

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2020-152

██████████ ██████████ ██████████
LCDR (Former)

FINAL DECISION ON RECONSIDERATION

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 September 3, 2020, and assigned the case to the Deputy Chair to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision dated March 22, 2024, is approved and signed by three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, a Lieutenant Commander (LCDR/O-4), who retired from the Coast Guard on March 31, 2019, asked the Board to reconsider its previous decision in docket 2017-080, issued on October 27, 2017, and correct his record by (1) removing a Special Officer Evaluation Report (SOER) documenting his removal as the Executive Officer (XO) of a new National Security Cutter on April 7, 2015; (2) voiding the decision of a Special Board to remove his name from the Commander (O-5) promotion list; (3) convening a new Special Board to reconsider his suitability for promotion to O-5; (4) if recommended for promotion, restoring his name to the promotion list for White House nomination and then Senate confirmation; (5) if promoted, assigning the applicant the date of rank he would have held had he been promoted in the first instance; (6) awarding the applicant sufficient service credit to retire in the grade O-5; and (7) awarding the applicant all pay and allowances, back and front, associated with these corrections.

In his original application, 2017-080, the applicant requested these corrections based on various allegations unrelated to his mental health, but the Board found no grounds for granting relief. In his letter to the Board requesting reconsideration, the applicant explained that he is providing new evidence regarding his mental health at the time of his misconduct (an extramarital affair with a married woman who was not associated with the Coast Guard) for the Board to take into consideration. The applicant alleged that his extramarital affair was a consequence of severe

occupational stress, PTSD, and Major Depression, and he submitted evidence that the Department of Veterans Affairs (VA) has assigned him a disability rating of 50% for Post Traumatic Stress Disorder (PTSD)/Major Depression, service connected, effective as of April 1, 2019, the day he retired. He stated that he is now “able to begin to understand what happened and why [he] behaved in a way counter to everything [he] had believed in and adhered to.”

Regarding his traumatic experiences during his service, the applicant stated that in 2001, he was the senior landing signals officer on a cutter practicing helicopter landings when the cutter pitched and rolled toward starboard just after a helicopter had touched down and before it was tied down and the rotors were stopped. He saw the helicopter tilt and then screamed at the crew and jumped off the flight deck into the flight-deck netting just below the edge of the deck “but quickly realized the stupidity of my decision as I heard the helicopter hitting the deck and disintegrating and saw parts fly above me.” He was afraid the helicopter would roll onto him and “so I pressed myself up against the hull as hard as I could, essentially waiting to die. After a few seconds passed, the slamming of steel and the whine of the helicopter engines stopped.” He climbed out of the net onto the deck and did not see the ten crewmembers he had been standing near on the deck and so he got into the rescue boat with seven others and began searching for the missing crew. The crew aboard the cutter had thrown out life rings and provided lighting. They pulled three members out of the water who were uninjured. No one died in the mishap, but when they reboarded the cutter, the applicant “collapsed from the pain of a leg injury” and spent the next two and a half days lying on a stretcher in shock and pain on the way back to port. He later found out that he had ruptured his right calf muscle and, despite a lot of physical therapy, that muscle still cramps “after any amount of exercise.” He stated that the cramping “is a constant reminder of the night that I thought I was going to die, then realized my shipmates might be dead. Throughout I have felt responsible.”

The applicant stated that although he never worked on the flight deck again, the “trauma of the accident was relived ... each time we conducted flight operations.” His heart would race and he would sweat a lot. The applicant stated that he “remain[s] easily startled and continue to be hypervigilant even during routine outings. I am always thinking of escape routes, whether I am in a car in traffic, church, grocery shopping, or even at home. I was not offered counseling following the accident and was focused on my physical recovery as just days before the crash I had been given orders to a patrol boat in [redacted].” He stated that he did not take any time off, buried the memories, and transferred to the patrol boat.

From Fall 2003 to Spring 2006, the applicant attended law school on Duty Under Instruction (DUINS). During the summers, he “worked as an intern in the [redacted] District Legal Office. ... I was immediately assigned cases involving drug use. It was a shock to me to learn that my peers, who wore the uniform and swore an oath, would violate laws that our service was statutorily charged with enforcing. ... My heart dropped further when I was asked during the summer of 2005 to assist trial counsel prepare for a child pornography case.” He was required to provide a written description of each image of child pornography found on the accused’s computer. The applicant stated that he had not known “such cruelty and depravity could exist. Some of the images included young girls not much older than my own daughter. I felt for each of them and became angry that there was nothing I could do to take their pain away. I still recall parts of a victim impact letter that one of the girls in the images had written for a prosecution years before. Sadly, I can still describe many of the images in great detail, including one of a young toddler holding a teddy bear as she is molested.”

The applicant stated that after graduating from law school and attending Naval Justice School for ten weeks, he was assigned to a Marine Corps base, where he was again assigned to prosecute “cases involving child pornography as I had prior experience handling such evidence. And, again, I was tasked with reviewing and describing the evidence in those cases.” Then, the applicant stated, he served as a prosecutor for the Coast Guard from 2007 through June of 2010, and handled cases of sexual offenses. He would have to “walk [the victims] through in painstaking detail incredibly personal and embarrassing aspects of the assault as well as their own sexual experiences and relationships. Each time I felt that I was traumatizing them over again and often was helpless as they were berated and belittled as witnesses.” The applicant stated that his “view of humanity became dark and cynical. I trusted no one outside my family with my own children. My belief in the fundamental goodness of humans was destroyed. My mood deteriorated and I became very depressed. My own intimate life was negatively impacted. The world I had known and loved prior to sex offense prosecution was gone.”

The applicant stated that he then requested another shipboard assignment. He wanted one aboard a cutter homeported in the northeast, where his wife and children lived, but received orders for a cutter homeported in the mid-Atlantic area. They decided that his wife and children would remain in the northeast, while the applicant would live aboard the ship for the two-year tour of duty from 2010 to 2012. He was looking forward to “leav[ing] the mental stress of legal work behind for a few years” and “being at sea made me happy ... despite the family separation.” However, the “two years were incredibly trying for me and my family.” His wife’s mother, who had “been key in helping my wife with our children while I was away,” died suddenly on August 1, 2011, and her father died suddenly in January 2012. Each time, he took a few weeks of leave to help his wife and kids who were “in extreme distress.”

In 2012, because his tour aboard the cutter was ending and he was feeling stressed, he asked to be assigned as an instructor at the Naval Justice School, but the Deputy JAG contacted him and asked him to take an assignment as a Deputy Staff Judge Advocate for a District on the other side of the country. The applicant did not want to disappoint him, so he accepted the assignment, and he and his family packed up and moved. On the week-long cross-country trip, which he had expected to enjoy, he got shingles followed by severe Rosacea on his face and was miserable. In addition, the applicant stated, “[m]y sleep patterns became very irregular and my anxiety and hypervigilance took over. I felt guilty that the family tie we longed for was disrupted by my physical ailments. I could not relax and was on edge throughout the trip. This anxiety continued throughout my time in [the District]. A few months into the job, I developed an uncontrollable twitch in my left hand. In addition to continued trouble sleeping, I found myself waking up increasingly earlier with heart palpitations and fear over what I had to accomplish each day.” Besides being the Deputy Staff Judge Advocate, he also had “the most military justice experience of the attorneys, which included special victims’ cases.” Therefore, he was again working long hours, handling sexual assault cases, and working with traumatized victims, often with little success. One of those cases involved a Coast Guard member who had molested teenage boys.

The applicant stated, “Looking back, I can see that I had become severely depressed,” and his wife was struggling with the loss of her parents and the cross-country move. She buried her losses “so she could support our kids in their transition. I didn’t know how to help her and became frustrated at her complaining of the social isolation, constant precipitation, and long cold winters.

I couldn't turn to her with my struggles at work as it was my assignment to [the District] that exacerbated her suffering, so I dug deeper into work, again doing the job of at least two people." The applicant stated that the "work consumed" him, even though he wanted to "be a more positive support for [my wife]." When the announcement for the Executive Officer (XO) position on a new cutter came out, he applied for it because he saw it as "a way out of the legal job and a chance to get back to sea, where I longed to serve. I realized it meant another family separation, but as strained as life was with my wife, it seemed like the quickest way to improve our situation. I figured that if I could become happy again, I could help everyone else." Therefore, he applied for the XO position in the summer of 2014. Before he transferred to the cutter in late December 2014, his workload and stress eased a bit, he was selected for promotion to CDR, and his life became much better. The applicant stated, "my family appeared happy, and I was so excited to go back to sea. I had the holidays to spend with my family, and I could again leave the trauma of the legal work behind in pursuit of a job that the Coast Guard said they needed me to fulfill. I was on a mental high and life seemed to be working out great."

