulations requiring administrative personal records accuracy." He admitted that an offense need not be proven at court-martial to be mentioned on a Page 7 but alleged that the Page 7 "finds" that he violated articles of the UCMJ and committed rape, unauthorized absence, obstruction of justice, drunkenness and violations of various Florida laws. The applicant stated that the Coast Guard tried to prove these unsubstantiated allegations for three years but could not and tried to intimidate witnesses. The applicant argued that the Page 7 is slanderous because he had no opportunity to challenge the allegations at trial and the government failed to substantiate them. The applicant also argued that this Page 7 unjustly calls the alleged victim a "teenage babysitter" even though "she was 17 and was of the legal age to consent to sexual relations under the UCMJ."

The applicant noted that following an alcohol incident, a member is supposed to be medically screened for alcohol abuse or dependency, and the results should be documented on a second Page 7. He alleged that his command failed to require him to undergo screening and so documented no screening results in his record. The reason, he alleged, was that alcohol was not a significant or contributing factor in his conduct, and his command knew that. He alleged that his command "tried to pigeonhole the incident under this category [alcohol incident] to avoid proving the offenses." The applicant noted that because he did not undergo screening, he was not offered alcohol rehabilitation treatment prior to discharge.

The applicant argued that this Page 7 should be removed from his record in its entirety or at least amended by removing all references to the following: state and military criminal charges, Florida statutes and violations thereof, unauthorized absence, being under the influence of alcohol, unlawful sexual acts, providing alcohol to a minor, the teenage babysitter's inability to recall the events, "alcohol incident," alcohol being a significant or causative factor in the incident, and his being an unfit father or endangering the lives of children. He stated that the allegations listed on this Page 7 are shown to be false by the Page 7 dated October 25, 2015, which states that he pled guilty only to battery of a child, a charge that "eschews any element of physical touching."

***Applicant's Arguments about the Second Disputed Page 7***

Regarding the second disputed Page 7, dated September 14, 2015, the applicant noted that it does not allege that his conduct was intentional or purposeful. He argued that without some element of intent or gross negligence, his conduct should not have warranted a negative Page 7 entry. He argued that if his conduct really had been intentional, the command could have added an assault and battery charge to the criminal charges against him. The command's failure to do so, he alleged, purposefully avoided any adjudication of the allegations; added negative

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The applicant did not specifically relate his medical allegations and evidence to the disputed documents that he is asking the Board to remove or amend.

documentation to his record for the Special Board to review; and would have provided evidence of "aggravation" and been used to rebut character witnesses at his court-martial.

The applicant stated that he and the YN1 were both attending a seminar and on break in the Exchange when the incident happened and that he had not previously known the YN1. He stated that there was no investigation or adjudication of the alleged incident and that when presented with the Page 7, he asked the command to interview other members who were present and to secure any available surveillance video, but they did not convene an investigation and ignored his request "to review and preserve the only reliable source of exculpatory evidence to the event, i.e., security monitory tapes." The applicant stated that he was presented with the Page 7 and was not afforded the opportunity to comment or challenge the allegation. The command simply believed the allegation despite his claim of innocence, his request that the command interview others who were present, and his request that any video of the incident be reviewed. He alleged that his command had no interest in accessing the accuracy of the allegation, never interviewed him about it, and never interviewed others who were present. He stated that because the YN 1's back was turned toward him, she could not have seen what precipitated the event, and "[s]ince neither party said anything at the time of the alleged incident and no witnesses were interview, only [the applicant] was in the best position to describe the incident, if it happened. [The applicant] denies the incident ever happened; although, he was not interviewed or given the chance to rebut the allegation" before he was given the Page 7.

The applicant noted that the Page 7 states that the YN1 said nothing to him but "somehow registered her 'displeasure' through unspecific 'body language,' a clearly ridiculous statement if no witnesses were present or interviewed. The applicant stated that he has "no noted proclivity for placing cold drinks on the bare backs of unsuspecting members of the Coast Guard," and the most logical, reasonable and unbiased interpretation of the facts, especially if an investigation was not done and one were interested in ascertaining the truth, would be that the touching did not happen or was an accident or the contact incidental. Nothing rebuts this wholly logical analysis." Nevertheless, his command issued him a negative Page 7 "while purposefully avoiding the most rudimentary inquiry." He stated that his command was overzealous, vindictive, and predisposed to view his conduct in a negative light despite the lack of evidence. He stated that the Page 7 was "arbitrary, capricious, vindictive and unjust" and so should be removed. He alleged that his command contrived this Page 7 to justify convening the Special Board.

***Applicant's Witnesses' Statements about the Second Disputed Page 7***

- The applicant included with his application an undated statement to the BCMR from a retired lieutenant commander in the Reserve, LCDR L, wrote that he was the coordinator for the working group attended by the applicant and the YN1, where the dress code was "business casual." He stated that the YN1 never told him that the applicant "had placed a cold drink against her back or acted in any inappropriate manner," and he never witnessed any unusual interaction between them that would lead him "to suspect any unprofessional behavior or discomfort on the part of [the YN1]." He stated that the "reserve community among District 7 commands is a small and tight-knit community, so any misbehavior is usually known." He stated that if the applicant had done anything wrong,

"there is a high likelihood that it would have been discussed among the conference participants," "especially given his pending legal troubles."

LCDR L stated that about a week after the event ended, his Division Chief, CAPT U, sent him an email chain[7] that had originated with an email from the YN 1's supervisor, LT S, to the Sector Deputy Commander, "containing the allegations of the incident" on August 18, 2015. "To the best of [LCDR L's] recollection, there was no statement by [the YN1] or other statements or investigations attached to the emails. … [T]he emails merely contained the hearsay allegations as reported by others through multiple levels of supervisors." LCDR L stated that his Division Chief directed him to draft the Page 7 "based upon the allegations contained in the emails because of the other pending issues with [the applicant]." LCDR L stated that when he sent his draft to the Division Chief, he expressed his concern "that it was highly unusual to issue a negative CG-3307 to an officer without any supporting evidence or investigation or without confronting the member about the allegation to determine the exact circumstances of the incident particularly when the claim is made several days after the fact and seems trivial in nature."

LCDR L stated that to the best of his knowledge, "there was no independent investigation or witness corroboration." He claimed that it is "highly unusual to prepare such a document" especially when, "if the incident occurred, [it] certainly could have been an inadvertent or accidental touching." LCDR L stated that when he spoke to the applicant after he was presented the Page 7, the applicant was very upset, denied having placed the drink on the YN1's back, "identified witnesses who were with him while he was in the Coast Guard Exchange," complained that the command had not reviewed the videotapes, and thought that his command was being vindictive. LCDR L stated that he cannot refute the applicant's assessment.

- A second undated statement to the BCMR is signed by a chief warrant officer, CWO J (now retired), who wrote that he attended the Reserve Management Working Group event from August 17 to 20, 2015, with the applicant, and that many attendees would walk to the Exchange to buy food or drink during the lunch period and short break periods. He stated that "while it was possible for two people to be 'alone' in the Exchange, as a general matter there were usually other people present." CWO J stated that the YN1 and her immediate supervisor, LT S, also attended the event. CWO J stated that he never saw the applicant place a cold drink on the YN1, hear her complain or object to his conduct, or hear any other member discuss "any unusual actions on the part of [the applicant and the YN1]." He stated that the applicant acted professionally throughout the event "and did not have any interaction, that [CWO J] witnessed, with [the YN1]."

  CWO J stated that he was aware that the applicant "had a professional acquaintance" with the YN1, but the applicant never mentioned her to CWO J before the applicant told him about the accusation against him. Also, no one who attended the event mentioned or commented on any interaction between the two of them. He stated that "it is possible that either I would have witnessed it, or I would have heard about it from others at the working group, if the event was otherwise noteworthy in any respect. … [I]t is unlikely that such alleged actions by [the applicant] would go unnoticed and commented on by others … [I]t is likely that I would have heard about the incident had it hap-

[7] The applicant did not submit a copy of this email chain.

pen[ed], had it been purposeful or otherwise significant." CWO J stated that it was his understanding, and according to the applicant, that there was no investigation conducted and that the command "merely recorded the allegation as misconduct without any corroborating evidence."

***Applicant's Arguments about the Third Disputed Page 7***

The applicant stated that the third disputed Page 7, dated October 25, 2017, which cites the charge he pled guilty to, erroneously states that it "supplements" the first disputed Page 7, dated April 24, 2015, which noted the charges on which he was arrested. He argued that by stating that this third Page 7 "supplements" the first, the "command sought to deceitfully imply that [he] was guilty" of the charges noted on the first disputed Page 7. He complained that the third Page 7 does not mention the date of the alleged incident or identify the alleged victim and does not describe exactly what he admitted to having done. He argued that the "differences in the charges and circumstances between the April 2015 and October 2017 entries, the lack of specificity [in the third Page 7], the government's failure to prove the allegations [in the first Page 7] and the questionable purpose underlying the entries significantly undermine the accuracy, justness and administratively presumed correctness of the [third Page 7]."

The applicant alleged that because of the lack of specificity on the third Page 7, "one is merely left to assume that the same victim and events are involved in the two page 7s, even though the charges and circumstances are, as demonstrated above, demonstrably different." Therefore, the Special Board was "forced to make unsupported and unjust inferences (that the same victim and circumstances as alleged in the 24 April 15 page 7 were the same as those reported in the 25 Oct 17 page 7)."

The applicant also argued that the word "nevertheless" in this Page 7 unjustly implies that he lied when he proclaimed his innocence to charges that the government never proved and were never adjudicated in either a military or Florida State court. In addition, he asserted that this third Page 7 unjustly failed to mention that the proceeding was a withheld adjudication under Florida law, which means that "there is no conviction if the terms of probation are fulfilled." He argued that the omission of the fact that it was a "withheld adjudication" makes the Page 7 deceptive and false.

