DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2020-061

[redacted]

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on January 6, 2020, and assigned the case to the staff attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision dated January 27, 2023, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant, a Lieutenant (LT/O-3) on active duty, asked the Board to correct his record by promoting him to Lieutenant (O-3) and increasing his numerical mark for "Judgment" from a low mark of 3 to a standard mark of 4 on his Officer Evaluation Report (OER) for the rating period December 11, 2017, through May 14, 2018. The applicant further requested that the comment, "Lapse in judgment on port call created fraternizing environment & accidental injury to junior crew," be removed from his OER.

SUMMARY OF THE RECORD

The applicant graduated from the Coast Guard Academy and was commissioned an ensign on May 18, 2016.

On June 20, 2016, the applicant reported for duty aboard a cutter as a student engineer. On November 18, 2017, he was promoted to Lieutenant Junior Grade (LTJG/O-2). On January 9, 2018, during a port call, the applicant and several other service members rented a condo. While staying at the condo, an enlisted member became so intoxicated that he fell from the edge of an infinity pool and suffered serious injuries.

An investigation into the January 9, 2018, incident was conducted and on January 12, 2018, the Preliminary Investigating Officer (PIO) submitted his Investigative Report, wherein he stated

that four LTJGs, including the applicant, and two ensigns had rented a condo together. On the morning of January 9, 2018, ENS T had invited several enlisted members over to the condo to "hang out and relax with some food and drinks." After the enlisted members arrived at the condo, ENS T asked the applicant if it was okay that he invited the others to come over, to which the applicant replied that he was okay with it. According to the interviews conducted, none of the other LTJGs were informed that enlisted members would be coming to the condo. The PIO found that all the invited members arrived at the condo sober and were on authorized liberty. The members consumed food and drank beer, mixed drinks, and shots of vodka while at the condo. The PIO further found that other than LTJG G, all those at the condo consumed a moderate, but not an excessive amount of alcohol. During this time, multiple individuals took turns sitting on the edge of the infinity pool, when one of the enlisted members, MK2 P, fell off the side of the pool, which was a drop of approximately 20 to 25 feet. After MK2 P fell, the applicant notified his cutter's command of what had taken place. The PIO found that no one at the condo was forced to drink alcohol and that all drinks were consumed voluntarily without peer pressure. However, the Executive Officer of the cutter stated that the property manager reported that the occupants of the condo had been drinking "heavily" and that three doctors at the hospital had reported that the injured member was "severely intoxicated." Based on the evidence gathered, the PIO provided the following opinions and recommendations in pertinent part:

OPINIONS

1. Alcohol was a causative factor in MK2 [P]'s injury, which would make the event an alcohol incident. While sitting on the ledge was inherently dangerous. the coordination required to do so while intoxicated made the event considerably more dangerous, and led to him losing his balance, slipping, and falling over the edge. [Facts 19. 20, 26, 30, 37, 40-42]

2. I do not believe there is evidence to support an Article 134, disorderly conduct and drunkenness charge for MK2 [P]. He did not act in a manner to bring discredit to the service and the spirit of the Article does not fit the actions of MK2. He harmed nobody but himself, and did not make a scene in a public area. [Facts 19, 20, 31]

3. Due to the quick response by the other crewmembers at the condo. MK2 [P] received immediate initial actions, including stabilizing his head and neck to prevent further injury, potentially saving him from significantly more grievous injury. [Facts 21-25, 29]

4. All the Junior Officers at the condo showed poor judgment by spending their liberty time with some of the more junior petty officers in the engineering shop, specifically ENS [T] and LTjg [applicant], who were the primary drivers in inviting them over; and the fact that once there, no officers expressed concern over the events going on, or took action to step in and express reasonable concerns. ENS [T] likely learned the overly friendly behavior from his immediate superior in LTjg [applicant]. Additionally, as the leading people there the JOs did not take into account the safety of everyone and show a sufficient level of responsibility. [Facts 5-8, 40]

5. I believe all members should have been more prudent and acknowledged the dangers of trying to lift themselves onto the edge of the pool, knowing there was an approximately 20-25ft fall on the other side. [Facts 15, 20]

6. While alcohol was involved in causing the fall, I believe the fall was a true accident and no fault lies on anyone at the condo. [Facts 19, 20]

7. Based on the available information, the injury falls under a line of duty injury and not caused due to misconduct. A misconduct characterization requires clear gross negligence, which was not demonstrated by

this incident. Sitting on the wall may be simple negligence, as there was an inherent risk of danger, but other people were successfully getting up onto the wall safely. Additionally, being intoxicated in and of itself does not create a misconduct situation. [Facts 19, 20,34-36]

8. With the nature of the information, I do not believe there is evidence of Article 134, Fraternization[1] between the JOs and the enlisted that were present. While the get-together is borderline crossing the professional and personal relationship boundary, this incident does not constitute a fraternization case. [Facts 6, 32, 33]