But when he reported for duty aboard the cutter, the applicant stated,

The enormity of the job set in and I became immediately frustrated that few plans had been made for the training of the crew nor the operation of the ship. I learned that despite having the first National Security Cutter in operation for nearly five years, standard shipboard doctrine such as Main Space Firefighting Plan was not yet developed let alone published for implementation. Pre-arrival training for many of the crewmembers was being deferred and classes specific to the new class of ships were still in development, thus much of the training would fall upon ourselves to conduct. The few ship-specific classes were being held in [across the country] thus I and the crew had to include cross-country travel to our already packed schedule. More disheartening was the ever-revising schedule of contract modifications and equipment changes. While the ship was in the water, it became quickly apparent that it would not be ready for operations for over two years. I now knew that I would spend the next two and a half years struggling to prepare a crew without proper resources and that I would not spend time underway aside from the upcoming commissioning voyage to [redacted] and a few short training evolutions.

Furthermore, the applicant stated, he had left his family to complete the school year in his prior District, and "[e]ach parenting challenge [his wife] faced felt like my fault. Once again, I had failed to ease her burden and carried the weight of her struggles while burying my own. I was exhausted and spiraled downward quickly." He now understands that he was very depressed. He alleged that "the world around me was imploding and I had nowhere to turn."

The applicant stated that to cope with the stress, he increased his exercise, despite the pain in his leg; buried himself in his work; and tried to support his family, although the four-hour time difference "made even phone conversations tough." His wife needed him, the crew needed him, and he had "more than burned the proverbial candle at both ends. Everyone's challenges felt like my fault." The applicant further explained his circumstances and his affair with a civilian married woman as follows:

Ultimately, I got to the point that I just didn't care about anything other than trying to give my all for work. I was depressed and it was affecting my judgment. Getting up in the morning became a chore. I thought about ending my life. I was emotionally and physically exhausted. My wife was managing without me, and when we did talk on the phone, we largely argued. I hadn't found a place for them to live, I wasn't there to help with the move, I couldn't assist in the daily tasks of raising two children. If I told my boss that I needed time off or couldn't do the job, I might as well have resigned my commission. I had let down those I loved the most and was powerless to do anything about it. That is when the affair occurred. At that point I no

longer cared and was willing to take risks. Normally, I am one to think through the potential consequences of actions and, as a lawyer, I advised many people in the same vein. In retrospect, I know the affair and my subsequent suicide attempt and hospitalization were my desperate cry for help. I did not understand my behavior, but I could rationalize it at the moment. I was grasping at anything that gave me a moment of happiness to the point that it became what I can imagine addiction to a drug must be like. I wanted a reason to leave the office, to talk about something other than work, to smile again, if only briefly.

The applicant stated that his attorney provided him with research into the effects of handling sex offense cases on attorneys, including emotional pain and distress like he had experienced. The applicant stated that he now realizes he “experienced ‘secondary trauma’ from my extensive exposure to the details of sex crimes.”

The applicant noted that the Coast Guard provides counseling services (called Work-Life), but he was very concerned that his private matters would not remain private. He had worked closely with the counselors, medical staffs, clergy, and other mental-health support providers consulted by his subordinates and so knew that his seeking support would not remain private. He noted that during his first Executive Officer assignment, he was routinely briefed on the mental health concerns of his crew and given details about the struggles in their personal lives. He stated that he did not want to diminish his ability to succeed in the Service and was very concerned that, as an officer, seeking mental health treatment would be considered a sign of weakness. Because others had succeeded as XOs, he thought he “was weak and had simply not yet learned how to deal with the stress” and that if he could “stay the course and work harder,” his circumstances would improve.

The applicant stated, “Hindsight, good counseling, and the passing of time have allowed me to realize my mistakes and how things compounded. I can’t change what happened, but I know my actions were not who I am, nor who I want to be. I am a cautious, caring, positive and kind person. I always have been, and I am becoming that again. While my choices were mine alone, had the circumstances been different, I never would have allowed myself to hurt my wife, my family, or compromise myself in the way that I did.” The applicant stated that he has apologized to his wife time and again and will continue to do so.

The applicant stated that after his affair was discovered and he was removed from his position as the XO, he knew that he was suffering from severe depression, but he did not want to reveal that to the Special Board convened to determine whether his name should be removed from the promotion list because he thought he would be able to continue his career and he thought the information would negatively impact the Special Board’s view of his future service. And while he suffered from what he now knows to be PTSD, he was unaware of that at the time of the board. It was not until he retired that the signs of PTSD were identified. He was unaware of the toll that the handling sex offenses had taken over time, and he still has a hard time with the subject matter. The applicant concluded, “I gave the Coast Guard the best years of my life. I made one mistake in more than 20 years. God knows I have more than paid for it. All I ask from this Board in return is a little understanding and compassion.”

In support of his request for reconsideration and mental health claims, the applicant provided medical records and previous OERs documenting his performance. The applicant also asked the Board to reconsider his application, applying liberal consideration guidance, and referenced a September 3, 2014, Department of Defense (DOD) Policy Memoranda on PTSD and

Misconduct.¹ The applicant asserted that the National Child Protection Training Center has noted the deleterious psychological effects prosecutors involved in child sex cases may suffer, including “vicarious trauma,” and he provided professional literature stating that attorneys practicing in these areas of the law suffer vicarious trauma and burn out. The applicant also provided medical literature noting that there is a strong negative association between PTSD and family relationship functioning. He also cited a 2016 article published in a medical journal that stated that attorneys are likely to suffer depression and suicidal ideation more so than other professions and that attorneys are three times more likely than other professionals to suffer from depression. The applicant also provided references noting that suicidal thoughts and acts are common features of major depression, as is risky behavior, and that men who suffer depression are more likely than depressed women to engage in risky behavior, such as extramarital affairs.

The applicant also alleged that the BCMR’s prior decision is unclear as to whether the Special Board was provided with the November 10, 2015, addendum to his statement and that the BCMR decision noted only that the Special Board did not mention the addendum. According to the applicant, the addendum is material to the disposition of his case because it is proof that the Coast Guard entrusted him with an O-5 position. He explained that this detail by OPM, the very entity convening the Special Board, to an O-5 billet with substantially increased responsibilities was material to the Special Board’s determination. He explained:

The CGBCMR’s finding that the 13 October 2015 TJAG endorsement letter, which the special Board did have, rendered the addendum contents immaterial was clearly erroneous and unjust. There is a very material difference between an endorsement by TJAG for an O-5 billet at the same time the member’s suitability for promotion to O-5 is being considered by the Board. To suggest that Officer Personnel Management (OPM)’s action was not substantively different from the TJAG endorsement and material to the Special Board is simply incorrect.

The applicant contended that it reflected a vote of confidence in his suitability not just to continue Coast Guard service, but to do so in the rank of commander. He also stated that the Board misinterpreted his argument as being based on the content of the information before the Special Board *instead of the significance of who was making the recommendation*. He argued that—

The fact that CG PSC OPM, who make the final decision to remove me from primary duties, rescind my frocking to CDR and convene the Special Board, was now assigning me to a Commander billet in a highly-visible Headquarters Deputy Office Chief role is significant. Clearly, CG PSC OPM recognized I had the skill, leadership, experience, and ability to succeed as a Commander. CG PSC OPM’s faith and confidence in my ability to perform in a Commander assignment should have been before the Special Board.

The applicant further argued that the Special Board’s action was punitive in nature.

The applicant asked that if the Special Board is re-convened that it be provided with the addendum to the SOER as a factor to consider regarding his promotion to O-5. He argued that there is no requirement in regulation that he submit the addendum within 21 days and that the imposition of this requirement by the Coast Guard was arbitrary and capricious, especially since the applicant did not receive notification until four days before the Special Board convened on

¹ The Board notes that the DoD guidance does not apply to the Coast Guard BCMR, and the liberal consideration guidance of both DoD and DHS applies to upgrading discharges, not to corrections of performance evaluations or requests for promotion. Nevertheless, the applicant’s new medical evidence requires reconsideration pursuant to 10 U.S.C. § 1552(a)(3)(D).