The applicant stated that even though he pled guilty and received the withheld adjudication in June 2016, his command did not document it in his record on this third Page 7 until October 2017, after all of the UCMJ charges against him were dismissed. He stated that the Page 7 was a blatant attempt by his command to condemn him with deceptions and half-truths even while knowing that the government could not prove the allegations against him.

The applicant also argued that a Page 7 may not be used to report a civil conviction. He stated that COMDTINST 1000.14C prohibits the use of Page 7s to document events not listed in PPCINST M1000.2, which provides a different form—CG-5588—for reporting a member's civil conviction in Chapter 10.B.8. He noted that unlike Chapter 10.B.8., Chapter 10.B.9. states that alcohol incidents must be documented on a Page 7. Therefore, he concluded, this Page 7 is contrary to policy.

***Applicant's Arguments about the Derogatory OER***

The applicant stated that the marks and comments in the derogatory OER, dated May 31, 2015, are based on the same events as the first disputed Page 7, dated April 24, 2015. He argued that by also bringing criminal charges against him for the same alleged conduct, "the command knew or should have known that any substantive response to the administrative actions would be used again him at the court-martial." The command stifled his ability to rebut the allegations against him in this OER by bringing criminal charges against him, and so he OER is unjust. He argued that the simultaneous administrative actions and criminal charges placed him "in the position of either exercising his Constitutional and statutory rights against self-incrimination (U.S. Const. Fifth Amendment, 10 U.S.C. 831(b)), and remain silent, thus forfeiting his right to respond to the derogatory OER," or waiving that right by submitting an addendum to the OER, which would have "provid[ed] the government with compelled statements to be used against him in his courts-martial." He alleged that the government thus "manipulated the military justice system to subvert [the applicant's] ability to respond to the derogatory comments in his OER," and so it is unjust and should be removed.

The applicant noted that Coast Guard policy allows rating officials to base OER marks and comments "on underlying misconduct that may be subject to parallel disciplinary actions, such actions do not extent [sic] to the circumstances where, as here, the command was grossly negligent in the prosecution of its case and was either unwilling or unable to prove its criminal case or provide [the applicant] with a meaningful means of redress. Thus, the underlying conduct, which is the genesis of the OER's derogatory comments, remains unproven and unsubstantiated," the applicant argued. He stated that because the Coast Guard failed to successfully prosecute the UCMJ charges against him, this OER should be removed.

The applicant alleged that the OER should also be removed because it was erroneously prepared. He made the follow allegations of error:

- Contrary to Article 6.B.2. of PSCINST M1611.1 ("OER Manual"), block 2 of the OER does not state that it is a derogatory report. He claimed that the omission of this phrase denied him "the substantive and procedural protections required when filing a derogatory OER, rendering it unjust."
- Contrary to Chapter 4.A.3. of the OER Manual, the OER was not completed within 45 days of the end of the reporting period, May 31, 2015, because it was not provided to the applicant until on or about September 17, 2015.
- Contrary to Article 3.A.2. of the OER Manual, he did not receive mandatory mid-term counseling and "the Reporting Officer did not, as required, address the counseling entry notations in the comment section of the OER."
- Contrary to Chapter 6.B.5.e. of the OER Manual and Article 5.H.10. of COMDTINST M1000.3 ("Officer Manual"), the OER Reviewer did not ensure that the derogatory information in the OER was substantiated. He applicant alleged that the OER comment that he placed children at significant risk due to intoxication has "no basis in fact" and that the allegations of intoxication and child endangerment were never proven at trial. He

argued that the fact that, by himself, he launched his 30-foot boat from a trailer and recover the boat under high wind conditions, without damage to the boat or injury to himself, is proof that he was not intoxicated because he would not have been able to do so had he been intoxicated. In addition, all the witnesses interviewed by the government reported that he was not intoxicated, and none reported seeing him with alcohol.

- Contrary to Article 5.J.2. of the Officer Manual, the command did not comply with the alcohol program by having him screened and documenting the screening results on another Page 7.

The applicant concluded that this derogatory OER should be removed in its entirety because he was not afforded the procedural and substantive protections required by law and policy. In the alternative, he asked that all of the derogatory marks and comments be removed from this OER.

***Applicant's Argument about the Continuity OER Dated May 31, 2016***

The applicant stated that, contrary to the notation in the Continuity OER dated May 31, 2017, he did not concur with the decision to enter a Continuity OER in his record, instead of a substantive OER with numerical marks and comments about his performance. Therefore, he argued, this 2017 OER should also be removed. (It is the May 31, 2016, Continuity OER that includes this notation, rather than the May 31, 2017, Continuity OER, so the date in the applicant's brief may be a typographical error.)

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

## SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard Reserve in 1991, drilled regularly in the Selected Reserve, and was appointed an ensign in the Reserve in 2004. On October 19, 2011, the applicant received notification that he had completed twenty years of satisfactory service and so was eligible for a Reserve retirement and retired pay upon attaining age 60. As an officer, the applicant performed periods of extended active duty and received excellent OERs through May 2014. He was selected to be an RPA and began serving on extended active in that role in the Seventh District on June 1, 2013.

***Arrest and State Charges***

On Tuesday, December 22, 2014, the applicant was arrested at his office by local law enforcement. He was incarcerated and then released on December 28, 2014. According to a Probable Cause Affidavit signed by local law enforcement on December 22, 2014, a detective was assigned to investigate the allegations of a 17-year-old girl on November 24, 2014. She told the detective that she had met the applicant several times as a customer at the pizza parlor where she worked. She alleged that she had told him that she was in high school and that he had asked her to babysit his 2-year-old son while he went out on his boat. When she went to his residence on November 16, 2014, to babysit, the applicant told her that "they were all going out on the

boat," including her and his two children. On the boat, she alleged, the applicant "gave her several glasses of wine" and she became intoxicated. She stated that she remembered drinking three glasses of wine and she either fell asleep or blacked out "but later had memories of being back at [the applicant's] house with [the applicant] on top of her engaging in sexual intercourse with her." She stated that she also remembered having dinner with him at a waterfront restaurant, and he gave her another glass of wine on the boat ride home. She told the detective that she remembered that they removed the boat from the water and "next remembered again being at [the applicant's] house with [him] on top of her engaging in sexual intercourse with her. [She] said she told [him] to stop and pushed him off of her. [She] sustained bruising (hickey) on her neck and some bruising on her thighs which was photographed by the initial responding deputy." The babysitter stated that she did not remember consenting to any sexual activity with the applicant and that it was nothing she had ever considered as she only wanted to babysit. The detective reported that "[d]uring several recorded controlled phone calls with [the babysitter], [the applicant] made admissions to engaging in sexual intercourse with her. He stated they had consumed seven bottles of wine together and they both were intoxicated. [The applicant] indicated that [she] was a willing participant in the sexual activity and indicated that he was unaware of her age. [He] pled with [her] to not tell anyone what happened and, due to his position with the Coast Guard, an investigation into this matter would result in national coverage and they both would be 'in the news'." The detective concluded therefore that probable cause existed to believe that the applicant, who was 43 years old, had violated Florida Statute 794.05 by engaging in oral, anal, or vaginal penetration of a person 16 or 17 years old, as well as 827.04(1)(a) by providing her with alcohol.

The applicant was charged with the following alleged offenses under Florida statutes:

- **Florida Statute 784.085** prohibits "Battery of child by throwing, tossing, projecting, or expelling certain fluids or materials"; defines "child" as a person under age 18; and states, "It is unlawful for any person, except a child as defined in this section, to knowingly cause or attempt to cause a child to come into contact with blood, seminal fluid, or urine or feces by throwing, tossing, projecting, or expelling such fluid or material."

- **Florida Statute 794.05** prohibits "Unlawful sexual activity with certain minors" and states in part, "A person 24 years of age or older who engages in sexual activity with a person 16 or 17 years of age commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. As used in this section, 'sexual activity' means oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual activity does not include an act done for a bona fide medical purpose."

- **Florida Statute 827.04** prohibits "Contributing to the delinquency or dependency of a child; penalty," and states that it is a misdemeanor to commit an act that "causes, tends to cause, encourages or contributes to a child becoming a delinquent or dependent child or a child in need of services."

On February 9, 2015, an Assistant State Attorney referred the charges under Florida Statutes 784.085 and 827.04 for trial but declined to prosecute the charge of unlawful sexual activity with a minor (Florida Statute 794.05).

***First Disputed Page 7 (Alcohol Incident)***

On April 24, 2015, the applicant was issued the first disputed Page 7 in this case (summarized above) to document an "alcohol incident" resulting from his commission of alleged UCMJ offenses and the offenses he had been charged with by the State of Florida after having drunk alcohol on November 16, 2014.

***CGIS Investigation Report***

On April 27, 2015, CGIS received authorization to seize and search the applicant's personal and government phones, vehicle, and electronic logs, messages, and files. The CGIS agent's application for the authorization states the following: On or about November 13, 2016, the applicant asked a 17-year-old minor who worked at a pizza parlor he frequented with his children to babysit that weekend, and she agreed. When she arrived at his house on November 16, 2014, he showed her around, mentioned he might need a regular nanny, and told her that she could sleep in the guest room if she ever needed to stay overnight. They went to his boat, where he poured her a glass of wine. She remembered drinking two glasses of wine and being introduced to the crew of a Coast Guard small boat that the applicant stopped his boat beside. "Her final lucid memory is sitting up on the bow of the vessel with [the applicant's] two year old child in her arms." She told CGIS that she was not drunk up to that point but has only "a few fragments of memories" of what happened after that point. She remembered him being on top of her, in his bed, having vaginal sex with her, and feeling him inside of her. Later that day, they had dinner at a restaurant, where the applicant ordered her another glass of wine, but she did not drink it. She remembered that when they got back to his house, he had sex with her in his bed again and "she could hear his children calling for them from the other side of the door, he replied '… just a minute…' She told him to get off of her, and pulled her pants on." When she left, the applicant paid her $80, which was approximately $10 per hour. The CGIS agent stated that throughout the following week, the applicant called and texted the babysitter, and she let him know that she "was not ok with what had happened." He also showed up at the pizza parlor.