RECOMMENDATIONS

1. I recommend that MK2 [P] receive an alcohol incident for the actions leading up to his fall and injury. Alcohol was clearly a causative factor, directly leading to the poor decision to attempt to sit on the ledge while intoxicated. [Opinion 1, 5]

2. I recommend that all of the JOs have a sit-down discussion with either the Chiefs or Command about the necessity of keeping personal and professional relationships separated. [Opinion 3. 7]

3. I recommend all the JOs receive Administrative Letters of Censure for their action or inaction leading up to MK2's injury. [Opinions 4, 5]

4. As the primary drivers in getting the enlisted to the condo, I believe ENS [T] and LTjg [applicant] require extra attention; a reevaluation should be made of the command recommendation for flight school for LTjg [applicant], and proper adjustments to ENS [T]'s OER should reflect the poor judgment and decision making shown. [Opinion 4]

On January 19, 2018, the applicant received a negative CG-3307 ("Page 7") wherein he received an alcohol incident for his actions on January 9, 2018.

On April 30, 2018, the applicant applied to the Personnel Records Review Board (PRRB) to have the January 19, 2018, negative Page 7 removed from his record. The applicant argued that the January 19, 2018, negative Page 7 did not meet the requirements of an alcohol incident under the Coast Guard Drug and Alcohol Abuse Program, COMDTINST M1000.10. Specifically, the applicant disputed the claim that he abused alcohol and that his abuse of alcohol led to another service member's injuries. After reviewing the applicant's Personnel Data Record (PDR), the PRRB found that the applicant had no other Page 7s for alcohol related issues and that there was no other documentation to indicate that the applicant had any issues with alcohol. Ultimately the PRRB found that under Article 1.A.2.d. of the COMDTINST M1000.10, the applicant's behavior did not constitute an alcohol incident, and as such, the January 19, 2018, negative Page 7 was erroneous. The PRRB granted the applicant's request to have the negative Page 7 removed from his PDR. Of important note, the PRRB stated the following:

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[1] Fraternization is a violation of Article 134 of the Uniform Code of Military Justice. The Manual for Courts-Martial United States, Part IV-133, paragraph 83, lists the following elements of the offense of fraternization:

(1) That the accused was a commissioned or warrant officer;
(2) That the accused fraternized on terms of military equality with one or more certain enlisted member(s) in a certain manner;
(3) That the accused then knew the person(s) to be (an) enlisted member(s);
(4) That such fraternization violated the custom of the accused's service that officers shall not fraternize with enlisted members on terms of military equality; and
(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

> While the board does not feel that Applicant's actions constituted an alcohol incident, poor judgment was exercised by the junior officers, including Applicant, in socializing with the junior enlisted crewmembers and that this situation could have been better documented in a letter of censure, as recommended in the formal unit investigation, or through documentation in the Applicant's OER for that period.

On September 20, 2018, the applicant's command finalized the applicant's OER for the rating period of December 11, 2017, through May 14, 2018. Within this OER, the applicant received three 7s, nine 6s, four 5s, one 4, and one 3 for "Judgment." The applicant's supervisor supported the mark of 3, with the following comment: "Lapse in judgment on port call created fraternizing environment & accidental injury to junior crew." On the Comparison Scale, the applicant received the middle mark in the fourth spot denoting for "One of many high performing officers who form the majority of this grade."

On September 16, 2019, the applicant was passed over for promotion to Lieutenant, but he was selected for promotion the following year and is now serving as a Lieutenant.

APPLICANT'S ALLEGATIONS

The applicant alleged that the OER comment claiming that he had created an environment of fraternization that caused the injury to a junior enlisted member is erroneous and unjust. According to the applicant, under Article 2.A.4.a. of the Discipline and Conduct Manual, COMDTINST M1600.2,[2] his actions did not meet the definition of fraternization, and as such, the term "fraternizing environment" should not be included in his OER.

The applicant alleged that he was not partial toward any one group of people who visited his jointly rented condo on January 9, 2018. The applicant claimed that although he was aware that another junior officer had invited enlisted members to the condo, at no time did he personally invite or have any involvement in planning for others to visit the condo. In addition, the applicant claimed that there was no intent to provide special consideration or privilege to any one particular group of enlisted members. The applicant stated that during the enlisted member's time at his condo, he had a professional conversation with one enlisted member that focused on the Coast Guard and the enlisted member's family.

The applicant further alleged that no facts were found in the investigation that supported an accusation that his judgment or fraternization directly resulted in the enlisted crewmember's injuries. According to the applicant, the enlisted crewmember's injuries were "simply an unfortunate event."

