


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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2022-072


ENS (Former)

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 October 25, 2022, and assigned the case to an attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated October 10, 2024, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The Board received the applicant's complete application on October 25, 2022 which included a 543-page document wherein he outlined his numerous allegations that were often times redundant and restated using different wording. For efficiency and clarity the Board will provide a synopsis and overview of the applicant's allegations and not summarize the entirety of the 543-page document. To do so would make this decision unwieldy. The 543-page document included a declaration by the applicant, a Statement of Material Contentions, and supporting claims and evidence. In general, the applicant alleged that his Command's actions toward him in awarding the four negative Page 7's were erroneous and unjust, and not supported by the true facts of his case; the five contested OER's contained substantive and administrative errors and were not completed in accordance with Coast Guard policy; and that the administrative investigation that formed the basis of the NJP that resulted in the August 30, 2019 Punitive Letter of Reprimand was not within policy because it was not conducted by trained investigators. The applicant also alleged that his command was biased against him and harassed him.

The applicant, a former Ensign (ENS/O-1), alleged that his Coast Guard record while serving under his Commanding Officer (CO) Lieutenant (LT) T was erroneous and unjust, and

asked the Board to correct his record by: (1) removing four Page 7's (CG-3307)¹ he received dated March 20, 2019, April 20, 2019, May 19, 2019, and May 21, 2019; (2) removing five Officer Evaluation Reports (OERs) he received for the periods November 20, 2018 to March 31, 2019, April 1, 2019 to June 27, 2019, June 28, 2019 to September 30, 2019, June 28, 2019 to December 17, 2019, and October 1, 2019 to May 21, 2020; (3) overturning the results of the non-judicial punishment (NJP) that occurred on June 27, 2019 and removing all associated records, including a Punitive Letter of Reprimand dated August 30, 2019; (4) restoring the applicant's commission as an Ensign in the U.S. Coast Guard Reserve; (5) correcting his DD Form 214 signed on May 15, 2020 at block 12.b to add the date the BCMR directs his commission restored, block 26 to replace GNC² with a separation code that reflects completion of required active service, and at block 28 change the narrative reason to reflect completion of required active service; (6) ordering all military pay and entitlements for the period May 22, 2020 to the date the BCMR directs his commission restored; and (7) assigning the applicant to a Coast Guard unit as a Reservist, not serving on active duty.

In his declaration, the applicant attested that while serving in the Coast Guard he never "[i]nappropriately touched any Coast Guard member"; "[m]ade any inappropriate remarks to any Coast Guard member"; or "[h]ad interactions with any Coast Guard member that [he] knew would cause them to feel uncomfortable and unsafe in the workplace".

The applicant alleged that his CO, LT T, was being investigated for sexual harassment and that public internet comments made by LT T supported this claim; that he was unjustly treated by his command as to the qualifications required of him as Deck Watch Officer and that he was provided outdated materials; that his command's actions can be characterized as bullying and harassment; that he was never provided the CCTV coverage he requested on May 20, 2019 to support his bullying allegation against his CO, LT T, and refute the claim that he tried to run away across the mess deck on May 20, 2019; that he told his parents that his Command was harassing him on the same day but prior to his command initiating an investigation into his alleged inappropriate relationships with multiple junior enlisted members onboard Coast Guard Cutter (CGC) "RY"; that his Command failed to initiate a Coast Guard Investigative Service (CGIS) investigation (informal investigation, preliminary inquiry, or formal investigation) upon his mother reporting that he was being mistreated on the cutter; that the investigation did not lead to a finding of bullying, but did find instances that demonstrated a lack of professionalism and military bearding of the part of the CGC RY command and crew; that the unjust Page 7 he received on May 19, 2019 regarding his alleged performance failure was the reason the Selection Board that convened on November 13, 2019 did not promote him and the reason he was separated from service; that the declarations provided to the Personnel Records Review Board (PRRB) by his Reporting Officer and Supervisor, LT T and LT F, were factually inaccurate, and that the testimony provided by MKC R to the PIO does not support the declarations of LT T and LT F; and that five of his OERs were erroneous and unjust and not completed in accordance within policy.

The applicant alleged numerous actions by the Sector Commander (Captain (CAPT) B)'s were erroneous and inconsistent with policy, including that his command initially used counseling

¹ A CG-3307 is referred to as a Page 7, which can be positive or negative. The Page 7's requested to be removed by the applicant are negative Page 7's. CG-3307 and Page 7's are used interchangeably throughout this decision.

² This separation code denotes unacceptable conduct.

as a substitute for a Command investigation into alleged accusations of sexual harassment, fraternization, and lying and that this prejudiced him because at the time of counseling he was not provided the right to counsel whereas he would have been provided the right to counsel if he was being investigated; that he requested a polygraph to prove he was innocent of the harassment charges but he was never provided the opportunity; that the convening order issued by CAPT B was in error because it did not specifically state that the Preliminary Investigating Officer (PIO) must seek guidance from legal counsel as to whether or not to obtain written and/or sworn statements from witnesses that are interviewed; that the Command erred in that it did not provide direction to the PIO to include in the convening order an investigation as to his alleged operational qualifications failure; that CAPT B failed to seek legal counsel as to how to direct the PIO to conduct and document witness statements taken as part of the investigation; and that CAPT B's delay in issuing the reported findings and outcomes via action memo more than 30 days after the incident on May 19, 2019 resulted in his not being provided evidence that he could have used at the mast on June 27, 2019 and his Appeal of Imposition of Nonjudicial Punishment.

The applicant also claimed that the investigation conducted by the PIO was flawed because the investigator did not take notes while conducting interviews; did not respond to his request to provide a written statement; as part of the investigation, the PIO did not provide an assessment as to the credibility of the witnesses and whether the evidence examined was subject to reasonable dispute; that interview statements written by the PIO were not drafted in accordance with the GPO Style Manual³ as required by policy; that the PIO did not properly complete Form CG-4910 at the conclusion of the preliminary investigation; and the date noted by the PIO on the report is incorrect.

In his Statement of Material Contentions, the applicant claimed that in a December 11, 2019 "Righting the Ship" report, the "U.S. House of Representatives Committee on Oversight and Reform and the Committee on Homeland Security found deficiencies in the Coast Guard's processes for addressing allegations of harassment and bullying" and also noted that "the Coast Guard repeatedly withheld documents and improperly and inconsistently redacted documents that were produced" and "failed to produce all responsive documents" in response to the Congressional inquiry. The applicant argued that the Command investigation should not be relied upon because it was conducted by investigators/factfinders who lacked the required Civil Right and Civil Liberties approved training required by Congress, including approved training in investigating, interviewing, report writing, and investigating harassment allegations, and also the legal requirements for claims on harassment. The applicant further claimed that he did not receive informal counseling and was not warned that a subsequent violation would result in documentation; that LT T and LT F made false official statements and perjured themselves before the PRRB; and that he was not attached to Sector on June 27, 2019 when CAPT B imposed NJP.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on May 11, 2012 as a Seaman (SN/E-3). After attending A school, the applicant served in the Coast Guard Select Reserves as a Machinery Technician/Petty Officer Third Class (MK3/E-4). He was promoted to MK2/E-5 on April 1, 2014. On July 1, 2018, he was promoted to a MK1/E-6, and he served in this position until July 23, 2018.

³ See COMDTINST M5216.4C. The applicant argued that there is no evidence that the direct quotes in the interview summaries (relied on as evidence) accurately reflect the exact written or spoken words by the witness.

He attended Officer Candidate School from July 24, 2018 through November 20, 2018. On November 20, 2018, the applicant was appointed as a commissioned officer and entered active duty, at which time he was transferred and assigned to serve as an Ensign (ENS/O-1) onboard the Coast Guard Cutter (CGC), “RY”, as a Deck Watch Officer. At the time he reported onboard CGC RY on November 20, 2018, his CO was LT T.

On December 20, 2018, the applicant received a positive Page 7, acknowledging certain qualification deadlines, including a deadline of March 20, 2019 for qualification as an Inport Officer of the Deck (OOD) and Quartermaster of the Watch (QMOW). The Page 7 provided that E-5s and above will qualify as Inport OOD and those without previous cutter experience will qualify as Inport JOOD before breaking-in Inport OOD. The following qualification deadlines were established:

- a. Inport OOD . . . 20 MAR 2019
- b. QMOW . . . 20 MAR 2019
- c. [Underway] U/W OOD . . . 20 SEP 2019
- d. [Boat Deck Seaman/Boat Deck Captain] BDS/BDC . . . Jan 2019
- e. [Alien Migrant Interdiction Operation] AMIO . . . 20 FEB 2019
- f. [Boarding Team Member] BTM . . . 20 MAR 2019
- g. [Boarding Officer] BO . . . School Pending

On December 20, 2018, the applicant also signed a Page 7 acknowledging the policy on interpersonal relationships between shipmates onboard a cutter, specifically that “[r]omantic relationships between crewmembers are inappropriate and unacceptable.”