On November 24, 2014, the babysitter "engaged in a series of controlled calls with [the applicant] during which they discussed the events of the prior week," and these calls were recorded. During the calls, the applicant confirmed that they had had sex twice. He first told her that they had drunk seven bottles of wine, but later said it was six. When she said she was going to speak to a counselor, the applicant—

> insisted that they 'did nothing wrong' and that if she wanted to speak to someone he would find her someone to talk to. He voiced concern that her counselor would report the incident, that a federal investigation would result, and that they would both end up on the news. He stated that he would lose his kids, his job, his house and everything he had. When she asked why he would get in trouble, he told her that because he was older and that the police would get involved, then 'my people' would start an investigation, and that it was not going to look pretty [for him]. [sic] He assured her that it was 'actually a real big deal.' He told that if she told anyone at the school it would 'open up a can of worms' and that he was nervous.

CGIS stated that upon the applicant's release from jail on December 29, 2014, the applicant's supervisor submitted a request to have the applicant placed on leave for the period December 23, 2014, to January 9, 2015. The agent wrote, "His supervisor asserts this leave was pre-approved prior to [the applicant's] arrest. CG policy prohibits members from being placed on leave during times of civilian detention."

CGIS reported that upon being released from jail on December 29, 2014, the applicant contacted the crew members of the small boat he had spoken with on November 16, 2014. The agent interviewed three of the four crew members. The agent also interviewed a master chief to whom the applicant had, on the day in question, sent "a text containing a photo that depicted a female wearing a bathing suit and who was laying [sic] face down on [the applicant's] boat." The agent therefore argued that there was probable cause to conduct the search and seizure.

***Initial UCMJ Charges***

On April 27, 2015, the applicant was formally charged with the following violations of the UCMJ:

- **Article 86**, by absenting himself from his unit without authority from December 22 through 29, 2014.
- **Article 133**, by on or about November 16, 2014, "conduct[ing] himself in a manner unbecoming an officer of the armed forces, to wit: violating Florida Statute section 794.05(1) by having sex with a 17 year old female, [alleged victim's initials] and Florida Statute section 827.04(1)(a) by providing alcohol to the same [same initials], and such conduct was unbecoming of an officer and gentleman."
- **Article 134**, by on or about November 24, 2014, "wrongfully endeavor[ing] to influence the action of the minor known as [same initials], the only cognizant witness of his actions on or about 16 November 2014, in the case of himself, by telling her not to speak to her counselor or anyone else about the event of 16 November 2014 because he could get into serious trouble, that federal investigators and news trucks would be in front of her house, and that they both would end up on the news, or words to that effect, and such conduct was prejudicial to the good order and discipline in the armed forces and of a nature to bring discredit to the armed forces."
- **Article 134**, by on or about November 24, 2014, "wrongfully communicat[ing] to the minor known as [same initials] a threat, to wit: that if she told anyone what had happened on or about 16 November 2014 that the police would show up at her door, that federal investigators and news trucks would be in front of her house, and that they both would end up on the news, or words to that effect, and such conduct was prejudicial to the good order and discipline in the armed forces and of a nature to bring discredit to the armed forces."

This first Charge Sheet states that the applicant was informed of the charges on April 29, 2015.

In a memorandum dated May 26, 2015, the applicant was notified that although he had recently been selected for promotion by the RPA LCDR selection board, his promotion was being temporarily delayed due to pending adverse information in his record in accordance with Article 3.A.12.f. of the Officer Manual. The applicant acknowledged this notification on June 9, 2015.

The applicant's Article 32 hearing convened on June 1, 2015. A second Charge Sheet dated the same day states that the applicant was also charged with the following UCMJ violation and was informed of this charge on June 4, 2015:

- **Article 120**, by "on divers occasions on or about 16 November 2014, commit a sexual act upon [same initials], to wit: inserting his penis into her vagina, when [same initials] was incapable of consenting to the sexual act due to impairment by a drug, intoxicant, or other similar substance, and that condition was known or reasonably should have been known by the accused."

On July 29, 2015, a CGIS agent issued a report regarding an investigation of whether LCDR L had committed perjury at the applicant's Article 32 hearing on June 9, 2015. The agent reported that LCDR L had testified that "he did not recall the specific dates [of leave that the applicant] had requested, but agreed with defense counsel that it was between 22 and 28 of December 2014." LCDR L had also testified that—

- The applicant's leave was recorded on a paper calendar on the wall and that he had shown it to CAPT U after he approved it.
- The applicant had requested the leave during the first two weeks of December 2014.
- LCDR L could not remember the end date for the leave, but it was after December 29, 2014.
- The applicant had initially requested 72 hours of leave, but LCDR L had encouraged him to take more because of his "excessive leave balance," which was more than 60 days.
- The applicant had lost leave at the end of the prior fiscal year.
- It did not occur to LCDR L to follow policy by requiring submission of written leave request chits.
- LCDR L had notified another officer on the afternoon of the applicant's arrest that the applicant was on leave.
- LCDR L denied having discussed "the leave days in question" with the applicant.

On August 4, 2015, the Seventh District Commander referred all the charges on the two Charge Sheets together for trial by general court-martial. The charges were served on the applicant on August 26, 2015, but withdrawn and dismissed without prejudice by direction of the Convening Authority. The Article 86 charge was withdrawn and dismissed without prejudice on May 27, 2016; the Article 133 charge was amended on June 8, 2016, by removing the references to the Florida statutes; and the Article 133 charge and all remaining charges were withdrawn and dismissed without prejudice on January 5, 2017.

***Derogatory OER***

The first disputed OER in this case covers the applicant's performance on active duty from June 1, 2014, to May 31, 2015. There is no entry in the Date Submitted block to show when the applicant initiated this OER by submitting it to his supervisor. Block 2 describes his duties as an RPA and does not mention that the report is derogatory. His rating chain, including his supervisor, LCDR L, his Reporting Officer, CAPT U, and the Reviewer, CAPT B, all signed the OER on July 8, 2015.

The applicant received poor marks of 1, 2, and 3 (on a scale of 1 to 7) in the performance categories Directing Others, Teamwork, Workplace Climate, Judgment, Responsibility, Professional Presence, and Health and Well-Being and standard marks of 4 for Professional Competence, Looking Out for Others, Developing Others, and Evaluations. In addition, his Reporting Officer assigned him a mark in the lowest spot on the Comparison Scale. The OER includes some positive comments supporting the better marks, but his supervisor, LCDR L, supported the mediocre and poor marks he assigned with the following comments:

> Professional competence significantly diminished through ancillary personal actions occurring outside the performance of official duties. … off duty conduct, alcohol incident & personal circumstances have limited [his] ability to direct/develop DXR staff. His actions inhibited the team dynamic & significantly hampered workplace climate. Midway through the period, [he] was removed from his supervisory role based on conduct away from the workplace. … unfortunately, he can no longer effectively provide feedback and has lost the trust, respect, and confidence of the staff. Own evaluation focused on professional accomplishments; personal conduct was an overriding factor the majority of this period and transcended most professional successes.

The Reporting Officer, CAPT U, included the following comments to support the poor marks he assigned and the Comparison Scale mark:

> … Unfortunately, his poor judgment exercised during this period has derailed the career of a once stellar officer. The distraction brought on by his off-duty actions has significantly impacted his effectiveness as a member of the D7 Reserve Force Management staff. … Poor judgment exercised in his personal life has marred his professional accomplishments and distracted from the significant improvements in competency obtainment, operational proficiency, and administrative readiness of the larges reserve contingent in the nation. [He] received an alcohol incident this period and exhibited behavior inconsistent with our service culture. The irresponsible actions associated with this alcohol incident placed children under his charge at significant risk. His actions were grossly negligent and are contrary to the behaviors expected of a military officer. [He] portrayed a poor image of the Coast Guard to the community and his professional reputation was seriously diminished, offsetting any of his organizational success. The severity of these actions is abhorrent to our core values. Operating a vehicle and vessel after consuming alcohol was irresponsible and clearly failed to protect those onboard from the hazards of operating machinery under the influence of intoxicating substances. … As a result of his poor judgment and subsequent alcohol incident, [the applicant] has limited potential for future service in the Coast Guard. His extremely poor personal actions, decision making and behaviors outside the scope of his official duties has brought discredit to the Coast Guard and tarnished the service reputation in the community. As a result of his conduct, complete disregard for others, and exceptionally poor judgment, [he] can no longer effectively contribute to the organization of the reserve program.

Because of the lowest marks, the OER was considered "derogatory" and the applicant was allowed to submit an addendum for inclusion in his record with the OER. He opted to

submit an addendum on September 17, 2015, and argued that the OER included prohibited comments:[8]

> I acknowledge receipt of this report. I disagree with the contents of this report, and believe that it is in violation of COMDTINST M1000.3A, which prohibits comments on allegations that are pending. The mention of an Alcohol Related Incident directly relates to allegations that are made against me and have not been subject to trial or other adjudication. As such, I expressly disagree with any mention of the allegations against me, to include allegations that I had any problems or concerns with my personal life, as all such allegations are related to the alleged conduct for which I am charged. I maintain my innocence of these charges, and request that this report not be made a part of my official record due to these violations of Coast Guard instructions and policy.