The applicant explained that prior to departing on liberty on January 7, 2018, the crew

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[2] Article 2.A.4.a. of the Discipline and Conduct Manual, COMDTINST M1600.2, lists the same five elements of "fraternization" provided in the Manual for Courts-Martial United States: (1) The accused is a commissioned or warrant officer; (2) The accused officer fraternized on terms of military equality with one or more enlisted members in a certain manner; (3) The accused knew the person to be an enlisted member; (4) The association violated the custom of the Service that officers shall not fraternize with enlisted members on terms of military equality; and (5) That, under the circumstances, the conduct of the member was prejudicial to good order and discipline in the Armed Forces, or was of a nature to bring discredit upon the Armed Forces.

received a port brief, which included directions on responsible alcohol use and restrictions on renting hotels/condos. The applicant stated that the only discussion that the port brief provided about officers and enlisted members socializing on liberty was that neither faction were permitted to rent or lease condos together. The applicant alleged that at no time did he or the other junior officers lease or rent a hotel/condo together with enlisted crewmembers. The applicant further alleged that at no point before or after the January 9, 2018, incident was he counseled for having an inappropriate or unprofessional relationship with an enlisted member.

The applicant stated that immediately after the accident he notified his command and acted as the primary point of contact between his cutter and the husbanding agency over the phone to coordinate the ambulance's arrival time to the condo. The applicant alleged that using good judgment, he stayed on scene, assisted the EMTs with stabilizing the injured enlisted member, and accompanied the injured member to the hospital to ensure that he was properly taken care of.

The applicant alleged that opinion 4 of the PIO's Investigative Report is hearsay and unfounded. According to the applicant, there is no evidence that ENS T "learned his overly friendly behavior" from the applicant. Once again the applicant stated that prior to the current allegations of fraternization, he was never counseled or told that he had fraternized with the enlisted crew. The applicant argued that opinion 8 of the Investigative Report supports his position that neither he nor the other junior officers created an environment of fraternization, especially one that would cause a crewmember to be injured. The applicant further argued that approving the invitation of enlisted members to come to his condo to get together and talk outside of work is not creating a fraternizing environment that resulted in an injury.

To support his application, the applicant submitted a December 20, 2019, memorandum from his CO wherein the CO recommended the applicant for promotion to lieutenant. The CO stated that the applicant had exhibited superb judgment and decision-making ability in performance of his duties as an autonomous Port Engineer. The CO further stated that the applicant empowered co-workers and subordinates during the execution and planning phases of maintenance availabilities and was dedicated to continuous and professional development. Finally, the CO stated that the applicant had outstanding performance coupled with a can-do attitude and an eagerness to train others, while also taking time to grow professionally.

VIEWS OF THE COAST GUARD

On August 12, 2020, a Judge Advocate (JAG) for the Coast Guard submitted an advisory opinion in which she recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared by the PSC. In preparing the memorandum, PSC sought declarations from the applicant's rating chain and submitted three sworn declarations in response to the applicant's claims:

- In a March 23, 2020, sworn declaration, the applicant's direct Supervisor during the rating period, a Lieutenant who was the Engineer Officer of the cutter, stated that the sole reason for giving the applicant a mark of 3 for "Judgment" was the investigative report into the January 9, 2018, incident that was presented to the CO. According to the applicant's Supervisor, the CO felt that the applicant was a contributing factor in the events that took

place on January 9, 2018. The Supervisor stated that the mark of 3 was a total judgment call that he disagreed with and thought was unjust, which he expressed to the CO. The Supervisor alleged that he recommended the applicant receive a lessor punishment that would not have had as much of an impact on the applicant's career. The Supervisor expressed his support to have the mark of 3 increased to a mark of 4, especially in light of the applicant's successful appeal to have his documented alcohol incident removed from his military record. The Supervisor stated that he does not believe that the applicant was at fault for the events that unfolded on January 9, 2018.

- In a March 10, 2020, sworn declaration, the cutter's Executive Officer (XO), who served as the Reporting Officer for the disputed OER, stated that he observed the applicant to be a hard-working, knowledgeable officer who performed above-average for his paygrade in technical duties. The XO generally found the applicant to possess personal attributes in keeping with the Coast Guard core values, but the XO also stated that he found deficiencies during the applicant's final marking period that justified documentation. The XO stated that he fully endorsed a mark of 3 in the performance dimension of "Judgment" and still supports the mark. The XO explained that he was guided by the PIO's report, opinion 4, which specifically highlighted the poor judgment shown by the applicant on January 9, 2018.