On January 11 and 12, 2019, the applicant and LT T signed two Page 7’s acknowledging that the applicant had qualified as a Boat Deck Seaman and Boat Deck Captain onboard the CGC RY. The Page 7’s stated that these qualifications are cancelled upon the applicant’s PCS transfer from CGC RY and may be revoked at any time by LT T or his successors.

On March 20, 2019, the applicant received a negative Page 7 for failing to meet qualification deadlines of March 20, 2019 for Inport OOD and QMOW. This is the first contested negative Page 7. This Page 7, which is signed by LT T and acknowledged by the applicant, stated that if both qualifications were not earned by April 20, 2019, the applicant would receive another Page 7 noting his failure to meet shipboard qualification requirements and would be placed on Performance Probation. The applicant was again informed that the “qualifications are [his] to own and complete. The crew is available to assist, but [he] must be proactive in seeking that assistance. Qualifications are earned not given.”

On March 28, 2019, the applicant’s CO (LT T) sent an email to the CG Sector [] advising that the applicant failed to meet his March 20, 2019 qualification deadline, including Inport OOD, QMOW, and Advanced Damage Control. This email also noted that the applicant’s attitude had created hostility among the crew by placing the blame on them for failing to meet deadlines, using his position as an officer to shirk duties, and blatantly disregarding their opinions, instructions, and feedback. LT T also noted that he spoke with the applicant about the “perception he ha[d] created regarding a perceived fraternization issue as he only speaks with the female CS3 and 3 female non-

rates. The issue was enough that it was brought to my attention by the Chiefs, First Classes, and finally 2 of the 4 female crewmembers.”

On April 2, 2019, the applicant stated that he spoke to Ms. L, Coast Guard Civil Rights Directorate, and reported he was being bullied by LT T, and that Ms. L stated that she was familiar with LT T but advised that the Coast Guard Civil Rights Directorate could not help him because his report of harassment did not appear to be based on a protected status, and that he would have to report the alleged bullying by LT T to his chain of command. The applicant alleged that after reviewing the harassment complaint procedures in COMDTINST 5350.4D and COMDTINST M1600.2, that due to his seniority he was concerned about reporting LT T with no assurances of confidentiality and protection against retaliation and that, when he received an email from Mr. K with the Civil Rights Directorate on April 5, 2019, he decided not to respond.

On April 11, 2019, the applicant failed his third Advanced Damage Control Board. LT T noted that the crew had been even more involved with the applicant’s qualification since he failed his last board and done everything possible to make sure he had the knowledge required to combat a variety of shipboard casualties.

The applicant received a negative Page 7 dated April 20, 2019 for failing to meet qualification deadlines for Import OOD and Quarter Master of the Watch, and Advanced Damage Control, which had deadlines of March 20, 2019 and a second deadline of April 20, 2019. This is the second contested negative Page 7. The applicant was informed that, having failed to meet the deadlines, his training status would be continued for an additional 30 days in order to continue providing him the opportunities needed to improve his required knowledge, earn the qualifications, and contribute to the unit’s ability to operate. The applicant was informed that “if both qualifications . . . are not earned by 20 May 2019, [he would] receive another 3307 noting [his] failure to meet shipboard qualification requirements and additional measures may be taken to ensure the unit can effectively operate.” The applicant acknowledged this Page 7 and added an explanatory comment: “Received on 09 May 2019. Advanced DC board scheduled for 29 APR 2019 but postponed due to CO being TDY. Passed board on 07 May 2019.” This Page 7 is signed by both the CO and the applicant, and the date of April 20, 2019 is marked through.

On May 7, 2019, the applicant received a Positive Page 7 signed by LT T, which the applicant acknowledged, stating that he had satisfactorily completed all prescribed training, sign-offs, and examinations, and is certified in both Basic and Advanced Damage Control Watchstation Qualification Standards (DCWQS) onboard CGC RY.

During May 2019, the applicant began carrying a personal tape recorder with him, claiming he was using it to record key tasking information. He later alleged that the tape recorder also captured inappropriate conversations by LT T and others onboard the cutter.

A semi-annual OER (OER 1), for the rating period December 10, 2018 to March 31, 2019, and signed by the applicant’s Supervisor (Lieutenant Junior Grade (LTJG) F) and Reporting Officer (LT T) on May 7, 2019, is the first of five OERs contested by the applicant. For this OER, the applicant received seven marks of 4, seven marks of 3, and four marks of 2 (on a scale of 1 to 7, with 1 being the lowest mark and 7 being the highest possible mark), The marks of 2

were assigned for Professional Competence, Teamwork, Judgement, and Responsibility with the comment:

Significantly lacked critical knowledge necessary to qualify in primary shipboard watch stations incl Advanced Damage Control, Inport OOD, & Quartermaster of the Watch resulting in failure to meet initial qual deadlines; failed second Advanced Damage Control board despite intrusive instruction from Damage Control Training Team, provided ample opportunities to prepare for repeat scenarios, but still unable to articulate proper damage control procedures. Demonstrated unwillingness to utilize crew to maximum potential; frequently disenfranchised subord mbrs & excluded others from professionally developing activities; lack of attention to detail, timeliness, and inability to multi-task often led to increased burden on others & routinely missed deadlines. Exhibited poor decision-making in conjunction w/ behaviors not aligned w/CG Core values; levied posn as Commissioned Ofcr to improperly delegate duties to enlisted crewmbrs & justify lack of engagement in executing break-in duties/meeting standard shipboard expectations, contributing to deterioration of unit cohesiveness. Overwhelming lack of confidence in application of cutter ops created inherently unsafe conditions leading to revocation of 2 small-boat deck quals after repeated procedural vios.

On the comparison scale, compared to others in the same grade whom the Reporting Officer has known in their career, the Reporting Officer rated the applicant as a marginally performing officer, and commented:

Not recommended for promotion to O-2. Inconsistent productivity & development throughout a period marred w/personal & professional setbacks. Mbr was challenged in JO role & unreceptive to feedback provided by Command, Chief's Mess, & Sector [] Response Dept Head. Required repeat reminders to complete basic tasks on-time & of adequate qualify, which eventually led to intervention by predecessor. Mbr not recommended to assume positions of greater leadership or responsibility at this time. Mbr seeks assignment to [another sector] but would also serve well in District/Sector Command Center for prof growth.⁴

The applicant submitted a Reported-On Officer Reply to this OER dated December 9, 2019, in which he stated that he “chose to not submit a semiannual OER . . . due to the number of qualifications [he] had to achieve within this period.” He noted that “[i]n December 2018, the [CGC RY] Training Officer provided me an outdated Inport OOD WQS . . . which did not contain engineering BECCes [basic engineering casualty control exercises] or shipboard drawings.”

On May 9, 2019, the applicant sent an email to LT T stating that he respectfully refused to sign his OER because it contains issues that he intended to address, citing PSCINST M1611.11D, and noting that LT T asked him to sign the mid-period counseling but he refused to sign stating that he did not receive mid-period counseling.

On May 9, 2019, the applicant received a Page 7 congratulating him on getting certified in Basic and Advanced Damage Control.

On May 15, 2019, the applicant emailed the Executive Officer (XO) of the CGC RY, LTJG F, and stated:

Respectfully request to inform you that I will be working on the most up-to-date Inport OOD packet. This may take me a little past my deadline of 20May19 to request my Inport OOD board. As discussed, I was

⁴ The second version of this OER, dated the same, does not included the language: “Mbr seeks assignment to sector IMD/PIng/ENF, but would also serve well in District/Sector Command Center for prof growth” and “Mbr refuses to sign OER” was added.

unaware that I was completing the wrong packet. After I completed the packet, I was looking around CG-751 and discovered the current version of the packet.

On May 15, 2019, LTJG F responded to the applicant's email, stating:

Roger on all. You are still expected to make every effort to complete the remaining sign-offs before 20May2019, which is your third qualification deadline after having been extended by 60 days. As we discussed earlier, the unit's underway training calendar for this patrol has been drastically reduced and combined with the requisite knowledge you should have already attained during your cumulative Inport OOD break-in period of 5 months, I'm confident in your abilities to get the remaining sign-offs completed. Take advantage of the resources we have onboard and keep charging!

On May 16, 2019, LT T sent the applicant an email regarding Inport OOD, which stated:

Thank you for the update, however, after speaking with the Department Heads about the progress of your original packet it was brought to my attention that on 15 May a review of your Inport OOD WQS was conducted and there were still numerous outstanding sign-offs that have not been completed that are the same in both packets to include your engineering BECCES and a few more ship drawings. Based on these items you were previously required to complete in conjunction with the additional 60 days you've had to complete your qualifications from your initial 20 March deadline, your May deadline will stand. Through additional conversations with those authorized to sign-off on engineering BECCES, it appears there has been no planning or discussion on your part with any of those members to schedule for BECCES to be conducted. They are your qualification to complete, not theirs.