The applicant's rating chain forwarded his addendum to PSC without responding to his claims or adding additional comments. PSC validated the OER for entry in his record on October 5, 2015.

***Second Disputed Page 7***

On September 14, 2015, the applicant was issued the second disputed Page 7 (summarized above). On September 15, 2015, the applicant's CO sent an email to CGIS and the District's legal office. The CO attached a copy of the second disputed Page 7, dated September 14, 2015, stating that he had presented it to the applicant, who was upset; said he did not remember any such incident; thought people were "looking to pile on accusations against him"; asked if others present had been interviewed; stated that he did not touch the YN1 and that if he had, it was accidental; asked if the Page 7 was based solely on the YN1's statement or if an investigation had been done; asked if the security cameras in the Exchange had been reviewed; asked to speak to his lawyer but when he was unable to reach his lawyer, signed the Page 7 with a short statement; stated that he felt like everyone at the station was watching him; and stated, upon inquiry, that he was seeing a counselor once a week." At the end of this email, the CO explained why he was reporting their interaction as follows: "***THIS STATEMENT IS STRICTLY TO RECORD THE INTERACTION WITH [THE APPLICANT] AND NOT AN ENDORSEMENT OF HIS ACTIONS OR CONCERNS.***"

On November 5, 2015, the applicant's ex-wife advised him in an email that her attorney had advised her that she and her family should have no communication with anyone pertaining to the applicant's case. She noted that they had divorced before the alleged incident, and she and her family were not involved in the events at issue. She stated that a CGIS investigator and the

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[8] Article 5.A.7.f. of the Officer Manual, COMDTINST M1000.3A, states that in preparing an OER, a member of a rating chain may not—

> Mention the officer's conduct is the subject of a judicial, administrative, or investigative proceeding, including criminal and non-judicial punishment proceedings under the Uniform Code of Military Justice, civilian criminal proceedings, Personnel Records Review Board (PRRB), Coast Guard Board for Correction of Military Records (BCMR), or any other investigation (including discrimination investigations) except as provided in Article 5.A.3.e. of this Manual. Referring to the fact conduct was the subject of a proceeding of a type described above is permissible when necessary to respond to issues regarding that proceeding first raised by an officer in a reply under Article 5.A.4.g. of this Manual. These restrictions do not preclude comments on the conduct that is the subject of the proceeding. They only prohibit reference to the proceeding itself.

local sheriff had shown up at her door three days in a row, and she "felt pressured and coaxed into giving any information that would be used against" the applicant. She stated that her entire family received requests for interviews, but they had nothing to say. She stated that they felt harassed by the authorities. She also sent a text stating that the CGIS investigator had harassed her for three days by showing up at her house.

***Notification of Special Board***

In a memorandum dated November 19, 2015, the applicant was notified that in accordance with Article 1.B.3.i. of the Officer Manual, the Personnel Service Center (PSC) was convening a Special Board of Officers to review his record and determine whether his RPA designation should be removed and whether his name should be permanently removed from the LCDR promotion list. PSC stated that the decision to convene the Special Board was based on its receipt of the Page 7s dated April 24, 2015, and September 14, 2015. He was also advised that his promotion to LCDR had been temporarily delayed in accordance with Article 3.A.12.f. of the Officer Manual pending the outcome of the Special Board.

On December 7, 2015, the applicant acknowledged receipt of PSC's notification of a Special Board and indicated that he wanted to submit a statement to the board but that due to the pending court martial, he needed to consult his attorney. The applicant submitted his response on December 18, 2015, and included many arguments that the Special Board violated his due process rights, particularly because "[b]y imposing both administrative and criminal action concurrently for the same allegations, the command places me in the 'Hobson's Choice' of submitting a statement rebutting the allegations before the special board, and thus circumventing my rights under Article 31(b), UCMJ, or exercising my Article 31(b), UCMJ rights and having my RPA designation go unchallenged." [9]

On January 6, 2016, PSC notified the applicant that the Special Board would convene on January 13, 2016, or as soon thereafter as practicable. On January 8, 2016, Commander, PSC appointed three officers to serve as the Special Board to consider whether the applicant's RPA designation should be revoked and whether he was suitable for promotion.

***Special Board Report***

On January 13, 2016, the Special Board convened, examined the records, and issued a report recommending that the Commandant remove the applicant's RPA designation because he had met the standards for separation in Article 1.A.14.c. of the Military Separations Manual by—

- Mismanaging his personal affairs to the discredit of the Service by being arrested, incarcerated and charged with two felonies of raping a 17 year old female and providing alcohol to a minor;
- Committing acts prohibited by military or civilian authorities because he had admitted to engaging in sexual acts with a female under the age of 18 contrary to Florida Statute

[9] Because the applicant has withdrawn his complaints regarding his separation, the applicant's arguments about the Special Board have been abbreviated here.

794.05 and to contributing to the delinquency of a minor by providing her with alcohol in violation of the UCMJ and Florida Statute 827.04;

- Committing conduct unbecoming a gentleman both by splitting seven bottles of wine with a minor and "endanger[ing] his two children, age seven and two, by operating a motor vehicle as well as recreational vessel while the minors were in his custody" and by bringing discredit on and tarnishing the Service's reputation in the community with his "extremely poor personal actions, decision making and behaviors"; and
- Incurring an "alcohol incident" based on his admission of having provided alcohol to a hired babysitter under the legal drinking age "to the point where she could recall very little of the day and evening" and of having operated his boat and his vehicle with minor children present while consuming alcohol."

On April 15, 2016, the Commandant approved the Special Board's recommendation. On April 20, 2016, the Secretary approved the recommendation and removed the applicant from the RPA LCDR promotion list. On April 25, 2016, Commander, PSC informed the applicant that his RPA designation would be removed no later than May 16, 2016, and he would be released from active duty with a general characterization of service and no entitlement to separation pay.

In February 2016, the applicant underwent a lumbar fusion. He was repeatedly granted extended convalescent leave and did not return to duty before his separation in May 2016.

On April 13, 2016, an attorney representing the applicant's ex-wife told CGIS that any further attempts to contact her should be through his office. He noted that a CGIS agent had taken a videotaped statement from the ex-wife regarding the investigation and requested a copy. He stated that she was "concern[ed] for her children being involved and exposed to this matter."

***Release from Active Duty***

On April 26, 2016, PSC's Reserve Personnel Management Division issued separation orders for the applicant to be released from active duty "under honorable conditions" due to unsatisfactory performance on May 16, 2016. He was to be released to inactive duty in the Reserve. The orders state that he was required to submit an OER and provide citations to manual articles about submitting a Continuity OER.

On May 16, 2016, the applicant was released from active duty to inactive duty in the IRR. His DD 214 states that he was released "under honorable conditions" due to "unsatisfactory performance." On his final day of active duty, he was referred for six weeks of physical therapy.

The applicant received a Continuity OER, with a description of his duties but no marks or comments, for the period June 1, 2016, to May 16, 2016. The explanation for the Continuity OER is that he was "transferred to the IRR on May 2016."

The applicant also received a Continuity OER dated May 31, 2016—the date lieutenants regularly receive annual OERs—covering only his first two weeks in the IRR. This Continuity OER states that he had concurred in the decision to have a Continuity OER (which the applicant

alleged was not true). Thereafter, the applicant continued to receive Continuity OERs covering his time in the IRR.

***Guilty Plea in State Court***

On June 10, 2016, pursuant to a plea agreement, the applicant pled guilty to the crime of Battery of a Child, in violation of Florida Statute 784.085, which states that it "is unlawful for any person, except a child as defined in this section, to knowingly cause or attempt to cause a child to come into contact with blood, seminal fluid, or urine or feces by throwing, tossing, projecting, or expelling such fluid or material." He signed a waiver of rights agreeing, *inter alia*, that "there is a factual basis for the charges to which I am pleading guilty"; that even if the adjudication was withheld, a court could use the conviction against him in the future to enhance the another charge or increase a sentence; and that if he was sentenced to incarceration, he could be subject to involuntary civil commitment as a sexually violent predator. Pursuant to the agreement, the prosecutor declined to prosecute the remaining charge of contributing to the delinquency of a child.

In the video of applicant's plea, the prosecutor states that no sexual battery examination of the minor's body had been conducted and that the results of testing conducted on a pair of pants were pending. In addition, she stated that pursuant to the plea agreement, the applicant had stipulated that his act of battery had included an act of penetration. Following the applicant's plea, the judge found him guilty of the offense under Florida Statute 784.085 but then withheld the adjudication and required him to complete a five-year felony probationary period with the possibility of termination of the probation after three years or five years' incarceration if he violated the terms of his probation. The terms of his probation included successfully completing a sex offender treatment program; not having any unsupervised contact with minors except his own children; not working or volunteering at any place children congregate; submitting a DNA sample; submitting to random and warrantless searches; reporting to a probation officer as directed; not possessing, carrying, or owning a firearm or drugs unless prescribed by a physician; and not using intoxicants to excess.

***UCMJ Proceedings***

In the summer of 2016, the applicant submitted several requests to be retired, and was repeatedly advised that his request to retire could not be considered because of the pending UCMJ proceedings.

On December 15, 2016, PSC issued travel orders directing the applicant to report for duty on January 13, 2017, for disciplinary action.