  The XO noted that the Coast Guard Evaluation Report, CG-5310A, defines the performance dimension of "Judgment" as the "ability to make sound decisions and provide valid recommendations by using facts, experience, political acumen, common sense, risk assessment, and analytical thought." The 3 mark is not specifically defined, but it is to be used when the Reported-on Officer does not meet all of the criteria for a mark of 4 and exhibits one or more criteria for a mark of 2. The XO stated that he had agreed with the Supervisor that the applicant had exhibited some of the behaviors required for a mark of 2 in "Judgment," except the "political drivers" part which was not applicable in the applicant's case. The written descriptions for the marks of 2 and 4 in "Judgment" on the OER form are the following, and a mark of 3 requires performance in "Judgment" that is better than the description for a mark of 2 and but does not meet the criteria for a mark of 4:

  > 2. Decisions often displayed poor analysis. Failed to make necessary decisions, or jumped to conclusions without considering facts, alternatives, and impact. Did not effectively weigh risk, cost, and time consideration. Unconcerned with political drivers on organization.
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  > …
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  > 4. Demonstrated analytical thought and common sense in making decisions. Used facts, data, and experience, and considered the impact of alternatives and political realities. Weighed risk, cost, and time considerations. Made sound decisions promptly and with the best available information.

  The XO concluded by stating that he did not agree that the applicant demonstrated all the criteria for a mark of 4 during the rating period. Once again the XO pointed to the PIO's report to support his conclusion that the applicant did not demonstrate sound judgment during the port call. According to the XO, although it was an isolated event, it was of a

magnitude that justified a below-standard mark in "Judgment." The XO stated that not only was the injury to the enlisted member significant, but the impact on crew morale and good order and discipline was also significantly affected and had lasting effects. As such, the CO stated, he believed and continues to believe that a mark of 3 in "Judgment" was the appropriate rating for the applicant.

- In a sworn declaration dated March 23, 2020, the CO of the cutter, who served as the OER Reviewer, stated that he fully supports the mark of 3 for "Judgment." He stated that the investigation had shown that the applicant had signed and paid for the condominium and organized the payment of shares by other Junior Officers who stayed there. The applicant had also approved a subordinate Ensign's request to have a group of enlisted subordinates join them at the condominium to socialize. And the evidence showed that consumption of alcohol was a major part of the socialization that took place.

  In addition, the CO stated, he had personally counseled each junior officer in the presence of their chain of command after the accident. During those counseling sessions, he had learned that, as the renter of the condominium, the applicant had been approached by the property manager upon the arrival of the enlisted members to express concern regarding the number of people at the condominium. The applicant had assured the property manager that the additional people would be respectful of the rules and stay in the private confines of the condominium they had rented and not use the common facilities shared with the other rented condominiums. However, the enlisted member's injury, which the applicant had witnessed, had occurred while the member was using the common pool shared with the facility's other condominiums.

  The CO stated that following the accident, the property manager had found the XO at the hospital and reported that there had been heavy drinking at the condominium and that she was not surprised an accident had occurred. Also at the hospital, the XO had observed that the applicant himself appeared intoxicated. While the applicant still had his faculties (walking/talking), he was in no condition to help the XO who was coordinating the medical response at the hospital.

  The CO concluded by stating that he continues to support the mark of 3 for "Judgment" because the applicant had "displayed poor analysis; failed to make necessary decisions; did not consider facts, alternatives, and impact; and did not effectively weigh risk considerations." The CO stated that his performance did not meet the criteria for a mark of 4 in "Judgment" and the incident had had a significant adverse impact on the crew.

In light of these declarations, the JAG argued in the advisory opinion that the applicant has not established that either the mark of 3 on his OER for "Judgment" or the supporting comment, which were assigned by his Supervisor in 2018, were erroneous or unjust. The JAG further argued that the evidence submitted by the applicant to support his allegations—that there is no evidence to support a claim that his actions led to the enlisted crewmember's injuries and that he demonstrated sound judgment after the crewmember's injuries—does not satisfy the legal

requirements articulated in *Muse v. United States* and *Hary v. United States*[3] to warrant a revision of his OER. The JAG claimed that in order for the applicant to establish that his OER was erroneous or unjust, he must first prove that it was adversely affected by a misstatement of significant hard fact, a clear and prejudicial violation of a statute or regulations, or factors that had no business being in the rating process.[4]

The JAG argued that the evidence does not support the applicant's contentions that his mark of 3 in "Judgment" was unjustified. The JAG stated that the applicant does not deny that a crewmember was in fact injured while visiting his rental condo or that he had approved a subordinate's request to invite enlisted crewmembers to socialize in his condo. Instead, the JAG argued that the applicant's arguments rest on his assertion that "[t]here are no facts in the investigation that supports the accusation that [his] judgment … directly resulted in the crewmember's injury," but there is no requirement that the failure in judgment be the direct cause of the injury for consideration in an OER. The JAG further argued that the mark of 3 was predicated upon the lapse in judgment that led to a situation where someone could be and was injured. According to the JAG, the applicant's failure in judgment is tied to his decision as one of the senior officers present to allow enlisted crewmembers to come to their rental home and use the infinity pool while intoxicated. The JAG claimed that had the applicant declined to extend the invitation, the enlisted crewmember would not have been injured. In addition, the JAG stated that the applicant's failure to provide adequate supervision over the invited guests, including their alcoholic intake and activities, led to the accidental injury. Lastly, the JAG argued that the disputed OER does not accuse the applicant of fraternization, as it states only that the applicant's actions led to an environment that facilitated both fraternization and the injury. As such, the JAG stated that the comment, "[l]apse in judgment on port call created a fraternizing environment & accidental injury to junior crew," does not constitute a misstatement of significant hard fact and adequately supports the mark of 3 in "Judgment."