November 9, 2015.

According to the applicant, at the time of the Special Board he had not been diagnosed as suffering from mental illness, and he did not have the opportunity to provide evidence of his general mental state to the Special Board. He relied on evidence showing that following his retirement from the Coast Guard in 2019, the VA assigned him a disability rating of 50% for service-connected PTSD/Major Depression, effective as of April 1, 2019. He also pointed to the medical records following his suicide attempt as proof of his mental health condition. The applicant further argued as evidence that medical officers at the Naval Health Clinic suspected underlying PTSD in April 2015, following his suicide attempt on April 7, 2015, when the “provider noted, ‘[A]ny further treatment should consider this aspect [PTSD] of his depression.’”

The applicant alleged that the medical records clearly show that he suffered from Major Depressive Episode and likely PTSD at the time of his post-attempt hospitalization and evaluation. The applicant further alleged that he “did not acquire the disorder only when the affair came to light or because of the adverse actions taken against him by the Coast Guard.” He argued that the depression preceded the affair and was a contributing factor to the poor judgment and risk-taking that led to the affair.

The applicant stated that he did not present evidence of his mental health to the Special Board but “merely noted in characteristic fashion of a commissioned officer, that he experienced highs and lows and that life had been stressful.” The applicant alleged that “had the Special Board received the mitigating evidence that [the applicant] is now presenting to this Board, the outcome may well have been different.”

The applicant argued that the “punishment” he received for his adultery was too harsh. He stated that “[t]he commander had at his disposal numerous less onerous disciplinary tools, including verbal and written counseling. The commander could have attempted reconciliation by seeking a meeting between [him] and the husband. There are a variety of actions he could have taken short of relief and a Special OER.” He asserted that “[g]iven [the applicant’s] conscientious nature, we submit that lesser forms of discipline would have achieved the intended purpose of rehabilitation.” He also argued that his mental health at the time was a mitigating factor, as shown by his subsequent medical records. He argued that the records show he “was a seriously ill officer. He desperately needed help. He attempted to kill himself. He engaged in the affair as a way to ease his pain and suffering, as the professional literature supports. If he had not been at the breaking point, he would not have engaged in the affair.”

The applicant did not argue the remaining five factors but noted the following:

[The applicant] was and remains humbled by his own misconduct. He has suffered severely because of it. Following the misconduct and subsequent medical treatment, he characteristically picked himself up and moved on, providing the Coast Guard with more years of outstanding service. Surely he has earned a measure of compassion. Surely this Board can exercise its discretionary authority on his behalf, after all [the applicant] gave to the Coast Guard.

The applicant, through counsel, submitted three letters in support of his application for reconsideration to the Board:

- The applicant’s wife provided an undated statement, in which she said that her husband “was always good at hiding his stress and trying to make sure the kids and I were happy and comfortable. He never let on how sad he was to miss all the kids’ games, events and milestones. The first time I noticed his stress was when he got Shingles the year we moved to [the District]. He had just left a tour on a ship, helped me bury both of my parents whom he was close to, and did most of the move prep by himself since I was not dealing well with their untimely deaths.” The applicant’s wife stated that he worked long hours and they had “spoken a few times about going to see a counselor for his stress, but he always was worried about going through the Coast Guard to request help because it might affect his job and promotions. He stopped sleeping well, which I now understand was due in part to the sex crimes he was dealing with in his job as a Coast Guard prosecutor and the consequences of making any mistakes and someone getting off because of some minor issue. Having kids and then seeing the horrors inflicted on other kids was harder to deal with than he wanted to talk about. He closed himself off, to try to protect me from the ugly details, and had no one else to talk to since that was taboo.” She also stated that she is very angry with how the Coast Guard treated her husband. She claimed that after 16 years of hard work, he had earned the promotion to CDR, which he was denied because of “a single personal mistake, one that really should have only affected my relationship.” She noted the financial impact of his loss of promotion and career on their family and argued that “[s]urely this Board can understand that a single mistake in an otherwise dedicated and flawless career should not be held against [my husband] forever. I strongly believe that by destroying any prospect for [my husband] to advance in his career the Coast Guard has imposed punishment that is excessive and unjust.”
- On November 29, 2018, a Coast Guard Commander, who is a personal friend of the applicant and his family, wrote that he has known the applicant since 2003 when the applicant was in law school and interning during the summers. He stated that the applicant was the smartest and hardworking intern in the office and that he “embraced the most challenging legal issues and always went the extra mile to help with administrative tasks, logistics and planning involved in preparing for complex court martials.” He stated that they had maintained contact over the years and that he was impressed by how the applicant “was expertly balancing a legal and operational career as a cutterman.” The friend also stated that when the applicant was transferred to Coast Guard Headquarters, he worked for him from April 2015 to January 2016. The friend commended the applicant as follows:

He immediately made a positive impact on our office, taking on extra duties related to personnel, budget, and overhauled the master training plan for the entire legal program (over 200 judge advocates). I was impressed with his focus, determination and resolve making the best out of an extremely difficult situation. Upon my departure in early 2016, he seamlessly stepped into my shoes, performing O5 duties, for approximately seven months until my replacement arrived. . . .

[The applicant] has been functioning at the O5 pay grade for more than five years. He has been serving as a Trial Attorney at the Department of Justice, Environmental Crimes Section since 2016. One of the most highly sought after billets in the CGJAG, the program has entrusted him with some of the nation’s most high visibility and complex cases against civilian mariners. He is not only a top-notch attorney; he is a trusted colleague and life-long friend. His integrity, intelligence and humility are admirable. He has never given less than 100% effort to the Coast Guard. Out of all of the judge advocates with whom I have worked, [the applicant] is in the top five for his legal acumen, tireless work ethic and dedication to the organization. [The applicant] has demonstrated unparalleled perseverance and resilience and has continued to make lasting

positive contributions to our service. I ask that you grant his petition to continue to service by reinstating him to 05.

- A former direct report of the applicant, currently the Senior Independent Duty Health Services Technician for Coast Guard, stated that he always respected the applicant and saw the goodness, truthfulness, dedication, and unselfish service he has provided the Coast Guard. He said that the applicant was an exemplary leader and exactly the type of person the Coast Guard should aspire to have in every leadership position. He stated that, in his opinion, the applicant “paid a very high price for a single mistake even though it was a fairly serious one” and that he has full confidence in the applicant’s abilities and sees no limits to the applicant’s potential for success. He described the applicant as a talented officer, lawyer, and dedicated leader with unlimited potential who had earned his highest respect and recommended him for promotion should the Board find in the applicant’s favor. He ended his statement by saying that he would love the opportunity to serve with the applicant again.

The applicant attached to his application medical records from his time in the Coast Guard, articles and medical literature in support of his mental health claims, proof of his VA disability rating, which are included in the summary below, as well as performance appraisals showing his consistently strong performance during his time in the Coast Guard and the Report of the Special Board that Convened on November 13, 2015. The applicant also submitted liberal consideration guidance issued by the Department of Defense, which is not applicable to this case.

SUMMARY OF THE RECORD

The applicant was commissioned an ensign in May 1999 and served aboard two cutters before the Coast Guard assigned him to attend law school. He was promoted to lieutenant junior grade in 2000 and to lieutenant in 2003, and he received two Achievement Medals and a Commendation Medal.

The applicant graduated from law school in 2006 and served as a District staff attorney for four years, where he received excellent OERs and was promoted to LCDR in 2009. From 2010 to 2012, he served as the XO of a large cutter and received excellent OERs. The applicant received another Commendation Medal and a Navy Achievement Medal during this period.

From 2012 through December 2014, the applicant served as a Deputy Staff Judge Advocate, advising a busy District on numerous legal issues, handling two environmental crimes cases, and prosecuting four general courts-martial cases, in addition to managing an office and supervising three attorneys and support staff. (The applicant stated that this is also when he handled child pornography cases.) The applicant received excellent OERs and was awarded two more Commendation Medals for this service. In August 2014, he was selected for promotion to CDR and placed near the top of the promotion list by the selection board. In December 2014, he was frocked as a CDR based on his upcoming promotion and assignment to a CDR billet.