In addition, your QMOW qualification is still expected to be completed by 20 May as well, which is also an additional 60 days from your initial deadline. Having failed your first QMOW board earlier this week on 14 May, you need to be proactive about your qualifications and retaining the knowledge necessary to stand an effective and SAFE watch aboard CGC [RY], anything less will not be tolerated.

On May 16, 2019, the applicant sent LT T an email regarding the Input OOD qualification, that stated:

Your email confuses me a little. My original Inport OOD packet was completed on 25 Feb. I'm in possession of the completed packet. Was the person who reviewed my packet on 15 May looking at an old copy? I am standing by if you or XO would like to take a look at it. I have compared the old version (2014) to the current version (3.0 August 2015) of the packet and the old version does not contain engineering BECCES or shipboard drawings. However, I have completed the drawings that were given to me. As I brought to the XO's attention, I was given the wrong packet upon reporting aboard in December. I am concerned as I just found out yesterday about this and will now need to complete the new packet.

On May 17, 2019, the applicant sent an email to Machinery Technician Chief Petty Officer (MKC) R asking him to inform the CO and XO that all Inport OOD sign-offs are complete. MKC R responded on May 18, 2019 and stated: "Yes I did look over your packet and seen that you have all of your sign offs completed but I will NOT advise the CO/XO of my findings. They are literally your neighbor so walk over and inform the XO of your packet completion. I am not in your [chain of command] so there is no need to inform me. There is no need for all the secrecy."

The applicant provided a May 17-18, 2019 email chain that he obtained through a Freedom of Information Act (FOIA) request; the name of the sender and recipient of the emails are redacted:

Email sent at 7:31 PM on May 17, 2019 by the CO (LT T) of the CGC RY:

We gave [the applicant] his second QMOW board today and it went just as poorly as the first. The consensus amongst the board members was that he not only lacks the knowledge to stand the watch, but more importantly the judgment, bias to act in emergent situations, and ability to safely execute the duties as a QMOW. His board consisted of [redacted text].

His qualification deadline for Inport OOD and QMOW is 20 May, but after him having to sit for 6 boards for only 2 qualifications (Advanced Damage Control – 4 and QMOW – 2) with varying members of the crew, the observation across the board is that he has a major issue with knowledge retention and application. As such, the crew and, more specifically, the Board Members who have stood watch with him expressed that they cannot trust him to stand a proper or safe watch by himself. Example, the bilge alarm activated the night after he failed his first board (14 May) and his response was to stand still until the EOW came up to silence the alarm instead of checking MCMS to verify if there was a space flooding or preparing to pipe all hands away to investigate. Additionally, he failed to notify the U/W OOD of changes in weather that REQUIRED the PPD to call me per my Standing Orders, further causing distrust in his abilities from shipboard watch standers.

With regards to his work outside of his qualifications, he has had very minimal amounts of work to complete, but also refuses to leave his room outside of having watch or meals. I've tried to engage him in conversation, and he has noticeably been attempting to avoid me since we departed [] on 12 May, which has also been brought up by the crew. Despite members of the crew attempting to have conversations with him and offering their time and assistance with his qualifications, his adamant refusal of help, camaraderie amongst the crew, and noticeably unhappy attitude has continued causing degradation in crew climate as noted in last marking period's OER. We may begin exploring our options of removing him from the cutter so as not to continue detracting from our current mission amongst a small unit, with international partners currently embarked...

Email sent at 9:08 AM on May 18, 2019:

Do you think flying him back would be beneficial? I would like to see him set a qmow board given by another crew. . . . just to make sure we do our due diligence on being non-biased. If you don't feel he needs to come back early, please ensure he is treated fairly and we will start discussion on his removal.

Email sent by the CO of CGC RY at 10:01 AM on May 18, 2019:

I understand wanting to have him take another board somewhere else, but the question being asked of him are coming directly out of his WQS and my Navigation and Standing Orders. The questions are also the same questions that were asked of the two-non rates that have qualified here since I've been here as well. He's missing basic day-1 knowledge such as how to properly label a fix, estimated position or radar fix on a chart. He was asked on both boards where are the ship's EPIRB's located and how are they activated and on his first board he grabbed the grey hand sanitizer case on the wall and told us it was an EPIRB and on his second board he still didn't know how to activate them, which is part of the Abandon Ship knowledge required of a QMOW. He couldn't tell us what the difference between iala A or B stated that A is inland and B is international. Even after being at the unit for just under 6 months, he still couldn't identify any flags used for operations, specifically, the Bravo flag, which he has seen and raised himself for fueling operations Inport and GUNNEXs that he has run as the Weapons Officer.

Giving him another board is one thing, but in my opinion, at this point that also completely undermines the observations and perspective of an entire crew that has stood countless days of watch with him, trained him, sat on his boards, watched him fail to respond to casualties, and watched him fail to retain information that they've been giving him for almost 6 months. This is basic knowledge that if he can't grasp, his Inport and u/w OOD qual are going to be non-existent because everything is built off of this information.

Email sent at 10:14 AM on May 18, 2019:

I completely understand and don't feel that you are doing anything wrong. My suggestion is to make sure we deny the opportunity to suggest that you and your crew are prejudicial towards him. If he takes a board on another cutter with people that have no pre-board interaction, and he fails, we have a lot more strength against an argument that you and your crew are prejudiced towards him.

It doesn't have anything to do with you or your crew's abilities.

An email chain dated May 19, 2019 reflected a conversation regarding initiating an investigation into alleged sexual harassment, fraternization, and lying by the applicant by four female crew members. Also on May 19, 2019, the applicant's mother contacted the Sector command claiming that the applicant was being mistreated aboard the cutter.

The applicant received a negative Page 7, dated May 19, 2019 and signed by LT T, formally counseling him regarding inappropriate relationships and fraternization due to multiple complaints regarding the applicant's inappropriate interactions with junior enlisted female members onboard the cutter. This is the third contested Page 7, which stated:

19MAY2019: On this date you were formally counseled regarding inappropriate relationships and fraternization following a previous informal counseling, which occurred in March 2019 where you were very clearly warned that a subsequent violation would result in documentation. This was directly caused by observations of the Command and multiple complaints being brought to the attention of the Command Cadre from separate members of the crew, specifically the junior enlisted female members with multiple claims of inappropriate touching during conversations, inappropriate remarks, and interactions that have caused them to feel uncomfortable and unsafe in the workplace. Your actions have severely eroded unit cohesion and undermine the Coast Guard's Anti-Harassment policy. As a result, you were directed to have no contact with the four female junior enlisted members in any setting alone until further notice. The Coast Guard's stance is clear regarding fraternization and inappropriate relationships and the unit's expectations were clearly outlined in the CG-3307 you signed on 20 December 2018 upon reporting aboard.

The applicant refused to sign this Page 7 and the document contains the handwritten notation: "MBR counseled on 20 May 19. Refused to sign CG-3307. MBR grabbed paper and attempted to run away with it across mess deck to write personal comments."

On May 20, 2019, the Sector Commanding Officer, CAPT B, called the applicant's father. Also on this date, an internal email stated: "Please be aware that [the applicant's] mother called the command center claiming that [the applicant] is being mistreated aboard the cutter." The email further stated: "I don't have a lot of info . . . but amongst other things she is claiming that you are harassing him and that the crew has it out for him. Please be aware and cautious on how you interact with him. Continue moving ahead with plans to drop him off in [] to return to []."

An email dated May 21, 2019 that included the Executive Officer stated that the applicant missed his third qualification deadline and received a negative Page 7.

On May 21, 2019, the applicant received a negative Page 7 for failing to meet qualification deadlines. This is the fourth contested Page 7. LT T signed the Page 7 with a written notation indicating that the applicant was counseled on May 21, 2019 and refused to sign. The Page 7 stated:

21 MAY2019: Per your signed 3307 Qualification Timeline dated 20 December 2018, CG-3307 dated 20 March 2019, and CG-3307 dated 20 April 2019 you have failed to meet your qualification deadlines for

Inport OOD and Quartermaster of the Watch, which had deadlines of 20 March 2019, a second deadline of 20 April 2019, and a third deadline of 20 May 2019. Having failed to meet those deadlines, your Training Status will be continued for an additional 30 days in order to continue providing you the opportunities needed to improve your required knowledge, earn your qualifications, and contribute to the unit's ability to operate.