The JAG further argued that the applicant has failed to show that the comment or the mark of 3 in "Judgment" were clear and prejudicial violations of a statute or regulation. According to the JAG, in marking an officer, supervisors may draw on their observations, the observations of secondary supervisors, and other information accumulated during the reporting period. The JAG stated that while OERs may not mention a judicial, administrative, or investigative proceeding, such restrictions do not preclude comments on the conduct that is the subject of the proceeding. In addition, the JAG stated that no policy requires a supervisor's comments to be supported by adjudication at a court-martial or non-judicial punishment proceeding. As such, the JAG argued that the applicant's rating chain was not required to formally charge the applicant or find him guilty of fraternization before noting that he had helped create a "fraternizing environment."

The JAG explained that even though the applicant may have exercised good judgment prior to and after the accident, the applicant's rating chain did not violate policy in determining that a single incident of poor judgment warranted a mark of 3. The JAG argued that OERs are somewhat subjective in nature and as such, perfect objectivity is not required. According to the JAG, to earn a mark of 4 in "Judgment," the Reported on Officer (ROO) must have met each of the dimensions

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[3] *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).
[4] *Id.*

required by a rating of 4 as defined in Form CG-5310A. The JAG stated that the applicant's rating chain determined that the applicant's judgment during the rating period did not meet the required dimensions for a mark of 4 in "Judgment." The JAG argued that the applicant's rating chain included a required comment in support of the mark of 3, which captured the applicant's lapse in judgment, thereby justifying their determination. As such, the JAG argued that even though the applicant exercised good judgment before and after the accident, his rating chain provided the applicant with the appropriate mark and supported their decision with a comment based upon their observations and evaluations of the applicant's performance.

The JAG argued that the applicant has failed to show that the "Judgment" mark and supporting comment had no business being in the rating process and that neither the mark of 3 or the supporting comment shock the sense of justice. The JAG explained that OERs are used to document an officer's performance and the mark of 3 in "Judgment" and the supporting comment are precisely the type of information that an OER should include because even an officer's short lapse in judgment is relevant to the applicant's performance, fitness for promotion, and future assignments to positions with greater responsibility. Because the applicant's rating chain deemed such information relevant and policy did not prohibit the inclusion of such information in the OER, the JAG argued that the applicant cannot claim that it had no business being in the rating process.

Regarding the declaration of from the applicant's Supervisor, who supported increasing the applicant's mark of 3 in "Judgment" to a mark of 4, the JAG argued that it is immaterial. The JAG stated that not only was the letter of support written nearly two years after the original OER was executed, but neither the applicant nor the Supervisor have alleged that the mark of 3 and the supporting comment were a result of undue influence. In addition, the JAG noted that both the Reporting Officer and Reviewer have submitted declarations showing their continuing support for the mark of 3 given at the time. The JAG argued, "After the fact statements by raters contending that they scored the applicant too low on their OERs are not to be given great weight."[5]

The JAG noted that the applicant did not submit an OER Reply, as authorized by policy. The JAG explained that an OER Reply provides the officer with the opportunity to express a view of performance which may differ from that of his rating officials. The JAG also pointed out that the applicant did not apply to the PRRB to contest the OER as authorized by policy. As such, the JAG argued that the applicant did not exhaust all of his remedies available to him prior to this request.

Regarding the applicant's claim that the comment that his "[l]apse in judgment on port call created a fraternizing environment and accidental injury to junior crew," found in his OER was unjustified and erroneous because his actions did not meet all of the elements of fraternization as provided in the Coast Guard Discipline and Conduct Manual, COMDTINST M1600.2, the JAG argued that the comment at issue does not assert that the applicant was guilty of fraternization, only that his lapse in judgment created a fraternizing environment. The JAG further argued that opinion 8 of the Investigative Report found that the get-together between the junior officers and enlisted crewmembers "borderline cross[ed] the professional and personal relationship boundary…" The JAG explained that as the senior engineering officer present at the rental property and the one who ultimately permitted the enlisted members to join the party, the applicant's decisions

[5] *Paskert v. United States*, 20 Cl.Ct. 65 (1990).

created a situation where officers and enlisted crewmembers interacted in a way that "borderline cross[ed]" boundaries. As such, the JAG argued that regardless of whether or not the applicant's personal conduct satisfied the specific elements of fraternization, his lapse in judgment still created an environment of fraternization.