On April 4, 2017, the applicant was charged with two other violations of the UCMJ. This fourth Charge Sheet states that he was informed of these charges the same day:

- **Article 133**, by "on or about 16 November 2014, conduct[ing] himself in a manner unbecoming an officer of the armed forces, to wit: by providing alcohol to [same initials as on

previous Charge Sheets], a minor under the legal age to consume alcohol in the State of Florida, and such conduct was unbecoming of an officer and gentleman."

- **Article 133**, by "on or about 16 November 2014, conduct[ing] himself in a manner unbecoming an officer of the armed forces, to wit: by engaging in a sexual act with [same initials], a minor under the age of 18, and such conduct was unbecoming of an officer and gentleman."

This Charge Sheet shows that the charges were referred for trial by general court-martial by the District Commander on July 25, 2017, and served on the applicant on August 17, 2017, but they were withdrawn and dismissed without prejudice by direction of the Convening Authority on October 6, 2017.

In a letter dated April 12, 2017, the applicant submitted a request for written transcripts of his court-martial dated January 3, 2017, pursuant to the Freedom of Information Act (FOIA). His request was acknowledged on May 12, 2017. On April 11, 2018, the applicant requested a copy of his personal FOIA log. The Coast Guard forwarded the log to him, and it shows that he had submitted seventeen FOIA requests since May 5, 2017, including a request for records relating to his "dismissal" dated September 3, 2016; his request for the transcript on April 12, 2017; and a request for all records pertaining to his court-martial on February 11, 2018.

On October 19, 2017, the applicant's attorney renewed a request to have the applicant retired due to physical disability. On November 7, 2017, the applicant submitted a CD of his medical records from the VA. He noted that the VA had found him to be 100% disabled.

***Third Disputed Page 7***

On October 25, 2017, the Assistant Chief of PSC's Reserve Policy Management Division (RPM) sent the applicant and his command an email with the third disputed Page 7 (summarized above) attached. He stated that the Seventh District Commander had dismissed the charges against the applicant without prejudice on October 6, 2017. The Assistant Chief had reviewed the applicant's record and determined that the attached Page 7 was "required to document the disposition of criminal charges against you in the State of Florida." He stated that once the Page 7 was entered in the applicant' record, he would complete the administrative review pursuant to the applicant's requests to transfer to retired status or to be medically retired.

This Page 7 states that it supplements the first disputed Page 7 and the May 31, 2015, OER. It documents the applicant's guilty plea in State court; notes that he pled guilty to violating Florida Statute 784.085 despite having claimed that he was innocent of the charges against him on his OER addendum; and turns the State's terms for the applicant's probation into direct military orders that he would have to obey while he remained a member of the Coast Guard Reserve.

***Resignation***

On August 22, 2018, the applicant submitted to RPM a memorandum with the subject line "Request for Retirement/Transfer to Retired Reserve in Lieu of Proposed Board of Inquiry

Action ICO [the applicant]." He stated that in April 2018, he had received the "Notification of Results of a Coast Guard Determination Board and Proposed Board of Inquiry Action," which would require him to show cause for retention in the Reserve.[10] (PSC's notification is not in the record before the BCMR.) The applicant wrote that on August 16, 2018, he was provided with a Determination Board's "finding, the basis for separation and disclosure of the evidence relevant to the subject matter." He requested voluntary retirement and transfer to RET-2 status in lieu of the BOI. He included a completed CG-2055A, "Reserve Retirement Transfer Request," in which he requested transfer to RET-2 status and retired pay prior to age 60 based on his time on active duty after 2008.[11]

On August 30, 2018, in a memorandum clarifying the prior notification of the BOI, CAPT W of RPM advised the applicant that the notification had incorrectly stated that the Determination Board had found that he should be required to show cause for retention on active duty, whereas he would actually be required to show cause for retention in the Reserve. CAPT W stated that he was placing the applicant's request to transfer to RET-2 status dated August 22, 2018, on hold, pending the outcome of the board proceedings. He stated that if the applicant was not retained in the Reserve pursuant to the BOI, he would not be entitled to RET-2 status or evaluation by a Medical Board. CAPT W stated that he would not approve the request to transfer to RET-2 status unless the BOI found that he had shown cause for retention or the Commandant retained him, but he would approve the applicant's request to resign in lieu of board action in accordance with Article 1.A.14.h.(4)(b) of the Military Separations Manual. He stated that if the applicant resigned, he would not be placed in RET-2 or processed for a disability separation because he would be separated for misconduct, but he would be eligible to receive retired pay upon attaining age 60 or before age 60 based on his qualifying active duty under 10 U.S.C. § 12731. CAPT W also noted that because the applicant was recovering from surgery at the time he was released from active duty in May 2016, he could apply for incapacitation benefits even if he resigned.

On September 4, 2018, the applicant submitted a memorandum to RPM with the subject line "Conditional Resignation in Lieu of Proposed Board of Inquiry Action ICO [Applicant], USCGR." He stated that in response to RPM's reply dated August 30, 2018, he was submitting his resignation in lieu of the BOI with the following conditions:

- The applicant would receive no lower than a general discharge under honorable conditions from the Coast Guard Reserve for the period May 17, 2016, to the present.

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[10] Article 1.A.14 f.(1) of the Military Separations Manual, COMDTINST M1000.4, states the following:

> At any time and place Commander (CG PSC) may convene a board of officers to review any Regular Coast Guard officer's record to decide whether the officer should be required to show cause for retention on active duty because:
> (a) The officer's performance of duty has declined below the prescribed standards; or
> (b) The officer has demonstrated moral or professional dereliction; or
> (c) Retention is clearly inconsistent with the interests of national security.

[11] 10 U.S.C. § 12731(f)(2))(A) states that "[i]n the case of a person who as a member of the Ready Reserve serves on active duty or performs active service described in subparagraph (B) after January 28, 2008, the eligibility age for purposes of subsection (a)(1) shall be reduced, subject to subparagraph (C), below 60 years of age by three months for each aggregate of 90 days on which such person serves on such active duty or performs such active service in any fiscal year after January 28, 2008, or in any two consecutive fiscal years after September 30, 2014. A day of duty may be included in only one aggregate of 90 days for purposes of this subparagraph."

- The applicant would waive his right to a BOI.
- The applicant would not be placed in the status of a reservist awaiting retirement at age 60 (RET-2), but he would be entitled to RET-1 status (retirement with pay) upon attaining age 60 and he would "remain eligible for reserve retirement benefits currently accrued." He noted that RPM's response had stated that "[r]esignation in lieu of board action will not affect your right to apply for and be placed in RET-1 (Retired Receiving Pay) … no matter the outcome of your BOI or action by the Commandant.
- The applicant would not be processed for a physical disability retirement, but he remained eligible to apply for incapacity pay for injuries sustained on active duty.
- His resignation would not forfeit or waive any challenge concerning his separation from active duty on May 16, 2016.

The applicant also acknowledged the following in his resignation request:

> I have consulted with my counsels and reviewed the case file, evidence and potential witnesses. The BOI process, procedures and standard of proof have been explained to me. I understand that by waiving the BOI, I will forfeit my right to challenge the allegations against me, per [the April 4, 2018, Notification of Results of a Coast Guard Determination Board and Proposed Board of Inquiry Action], before a board of officers who will make findings and recommendations concerning my continued service in the Coast Guard Reserve. I understand the consequences of this conditional resignation and waiver and I believe this submission is in my best interests. I further understand that any characterization of service less than an Honorable Discharge may negatively impact any final retirement pay determinations. I understand that a General (Under Honorable Conditions) Discharge may deprive me of some rights and privileges available to [honorably discharged] veterans under federal or state law and that I may encounter some prejudice in situations in which the characterization of service may have a bearing. I have consulted with my civilian attorney … and my military attorney … USN JAGC, on all matters related to the BOI and this conditional resignation and waiver and I am completely satisfied with their advice and representation. I freely and voluntarily submit this conditional resignation and waiver.

On September 11, 2018, CAPT W approved the applicant's resignation and directed that he receive a general (under honorable conditions) discharge as of September 14, 2018.

## VIEWS OF THE COAST GUARD

On August 13, 2018, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief and adopting the findings and analysis of the case provided in a memorandum signed by Commander, Personnel Service Center (PSC), who addressed the propriety of the primary disputed documents as follows:

- **First Disputed Page 7**: PSC stated that the accuracy of this Page 7, dated April 24, 2015, is supported by the fact that the applicant admitted to local authorities that he drank alcohol to the point of intoxication; admitted sharing six or seven bottles of wine with a 17-year-old babysitter, who had told him she was in high school; admitted that he had had sex with her that day; had sex with her that she could not remember consenting to; operated a boat while intoxicated with his children and the babysitter aboard; was absent

without authority for seven days while incarcerated; and threatened to use his position as an officer in the Coast Guard to discredit and silence the babysitter.

- **Second Disputed Page 7**: PSC stated that this Page 7, dated September 14, 2015, is presumptively correct and the applicant has not overcome the presumption of regularity. PSC noted that the applicant had offered two unsworn statements from members who were not present during and had no personal knowledge of the incident in the Exchange, and one of those members, LCDR L, is "suspected of falsifying leave records and committing perjury in order to cover up the applicant's misconduct."
- **Third Disputed Page 7**: PSC stated that this Page 7, dated October 25, 2017, properly documents the applicant's criminal conviction in Florida and that, pursuant to his plea agreement, the applicant had stipulated that there was a factual basis to support the charge of Battery of a Child under Florida law and that his act of battery had included an act of penetration.
- **Derogatory OER**: PSC stated that the misconduct documented in this OER, dated May 31, 2015, is supported by substantial evidence of record, including the probable cause affidavit dated December 22, 2014; the charges referred for trial by the State of Florida on February 9, 2015; the CGIS agent's application for search and seizure authorization dated April 27, 2015; the Page 7 dated April 24, 2015; and the CGIS report dated July 25, 2015.