On January 5, 2015, the applicant reported for duty as the XO of a new National Security Cutter that was not yet commissioned. Within a few weeks, the applicant engaged in an affair with a married woman. The woman subsequently revealed the affair to her husband, who complained

to the applicant's commanding officer (CO) and the affair became public knowledge. As a result, on April 7, 2015, the applicant was removed from his assignment as the XO based on "substandard conduct" in accordance with Article 5.A.3.e.(1)(b) of COMDTINST M1000.3A (hereinafter, the "Officer Manual") and his chain of command prepared the disputed SOER to document his removal. In the meantime, the applicant was transferred to an office at Coast Guard Headquarters.

SOER Input

A few days after his removal, the applicant submitted five pages of bulleted information about his performance from January 5, 2015, to April 7, 2015, and supporting documentation as input for the SOER that would document his removal from his duties. He also submitted a draft SOER with many positive comments about his performance as well as the following:

Unfortunate personal conduct outside of CG work environment compromised ability for continued fulfillment of primary duties. [His] involvement in extra-marital affair & subsequent investigation necessitated removal; otherwise perception amongst crew would be that disparity existed in handling Good Order & Discipline. Upon realization of gravity of situation, [he] self-reported conduct to CO; work never diminished thru invx. Outside of this conduct, [he is] a self-starter. ...

Unfortunate personal conduct that occurred over less than 3 week period appears far from norm for [the applicant]; fully expect [him] to move forward with career utilizing available support to ensure conduct is never again called into question. Highly recommend future assignment afloat ... Recommend proceed with promotion to O-5 as scheduled.

Medical Records After Suicide Attempt

The discharge summary following the applicant's hospital stay on April 16, 2015, provides the following:

DISCHARGE DIAGNOSIS:

Axis I: Major Depressive disorder, severe, single episode. Anxiety disorder, not otherwise specified, rule out posttraumatic stress disorder.
Axis II: Deferred
Axis III: Rosacea

PSYCHIATRIC/MEDICAL PSYCHOSOCIAL STRESSORS

Axis IV: Marital, family, work stressors
Axis V: GAF of 60.

A health record dated April 17, 2015, signed by a private clinical psychologist provided the following:

Session #1: The service member was diagnosed with major depression, single episode severe [during his hospitalization following the applicant's suicide attempt]. The examiner's in agreement with this diagnosis and [] there exists a strong suggestion that the service member may suffer a mild PTSD and any further treatment should consider this aspect of his depression.

A health record dated April 23, 2015, signed by a private clinical psychologist provided the following:

MAJOR DEPRESSION, SINGLE EPISODE: His current depression symptoms started in early January and have gotten worse. He recalls phases of some depression-type symptoms in the past at 14 (with symptoms lasting about a year); during his junior year of college (symptoms lasting about a month); at 26 (symptoms lasting about 4 months); and at 35 (symptoms lasting about 2 years). These past episodes would probably not met criteria for major depression. Diagnostic issues and treatment options discussed. It is too soon to say what eventual benefit he will gain from Remeron at this dose. Overall his symptoms are better since he started Remeron a week ago, so I encourage that he stay on that. We discussed that a patient his own best dose of Remeron and at what time of day to take it, higher doses sometimes being less sedating than lower doses. E/SE discussed. The patient is not much interested in psychotherapy but I encourage that he continue to see Dr. [] for a while. RTC 1-2 weeks, at which time we can discuss further medication options. RISK ASSESSMENT: See Dr. [B's] assessment of 17 April. The patient has had no thoughts of death or self-harm in the past week. He is not feeling hopeless. He is not preoccupied with death. Identified reasons for living: wife, kids and other family members. He does not desire to die. He desires to live. In the matter of optimism is he 'getting there.' He has spiritual support. Overall his risk level is low to medium. Outpatient treatment is appropriate.

Seven months later, a health record dated November 24, 2015, and signed by a private clinical psychologist provided the following:

Patient reported presenting for evaluation per PCM referral. Patient reported patient PCM wanted a behavioral health evaluation with specific interest in diagnosis and prognosis. Patient reported that this would be required for security clearance. Patient specifically reported not wishing to have medication management services for psychiatric symptoms at this time.

Assessment and Diagnosis: Maj. Depressive disorder, recurrent episode, unspecified and anxiety disorder not elsewhere classified versus Adjustment disorder with anxiety and depressed mood; this is difficult to determine due to patient unclear possible history of depressive episodes at 14 years old, 26 years old, 36 years old.

TREATMENT PLAN AND STRATEGY

Medication: *Patient reported categorically wishing not to start any psychotropic medication at this time.*

Psychotherapy: Patient was referred to begin individual psychotherapy.

Provisional Diagnosis: *Major depressive disorder, single episode, unspecified*

SOER

On the official SOER documenting his removal, the applicant received eight marks (out of eighteen) of "not observed," indicating that the CO felt that he had not observed sufficient performance to assign a numerical mark in that performance dimension. He also received three high marks of 6 and four marks of 5 (on a scale from 1 (worst) to 7 (best)) with supporting positive comments. The Reporting Officer's part of the SOER, however, includes a low mark of 3 for "Professional Presence," two poor marks of 2 for "Judgment" and "Responsibility," and a mark in the third spot on the comparison scale, denoting a "fair performer." These low marks are supported by the following negative comments:

[The applicant] was off to a promising start as an XO; however, [he] had an unfortunate lapse in personal conduct that occurred over a period of approximately 3 weeks. This lapse revealed significant defects in his personal and professional qualities.

Personal misconduct outside of CG work environment compromised ability for cont'd fulfillment of primary duties as XO and exposed character flaw. Involvement in an inappropriate relationship with a married woman demonstrated a lapse in judgement and personal accountability that disparaged CG's reputation among individuals in local community. ...

[The applicant's] poor personal conduct may have been out of the norm for an otherwise solid officer. Behavior was reprehensible & in direct contrast to Good Order & Discipline, undermining duties & responsibilities as a senior leader & XO of a major cutter crew. Actions necessitated removal from primary duties. I fully expect [him] to move forward w/career utilizing available support to ensure conduct is never again called into question. Rec[ommend that he] be retained in Service, but not be permitted to promote as scheduled due to substandard conduct. [His] administrative skills and legal background make him well suited for most staff assignments.

On April 24, 2015, OPM-1 advised the applicant that "based on pending potential adverse information," his promotion would be temporarily delayed in accordance with Article 3.A.12.f. of the Officer Manual and his authorization to frock as a CDR had been revoked. OPM-1 stated that the applicant would be notified "when it has been determined that either [he would] be promoted or further administrative action [would be] necessary." The applicant acknowledged this notification on April 30, 2015.

On May 22, 2015, the applicant submitted to OPM-1 an addendum for the SOER with many comments concerning his wife, children, and other family members. On May 26, 2015, OPM-1 returned the addendum with comments and redactions of "information/comments that specifically relate to or indicate your family status, such as wife and kids/geo-separation, which is restricted," as well as specific details about his performance that occurred outside of the reporting period for the OER, which are also restricted.² The applicant replied that the restrictions would limit his ability to provide context for the SOER. OPM replied that the policy allowed for only broad references to family and prior assignments, such as "cumulative stress built up from being away from family in addition to demanding/high stress jobs." The applicant revised his OER addendum and submitted it the same day.

In his OER addendum, the applicant stated that he deeply regretted and was embarrassed by his conduct. To put his behavior "into context," he stated that he had worked in high-stress assignments since 2006 in which he had carried a smart phone to be available 24/7, which often reduced his personal time. He stated that although he had enjoyed more personal time in 2014 and was able to explore the wilderness in his boat, he vigorously pursued the opportunity to be the XO of the new cutter, which would be homeported near his hometown. He explained that his excitement quickly diminished when he reported for duty in January 2015, however, because the disruption to his personal life caused stress, sadness, and depression. He stated that he compensated by working longer hours and increasing his exercise routine and did not realize that "the emotional toll that was occurring put [him] in crisis mode." He explained that he was "[l]ooking for anything that would lift his spirits" when he began a romantic relationship with a civilian woman, which "gave him something to look forward to." The applicant stated that the relationship "ended badly" and he simultaneously realized that it was not what he wanted. However, the damage had already been done. The applicant stated that he "informed [his] CO" and "cooperated through the aftermath." The applicant stated that he had "paid dearly for [his]

² Article 2.B. of the OER Manual prohibits comments referring to an officer's "performance or conduct which occurred outside the reporting period" or the officer's "marital or family status."

mistake” because of the personal and professional embarrassment, the loss of his “dream assignment,” and continuing negative effects on his career. He asked for an opportunity to rebuild his career.