According to the JAG, the applicant's reliance upon the terms of the "port brief"—which prohibited officers from renting a hotel or condo with enlisted crewmembers but did not expressly prohibit socializing between the two groups—fails to establish an error or injustice. The JAG stated that just because the applicant did not violate the terms of the port brief does not mean that the applicant was relieved of his duty as a commissioned officer to ensure appropriate relationships with and among subordinates in accordance with military protocol and the Discipline and Conduct Manual, COMDTINST M1600.2. The JAG claimed that the applicant's arguments deliberately misinterpret the intent of the port brief, namely, that officers and enlisted crewmembers should not be sharing private quarters during the port call. The JAG argued that the applicant's reliance on his compliance with the strict letter of the port brief, as opposed to his flagrant violation of the intent, does not establish an error or injustice.

In response to the applicant's claim that after the January 9, 2018, incident, he was never counseled for having inappropriate or unprofessional relationships with enlisted personnel the JAG argued that the applicant's allegations are not supported by the evidence. The JAG pointed to a March 23, 2020, sworn statement provided by the applicant's Commanding Officer (CO) at the time of the event, to show that the applicant was verbally counseled by his CO, as were all the junior officers, in the presence of their chain of command. The JAG argued that even if the applicant was not counseled on inappropriate and unprofessional relationships that would not erase the fact that the incident occurred, a fraternizing environment was created, and a junior enlisted member was injured. As such, the JAG stated that the applicant should not have been surprised by the comment provided in his annual OER.

Regarding the applicant's allegations of hearsay regarding the comment found in opinion 4 of the Investigative Report, specifically, "ENS [T] likely learned the overly friendly behavior from his immediate superior [applicant]," the JAG stated the applicant's allegations of hearsay are inconsequential because the statement was not included in his OER. As such, the JAG argued that because the disputed OER does not allude to opinion 4 of the Investigative Report, the applicant's allegations of hearsay are immaterial to his argument that the OER comment regarding creating a fraternizing environment is erroneous or unjust.

Regarding the applicant's request for promotion, the JAG argued that even if the mark of 3 and the corresponding comment were found to be erroneous and unjust, their inclusion in his record alone would not warrant the applicant's reconsideration for promotion to lieutenant. According to the JAG, the applicant has failed to establish, by a preponderance of the evidence, that the mark and corresponding comment were material to his non-selection for promotion or that, but for their inclusion in his OER, he would have been selected for promotion to lieutenant. The JAG pointed to BCMR docket number 2019-151, wherein a Coast Guard member, who was involved in the same January 9, 2018, incident as the applicant, applied for relief based on the fact that evidence of an alcohol incident remained in that applicant's file, despite already having been deemed to be erroneous. In that case, the JAG explained, a special selection board was ordered

because the original selection board had specifically cited the alcohol incident as the reason for that applicant's non-selection. Here, the JAG argued, the applicant was not selected for promotion to lieutenant by a "best-qualified" promotion board, which is not obligated to explain non-selections. Therefore, the JAG stated, the reason for the applicant's non-selection is unknown, and the applicant has failed to prove, by a preponderance of the evidence, that had it not been for the mark of 3 and the corresponding comment, he would have been selected to promotion to lieutenant. The JAG concluded that the applicant's request for relief should be denied.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 12, 2020, the Chair sent the applicant a copy of the Coast Guard's advisory opinion and invited him to respond within thirty days. As of the date of this decision, no response was received.

APPLICABLE LAW AND POLICY

Article 5 of The Coast Guard Officer, Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A, provides the following guidance on the Officer Evaluation System (OES):

> **Article 5.A. Overview.** This Chapter states policies and standards for conducting performance evaluations for Coast Guard officers.
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> > 1. Purpose. The Officer Evaluation System documents and drives officer performance and conduct in accordance with Service values and standards. This information is used to support personnel management; primarily selection boards and panels, retention, and assignments.
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> …
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> **Article 5.I. Prohibited Comments.** The rating chain must not:
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> > 1. Mention 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 required by a non-regular OER. 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.K. 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.
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> **5.J. Required Comments.**
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> > 1. The rating chain must support any mark of 1, 2, 3, and 7. Comments with 4, 5, or 6 do not require support.
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> **5.K. Replies to OERs.** The reported-on officer may reply to any OER. Replies provide an opportunity for the reported-on officer to express a view of performance which may differ from that of a rating official.

> 1. Content of Replies. Comments should be performance-oriented, either addressing performance not contained in the OER or amplifying the reported performance. Restrictions outlined in Article 5.I. of this Manual apply. Comments pertaining strictly to interpersonal relations or a personal opinion of the abilities or qualities of a rating chain member are not permitted.
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> 2. Corrections. Reported-on officer replies do not constitute a request to correct a record. An officer who believes their OER contains a major administrative or substantive error should follow the procedures to correct military records as outlined in Article 5.N. of this Manual. This includes requests to have the OER, or a part thereof, removed from the record. Members of the rating chain who, in their review of a reported-on officer's reply, concur with the reported-on officer that an error may be present in the OER, must return the reply to the reported-on officer and assist that officer in following the procedures of Article 5.N. of this Manual.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction over this matter under 10 U.S.C. § 1552(a) because the applicant is requesting correction of an alleged error or injustice in his Coast Guard military record. The Board finds that the applicant has exhausted his administrative remedies, as required by 33 C.F.R. § 52.13(b), because there is no other currently available forum or procedure provided by the Coast Guard for correcting the alleged error or injustice that the applicant has not already pursued.