Commander, PSC concluded that no relief should be granted because the record contains substantial evidence of egregious misconduct committed by the applicant and the "adverse administrative actions he experienced as a consequence of his misconduct were conducted in accordance with applicable law and service policy."

## APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

The applicant received an extension of the time to respond to the Coast Guard's advisory opinion in accordance with 33 C.F.R. §§ 52.26 and 52.42(d) and submitted his response on November 2, 2018.

The applicant argued that the Coast Guard had ignored his claims of error—claims that the disputed documents violate regulations—and merely repeated "untested allegations." He stated that by arguing that there is "substantial evidence" supporting the disputed documents, the Coast Guard avoided the issues. He alleged that every allegation in each of the disputed documents "must be supported by reliable evidence" and addressed them individually as follows:

- **First Disputed Page 7**: The applicant called this Page 7 a "laundry list of possible charges," which "remained inchoate and unproven." He argued that his "record should be expunged of any reference to anticipated charges that were not prosecuted." He argued that because he was not tried for any of the listed offenses, they should all be expunged. He also argued that this document is unjust because of the "unique procedural history" of his case and the "unlawful command influence" exerted against his witnesses, as discussed in his application. Regarding the charges listed on the Page 7, he stated the following:

Contrary to the advisory opinion, the applicant argued, there is no evidence that he was intoxicated on November 16, 2014. He noted that he was never charged with being drunk and disorderly. He stated that although Page 7s often address conduct that is not criminally prosecuted, given the Coast Guard's "predilection to charge [him] at every conceivable opportunity," its failure to charge him with an intoxication-related offense is significant. He argued that the "impairment" discussed in the Page 7 is mere speculation. Even if one were to assume *arguendo* that he was "impaired" at some point during the day, it does not prove that he drove a boat or car while intoxicated or endangered the minors in his care. He argued that when he consumed the alcohol, the amount and effect of the alcohol, and whether he drove a boat or car while impaired was all speculation. He stated that there is no evidence that he was impaired to the point of endangering the welfare of his children, and he was never charged with that offense.

The applicant also claimed that the evidence of record does not support any allegation of obstruction of justice. Moreover, he alleged, the babysitter repeatedly admitted to authorities that she had presented herself to the applicant and others as being 18 years old. He noted that the age of consent under the UCMJ is just 16 years old and complained that the Coast Guard tried to "avoid these salient facts by obfuscation, relying on the unsubstantiated hearsay claim that the purported victim told [him] that she was in high school" in prior conversations at the pizza parlor.

The applicant pointed out that he was not charged with rape by the State of Florida and the Coast Guard dropped that charge against him. Therefore, any claim that the alleged victim could not recall what happened or give consent due to intoxication is unsupported in the record. In addition, although the Page 7 states that he was AWOL while incarcerated, the Coast Guard later withdrew this charge.

- **Second Disputed Page 7**: The applicant complained that the Coast Guard's advisory opinion ignored his factual and legal objections to this Page 7 and simply relied on the presumption of regularity without offering any evidence to support the allegations against him. He pointed out that even though the Coast Guard submitted no evidence regarding this Page 7, it criticized his evidence because his witnesses did not witness the alleged incident and submitted unsworn statements. The applicant argued that because the alleged incident never happened, there can be no witnesses since it was a "non-event." Moreover, he noted, both of his witnesses stated that they were in a position to know if such an incident had occurred and denied hearing about it. He stated, "sworn or unsworn, [his] evidence is monumental, overwhelming and uncontroverted."

  In response to the Coast Guard's point that one of the applicant's witnesses, LCDR L, was suspected of perjury and falsifying records, the applicant pointed out that it was LCDR L who drafted this disputed Page 7 "and upon whom the agency seeks to advance the 'presumption of regularity' defense." He called this argument a "logical fallacy." He argued that if LCDR L's statement on his behalf cannot be trusted, then neither can the Page 7, which LCDR L drafted.

  The applicant also argued that the Coast Guard's reliance on the presumption of regularity is misplaced because that presumption "only applies in the absence of other contrary evidence." He argued that because there is no evidence supporting this Page 7

and he has submitted two statements supporting his claims, the presumption of regularity cannot apply.

The applicant also argued that this Page 7 is unjust because he was not informed of the allegations until he received the Page 7, he was not allowed to submit evidence to rebut the allegations, and the Coast Guard failed to interview witnesses he identified or secure the videotape of the incident.

- **Third Disputed Page 7**: The applicant complained that the Coast Guard failed to address his allegations of error and injustice about this Page 7. He also claimed that "the crime alleged is not and was not a crime that involved penetration. [He] knows of no admission associated with the Batter of a Child issue in which he admits to penetration."

- **Derogatory OER**: The applicant pointed out that LCDR L drafted and signed this OER as his supervisor, so if the Board distrusts his testimony, this OER is inherently unreliable and the presumption of regularity does not apply.

## FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter under 10 U.S.C. § 1552. The application was timely filed within three years of his separation from active duty.[12]

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.[13]

3. The applicant alleged that three Page 7s and his OERs since May 2015, are erroneous and unjust. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information 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.[14] In addition, absent specific evidence to the contrary, the Board presumes that the members of an applicant's rating chain have acted "correctly, lawfully, and in good faith" in preparing their evaluations.[15] To be entitled to relief, the applicant cannot "merely allege or prove that an [OER] seems inaccurate, incomplete or subjective in some sense," but must prove that the disputed OER was adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a

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[12] *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that, under § 205 of the Soldiers' and Sailors' Civil Relief Act of 1940, the BCMR's three-year limitations period under 10 U.S.C. § 1552(b) is tolled during a member's active duty service).

[13] *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).

[14] 33 C.F.R. § 52.24(b).

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

statute or regulation.[16] The applicant argued that the Board should not accord the presumption of regularity in evaluating these documents because his command exercised "unlawful command influence" over his court-martial proceedings by investigating LCDR L's testimony at the Article 32 hearing. The Board finds, however, that the command's decision to investigate LCDR L's implausible testimony at the Article 32 hearing was not unreasonable, especially since his testimony at the hearing could have been entered into evidence at the applicant's trial. The Board finds no grounds not to apply the lawful presumptions and burden of proof.

4. **First Disputed Page 7**: The Board finds that the applicant has not proven by a preponderance of the evidence that this Page 7 ("Administrative Remarks"), dated April 24, 2015, is erroneous or unjust. The Page 7 documents his incurrence of an alcohol incident on November 16, 2014, as required by Article 2.B.7. of COMDTINST M1000.10. A Page 7 documenting an alcohol incident must "describe what happened," including pertinent information such as the time and place and whether the member was arrested, to show how the member's conduct constituted an alcohol incident.[17] An "alcohol incident" is "[a]ny behavior, in which alcohol is determined, by the commanding officer, to be a significant or causative factor that results in the member's loss of ability to perform assigned duties, brings discredit upon the Uniformed Services, or is a violation of the Uniform Code of Military Justice, Federal, State, or local laws. The member need not be found guilty at court-martial, in a civilian court, or be awarded non-judicial punishment for the behavior to be considered an alcohol incident."[18] The Page 7 dated April 24, 2015, explains how the applicant's conduct met this definition because it states that the command had determined that the applicant's abuse of alcohol and intoxication had been a significant or causative factor in both bringing discredit on the Coast Guard and violating the UCMJ and Florida State law. Although the applicant complained that the record does not support the description and that the description is unjust because it lists charges he was never convicted of, the Board disagrees for these reasons:

a. The detective's report shows that the applicant admitted in a recorded phone conversation that had shared six or seven bottles of wine with a minor and become intoxicated on November 16, 2014, and that afternoon he committed Battery of a Child, in violation of Florida Statute 784.085.

b. The applicant was initially arrested and charged by State officials with violations of two Florida Statutes, which was also discrediting to the Coast Guard. Therefore, the statements on the Page 7 that he was arrested and charged with these violations are factual. The fact that he was later found guilty of violating a different Florida Statute for his conduct on November 16, 2014, does not render the factual statements on this Page 7 erroneous or unjust. As the definition of "alcohol incident" indicates, the applicant did not have to "be found guilty at court-martial, in a civilian court, or be awarded non-judicial punishment for [his] behavior to be considered an alcohol incident."[19] These statements are factual and not unjust given the information in the detective's report that

[16] *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), *cited in Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).
[17] PPCINST M1000.2, Enclosure 6.
[18] COMDTINST M1000.10, Article 1.A.2.d.
[19] COMDTINST M1000.10, Article 1.A.2.d.

the applicant admitted in recorded telephone calls that he had shared six or seven bottles of wine with the babysitter and engaged in sexual intercourse with her.