...
Having failed to meet your qualification deadlines after an additional 60 days, concurrent with your Training Status, your suitability for sea-service and potential Coast Guard service will be under review by your current command and parent command at Sector []. Your qualifications are and have been yours to own and complete. The crew still remains available to assist, but you must be proactive in seeking that assistance. Qualifications are earned, not given.

On May 22, 2019, the Sector Command initiated an investigation into alleged misconduct (sexual harassment) by the applicant while onboard the cutter.

On May 23, 2019, CAPT B forwarded an email from the applicant's father regarding an alleged physical incident between the applicant and LT T to the investigating officer for consideration during the inquiry.

An email dated May 23, 2019 included reference to a discussion of the applicant's response to receiving a negative Page 7 regarding inappropriate relationships, inappropriate touching during conversations, and inappropriate remarks to junior enlisted female members. The applicant refused to sign the Page 7 and alleged that the Page 7 was pulled from his hand, which resulted in a cut to his finger.

An interview summary by the CO (LT T) and XO (LTGJ F) dated May 23, 2019, discussed the applicant's inappropriate conduct with junior enlisted females and other misconduct, specifically:

Middle to late January 2019 – On [the applicant's] first underway patrol LT T was approached by BMC [M], BM1 [Y], and MK1 [K] all on separate occasions. The three crewmembers each informally brought up how they each noticed [the applicant] was showing preference for the junior enlisted females . . . and it was borderline inappropriate. It was also explained to the CO that [the applicant] was only talking to these four junior enlisted female members for qualification sign offs and normal [] conversing. During these encounters it was noticed that [the applicant] would do so by getting physically close and whispering.

Mid February 2019 – On [the applicant's] second underway patrol, it was brought to the CO and [XO's] attention that [the applicant] was making his own Inport duty schedule and if he was on duty it wasn't noticeable by the watch standers due to his lackluster effort and attendance. [The applicant] made his own schedule by handwriting over the approved schedule, and made it so he stood only weekdays instead of the required 1-3 rotation. On several occasions, while on Inport duty watch member would disappear from the unit for an unknown amount of time. On a separate occasion, when [the applicant] was approached by the qualified watchstander about conducting rounds and standing the watch, [the applicant] replied 'I'm an officer and I'm empowering you to do the rounds.' While on this patrol, there was a loss of power which required the entire crew to man their General Emergency billets. However, [the applicant] neglected to report to his duty station. [The applicant] was later discovered having a private talk with CS3 [R] alone in the galley. On numerous occasions [the applicant] was confronted about his continual lying habit in regard to making up stories about what LT [T] said. After all of this, LT [T] privately talked to [the applicant] about what the crew was witnessing with his watchstanding and his actions towards the junior enlisted females onboard. LT T further went on to explain how perception is reality and how [the applicant] should be careful of his actions. [The applicant] shrugged off the allegations from the crew and said that he didn't believe it and that they were lying.

20 March 2019 – [The applicant’s] third patrol, MBR was counseled by CO and XO and received a negative CG-3307 for failing his Advanced Damage Control qualification board a third time, a prerequisite for Inport OOD and Quartermaster of the Watch (QMOW). Therefore, not meeting the timeline that was established in the Training and Qualification CG-3307 every member signs upon report to the unit. MBR failed the Advanced Damage Control board for the fourth time on 20 April 2019 and received another negative CG-3307 (30 days after the initial deadline) from CO and XO. During both these incidents, [the applicant] was notified that he should seek assistance for qualification sign offs from different crew members other than the four junior enlisted members.

19 May 2019 – CO and XO received multiple questions from crewmember in regards to [the applicant’s] frequency, duration, and sneaky behavior around the four junior enlisted females onboard that is [sic] inappropriate. . . . The four junior enlisted female crew members discussed [with the CO, XO, and EPO] that [the applicant] was very touchy and invaded their personal space when he talked to them and it made them feel uncomfortable. None of them had said anything before because they just thought that was the way he was and he was an officer and for CS3 [R] her division officer . . . CS3 [R] . . . later went on about how [the applicant] would comment on how good she looked in certain clothing. She also mentioned that [the applicant] didn’t like when she went to the CO for anything especially when it came to discussing personal health matters. The next morning, 20 May 2019, CS3 came back to the CO with more stories of [the applicant’s] inappropriate and unprofessional actions towards her.

On May 25, 2019, the applicant was provided his Uniform Code of Military Justice (UCMJ) and Miranda/Tempia Rights. This document noted that he was being investigated for inappropriate relationships with multiple junior enlisted members onboard the cutter and suspected of violating Article 92 (Failure to Obey an Order or Regulation) and Article 128 (Assault). He indicated he wished to consult a lawyer and did not want to make a statement or answer any questions.

On May 31, 2019, the applicant sent an email to LT L reporting that he had been the victim of bullying, which started shortly after reporting to the CGC RY. He stated that some of the actions constitute harassment in accordance with COMDTINST, M5350.4D, Chapter 3.F.1 (the Coast Guard’s Civil Rights Manual).

On June 4, 2019, LT C, the Preliminary Inquiry Officer (PIO), after interviewing multiple individuals on the cutter, transmitted the findings of the investigation into allegations of misconduct by the applicant to CAPT B, CG Sector []. The investigation concluded that the applicant violated Articles 128 (assault) and 133 (conduct unbecoming an officer) of the UCMJ. The PIO made the following findings of fact.

- The applicant had failed the Advanced Damage Control board four times and his QMOW board twice.
- The applicant spent a majority of his time talking to the four junior enlisted female members onboard the cutter.
- At the end of March 2019, the command informally counseled the applicant about the perceived fraternization issue.
- On May 19, 2019, there were multiple reports made to the command about the applicant’s inappropriate relationships with the four junior enlisted members, resulting in the applicant’s formal counseling and the issuance of a negative Page 7.
- The applicant touched CS3 R and SN M on the shoulder while talking to them alone on multiple occasions and made them both “feel uncomfortable” based on his

unsolicited and inappropriate comments and actions towards them. The comments included: telling CS3 R that she “looks cute,” that “oh you're a bad girl” and “I am into and attracted to Asian women”; responding that he can't wait when CS3 said her younger sister was 13 years old; asking for CS3 R's body if she died; telling CS3 R she looked “really good” when she changed into physical fitness gear; and telling SN M she has “very thick legs.”

- The applicant lied to cover up things in front of the CO on multiple occasions.
- After the May 19, 2019 formal counseling, the applicant walked around the cutter leaving his limbs (arms and legs) in the path of the CO and XO as they transited narrow spaces.
- When the CO took the May 19 Page 7 from the applicant, it resulted in a paper cut to the applicant's right middle finger.

The PIO opined that the applicant violated Article 128 (assault) when he touched both CS3 R and SN M on the shoulder unwantedly. The applicant violated Article 133 (conduct unbecoming an officer) when he made multiple inappropriate and unsolicited comments towards CS3 and SN M, which made them feel uncomfortable. The PIO noted the applicant lacked integrity and respect by continually lying to the command and was intentionally trying to hit or be hit by members of his command by leaving his limbs out when they walk by. The PIO recommended this matter be disposed of at an Article 15 (NJP) and that the applicant be removed from the cutter due to his lack of integrity and Coast Guard core values.

Also on June 4, 2019, the applicant reported that he had been the victim of bullying by the CO of the CGC RY, alleging that it started shortly after reporting on December 10, 2018 until he departed on May 26, 2019. Specifically, the applicant reported that he had been the subject of racial discrimination, teasing and taunting, and intimidating actions while in the Coast Guard, and stated:

[] I am reporting that I have been the victim of bullying by the Commanding Officer of the CGC [RY] which started shortly after reporting on 10 Dec 18 and built in intensity until I departed on 26 May 19. . . . After reporting, I observed action of the Commanding Officer which caused me concern. I concluded that this was the accepted command climate and felt pressured to participate in these behaviors which I did not. It was clear my personal conduct to not participate irritated the Commanding Officer and some members of the crew. As a result, I experienced bullying which intensified and resulted in my inability to execute duties assigned and my exclusion from the crew.

Examples provided by the applicant included routine references to race and discrimination, bullying, teasing, taunting, and intimidation. The applicant is Caucasian.

By memo dated June 4, 2019, CAPT B acknowledged the applicant's report of an incident of harassment from December 10, 2018 to May 26, 2019⁵ and advised the applicant that she had initiated an administrative investigation and notified the Civil Rights Service Providers (CRSP).

⁵ The memo referenced the Coast Guard Civil Rights Manual, COMDTINST M5350.4; the Administrative Investigations Manual, COMDTINST M5830.1; an Equal Opportunity Policy Statement; and an Anti-Discrimination/Anti-Harassment Policy Statement.

On June 12, 2019, Coast Guard District [Command] directed a preliminary inquiry into the applicant's allegations of bullying onboard the CGC RY. On that same day, the applicant stated that he wanted to make a statement and exercise his right to have a military lawyer present at that time.