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.[6]

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

4. The applicant alleged that his mark of 3 for "Judgment" and the supporting comment on his OER for the rating period December 11, 2017, through May 14, 2018, are erroneous and unjust because there was no evidence to support a finding that his actions fostered a fraternizing environment or contributed to an enlisted member being injured. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in the military record, and the applicant bears the burden of proving, by a preponderance of the evidence, that the disputed information is erroneous or unjust.[7] Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."[8] To be entitled to relief, the applicant cannot "merely allege or prove that an [evaluation]

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[6] *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).

[7] 33 C.F.R. § 52.24(b).

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

seems inaccurate, incomplete or subjective in some sense," but must prove that the disputed evaluation 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 statute or regulation.[9]

5. According to the applicant, the PIO's report contained no evidence that his judgment created a "fraternizing environment" resulting in an enlisted member's injuries, and so his mark of 3 and the corresponding comment are erroneous and unjust. For the following reasons, the Board disagrees:

a. The record shows that on January 7, 2018, while on approved liberty, the applicant, along with several other junior officers, rented a condominium. The record also shows that on January 9, 2018, the applicant was asked by a subordinate ensign if it would be okay to invite a few enlisted members to the condo for a "get together" and the applicant agreed to the invitation. The PIO found that the applicant had exhibited poor judgment by inviting, or permitting an invitation to be extended to, junior enlisted members to the condo that the applicant had arranged to rent.

b. The record further shows that the "get together" on involved a significant amount of drinking by all present. Although the PIO reported that the consumption of alcohol had been moderate, he also stated that the members had been drinking beer, mixed drinks, and shots of vodka. Moreover, the XO stated that the property manager told him that they had been drinking "heavily"; that doctors at the hospital had told him that the injured service member was "extremely intoxicated"; and that the applicant himself had been too intoxicated to be helpful at the hospital. The evidence further shows that intoxication caused or contributed to an enlisted member losing his balance, falling approximately 25 feet from the edge of an infinity pool, and suffering significant injuries. The Investigative Report found that after the enlisted members arrived, none of the officers, including the applicant, who was the most senior officer present, expressed concern over the amount of alcohol being consumed. Nor did any of the junior officers take any action to step in and moderate the behavior or alcoholic consumption taking place.

c. As the applicant noted, Coast Guard policy acknowledges that junior officers will make mistakes as part of the learning process, but the policy also states that a junior officer's mistakes should be evaluated based on the underlying conduct. Here, the preponderance of the evidence shows that the following underlying conduct: The applicant as the senior engineering officer present condoned a situation where subordinate commissioned officers and junior enlisted members were allowed to socialize together in private quarters he had rented and to consume alcohol to the point of intoxication. The applicant also failed to recognize the inherent dangers in this situation, which ultimately led to an enlisted member losing his balance and being severely injured. The record shows that the applicant's rating chain carefully considered what repercussions the applicant should face and intentionally assigned him a mark of 3 in "Judgment" on his OER.

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[9] *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).

Therefore, the Board finds that the applicant has failed to prove, by a preponderance of the evidence, that his rating chain's decision to give him a mark of 3 in "Judgment" on his OER was erroneous or unjust. As such, the applicant's request to have the mark of 3 raised to a 4 should be denied.

d. The applicant contended that because he was never charged with fraternization and the PIO found insufficient evidence of fraternization, including the word "fraternizing" in his OER was erroneous and unjust. However, the applicant did not receive a mark of 3 in "Judgment" for fraternizing but because his rating chain found that his poor judgment had led to the creation of an environment where commissioned and enlisted personnel were permitted or likely to fraternize. Given the definition of fraternization, the Board finds that the disputed OER comment is not erroneous or unjust in stating that the applicant's lapse in judgment had "created fraternizing environment & accidental injury to junior crew."

e. Under Article 5.I.1. of the Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A, the only comments that are prohibited from being included in an OER are comments mentioning a—

> [j]udicial, 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 required by a non-regular OER. 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.K. 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.

Here, the applicant's Supervisor made no mention of any proceeding prohibited by policy, and only referenced the "fraternizing environment" to support the assigned mark of 3 in "Judgment" as required by Article 5.J.1. of the same manual, which states, "The rating chain ***must*** support any mark of 1, 2, 3, and 7." Therefore, the Board finds that the applicant has failed to prove, by a preponderance of the evidence, that his Supervisor erred by commenting that his "lapse in judgment" on January 9, 2018, had created a "fraternizing environment & accidental injury" to a junior crewmember. The applicant's request to have this comment stricken from the disputed OER should be denied.