c. The record contains sufficient evidence to support the command's finding by a preponderance of the evidence that the applicant had been absent without leave during the week he was incarcerated, in violation of UCMJ Article 92. Despite the upcoming holidays when people often want to take leave at the same time, the applicant had no approved leave request in Direct Access for that period as required by policy.[20] Although as soon as the applicant was released from jail, LCDR L submitted a request to have the applicant authorized leave retroactively for the eighteen days from December 23, 2014, to January 9, 2015, LCDR L's actions and claims are not persuasive given the Coast Guard's leave policy. The fact that the applicant was never convicted of this offense does not render the Page 7 dated April 24, 2015, erroneous or unjust.[21]

d. Given the nature of the Florida Statute to which the applicant pled guilty and the detective's report, the record contains ample evidence to support the command's finding by a preponderance of the evidence that the applicant had committed conduct unbecoming an officer in violation of UCMJ Article 133. The fact that the applicant was never convicted of this offense does not render this Page 7 erroneous or unjust.[22]

e. The record contains sufficient evidence to support the command's finding by a preponderance of the evidence that the applicant had attempted to obstruct justice, in violation of UCMJ Article 134, by repeatedly contacting the babysitter—a minor—to try to convince her not to report that they had become intoxicated and engaged in sexual intercourse. The detective reported that "[d]uring several recorded controlled phone calls with [the babysitter], [the applicant] made admissions to engaging in sexual intercourse with her. He stated they had consumed seven bottles of wine together and they both were intoxicated. … [He] pled with [her] to not tell anyone what happened and, due to his position with the Coast Guard, an investigation into this matter would result in national coverage and they both would be 'in the news'." The fact that the applicant was never convicted of this offense does not render this Page 7 erroneous or unjust.[23]

f. In light of the evidence that the applicant admitted to having shared six or seven bottles of wine with the babysitter and to having become intoxicated, as well as her statements to the detective about having drunk wine while on the boat and before the applicant drove them back to his house, the Board finds that the command committed no error or injustice in stating that the applicant had "[d]uring this time operated both your boat and your personally owned vehicle with your minor children present," "endangered the lives of the children," and "created an unsafe environment for everyone involved" that day.

g. The fact that there is no Page 7 documenting the results of alcohol screening after the alcohol incident in the applicant's record, pursuant to Article 2.B.5. of COMDTINST M1000.10, does not invalidate the applicant's "alcohol incident." Nothing in that manual states or even suggests that if the command fails to refer a member for alcohol screening

[20] PPCINST M1000.2, Article 5.D.1.; COMDTINST M1000.8, Article 2.A.5.b.
[21] COMDTINST M1000.10, Article 1.A.2.d.
[22] COMDTINST M1000.10, Article 1.A.2.d.
[23] COMDTINST M1000.10, Article 1.A.2.d.

and document the results on a second Page 7, the alcohol incident is rendered invalid or removed from the member's record.

5. **Second Disputed Page 7**: The Board finds that the applicant has not proven by a preponderance of the evidence that the second disputed Page 7 ("Administrative Remarks"), dated September 14, 2015, is erroneous or unjust for the following reasons:

a. Coast Guard policy allows members to be notified of important information or counseled regarding poor performance or conduct on a Page 7.[24] The "General-Negative" Page 7 dated September 14, 2015, counsels the applicant that his conduct in the Exchange on August 18, 2015, had been inappropriate. It also officially notified him of significant new restrictions: "[F]rom this point forward, you shall limit your interactions during the duty day with personnel on matters pertaining to official business only," "refrain from any contact with [the YN1]," and "not participate in any working groups, formal presentations, or TDY travel until your case has been resolved." The applicant has not proven by a preponderance of evidence that his command's motivation in directing LCDR L to draft this Page 7 was gratuitous or vindictive.

b. The applicant proclaimed his innocence of the alleged inappropriate conduct and submitted statements from two officers who were not actually present at the Exchange at the time but claim that they would have heard if such an incident had occurred, that they did not hear about the incident at the time, and that they did not notice any tension or reticence between the YN1 and the applicant following the alleged incident. The applicant also claimed that because the dress code for the conference was "business casual," the back of the YN1's shoulder would not have been bare. However, it was August and the participants were on break and apparently had to walk outside quite a distance to reach the Exchange. Therefore, it is not unlikely that the YN1 might have worn a sleeveless blouse and/or removed a covering shirt or jacket for the trip to the Exchange and thus bared her shoulders. In addition, LCDR L's statement shows that the YN1's supervisor, LT S, also attended the conference and that it was LT S who actually sent the email with the complaint. LT S wrote that the YN1's body language and reaction had "clearly conveyed her displeasure." Therefore, the Page 7 itself indicates that the command had the witness statement of the YN1's supervisor to rely on, as well as the YN1's. Given that neither of the applicant's witnesses were at the Exchange at the time, the Board finds that he has not proven by a preponderance of the evidence that the Page 7 is inaccurate.

c. The applicant denied the incident but claimed that if it occurred, it was unintentional and harmless and the YN1 could not have known because her back was turned. He also argued that even if the incident had occurred as described, it would not warrant a Page 7. As noted above, however, the Page 7 indicates that the YN1's supervisor was present to witness her body language and reaction. LT S may well have witnessed the applicant's movements before his cold drink touched the YN1's bare shoulder, and both LT S and the YN1 presumably witnessed the applicant's response after the touch and concluded that it was intentional. Given the great difference in rank between the YN1 and the applicant and the fact that they were barely acquainted, the Board finds that the applicant has not proven by a preponderance of the evidence that the Page 7 dated September 14,

[24] PPCINST M1000.2, Enclosure 6.

2015, was unwarranted, particularly because the description of the incident provides at least a partial explanation for the new restrictions imposed in the second paragraph of the Page 7.

d. The applicant argued that he was denied due process because there was no documented investigation; the command did not seek to review any videotapes of the incident that the Exchange might have possessed; and he received no prior notice of the complaint or opportunity to refute the allegations in the Page 7 dated September 14, 2015. The Board knows of no requirement that a command convene an investigation, question every possible witness, question the member, or review videotapes before documenting inappropriate conduct and new restrictions on a Page 7. Moreover, the applicant could have promptly appealed the Page 7 through his chain of command[25] and/or the PRRB. The Board finds that the applicant has not proven by a preponderance of the evidence that he was denied due process with respect to this Page 7.

e. The applicant argued that if the Board finds that LCDR L's testimony is unreliable and does not prove that the first disputed Page 7 should not have accused him of being absent without leave, then the Page 7 dated September 14, 2015, should be removed because LCDR L drafted it. According to LCDR L's statement on behalf of the applicant, however, the Division Chief, CAPT U, forwarded LT S's emailed complaint to LCDR L about a week after the conference ended and directed LCDR L to draft the Page 7. Therefore, CAPT U must have reviewed and known the allegations in the email. And even though LCDR L expressed concerns about the Page 7 when he sent his draft to CAPT U, CAPT U signed the Page 7 for entry in the applicant's record. Therefore, the fact that LCDR L's testimony at the Article 32 hearing does not persuade the Board that his command erred in finding that the applicant had been absent without leave does not persuade the Board that the information on this second Page 7 is unreliable or inaccurate.

6. **Third Disputed Page 7**: The Board finds that the applicant has not proven by a preponderance of the evidence that this third disputed Page 7 ("Administrative Remarks"), dated October 25, 2017, is erroneous or unjust for the following reasons:

a. The applicant complained that this third Page 7 states that it "supplements" the first disputed Page 7, dated April 24, 2015, because, he alleged, the word "supplements" suggests that he was guilty of the charges on the first disputed Page 7. However, the first Page 7 clearly states that the applicant was arrested and charged with two violations of Florida Statutes, and this third Page 7 clearly states the crime he pled guilty to. The word "supplements" here does not cause any confusion as the applicant alleged. And although

[25] Article 7.B.1. of COMDTINST 1070.1 states the following regarding appealing Page 7s and other record entries:
> If a member believes a personnel record entry is unfair, an appeal through the member's chain of command usually is the simplest and fastest means for seeking correction or deletion of the entry. The level in the chain of command to which the appeal should be directed is dependent upon all of the circumstances. As an example, for a member who receives an Administrative Remarks, Form CG-3307, entry from his or her division chief documenting purported substandard watchstanding, an appeal through the division chief and the executive officer to the commanding officer should suffice. (This appeal may be in the form of a so-called "Request Mast" pursuant to Article 9-2-3 of [COMDTINST M555.3].

the applicant alleged that a "lack of specificity" in the third Page leaves a reader merely "to assume that the same victims and events are involved in the two page 7s," the Board finds that the word "supplements" clearly ties the two Page 7s together so that the reader knows that the third Page 7 documents the outcome of the arrest and initial charges documented in the first Page 7.

b. The applicant argued that the word "nevertheless" on this Page 7 unjustly implies that he lied when he proclaimed his innocence of the charges. The Page 7 notes that he had proclaimed his innocence in his addendum to the derogatory OER but "[n]evertheless, on 10 Jun 2016, you pled guilty to the crime of Battery of a Child, in violation of Florida Statute 784.085." In his addendum to the OER, dated September 17, 2015, the applicant wrote that he maintained his innocence of the charges against him, and one of the charges against him at the time was a violation of Florida Statute 784.085. An Assistant State Attorney had referred that charge for trial on February 9, 2015, and that was the charge to which the applicant pled guilty on June 10, 2016. Therefore, to the extent that the word "nevertheless" on this third Page 7 implies that the applicant lied on his OER addendum, his guilty plea (and other evidence of record) fully supports that implication.

c. Although the applicant alleged that this third Page 7 was improper because Chapter 10.B.8. of PPCINST M1000.2 states that civil convictions are reported on a form CG-5588, Chapter 10.B.8. concerns reporting an arrest or conviction to the Coast Guard Security Center for its security clearance program. Form CG-5588 is titled "Personnel Security Action Request" and is used to request investigations, to start and end a member's access to types of information, and to request particular levels of security clearance. The CG-5588 is not a form for counseling a member or documenting significant information in a member's record.

d. Nothing in Chapter 10.B.8. of PPCINST M1000.2 prohibits a command from counseling a member on a "General-Negative" Page 7 about a criminal conviction, about including a claim of innocence in his OER addendum that contradicted his guilty plea, or about the probationary requirements that he was required to comply with while a member of the Coast Guard Reserve. This Page 7 turns the State's terms for the applicant's probation into military orders and thus put him on notice that a violation of the terms of his probation would also be a violation of a direct military order while he remained a member of the Reserve, which he did until September 14, 2018. This Page 7 is sufficiently specific about the applicant's crime, guilty plea, and probationary terms to meet the requirements for a "General-Negative" Page 7 in Enclosure 6 to PPCINST M1000.2. The fact that this Page 7 does not mention that, although the judge found him to be guilty, the conviction is a "withheld adjudication" that will be negated in a few years if he meets the terms of his probation does not render this Page 7 erroneous or unjust. And even if it did, the appropriate correction would be to add the fact that it was a "withheld adjudication" to the Page 7, not to remove the Page 7 from the applicant's record.

e. The applicant alleged that the date and timing of this Page 7—October 25, 2017, soon after the final UCMJ charges were withdrawn and dismissed without prejudice—shows that it was prepared vindictively because the charges had been dismissed. He noted that he had pled guilty in civil court on June 10, 2016, more than a year earlier. However, this Page 7 documents the disposition of the criminal proceedings against the applicant, and his command could not know what the disposition would be until the Convening Author-

ity dismissed the final charges. The date and timing of this Page 7 do not persuade the Board that the command prepared it vindictively.