A June 21, 2019 Report of Offense and Disposition, and Record of Non-Judicial Punishment, noted the date of the offenses as May 19, 2019, and provided:

Article 92 – Failure to Obey a lawful order; In that member violated the Sexual Harassment ACN 085/18 and disregarded instruction by [his] CO to discontinue having unsupervised contact with a subordinate member.

Article 133 – Conduct Unbecoming an Officer and Gentleman: In that member's conduct was violative and dishonoring to the Coast Guard and the Officer Corp due to inappropriate comments the member made to subordinates.

On June 24, 2019, the applicant requested CCTV coverage be preserved to corroborate his claims as to what happened on May 20, 2019. He also requested an exculpatory polygraph to counter the claims of bullying and inappropriate relationships against him. This request was denied by LCDR F, Deputy Chief of Staff, Homeland Security Task Force, stating it was unnecessary because of several live witness accounts to establish what happened. Further, because the investigation was looking into the applicant's claims of bullying and harassment by his CO, LCDR F did not see what purposes an exculpatory polygraph would serve.

On June 26, 2019, CAPT B directed that the charges be disposed of at Captain's Mast (Article 15, UCMJ). The applicant was informed that the commanding officer had chosen to pursue nonjudicial punishment (NJP) proceedings. On June 27, 2019, the applicant acknowledged being informed of the offenses, requested a Mast representative be appointed, and did not demand trial by court-martial. LCDR L was appointed as the applicant's representative. Via email that same day, the applicant requested to speak to an attorney. The applicant indicated in various emails that he wanted to speak with an attorney prior to deciding whether to accept NJP or demand trial by court-martial.

On June 27, 2019, the applicant was the subject of NJP at Captain's Mast by the Sector Commanding Officer. As a result, the applicant was found to have violated Articles 92 (Failure to obey a lawful order) and 133 (Conduct unbecoming an Officer and Gentleman) of the UCMJ. The applicant was to be issued a punitive letter of reprimand. Also on June 27, 2019, the applicant included a handwritten note on the Member's Elections page:

I requested to speak to an attorney on 26 June 19. As of 1255 on 27 Jun I have not received a reply to my request. I still desire to speak to an attorney prior to NJP. An attorney would help me make an informed decision concerning whether to accept or decline the NJP. I was advised that I am required to complete this form by the deadline provided on the page.

On July 1, 2019, the applicant appealed the imposition of NJP claiming it was, under the circumstances, unjust. The applicant asserted a myriad of flaws with how the underlying investigation was conducted. Regarding the NJP, the applicant alleged the process was unjust because his mast representative was reluctant to support him and instead encouraged him to admit

to the charges; he was not allowed to examine documents and evidence; he was not afforded a reasonable delay in scheduling the Mast; and he was unable to ask any questions of witnesses.

A Removal from Primary Duty (RPD) OER (OER 2) for the rating period of April 1, 2019 to June 27, 2019 was submitted due to sub-standard performance and/or conduct removing the applicant from primary duties on June 27, 2019. This OER is signed by LT T as the Supervisor on September 20, 2019, by CAPT B as the Reporting Officer on October 20, 2019, and by the applicant as the Reported-On Officer on October 22, 2019.⁶ This is the second of five OERs contested by the applicant. The RPD OER notes that the applicant was removed from his primary duties on June 27, 2019, received NJP on June 27, 2019 for violation of UCMJ Articles 92 and 133, and was awarded a Punitive Letter of Reprimand. For this OER, the applicant received three marks of 4, nine marks of 3, 3 marks of 2, and three marks of 1 (on a scale of 1 to 7, with 1 being the lowest mark and 7 being the highest mark). The applicant received marks of 1 for Workplace Climate, Responsibility, and Professional Presence; and marks of 2 for Professional Competence, Looking Out for Others, and Judgment. The RPD OER contained the following comments:

Demo'd continued regression in qual progress, failed to meet second & third qual deadlines for initial Damage Control, QMOW, & Inport OOD, mbr 60+ days behind sked w/clear inability to qual as U/W OOD. Ignored needs of subord w/severe medical ailments, deliberately ordered mbr not to alert Command, substantially delayed ability to expedite medical care & undermined Command's authority. Failed to make effective use of crew availability; continued to under-utilize crew for shipboard projects incl unit Public Affairs team & mbrs offering qual assistance, resulted in disenfranchisement of subords & repeated qual board failures. Violated service & Command policy on interpersonal/inappropriate relations w/enlisted crew, mbr rcv'd negative CG-3307 for inappropriate interactions & sexually suggestive comments toward junior enlisted females despite order from CO & Response Dept Head to discontinue behavior, eroded trust & climate of unit. Repeatedly failed to adhere to CG Core Values of Honor, Respect & Devotion to Duty through inability to contribute to execution of a fast-paced D7 operations based on lackluster effort to qualify in prescribed watchstations & ignorance of detrimental effect of mbr's actions on maturation/comfort of subords.

The Reporting Officer ranked the applicant as unsatisfactory on the Comparison Scale (the lowest possible mark) when compared to other officers whom they have known in their career and provided the following comments:

Member fails to meet minimum Coast Guard standards and is not recommended for retention in the Coast Guard. Recent conduct indicates this officer does not have the integrity or judgment necessary for continued service. Strongest possible recommendation for revocation of commission. Consistently poor judgement and unsatisfactory conduct; I would not assign this officer to duties that require any significant level of leadership or responsibility. This officer has failed to adhere to the most basic standards of service as a Commissioned Officer in the U.S. Armed Forces. He is not suited for continued service.

On July 8, 2019, the Coast Guard District Command reviewed the findings of the investigation into the applicant's claims of harassment and found the allegations unsubstantiated.

⁶ The Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A, designates authority to Commanding Officers to establish rating chains for officers at the command. The Officer's Evaluation Branch (CG PSC-OPM-3) retains the authority to approve exceptions to unit policy that would change the rating chain for an officer on a case-by-case basis. On September 4, 2024, in response to an email query from the Chair, a Coast Guard judge advocate stated that, per OPM-3, the RPD OER was submitted with a non-standard rating chain with OPM-3 concurrence and in accordance with Sector policy because the cutter XO was newly reported and did not have the opportunity to observe the applicant during the period covered by the OER.

Considering the totality of circumstances, the PIO found the applicant was not bullied by LT T because: the applicant's allegations were disproven by witness statements; there is no evidence the applicant was intentionally excluded; and the disciplinary actions against the applicant by LT T were for a legitimate military purpose – ensuring crewmembers became qualified in their primary duties. The memorandum notes the situation detailed in the investigation indicated performance challenges on the part of the applicant.

On July 23, 2019, the Coast Guard Sector Command provided a first endorsement on the applicant's July 1 NJP appeal, addressed the applicant's specific allegations of error, and recommended disapproval. The appeal was denied by RDML J, District command.

On August 30, 2019, Coast Guard Sector Command signed a punitive letter of reprimand regarding the NJP but the applicant refused to sign the endorsement, which stated:

1. You were found to have violated Articles 133 (Conduct Unbecoming an officer), and 92 (Failure to Obey a Lawful Order) of the Uniform Code of Military Justice at a non-judicial punishment proceeding on 27 June 2019. You are accordingly REPRIMANDED for your conduct from December 2018 through May 2019 onboard USCGC [RY].
2. While serving in a position of trust and confidence as an officer onboard CGC [RY], you repeatedly made unwelcome, sexually inappropriate comments to junior enlisted members of the crew. Those comments are a clear violation of Coast Guard Core Values, and violated ALCOAST COMDTINST NOTICE 085/18, a lawful general order prohibiting sexual harassment in our service.
3. Significantly, your conduct onboard USCGC [RY] was inconsistent with the expectations of a commissioned officer in military service. Your actions unreasonably interfered with individual work performance and created an intimidating, hostile, and offensive work environment. You compromised your position of authority, your service reputation and the good order and discipline necessary to serve as a commissioned officer in the military service. Your conduct is reprehensible because it bespeaks a serious lack of judgment and blatant disregard for the men and women of the United States Coast Guard who were placed under your supervision, and who serve alongside you.
4. You have been permanently revoked from your duties on board the CGC [RY].

On September 11, 2019, the applicant was counseled on the punitive letter of reprimand; the applicant refused to sign, acknowledging receipt.

On October 8, 2019, the applicant submitted comments for his June 27, 2019 RPD OER. The applicant stated that he did not violate Articles 92 and 133 and would not admit to actions he did not commit. The applicant asserted that his performance as impacted by derogatory comments made about him by the RY crew. The applicant continued to dispute the underlying misconduct as well as alleged errors in the investigation and NJP process.