The applicant’s CO and the OER Reviewer forwarded the OER addendum for entry in the applicant’s record without comment.

Special Board

On September 15, 2015, the Boards, Promotions, and Separations Branch of OPM (OPM-1) notified the applicant by memorandum that based on the SOER, OPM-1 had initiated action to convene a Special Board to “recommend whether you should be permanently removed” from the promotion list in accordance with Article 3.A.12.f. of the Officer Manual. OPM-1 noted that pursuant to COMDTINST 1410.2, the applicant was allowed to submit comments on his own behalf for the Special Board within 21 days of acknowledging the notification. The applicant acknowledged it by signature on September 25, 2015; therefore, pursuant to this agreement, any comments submitted after October 16, 2015, were not allowed.

On October 9, 2015, the applicant submitted a statement to OPM-1 for the Special Board. He admitted that he had had a sexual encounter with a married woman. He stated that upon learning that the woman had told her husband, who intended to complain to his command, he self-reported to the CO. The applicant detailed his prior performance, the stresses of his prior assignments, and the sacrifices he and his family had made for his Coast Guard career. He noted that from 2010 to 2012, when he was assigned to a cutter and living away from his family, both of his wife’s parents had died unexpectedly, which caused immense strain on her and their children. The applicant stated that the stresses and long hours of legal work as a Deputy Staff Judge Advocate from 2012 through 2014 had diminished his resiliency and “created a chasm with my family.” He stated that when he learned about the opportunity to serve as the XO of the new cutter in June 2014, he requested the assignment and was ecstatic because his mother and brothers lived near the homeport. He planned to transfer to the homeport by himself in January 2015 but move his wife and children to the area at the end of the summer in 2015.

The applicant explained to the Special Board that when his workload became more manageable in the summer of 2014, he took leave and spent a lot of time with his family. The rest of the year included “emotional highs” in the successful conclusion of two cases, his receipt of a Commendation Medal, and his frocking as a CDR. He stated that during and after his transfer to the cutter he experienced “deep emotional lows.” He explained that when he arrived, he discovered that the cutter would likely not be ready for an operational patrol until 2017 and so he would not “get the time at sea that [he] so highly treasured.” He stated that his isolation from family and friends was exacerbated by the time difference, which made telephone calls difficult. However, he explained that he “dove into the extensive work with a determination to support the crew” and “tackled a wide range of personnel and morale issues.” He went on to say that, after a month, he took leave to visit his wife and children for a few days but that the visit did not go well. He explained that his wife and kids had been having a tough time because of his absence and they were angry that they were going to have to move again. He stated that he and his wife did not communicate well, and when he arrived back at the cutter he “needed an escape, a distraction,

from my own guilt and feelings of sadness.” He alleged that he avoided the dangers of alcohol and comfort food but did not ask for help because of the stigma. He stated that his “initial interaction with the woman created the distraction from [his] sadness that [he] was searching for and the immediate euphoria clouded [his] judgment.” The applicant also noted his work aboard the cutter and attached the draft SOER he had prepared with the attachments. He discussed his current performance and career goals and asked the Special Board for the opportunity to retain his promotion and rebuild his career.

In an endorsement for the Special Board dated October 13, 2015, the Judge Advocate General (JAG) stated that the applicant had achieved enormous accomplishments since arriving at Headquarters in late April. He stated that the applicant is a “self-starter with limitless capacity” who “sought and excelled handling additional duties.” He further stated that the applicant “is a selfless leader – he’s first to lend a hand to subordinates and superiors” and is “an inspiring leader and inexhaustible teammate.” He attested that the applicant’s work quality is “easily what we want from a Commander” and that he had “just allowed the current O-5 office deputy to compete for an offseason assignment because I know [the applicant] can step into that billet and function instantly without any programmatic gap.” He further stated that the applicant had “demonstrated candor, self-examination, and personal accountability,” and that his experience and intellect could “significantly benefit the Coast Guard’s operational and strategic leaders for years to come.”

On November 9, 2015, the applicant’s Division Chief advised OPM-1 that his deputy had received transfer orders and that he had supported her request to transfer because his office was over-billeted due to the applicant’s assignment. The Division Chief told OPM-1 that the applicant “will assume those responsibilities upon [her] departure, noting: “We had OPM-2 [the Officer Assignments Branch of OPM] adjust the PAL [the Division’s Personnel Allowance List] to reflect [the applicant’s] filling the O-5 deputy position. What is the proper mechanism to get this info before the special board?” OPM-1 replied that the applicant could “include this information in comments to the board in accordance with [Article 3.A.12.f. of the Officer Manual].” The Division Chief forwarded this email to the applicant and told him that he was “able to get [him] moved into the deputy position on PAL” and that he could provide the information to the Special Board, which was to convene on November 13, 2015. Accordingly, the applicant submitted an addendum on November 10, 2015, which stated that he would be fleeting up to backfill the O-5 deputy position when the incumbent was transferred in January 2016. The applicant remained an O-4 while filling in as the O-5 deputy.

On November 13, 2015, a Special Board, composed of a captain and two commanders, convened to review the applicant’s records and recommend whether or not his name should be removed from the promotion list. The list of attachments to the Special Board’s report includes the applicant’s statement dated October 9, 2015, with its endorsement at “Tab A,” but the addendum to the statement is not mentioned. The Special Board concluded that the applicant’s name should be removed from the promotion list, finding that his conduct constituted a significant breach of good order and discipline and reflected poorly upon his judgment and professionalism as an officer of the Coast Guard. The Special Board found that the applicant, “[w]hile serving in a position of trust and leadership as Executive Officer of a major unit, mismanaged personal affairs to the detriment of the Service by engaging in a sexual relationship with a married woman. The Special Board agreed that the applicant’s “behavior subverted trust within the local community

and brought discredit to the Service.” The Special Board noted that “[t]he aggrieved spouse of the married woman sought retribution through reporting the misconduct of a Coast Guard Officer to the Command” and that “[the applicant] failed to serve as a role model of ethical behavior while assigned in a highly visible leadership position.” Accordingly, the Board found:

As demonstrated by the above deficiencies, these actions are inconsistent with Coast Guard Core Values. [The applicant] failed to meet the prescribed standards expected of senior officers as outlined in Commandant’s Guidance to PY15 and PY16 Officer Selection Boards and Panels.

On December 1, 2015, OPM-1 forwarded the Report of Proceedings of the Special Board up through the Commandant, who approved the proceedings and the Special Board’s recommendation on January 5, 2016.

On January 22, 2016, the Secretary of Homeland Security approved the Special Board’s recommendation that the applicant’s name be removed from the promotion list.

On January 28, 2016, OPM-1 informed the applicant of the results of the Special Board and forwarded him the Report of Proceedings. OPM-1 stated that under 14 U.S.C. § 272, the removal would constitute the applicant’s first non-selection for promotion and noted that the applicant would be reconsidered for promotion in August 2016. The applicant acknowledged this notification on February 4, 2016.

On his OER dated April 30, 2016, the applicant received excellent marks and was strongly recommended for accelerated promotion. However, he was not selected for promotion when the Commander selection board convened in August 2016. Accordingly, based on his two non-selections and more than 18 years of service, the applicant would be retained on active duty until eligible to retire.

On January 25, 2017, the applicant applied to this Board to correct his military record.

On October 27, 2017, in its decision for BCMR Docket No. 2017-080, the Board denied the applicant’s requests.

On March 31, 2019, because the applicant had not been selected for promotion to O-5 since his removal from the promotion list, he was retired upon attaining 20 years of service.

The applicant provided a letter with a summary of his VA Benefits dated March 15, 2020, and effective as of his retirement on April 1, 2019:

Rated Disabilities

- Post Traumatic Stress Disorder (PTSD) with Major Depressive Disorder – 50%, Service Connected, effective date 04/01/2019
- Hypertension, not service connected
- Rosacea, 0%, service connected, effective date 04/01/2019
- Bilateral Hearing Loss, not service connected
- Unspecified Sleep Disorder, not service connected
- Right ankle Achilles tendonitis – 10%, service connected, effective date 04/01/2019

- Unspecified Sleep Disorder, not service connected
- Rupture of right leg gastrocnemius muscle with Achilles tear -0%, service connected
- Tinnitus – 10%, service connected, effective date 04/01/2019
- Shingles, not service connected
- Left Ankle Achilles Tendonitis, not service connected
- Left Hand and Finger Extremity Numbness and Tingling, not service connected
- Migraine Headaches with Photosensitivity and Blurred vision, not service connected

On September 3, 2020, the applicant submitted an Application for Reconsideration of BCMR decision 2017-080.