5. Although the applicant did not explicitly say so, he implied that, but for the mark of 3 in "Judgment" on his OER, he would have been selected for promotion to lieutenant in 2019. While the mark of 3 and supporting comment may well have caused or contributed to his non-selection for promotion, he has not proven, by a preponderance of the evidence, that the mark of 3 or the supporting comment is erroneous or unjust and so there are no grounds for amending or removing the disputed OER or for directing the Coast Guard to convene a Special Selection Board.

6. The Board notes that in March 2020, after the applicant had been passed over for promotion, his Supervisor stated in a declaration that he thinks the "Judgment" mark should be raised to a 4. However, the Supervisor assigned the mark of 3 and wrote the supporting comment on the OER in 2018, and he has not claimed that the Reporting Officer or the Reviewer, who

continue to support the marks and comment, directed him to lower the mark. According to long-standing case law[10] and prior BCMR decisions,[11] "retrospective reconsideration" of an officer's performance after an officer has been non-selected for promotion is not grounds for removing or raising the marks in an OER. As the court held in *Remy v. Air Force Board for Correction of Military Records*, "[n]othing could be more inimical to the fair rating system"[12] than to change or remove an OER based on a *post hoc* judgment following an officer's non-selection for promotion.

7. The applicant has also failed to show that the disputed evaluation 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 statute or regulation, as required under *Hary*.[13] Therefore, the applicant has failed to prove, by a preponderance of the evidence, that the mark of 3 for "Judgment" and the supporting comment in his OER for the rating period of December 11, 2017, through May 14, 2018, are erroneous or unjust. His requests for relief should therefore be denied.

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[10] *Paskert v. United States*, 20 Cl. Ct. 65, 75 (1990) (finding that "[a]fter the fact [non-selection] statements by raters contending that they scored the applicants too low on their OER's are not to be given great weight"), *citing Tanaka v. United States*, 210 Ct. Cl. 712, 713 (1976), *cert. denied*, 430 U.S. 955 (1977) (noting that the raters who submitted letters on behalf of the plaintiff claiming that the marks they had assigned him were too low did not "point out any misstatements of fact in their original OER's" and offered "only opinions they no longer entertained"); *Remy v. Air Force Board for Correction of Military Records,* 701 F. Supp. 1261, 1271 (E.D. Va., 1988) (noting that "[n]othing could be more inimical to the fair rating system" than allowing *post hoc* judgments years later and after an officer has been non-selected for promotion); *Voge v. United States,* 11 Cl. Ct. 510, 515 (1987), *rev'd on other grounds,* 844 F.2d 776 (1988) ("Nor is it enough to impel us to act that the rater may now say that he scored the claimant too low. In *Tanaka* ... we held that rater's statement that his opinion has changed and that he would now rate plaintiff higher, absent any misstatements of fact in the OER, did not tender a triable issue on the accuracy of the OER"); *Chronis v. United States,* 222 Ct. Cl. 672, 673 (1980) (holding that "the retrospective statements of plaintiff's rating officers are insufficient to prove that the AFBCMR acted arbitrarily in refusing to void the challenged OER"); *Reid v. United States,* 221 Ct. Cl. 864, 867 ("The retrospective statements of plaintiff's rating officers are thus insufficient to prove that the board acted arbitrarily in refusing to void the challenged OER's."); *Savio v. United States,* 213 Ct. Cl. 737, 740 (1977) (denying relief despite "after-the-fact letters from rating officers who in retrospect state that in their opinion they rated a particular officer too low").

[11] Decision of the Deputy General Counsel in BCMR Docket No. 84-96 (denying relief because the CO's statement arguing that the marks should be raised constituted "retrospective reconsideration"); s*ee also* BCMR Docket Nos. 2021-2015-136 (finding that a Supervisor's statements supporting removal of an OER constituted "retrospective recon- sideration," which "is not grounds for removing" an OER); 2011-179 (denying relief and finding that a CO's statement constituted "retrospective reconsideration" that did not warrant raising marks on the disputed OER); 67-96 (denying relief because three statements by the rating chain supporting the application "constituted 'retrospective reconsideration' induced by the applicant's failure of selection"); 189-94 (denying relief and finding that a Supervisor's claim that a mark should be raised because the applicant was never counseled about the deficiency constituted "retrospective reconsideration" that did not justify raising the disputed OER mark); 24-94 (finding that a Reporting Officer's statement that "had I known then what I know now I would have marked him differently" constituted retrospective reconsideration that did not justify changing the OER).

[12] 701 F. Supp. 1261 (E.D. Va. 1988).

[13] *Hary,* 618 F.2d at 708.

ORDER

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

January 27, 2023

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[redacted]

[redacted]