A Semi-Annual OER (OER 3) for the period June 28, 2019 to September 30, 2019 and signed by the applicant's Reporting Officer and CO on October 15, 2019 is the third of five OERs contested by the applicant. For this OER, the applicant was TDY to another Sector. The OER lists the applicant's primary duty as Deck Watch Officer and contains a description of the applicant's primary duties. The Performance of Duties section of the OER is not completed but does include the comment: "Mbr not observed due to authorized TDY to Sector [] for entirety of period. See concurrent OER." This OER was signed by both the applicant's Supervisor, LT L, and by the applicant's Reporting Officer, LT C, on October 15, 2019. The OER does not reflect the applicant's signature.

On October 15, 2019, the applicant's CO onboard the CGC RY provided comments in response to this OER. The applicant's Reporting Officer for the OER also provided comments. The Report Officer noted the applicant was removed from primary duties aboard the RY for violating Articles 92 and 133 of the UCMJ, not meeting command expectations, and blatant disregard of the Coast Guard Core values. The Reporting Officer recommended revocation of his commission and removal from Coast Guard service as soon as possible.

On December 9, 2019, the applicant sent a Reported-On Officer Reply to CG PSC-OPM-3, through LT F and LT T, regarding OER 1 for the period November 20, 2018 to March 31, 2019. The applicant alleged that, in accordance with COMDTINST M1000.3.A, Art. 5.E.2.c.4, he choose not to submit a semiannual OER, but his command told him without any explanation that one would be submitted. He originally chose not to submit a semiannual OER because of the number of qualifications he had to complete. The applicant alleged the validated OER is not the same OER the Reporting Officer sent him for signature of May 7, 2019. Further, the applicant contended the Supervisor's comments were not their own and rather those of the Reporting Officer, which was contrary to policy. He alleged the Reporting Officer also violated policy in not providing an explanation on a CG-5310B after the applicant refused to sign. Finally, the applicant outlined the various standards he had achieved during the rating period.

On December 13, 2019, LT T provided a response to CG PSC-OPM-3 regarding the applicant's December 9, 2019 memo.

1. Having thoroughly reviewed the memo submitted by [the applicant] regarding his OER dated 20 November 2018 to 31 March 2019 and the requirements of reference (a), a semi-annual OER was submitted following his arrival on board CG [RY] on 10 December 2019 that encompassed 108 days of observation. The member was counseled on his performance, deficiencies, and path forward on 12 February and was reminded of his responsibilities for his upcoming OER. The member acknowledged he would be receiving an OER for the aforementioned period and submitted his OSF in accordance with timelines outlined in reference (a).
2. Throughout the period [the applicant] received numerous negative counseling sessions from the Command Cadre with incidences of personal misconduct and violations of the Coast Guard's interpersonal relations policies dating back to 20 December 2018, days after arriving on board. [The applicant] continued to encounter difficulties with qualifications and integrating with the crew through his own negative encounters with crewmembers and personal lack of initiative in earning qualifications.
3. Due to the frequency of negative counseling, severity of incidents noted during the period, and lack of effort in correcting course it was determined an OER was necessary to document [the applicant's] substandard performance and conduct throughout the period to ensure an accurate record of the member's performance was kept for future consideration during promotion boards and selection panels. Following completion of the OER and counseling of [the applicant], he informed me via email that he was refusing to sign the OER based on disagreeing with my assigned marks. Per guidance from OPM-3, I annotated his refusal to sign the OER in my Reporting Officer comments and stand by my previously stated recommendation that member is not suited for positions of greater leadership or responsibility.

A Concurrent OER (OER 4), for the period June 28, 2019 to December 17, 2019, and signed by the applicant, and the applicant's Supervisor and Reporting Officer on January 16, 2020, is the fourth of five OERs contested by the applicant. For this OER, the applicant was rated as a marginally performing officer. He received two marks of 5, ten marks of 4, four marks of 3, and two marks of 2 for Workplace Climate and Judgment. Emails dated January 13, 2020 reflect the

applicant declined to provide any additional comments to his OER. The Supervisor entered the following comment:

Successfully coordinated w/ Southeast Regional Fisheries Training Center for lobster “mini” season training; significantly increasing Living Marine Resources (LMR) LE capability, resulting in 17 LMR boardings. Developed 3-tiered strategy to review & maintain validation for LE MISLE cases across 4 stations. Established/executed plan to satisfy FOIA request; collecting/organizing 10,000 [plus] ship’s logs. Overlooks & screens out info & support from Senior Officers; fails to adapt professional presence to reality. Merged separate engineering awards into one submission entry for 2 SECMIA cutters; Crafted unit “at-a-glance” sheet. Shows lack of accountability for poor performance & impact upon shipmates/climate/workplace. Has inhibited cooperation w/in workspace affecting productivity. Mbr’s actions created a negative atmosphere & fear of reprisal w/in the workspace. Repeatedly challenged authority decisions; continued interrogatories & investigation to seek acquittal from amiss behavior created ethics concerns. SITL during Hurricane []; worked w/Sector Command Center to field 100 [plus] overflow SAR calls post hurricane. Interpersonal relationships negatively affect others w/in workspace.

The Reporting Officer commented:

Not recommended for promotion or retention. Demonstrated capability to complete routine & administrative tasks w/ marginal direction. Adept at coordinating dates & venues for meetings & trainings sections encompassing both CG reps & DHS partners. Exhibited initiative by seeking additional tasking & maintaining teamwork attitude. Showcased prospect of succeeding in areas concerning: arrangement & developments of plans, data collection & validation, & training/curriculum development oriented billets. Struggles w/ moving forward after past errors. Mbr needs to demonstrate continued & sustained upward performance.

On December 18, 2019, the applicant was formally transferred and assigned to Sector [] and his rate and rank remained ENS/O-1.

On January 27, 2020, the applicant submitted a memorandum to CG Sector [] requesting to redress wrongs under Article 138, UCMJ. The applicant requested the Page 7’s be removed because he was incorrectly assigned to qualify as Inport OOD versus Inport JOOD, continued to dispute the findings and conclusions of the investigations, and disputed some of the records withheld following his FOIA requests.

On January 30, 2020, the applicant sent a Reported-on Officer reply to PSC-OPM regarding OER 2, period ending June 27, 2019, in which he stated that he was forced to obtain the unit Training and Qualification manual and CO’s Standing Order through a FOIA request.

3. On 17 Jun 2019, I described in detail challenges I encountered with achieving Advanced Damage Control, QMOW, and Inport OOD qualifications during this period. On 18 May 2019, sector [] Staff stated: ‘I would like to see him sit a QMOW board given by another crew. Probably [], just to make sure we do our due diligence on being non-biased . . . please ensure he is treated fairly . . . ‘ Sector [] Staff later stated: ‘My suggestion is to make sure we deny the opportunity to suggest that you and your crew are prejudicial towards him. If he takes a board on another cutter with people that have no pre-board interaction, and he fails, we have a lot more strength against an argument that you and your crew are prejudiced towards him.’

4. I received a response to my FOIA request of 15 Jul 2019 which did not include records directed to me between 20 Dec 2018 to 18 May 2019 pertaining to the following statement of LT T[] ‘ . . . [the applicant] received numerous negative counseling sessions from the Command Cadre with incidences of personal

misconduct and violations of the Coast Guard's interpersonal relations policies dating back to 20 December 2018, days after arriving on board.

On January 31, 2020, CG Sector [] responded to the applicant's request to redress wrongs and noted the applicant appeared to attempt to relitigate matters that have already been investigated and resolved. CAPT B found that no action was required with respect to any of the alleged wrongs.

On February 5, 2020, the applicant's CO provided a First Endorsement to the applicant's reply to the April 1, 2019 through June 27, 2019 OER 2. The CO noted that a semi-annual OER was submitted which captured the applicant's continued substandard performance, engagement in inappropriate interpersonal conduct with enlisted crewmembers, harassing behavior towards female subordinate crewmembers, and a blatant disregard for unit and service expectations. Further, the applicant was offered and given the standardized damage control, QMOW, and Inport OOD training that all crewmembers receive.

On February 10, 2020, the applicant submitted a formal Article 138 UCMJ complaint to Coast Guard [] Area, through both Coast Guard Sector [] and Coast Guard District []. Coast Guard Sector [] provided an undated First Endorsement on the applicant's Article 138 complaint, responding to the applicant's claims.

On February 24, 2020, Coast Guard Sector [] provided a Second Endorsement to the applicant's Reply.

On February 25, 2020, the applicant was informed that he was not selected to Lieutenant (junior grade) by a selection board that convened on November 13, 2019. The applicant was also informed that the report of the board recommended that his commission be revoked due to meeting multiple causes for separation as outlined in COMDTINST M1000.4, article 1.A.14.c. Specifically, for an act of sexual harassment and failing to keep pace of progress with contemporaries. In response, the applicant provided his endorsement of the memo on February 27, 2020, stating that he desired to separate from the Coast Guard on May 21, 2020.