VIEWS OF THE COAST GUARD

On April 1, 2021, a Judge Advocate (JAG) for the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

At the outset, the Coast Guard argued that relief should be denied in this case because the application is untimely pursuant to the two-year deadline established by 33 C.F.R. § 52.67(e); the BCMR issued a decision on November 3, 2017; and the applicant's request for reconsideration was dated August 26, 2020, more than two years later.³

In response to the applicant's contention that due to his mental health diagnosis the Liberal Consideration Guidance should be applied to his case and his request for O-5 promotion, the Coast Guard stated that the applicant's request for relief falls outside the remedies provided by DHS's Liberal Consideration Guidance, which is limited to modification of discharge defined as "character of service, narrative reason for separation, separation code, and reenlistment code." The Coast Guard noted that here the applicant's request to remove an SOER, to convene a Special Selection Board to reconsider his selection for promotion, and ultimately, to promote him to O-5, falls outside the scope of relief wherein the Liberal Consideration Guidance would apply.

The Coast Guard also submitted a medical advisory opinion, in accordance with 10 U.S.C. § 1552(g), and the psychiatrist stated that having an affair is *not* symptomatic of or excused by the applicant's mental health conditions. The psychiatrist's opinion also states the following:

Applicant, a former O4, retired from the Coast Guard in 2019 after having been non-selected for promotion to O5. Applicant attempted suicide in 2015 following an incident of misconduct and was evidently diagnosed with Major Depressive Episode, Severe. A follow-on diagnosis indicated possible PTSD linked to his involvement in a service-related helicopter crash in 2001. Applicant alleges that his misconduct (extramarital relations) may have been linked to his mental health condition stemming from the 2001 incident and/or from additional stressors related to his work as a Military Trial Counsel involved in cases of sexual assault and child abuse/pornography. ...

Member had one episode of major depression in context of having an extramarital affair and subsequent administrative punishments by the Coast Guard. Member had expressed seeing a helicopter accident on April

³ The two-year limitation on requests for reconsideration in 33 C.F.R. § 52.67(e) has been superseded by statute: "Any request for reconsideration of a determination of a board under this section, no matter when filed, shall be reconsidered by a board under this section if supported by materials not previously presented to or considered by the board in making such determination." 10 U.S.C. § 1552(a)(3)(D).

2015 [sic]. However member denied any additional symptoms to support a post-traumatic stress disorder.

At the time of retirement, member and medical officer reported no psychiatric issues. Therefore member had one discrete period of depression associated with an affair that resolved. There is nothing in the medical record to support poor performance attributed to a psychiatric disorder. Therefore his poor performance cannot be excused by his major depression.

The Coast Guard further argued that the applicant failed to provide sufficient evidence to establish error or injustice in the manner of his discharge, making the following points:

In accordance with 33 C.F.R. § 52.67(a), reconsideration of an application requires Applicant to present “new evidence or information.” In this case, Applicant’s request is based on new VA medical documentation and an accompanying allegation that his PTSD, and possibly Major Depressive Disorder, were linked to the misconduct that resulted in his relief from primary duties, derogatory OER, and removal from the O5 promotion list. However, the medical conclusion of [the psychiatrist] cuts against both this basis and assertion; namely, “member had one discrete period of depression associated with an affair that resolved. There is nothing in the medical record to support poor performance attributed to a psychiatric disorder. Therefore, his poor performance cannot be excused by his major depression.” Accordingly, without a basis for reconsideration, the Board’s [prior] determination ... should continue to stand.

In sum, the Coast Guard “recommended denial due to the Applicant’s failure to prove by a preponderance of the evidence that an error or injustice exists.” The Coast Guard concluded that “the Board should deny relief in this matter of reconsideration because the VA finding of service-connected PTSD satisfies neither the requirements for the application of the Liberal Consideration Guidance, nor retroactively induces [sic] error or injustice on the part of the Coast Guard with regard to the Applicant’s removal from the O-5 promotion list.” The Coast Guard further noted the fact that “[t]he Applicant continued to render quality service to the Coast Guard was in keeping with his duty, and the presumption of regularity afforded the Agency dictates that his removal in 2015, and informed non-selection every year following, was executed correctly, lawfully, and in good faith.” Therefore, the Coast Guard advised that the applicant’s request should be denied.

The Coast Guard also referenced the DHS Office of the General Counsel Memorandum, Guidance to the Board for Correction of Military Records of the Coast Guard Regarding Requests by Veterans for Modification of their Discharges Based on Claims of Post-Traumatic Stress Disorder, Traumatic Brain Injury, Other Mental Health Conditions, Sexual Assault, or Sexual Harassment (20 June 2018) (“DHS OGC Guidance”), in pertinent part:

- (1) This document provides guidance to the Board for Correction of Military Records of the Coast Guard for providing ‘liberal consideration’ pursuant to 10 U.S.C. §1552(h) and ‘due consideration’ pursuant to 10 U.S.C. § 1554b(b) when deliberating and deciding a veteran’s request for modification of his or her **discharge** based in whole or in part on a claim that a mental health condition, sexual assault, or sexual harassment, either excuses the conduct or poor performance that adversely affected the **discharge** or otherwise warrants modifying the discharge. (Emphasis added).

...

- (4) The term ‘discharge.’ As used in this guidance, means a veteran’s **character of service, narrative reason for separation, separation code, and reenlistment code**. (Emphasis

added).

...

(23) A veteran's mental health condition or experience of sexual assault or harassment does not generally excuse premeditated misconduct. **The Board shall exercise caution in assessing the causal relationship between any asserted mental health condition, sexual assault, or sexual harassment and a veteran's premeditated misconduct.** (Emphasis added).

Regarding the applicant's assertions that his record before the Special Board was erroneous and incomplete, that the findings of the Special Board were unjust, and that the inclusion of his SOER in his permanent record serves no official purpose, the Coast Guard opined as follows:

Regarding the applicant's allegations that the inclusion of the SOER in his permanent record serves no official purpose, the Coast Guard responded that the actions by the Coast Guard were justified and in accordance with policy for the following reasons:

- The applicant did not pursue all his available administrative remedies for relief; he did not file a Reported-on Officer (ROO) Reply as authorized per policy.
- The applicant did not submit an application to the PRRB.
- At the Command's discretion, an officer may be removed from primary duties at any time if that officer fails to perform primary duties and their performance hinders unit readiness of that officer's actions undermine their leadership authority.
- The applicant's SOER was issued due to his substandard conduct that resulted in his removal from his primary duties as the XO in accordance with COMDTINST M1000.3A. The Coast Guard fairly captured the substandard conduct, as noted: "fair performer; recommended for increased responsibility" on the comparison scale, and the reviewer commented "[The applicant's] poor personal conduct may have been out of the norm for an otherwise solid officer. Behavior was reprehensible and in direct contrast to Good Order and Discipline, undermining duties and responsibilities as senior leader and XO of a major cutter."

The applicant also claimed that the SOER is unjust because he had to draft his own SOER and that it was changed based on one person's subjective opinion vice the usual three-level review of a rating chain. The Coast Guard responded:

- The rating chain and evaluation for the contested SOER is in accordance with policy. The Supervisor and RO may be the same member per PSCINST M1611.1 (series) and the Reviewer is a position designated by competent authority. Therefore, in certain circumstances, the Reviewer may be junior to the Reporting Officer. The officer occupying that position has a definite Officer Evaluation System (OES) administrative function affirmed that in his administrative capacity as the Reviewer, he worked with CG PSC-OPM and Area Legal to ensure the SOER was completed in accordance with policy. Coast Guard

officials, to include the Applicant's rating chain, are presumed to have completed their duties correctly, lawfully, and in good faith absent evidence to the contrary.

- The language in the SOER mirrored the opinion of the majority of the Special Board that the applicant's conduct constituted a significant breach of good order and discipline and reflected poorly upon his judgement and professionalism as an officer in the Coast Guard.