7. **Derogatory Annual OER**: The Board finds that the applicant has not proven by a preponderance of the evidence that the derogatory OER, dated May 31, 2015, should be removed from his record for the following reasons:

a. The applicant argued that the derogatory OER is erroneous and unjust because the underlying allegations of misconduct had not been proven in a court of law and all but one of the charges against him were withdrawn and/or dismissed. But the OER Manual and Officer Manual (PSCINST M1611.1A and COMDTINST M1000.3A, respectively) do not prohibit a rating chain from basing their numerical marks and comments in an OER on misconduct that has not been proven beyond a reasonable doubt in a court of law. As noted in the findings above, the preponderance of the evidence—particularly the detective's report about what the applicant admitted during his recorded telephone calls with the babysitter—supports the misconduct evaluated and commented on in the derogatory OER, and the applicant has not proven by a preponderance of the evidence that any of those marks or comments are inaccurate. He has not shown that the OER Reviewer failed to ensure that the derogatory information in the OER was substantiated, as he alleged. Coast Guard policy prohibited the rating chain from mentioning that his conduct was the subject of a judicial, administrative, or investigative proceeding, and they did not do so, but they were allowed to comment "on the conduct that [was] the subject of the proceeding."[26]

b. The applicant argued that this derogatory OER is erroneous and unjust because he was facing criminal charges about the same incident referred to in the OER and so any statements he made in his addendum could have been used against him in court, which presented him with a "Hobson's Choice" of not defending his performance in the addendum or waiving his right not to self-incriminate. Thus, he argued, he was denied due process because he could not substantively address the comments in the OER in his addendum. Because the applicant was on active duty, however, his rating chain was required to prepare a substantive annual OER for him dated May 31, 2015.[27] The OER had to reflect their assessment of his actual performance in each of the performance categories during the reporting period and include a comment supporting each of those numerical marks.[28] The applicant's conduct on November 16, 2014, warranted very low marks in several of the performance categories—given the prescribed performance standards for the marks in those categories—and the rating chain was required to include comments to justify the low marks. The OER comments show that the rating chain avoided making any specific comments about the applicant's sexual misconduct and commented primarily on how his work performance had been negatively affected by his off-duty "personal conduct" and distraction. His sexual misconduct with a minor and providing alcohol to a minor in violation of State law—the specific allegations underlying the charges against him—are never mentioned. Instead, his rating chain used the terms "personal conduct," "poor judgment," "off-duty actions," "behavior inconsistent with our service culture," "irresponsible actions," and "actions [that are] abhorrent to our core values." And the only OER comments that allege

[26] COMDTINST M1000.3, Article 5.A.7 f.(1).
[27] COMDTINST M1000.3, Article 5.A.3.
[28] COMDTINST M1000.3, Article 5.A.7 h.

criminal behavior state that he had driven his vehicle and vessel while intoxicated, thereby placing his children at risk, but he was not facing either DWI or child endangerment charges. The applicant could have refused to comment, or he could have submitted an addendum with his own assessment of his job performance and potential as an officer that contradicted his rating chain's assessment that his job performance and potential as an officer had been severely diminished by his "off-duty actions." Instead, he opted to submit an addendum in which he mentioned that there were charges against him and objected to having his misconduct and resulting poor performance evaluated in the OER. The Board finds that the applicant has not proven by a preponderance of the evidence that the derogatory OER is erroneous or unjust just because he was facing criminal charges when he had the opportunity to comment on the OER in an addendum.

c. The applicant alleged that the OER is erroneous because it was not submitted to PSC within 45 days of the end of the reporting period, in accordance with Article 2.A.2. of the OER Manual. The Board has long held, however, that lateness *per se* does not justify removing an otherwise valid evaluation.[29] The applicant has not shown that the delay harmed him in any way, and so the Board considers it harmless error.[30]

d. The applicant alleged that the derogatory OER is erroneous and unjust because he did not receive mandatory mid-term counseling. The applicant cited Article 3.A.2. of the current OER Manual for the alleged requirement, but the reporting period of the OER ran from June 1, 2014, to May 31, 2015, and the mandatory mid-term counseling requirement did not appear in the OER Manual in effect during that reporting period. The mandatory mid-term counseling requirement went into effect with the issuance of the OER Manual denoted as PSCINST M1611.1C, which was issued on December 7, 2016. Prior versions of this manual required mid-term counseling only for ensigns and lieutenants (junior grade)—not for lieutenants such as the applicant.[31] During the rating period, Article 5.A.1.c(1)(d) of the Officer Manual, COMDTINST M1000.3, encouraged "performance feedback," which "occurs whenever a subordinate receives advice or observations related to their performance in any evaluation area."

e. The applicant argued that the derogatory OER should be removed because block 2 of the OER, which is where an officer's primary and collateral duties are listed, does not include the sentence, "Per Article 5.A.7.c. of M1000.3 (series), this OER is a Derogatory report," as required by Article 5.A.2. of the OER Manual. The applicant has not shown how the omission of this sentence harmed him, however, and in fact the omission benefits him, if it has any effect, because without that sentence, the first page of the OER does not reveal that the OER is derogatory. Omission of the sentence would only have prejudiced the applicant if he had not known that the OER was officially "derogatory" and so had not been aware that he was entitled to submit an addendum responding to the OER. But the applicant submitted an addendum, and so the preponderance of the evidence shows that the omission of the sentence was and remains a harmless error. Even if it were not harmless, correction of this error would involve inserting the sentence into block 2, not

[29] *See, e.g.*, CGBCMR Docket Nos. 2016-211, 2015-159, 2012-073, 2010-141, 2005-053, 2003-110; 2002-015; 43-98; 183-95 (Concurring Decision of the Deputy General Counsel Acting Under Delegated Authority); and 475-86.
[30] *See Hary v. United States*, 618 F.2d 704, 707-09 (Ct. Cl. 1980) (finding that the plaintiff had to show that the proven error "substantially affected the decision to separate him" because "harmless error … will not warrant judicial relief.").
[31] PSCINST M1611.1A, Article 1.A.

removing the OER. Because the applicant did not ask the Board to correct this error by inserting the missing sentence in block 2, the Board will not direct this correction.

f. The applicant has not proven by a preponderance of the evidence that the derogatory OER is adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation.[32] The Board finds no basis to amend or remove this OER from his record.

8. **Continuity OERs**: The applicant's record contains Continuity OERs, with no numerical marks or supporting comments, covering the period June 1, 2015, to May 16, 2016, when he was released from active duty into the IRR, and subsequent periods when he was in the IRR. Continuity OERs are authorized when an officer is in the IRR or when an officer is separating from active duty and concurs in the decision to complete a Continuity OER instead of a substantive OER.[33] It is not clear whether the applicant concurred with the decision to prepare the Continuity OER dated May 16, 2016, but Continuity OERs are also authorized when a substantive OER is "impractical, impossible to obtain, or does not meet OES goals."[34] The applicant's command reasonably could have relied on this policy when preparing the Continuity OER dated May 16, 2016, because the applicant had been on leave and convalescent leave for much of that year and had not been working for several months. In addition, he had zero chance of being promoted or reassigned to another active duty or Reserve billet and so a substantive OER would not have served the purposes of the Officer Evaluation System. And although the applicant alleged that one of the Continuity OERs he received in the IRR erroneously states that he concurred in the decision to have a Continuity OER, the Board finds no reason to remove or correct any of these Continuity OERs because all of an officer's commissioned service must be covered by an OER, and so any gaps in an officer's record are filled with Continuity OERs.[35] Therefore, when the Board removes an erroneous OER, that OER is replaced with a Continuity OER. There is no purpose in removing one or more of the applicant's Continuity OERs only to replace them with substitute Continuity OERs, especially when the applicant has not shown how he is harmed by them. In addition, assuming *arguendo* that he did not agree with the Coast Guard's decision to follow its policy of preparing Continuity OERs for officers in the IRR, he has not shown how he has been harmed by the statement that he concurred.

9. The applicant made numerous allegations with respect to the actions and attitudes of his rating chain, command, and other Coast Guard officers. Those allegations not specifically addressed above are considered to be unsupported by substantial evidence sufficient to overcome the presumption of regularity and/or are not dispositive of the case.[36]

10. The applicant has not proven by a preponderance of the evidence that any of the disputed Pages 7 and OERs should be removed from his record or amended because of a prejudicial error or injustice. His requests for relief should be denied.

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[32] *Hary*, 618 F.2d at 708.
[33] PSCINST M1611.1, Article 9.A.
[34] *Id.*
[35] *Id.* at Article 9.B.1.
[36] 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 LT [redacted], USCGR, for correction of his military record is denied.

February 15, 2019

[redacted]