On April 20, 2020, Coast Guard District [] provided a response to the applicant's article 138 complaint, addressing the complaints.

On May 13, 2020, the applicant's Command at Sector [] signed a Detachment of Reported-On Officer OER (OER 5) for the applicant for the time period of report October 1, 2019 through May 21, 2020. This is the fifth and final contested OER. The applicant received one mark of 5, fourteen marks of 4, one mark of 3, and two marks of 2. The Supervisor comments note a demonstrated lack of judgment and poor decision making and indifference to chain of command feedback on behavior and performance. The comments note the applicant continued to conduct self-motivated, unsanctioned investigations during work hours into personal issues despite chain of command direction otherwise. The applicant continually had gross misrepresentation of facts and discussions in official documents including the officer support form (OSF).

On the Comparison Scale, the Reporting Officer marked the applicant as a marginally performing officer and commented that he was not recommended for enlistment or re-commission in any follow-on military service.

The applicant was discharged from the Coast Guard on May 21, 2020. His DD Form 214 noted Character of Service: Honorable; Separation Code: GNC; and Narrative Reason for Separation: Unacceptable Conduct.

On June 29, 2020, the applicant sent a Reported-On Officer Reply to PSC-OPM regarding his concurrent OER (OER 4) with period ending December 17, 2019. The applicant claimed that his supervisor told him that “Sector Command is ensuring that the OER for this period is being written in a certain way to support a recommendation for revoking [the applicant’s] commission” and asserted that the Supervisor and Reporting Officer’s comments were not their own. The applicant also asserted that his Supervisor told him that “[his] FOIA request and information transmitted to DHS OIG had an impact on [his] OER” and that he was being reprised against in violation of COMDTINST M5350.4D. On July 27, 2020, the applicant’s rating chain for the OER ending December 17, 2019 provided a First and Second Endorsement to his Reply, both of which noted that the applicant’s reply “contains serious misrepresentations of facts. The OER stands as written.”

On August 6, 2020, the applicant sent a Reported-on Officer Reply to PSC-OPM regarding his Detachment of Reported-on Officer OER (OER 5) with period ending May 21, 2020 in which he disputed many of the comments and marks in the OER. On September 18, 2020, the applicant’s rating chain for the OER with period ending 21 May 2020 provided a First and Second Endorsement to his Reply. These endorsements noted that performance counseling occurred with the applicant throughout the marking period. Final counseling was offered to and declined by the applicant. The endorsements further note the applicant’s reply “contains serious misrepresentations of facts. The OER stands as written.”

LT F, Sector Intelligence Branch Chief and the applicant’s original supervisor, provided a declaration dated November 17, 2020, in which she stated:

2. I was [the applicant’s] direct supervisor as Executive Office of CGC [RY] from December 10, 2018, the date he reported onboard, to June 27, 2020, the date he was relieved from his primary duties.
3. [] I notified [the applicant] verbally in early February that he would be receiving an OER for this period to provide two OERs in his record before he was considered by the LTJG promotion board. There was no written documentation of this notification.
4. [The applicant] received informal counseling on February 12, 2019 with the Commanding Officer, Command Chief, and myself to address current discrepancies in performance and to discuss a way forward. In early March while I was preparing to write [the applicant]’s OER, the Commanding Officer and I agreed to use the counseling conducted on February 12, 2019 as his mid-period counseling. I discussed this with [the applicant] verbally but did not provide written documentation of that notification. Following the email discussion between [the applicant] and LT [T] on mid-period counseling in May 2019, I spoke to [the applicant] and he said that he had no recollection that I have ever told him of his mid-period counseling date.
5. [] The Advanced Damage Control Qualification was not listed on CG-3307 dated December 20, 2018 because it was a command/unit requirement for all members to earn Advanced Damage Control qualification prior to earning Inport OOD and QMOW qualification. [The applicant] was told of this requirement when he was given the CG-3307 dated December 20, 2018. When [the applicant] approached me about how there was no USCG requirement for an Advanced Damage Control qualification for Inport OOD and QMOW, I told him again that it was a command/unit specific requirement.
6. [] As an O-1 reporting aboard, [the applicant] was told verbally and through the CG-3307 dated December 20, 2018, that he was required to get an Inport OOD qualification. The statement on the CG-3307 that ‘E’5’s and above without previous cutter experience will qualify as Inport JOOD before breaking-in Inport OOD,’

was for newly reported enlisted personnel. All other O-1s reporting aboard CGC [RY] as their first unit had not expressed concerns in completing their Inport OOD qualification, nor had they been unable to meet qualification deadline.

7. [The applicant] did not notify the command of the outdated Inport OOD WQS until after he had missed his first qualification deadline of March 20, 2019. He was immediately given the correct Inport OOD WQS and was told to meet with [the cutter]'s qualified Inport OODs. This was to determine which signatures from the old WQS could be transferred to the new WQS to assist in meeting his next qualification deadline.
8. [The applicant] was notified verbally that his Boat Deck Seaman and Boat Deck Captain qualifications had been revoked due to the unsafe practices he implemented during a small boat recovery. During said recovery, he almost closed the stern gate on the boat crew and boarding team, which would have resulted in serious bodily harm. Revocation was done in the Training Management Tool (TMT).
9. [] I submitted [the applicant's] OER with the Supervisor's comments section complete. LT [T] reviewed what was written and made edits. These edits did not change the context on what was written to reflect 'the Reported-On Officer's performance during the period of report.' (PSCINST M1611.1D). Therefore, my signature as the supervisor attests that the comments written are my own.
10. [The applicant] received informal counseling on February 12, 2019 by the Commanding Officer, Command Chief, and myself. [The applicant] received counseling when his Boat Deck Seaman and Boat Deck Captain qualifications were revoked. On March 4, 2019, [the applicant] received an administrative Letter of Censure from the Commanding Officer. On March 20, 2019, [the applicant] received and was counseled on a negative CG-3307 for not meeting his first qualification deadline.
11. The Advanced Damage Control qualification was added to the CG-3307 dated April 20, 2019 to provide documentation on the context as to why [the applicant] was unable to get his Inport OOD and QMOW qualifications. The Advanced Damage Control qualification was a command/unit requirement to complete the Inport OOD and QMOW qualifications.
12. [The applicant] crossed out both dates on the negative CG-3307 (date created and signed by Commanding Officer and date received by member). When [the applicant] was given the negative CG-3307 dated April 20, 2019 on May 9, 2019, he asked if he could take the document to his stateroom to review it. He left for approximately fifteen minutes and returned the negative CG-3307 by placing it in my inbox with both dates crossed out, his hand-written comment section, and signature. He made no statements nor asked me any questions about the negative CG-3307.
13. In response to . . . Specifics on Injustices within CG-3307 [] On the evening of May 19, 2019, the Commanding Officer Engineering Petty Officer, [] and I met with [the applicant] on the bridge to discuss the alleged allegations.
14. In response to . . . Specifics on Injustices within CG-3307 [] I wrote the negative CG-3307 on May 19, 2019 following the meeting on the bridge with [the applicant] where the alleged allegations were discussed. The Commanding Officer and I agreed that we would not present the negative CG-3307 to [the applicant] until May 20, 2019. The two dates are different to ensure accuracy of the dates on when it was created and signed by the Commanding Officer and the date it would be presented to [the applicant] for receipt and counseling on the negative CG-3307.

. . .

LT T, Commanding Officer, CGC RY, provided a declaration dated November 17, 2020 in which he stated:

3. Having observed [the applicant] during the dates of his assignment to [the cutter], a semi-annual OER was conducted per policy for the period 20 Nov to 31 Mar to provide a historical record of significantly poor performance and actions contradictory to our service's Core Values. On 12 February, the member was verbally counseled regarding his poor performance and that he would be receiving an OER for the period to document the events that took place during his time on board. On 04 March [the applicant] was given an Administrative Letter of Censure due to further actions that violated our Core Values including lying to the command after he was caught by myself having a non-rate member complete his assignments that he fell behind on while that member was on watch, causing the member to not pay full attention to their underway duties and responsibilities as the Quartermaster of the Watch, his egregiously unsafe actions during small-boat evolutions that almost caused severe harm to a boat crew members, and for his personal neglect of his Inport watch standing duties. Member would routinely on watch, fail

- to perform the duties of the break-in OOD which included shipboard rounds and instead would tell the crew members, 'I'm an Officer and you're Enlisted. I'm going to empower you to go do the rounds.' Additionally, while underway I overheard him asking [MKI] to sign off qualification items, to which MKI inquired as to how to operate the machinery in question. [The applicant], after being questioned by MKI, admitted he had never learned nor attempted to operate the machinery.
4. During this period, [the applicant] received informal verbal counsel from me regarding his behavior with the junior female enlisted members and was warned that he was in violation of the orders contained in his check-in CG-3307 and that additional actions or reports would be cause for further administrative actions and documentation that may have a detrimental affect on his career.
 5. [The applicant] failed to meet qualification deadlines of 20 March and 20 April for his Inport OOD and Quartermaster of the Watch qualification as documented in his training status CG-3307s and initial check in 3307.
 6. [The applicant's] OER and all CG-3307's were accurate reflections of his performance, conduct, and attitude while attached to [the cutter].