The Coast Guard also noted that the applicant had one episode of major depression in the context of having his extramarital affair discovered and subsequent administrative punishments by the Coast Guard, and other than seeing the helicopter accident he has denied any additional symptoms to support a post-traumatic stress disorder. In addition, at the time of retirement the applicant and medical officer reported no psychiatric issues. There is nothing in the applicant's medical record to support poor performance attributed to a psychiatric disorder. Therefore, his poor performance associated with the misconduct cannot be excused by his one episode of major depression.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 7, 2020, the Chair sent the applicant a copy of the Coast Guard's advisory opinion and invited him to respond within thirty days. In response, the applicant provided the following statement:

Thank you for considering my application. As you review the information before you, please keep in mind that this case is about a high performing officer who was fired from an assignment he desired and loved, had his career cut short through forced retirement, demoted, pay reduced, and received a significantly lower retirement package (conservatively estimated at \$500k loss) because of a brief, private, consensual extramarital affair with an individual who was outside of the workplace with no connection with the Coast Guard nor anyone related to the service. I live with the regret of my actions every day and think about the heartache and pain I caused my wife, my family, and the family of the person I was involved with. From the outset, I have been open and honest and shared deeply personal experiences in an effort to process my own actions and provide context to those who controlled the fate of my career and would pass judgement on my capabilities as an officer. While I now better understand how I succumbed to work and life stress, it has never been intended as an excuse. I own my actions and have suffered the very severe consequences. What I am unable to rationalize when I look at my commissioning certificate signed by President Bill Clinton and my retirement certificate signed by President Donald Trump is how my one indiscretion resulted in such a catastrophic end to an otherwise brilliant Coast Guard career without the opportunity for redemption. I served with distinction up until the affair and again for four years afterwards at the O-5 level but was not given the opportunity to promote nor continue service to our country.

The hurt I caused others is for me to bear and I continue to live a better life in my effort to make amends. However, the injustice heaped upon me by the processes of the Service is what I ask you to correct. The resultant punishment I received is inequitable and the Board for Correction of Military records is to serve as the arbitrator when policy and procedures are not followed; or, if policies are followed but the outcome is incongruent with the facts, the Board has the authority, and the duty, to correct the matter.

A basic tenet of legal practice is that if your position is supported by the facts, argue those. If the position is not supported by fact, argue the law. The Advisory Opinions are steeped with technical legal arguments in an effort to justify the basic premise initially stated. All of the negative career impacts precipitated from a single, brief, indiscretion that was out-of-character, admitted to, addressed personally and professionally, and never repeated. To make my conduct any greater than such necessitates recognition that the matter was improperly handled at the outset by the Commanding Officer with repeated errors at every opportunity to

provide correction.

The medical opinion focuses on my exit physical, which was far from all-encompassing and was clear that any treatment or psychiatric evaluation was beyond the scope of the exam. Moreover, high work stress and increasingly elevating blood pressure levels are evident throughout the record, but not addressed in the opinion. The conclusion that psychiatric conditions did not cause the poor performance is a broad-brush conclusion. My service was anything but poor, including immediately following the derogatory OER. The medical opinion, read without context, indicates that I was removed from promotion and repeatedly passed over due to continued poor performance that was unrelated to any psychiatric condition. The reality is that a clear psychiatric break caused a major depressive episode, a manifestation of which was the affair. I then tried to end my life. Consequently, I was punished for the symptoms of poorly managed stress and was repeatedly punished for the fallout despite continued stellar performance.

The medical AO also notes that ‘I observed a helicopter crash in 2015’. The reality is that in January 2001 I was on the flight deck 15 feet from a helicopter that violently crashed, I screamed at my crew to run, I dove over the side of the ship and clung to a safety net. I believed I was going to die. I then climbed back on deck only to realize my crew was missing, then launched in the rescue boat expecting to find bodies floating in the ocean. All this happened with a severely injured leg that has caused chronic pain since. The leg pain is documented throughout my record.

So, the fact that the medical AO erroneously lists the date of the accident and the dismissive comment about its impact on me, and that the erroneous date of the helicopter crash is repeated in OPM’s memo is clear indication to me that the material I submitted was not carefully read nor considered. Rather, it was set aside in lieu of a rubber-stamp to a predetermined outcome.

In my declaration, I tried to explain in detail my mental state at the time of the affair. The AOs don’t seem to care. I hope this board will, even if just a little. Ultimately, I would like the opportunity to present my case in-person to the BCMR. If, as a Board, you determine that the significant professional consequences I endured because of a single brief indiscretion are warranted, please look me in the eye and tell me so. I think after giving 20 years of my life to the Service I am entitled to that basic courtesy.

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. Under 10 U.S.C. § 1552(a)(3)(D), “[a]ny request for reconsideration of a determination of a board under this section, no matter when filed, shall be reconsidered by a board under this section if supported by materials not previously presented to or considered by the board in making such determination.” Because the applicant has submitted new evidence and made new requests concerning his mental health that were not in the record when the decision in BCMR Docket No. 2017-080 was issued, the Board finds that his request meets the statutory requirements for reconsideration. Therefore, the Board will review his case on the merits.

3. The applicant alleged that the SOER documenting his removal from his position as

the XO of a new National Security Cutter on April 7, 2015; the removal of his name from the Commander (O-5) promotion list; and his consequent inability to retire in the rank of CDR are erroneous and unjust because he was suffering from depression and PTSD at the time of his misconduct. 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.⁴ 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."⁵ To be entitled to removal of an OER, the applicant cannot "merely allege or prove that an [evaluation] 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.⁶

4. In this case, the applicant has shown that he was diagnosed with depression and PTSD following his retirement in 2019. He attributes these diagnoses to having witnessed and been injured during a terrifying crash of a helicopter aboard his cutter in 2001 and to having worked on child pornography cases as a JAG. The applicant argued that his misconduct in 2015 should be considered a result of his depression and PTSD and so excused and that the consequences of his misconduct, including the SOER and the removal of his name from the CDR promotion list, should be corrected in the interest of justice. The applicant also argued that the removal of his name from by the Special Board on November 13, 2015, was erroneous because the Special Board was not provided an addendum that he submitted to PSC on November 10, 2015. Under 10 U.S.C. § 1552(a), the Board may "remove an injustice" from a member's record, as well as correct an error in the record. The Board has authority to determine whether an injustice has been committed on a case-by-case basis.⁷ Therefore, the Board must consider whether (1) the new information provided by the applicant as to his mental health excuses his misconduct and alters the Board's previous decision on October 27, 2017, regarding the SOER, and (2) whether it was an error or injustice that the Special Board that convened on November 13, 2015, may not have been presented with the addendum provided by the applicant on November 10, 2015, in which he informed the Special Board that while still an O-4, he would be fleeting up to fill the empty O-5 deputy position in his office when the incumbent was transferred in January 2016.

5. The applicant asked the Board to reconsider its earlier decision, docket 2017-080, and apply "liberal consideration" in light of the new evidence he provided about his mental health, including the service-connected diagnosis of PTSD by the VA and Major Depressive Disorder. The Board has considered the applicant's request and has determined that "liberal consideration" does not apply in this case. First, it does not apply pursuant to 10 U.S.C. § 1552(h) because (a) the

⁴ 33 C.F.R. § 52.24(b).

⁵ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁶ *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).

⁷ Decision of the Deputy General Counsel, BCMR Docket No. 2001-043. According to *Sawyer v. United States*, 18 Ct. Cl. 860, 868 (1989), *rev'd on other grounds*, 930 F.2d 1577, and *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976), purposes of the BCMRs under 10 U.S.C. § 1552, "injustice" is "treatment by military authorities that shocks the sense of justice."

Board is not reviewing the applicant's discharge, but his SOER and lack of promotion to CDR, and (b) the applicant has not shown that his PTSD is related to combat or military sexual trauma. Likewise, the DHS OGC Liberal Consideration Guidance does not apply because that guidance is also limited to reviews of discharges, and it defines "discharge" for the purpose of the guidance as a member's "character of service, narrative reason for separation, separation code, and reenlistment code." The applicant's request to modify his record by removing an SOER and reversing the removal of his name from the CDR promotion list or convening another board to reconsider his promotion to CDR falls far outside the scope of the Liberal Consideration Guidance.

6. Regarding the applicant's allegations that including the SOER in his permanent record serves no official purpose and that it should be removed from his record, the Board disagrees. The applicant has not submitted evidence to show that the statements in the SOER are false or provided information sufficient to excuse the misconduct noted in the SOER. The applicant alleged that his misconduct resulted from his depression and PTSD but he has not proven by a preponderance of the evidence that he was suffering the symptoms of either of those conditions when he committed the misconduct. The record shows that the applicant was not diagnosed with depression until after he had severely damaged his career by engaging in an extramarital affair that became known while he was the XO of a cutter, responsible for ensuring justice aboard the cutter.⁸ Before the discovery of his affair, he had volunteered to leave his wife and children on the West Coast to take up the new, high-visibility position of XO of a new National Security Cutter. The applicant has not provided any medical records diagnosing him with PTSD or depression before he committed the misconduct. The applicant's allegation that PTSD and/or depression contributed to his misconduct is speculative at best, and accordingly the applicant has not proven that the content of the SOER is erroneous or unjust. The Board finds no basis for removing the SOER from his record.

The Board finds that the SOER was due to his substandard conduct that resulted in his removal from his primary duties as the XO in accordance with COMDTINST M1000.3A. The Coast Guard fairly captured the substandard conduct, as noted: "fair performer; recommended for increased responsibility" on the comparison scale, and the reviewer commented "[The Applicant's] poor personal conduct may have been out of the norm for an otherwise solid officer. Behavior was reprehensible and in direct contrast to Good Order and Discipline, undermining duties and responsibilities as senior leader and XO of a major cutter."

The applicant also claimed that the SOER was unjust because he had to draft his own SOER and that it was changed based on one person's subjective opinion versus the usual three-level review of a rating chain. Allowing an officer to submit a draft OER as part of his OER input is not uncommon, and the Board finds that the rating chain for the contested SOER was designated in accordance with policy. Pursuant to PSCINST M1611.1, the Supervisor and RO may be the same member, and the Reviewer serves an administrative function and may actually be junior to the Reporting Officer if so designated. The CO of the cutter served as the Supervisor and RO in this case, and a second officer served as the Reviewer. Such a two-person rating chain is the norm for XOs of cutters because the only superior officer who observes their performance regularly in person is the CO of the cutter. Moreover, in this case, the Reviewer affirmed that in his administrative capacity, he had worked with CG PSC-OPM and Area Legal to ensure the SOER

⁸ Coast Guard Regulations, COMDTINST M5000.3B, Art. 6-2-3.

was completed in accordance with policy.

Therefore, the Board finds no grounds for removing the SOER because the applicant has not proven by a preponderance of the evidence that it 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 He has not proven any misstatements of fact or prejudicial violations of law in the preparation or the SOER or that his misconduct and consequent removal as the XO of the new National Security Cutter should not have been a factor in the rating process.

7. The applicant also alleged that the addendum to his personal statement to the Special Board contained information material to that board’s consideration of his promotion and that it remains unclear whether the addendum was provided to the Special Board. In the addendum, the applicant pointed out that the list of attachments to the Special Board’s report included the applicant’s statement dated October 9, 2015, with its endorsement at “Tab A,” but the addendum to the statement, which he submitted on November 10, 2015, three days before the Board convened, was not listed as a separate attachment. The applicant acknowledged that he provided the addendum after the deadline for submitting his personal statement to the Special Board but argued that there is no regulation regarding a deadline for submitting an addendum to the personal statement.

The Board has already addressed this issue in Finding 12 of its original decision in 2017-080:

12. Addendum to the statement to the Special Board. The applicant alleged that he was denied due process because his addendum to his statement was not submitted to the Special Board. He alleged that this error deprived the Special Board of the information that OPM was going to let him "fleet up" to fill his supervisor's O-5 position despite having convened the Special Board. Assuming that the applicant's addendum to his statement to the Special Board was not actually included with the statement at Tab A to the proceedings, which the Coast Guard did not deny, the applicant has not shown that the 21-day limitation on his submission was improper. But assuming that it was improper the question remains whether the Special Board was actually denied material information in making its decision. The record shows that the Special Board was informed of the applicant's possible "fleet up" and of the JAG’s confidence that the applicant could do his supervisor's job and perform well in an O-5 attorney position in the JAG's October 13, 2015, endorsement of the applicant's statement to the Special Board:

[The applicant's] work quality is easily what we want from a Commander. In fact, I just allowed the current O-5 office deputy to compete for an offseason assignment because I know [the applicant] can step into that billet and function instantly without any programmatic gap.

The applicant's November 10, 2015, addendum added only the information that because the current office deputy had actually received the offseason assignment, he was going to fleet up as the JAG had anticipated and that, at the Division Chief’s request and because the Division had been over-billeted due to the applicant's assignment, OPM-2 had adjusted the Division's Personnel Allowance List to reflect the fact that the JAG had decided that the applicant would fleet up to the O-5 position in January, when the incumbent left.

The Board finds that the applicant has not proven by a preponderance of the evidence that the Special Board was denied material information, assuming that the Special Board did not see his November 10, 2015,

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).

addendum to his statement to the Special Board. The addendum did not include information that was materially different from the JAG's endorsement for the purpose of the Special Board. The JAG's endorsement informed the Special Board that the applicant would fleet up to the O-5 position, with the JAG's full confidence, if and when the O-5 office deputy left. The applicant emphasized the fact that his addendum shows that OPM-2 had adjusted the PAL, as if the adjustment of the PAL somehow reflected a change in OPM's assessment of his misconduct, his abilities, or the need for a Special Board. But the emails dated November 9, 2015, do not show that the Chief of OPM had changed his mind about the need for the Special Board; the emails show that the JAG was going to fleet up the applicant—just as the JAG had anticipated in his endorsement for the Special Board—and that therefore and because the Division had been over-billeted, the Division Chief “had OPM-2 adjust the PAL to reflect [the applicant's] filling the O-5 deputy position.” The Board finds that the fact that the applicant would be fleeting up as anticipated and the fact that OPM-2 had adjusted the PAL to reflect the fleet-up at the Division Chief's prompting do not constitute materially different information about his ability to perform as an O-5—or about his superiors' confidence in his ability to perform as an O-5—from what the JAG had already told the Special Board in his endorsement.

The Board's assessment of this matter has not changed. Although the applicant argued that, contrary to the Board's prior finding, the fact that OPM—the authority convening the Special Board—had approved the JAG's plan to have the applicant “fleet up” to fill an O-5 attorney position when the office deputy left in January 2016 is significant information that was erroneously and unjustly denied to the Special Board, this Board disagrees for the following reasons:

- OPM agreed to allow the applicant to submit an addendum to his personal statement to the Special Board even after the deadline provided for submitting such statements, and those officials are entitled to a presumption that they acted correctly by forwarding this addendum to the Special Board despite its arrival after the stated deadline;
- The absence of a separate entry for the addendum on the list of attachments to the Special Board's report could be due to its late arrival or to its being considered and included as a part of his personal statement, which was listed as an attachment; and
- The Board disagrees with the applicant's claim that the fact that OPM-2 had agreed to allow the applicant to fleet up to fill an empty O-5 attorney position is more impressive or substantially different than the JAG's personal statement on behalf of the applicant stating that the applicant would be fleeting up to fill an empty O-5 attorney position even though OPM was responsible for convening the Special Board.

8. Even if the applicant could prove by a preponderance of the evidence that he was suffering symptoms of PTSD when he committed misconduct in 2015, he has not shown that he would be entitled to promotion based on the diagnosis alone. Title 14 U.S.C. § 2155 states, “An officer whose name appears on an approved list of officers selected for promotion to the next higher grade and who is retired for physical disability under the provisions of chapter 61 of title 10 prior to being promoted shall be retired in the grade to which he was selected for promotion.” But having symptoms of PTSD does not entitle an officer to a disability retirement. An officer diagnosed with PTSD must first undergo at least 12 months of treatment for PTSD without improvement to be processed for a disability separation.¹⁰ And in the applicant's case, the record shows that he was authorized to remain on active duty from 2015 until he retired in 2019 and performed very well during that period. Therefore, he has not shown that he should have been medically retired or promoted based on his post-misconduct diagnoses of PTSD and depression.

¹⁰ Coast Guard Medical Manual, COMDTINST M6000.1F, Chap. 3.F.16.b.

9. The applicant has not proven by a preponderance of the evidence that the SOER, his removal from the CDR promotion list, and his lack of promotion to CDR before his retirement is erroneous or unjust. Accordingly, the applicant's requests for relief should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of LCDR [REDACTED] USCG (Retired), for correction of his military record is denied.

March 22, 2024

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