On March 1, 2021, the President of the Coast Guard PRRB issued a decision in the applicant's case, in which it recommended that the words "and Advanced Damage Control" be removed from the CG-3307 dated April 20, 2019, and that a CG-5215 be completed for the OER with period ending March 31, 2019. The recommendation was approved by the Director of Military Personnel.

VIEWS OF THE COAST GUARD

On March 8, 2023, a Judge Advocate (JAG) for the Coast Guard submitted an advisory opinion in which he recommended that the Board grant alternate relief in this case and adopted, in part, the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC noted that the applicant alleged that the Supervisor's comments on the OER ending January 31, 2020 were not the Supervisor's own; however, the supervisor attested in their declaration to the PRRB that the comments were indeed their own. The applicant did file a Reported-On-Officer (ROO) OER Reply as authorized per policy. A ROO OER Reply provides an opportunity for the ROO to express a view of performance that may differ from that of a rating official. The applicant did not provide any clear and convincing evidence to show any material error occurred during the preparation of the contested Officer Evaluation Reports. They were completed in accordance with CG Policy; therefore, there is no basis to remove them.

PSC concluded by stating that the applicant did not meet the burden of showing by clear and convincing evidence⁷ to overcome the presumption of regularity when the CO acted within his authority to issue four CG-3307's. The OER was corrected by the PRRB by adding CG Form 5315 which documented the applicant's refusal to sign the OER claiming they did not receive midperiod counseling for period ending May 7, 2019. The Rating Chain performed their OES duties in accordance with policy. The applicant did not provide clear and convincing evidence to overcome the presumption of regularity with respect to the disputed OERs. The OERs do not contain any substantive errors. The rating chain appropriately carried out their responsibilities in completing the disputed OERs and accurately documented the applicant's performance based upon

⁷ The BCMR applies a preponderance of evidence standard when determining whether to correct a record to remove an error or injustice, which is a lower standard of proof than that of clear and convincing evidence.

their observations of the member's performance during the rating period, in accordance with applicable policy. The applicant did not meet the burden of showing by clear and convincing evidence to overcome the presumption of regularity when the CO acted within his authority under Article 15 to conduct NJP on 27 June 2019 or when the Coast Guard acted within its authority to separate the applicant from the service. Therefore, his commission should not be restored, nor his DD Form 214 changed.

The JAG provided the following analysis:

- a. *The applicant has not provided sufficient evidence to warrant removal of CG-3307s dated 20 March 2019, 20 April 2019, and 21 May 2019.*

The applicant makes multiple claims of error and injustice regarding the issuance of these three CG-3307's. However, the applicant's numerous claims fail to meet the required burden of providing error or injustice. 33 C.F.R. § 52.24. Although the applicant provides copious documentation, he does not provide sufficient evidence to support his requested relief. Absent strong evidence to the contrary, government officials are presumed to have carried out their duties correctly, lawfully, and in good faith. Here, there is insufficient evidence that these three CG-3307's contain erroneous or unjust information. The three CG-3307's contain information identifying that the applicant did not meet certain qualification deadlines that were explained to him upon checking into the unit. The applicant does not deny that he failed to meet these deadlines and admits to not meeting these deadlines numerous times when arguing that the timelines were unfair. As such, the applicant fails to provide that the three documents contain erroneous information. Regarding injustice, there is no evidence that the applicant was treated disparately or that he was provided different qualification requirements than any of the other junior officers onboard [the cutter]. As seen from numerous declarations attached to the investigations the applicant provided, there was no evidence that the applicant's requirement to obtain the Advanced Damage Control certification was out of the ordinary or different than any of the other junior officer's requirements onboard [the cutter]. Multiple shipmates attempted to assist the applicant with his qualifications, but he did not meet his deadlines. As such, the applicant fails to prove error or injustice with the three CG-3307's.

- b. *The applicant should be granted Alternate Relief for CG-3307 dated 19 May 2019.*

The applicant fails to prove that there is any erroneous or unjust information contained within the body of the CG-3307 dated 19 May 2019. A later investigation substantiated the applicant's misconduct toward junior enlisted female members onboard [the cutter]. As such, the applicant fails to prove that the information contained within the body of the 19 May 2019 formal counseling CG-3307 was erroneous or unjust. The applicant also fails to prove entitlement to have this document completely expunged from his record. However, regarding the signature block, policy states that the command should note 'member refused to sign' along with the date counseled and does not elaborate on if supplemental information may be included in the remarks. In the applicant's case, the CG-3307 also includes the words 'MBR grabbed paper and attempted to run away with it across mess deck to write personal comments.' As such the CG recommends that this language should be removed from the 19 May 2019 CG-3307.

- c. *The applicant has failed to provide sufficient evidence to show error or injustice with his NJP.*

(1) Although the BCMR may review the imposition of NJP for correction of error or injustice, in doing so, it should recognize that the Commanding Officer is the official responsible under statute and regulation for conducting the proceedings and determining an appropriate punishment. The Commanding Officer had the opportunity to view the evidence, including the demeanor of the applicant and the witnesses for and against him. The Commanding Officer's decisions and findings are therefore entitled to substantial deference. Absent proof that the Commanding Officer's determinations were clearly erroneous, or that a substantial right of the applicant was materially

prejudiced by clear procedural error, the Commanding Officer's decision should be upheld.⁸ Any decision of the NJP appeal authority affirming the punishment awarded is similar entitled to deference.

- (2) Article 15 of the UCMJ, 10 U.S.C. Section 815, is a Congressionally established administrative means for military commanders to deal with minor violations, as an essential part of the responsibility to preserve discipline and maintain an effective armed force.⁹ NJP under Article 15, UCMJ, is intended to provide military commanders with a prompt means of maintaining good order and discipline and promoting behavioral changes in members without the stigma of a court martial (i.e. criminal) conviction.¹⁰
- (3) The authority to determine whether an offense occurred, and if so, the appropriate punishment for such offense, is committed by the UCMJ and service regulations to be the designated military authority and designated appeal authorities. To prove an error before the BCMR, the applicant must generally overcome the strong presumption that military officials involved performed their duties correctly, lawfully, and in good faith.¹¹
- (4) In addition, Congress, the President, and the Secretary (who has delegated regulatory authority to issue regulations), have specifically provided for factual and legal review of punishment imposed by establishing rights of appeal to the next superior authority in the chain of command.¹²
- (5) Even assuming, *arguendo*, the applicant could somehow show administrative or procedural error occurred, he would still not be entitled to relief on that basis alone. Under regulations established by the president, non-compliance with any of the procedural provisions for imposing NJP does not invalidate a punishment unless the error materially prejudiced a substantial right of the applicant.¹³ Moreover, because NJP is administrative in nature, the constitutional rights applicable to criminal trials do not apply to NJP proceedings.¹⁴
- (6) When assessing the appropriateness of a punishment, the BCMR must be particularly deferential to the broad discretion of military authorities, who are best able to assess appropriate punishments in light of unit missions and the concomitant needs of good order and discipline at their units. Finally, because of the appeal procedures established by state and regulation within the military system, the BCMR should deem any issue not raised through this process to be waived, absent proof of compelling circumstances that prevent the applicant from raising such issues within the military justice system. Therefore, to establish entitlement to relief, an applicant must prove (1) that the NJP authorities' determinations regarding commission of an offense were clearly erroneous; (2) that the accused suffered material prejudice due to clear procedural error; or (3) that the punishment imposed was a clear abuse of the broad discretion accorded military commanders under Article 15, UCMJ, to take corrective action.¹⁵
- (7) In the instant case, the applicant was awarded a punitive letter of reprimand due to his actions towards junior enlisted female members, which violated CG sexual harassment policies and constituted conduct unbecoming an officer and a gentleman. Although the applicant submitted an

⁸ Note for Board, not from advisory opinion: The BCMR applies a preponderance of the evidence standard, including for those claims involving nonjudicial punishment.

⁹ *Cochran v. United States*, 1 Cl. Ct. 759, 765 (1983).

¹⁰ Manual for Court-Martial United States (2019 edition) (MCM), part V, para.1.c.

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

¹² MCM Part V; Military Justice Manual, COMDTINST M5810 (series).

¹³ MCM Part V, para.1.i.

¹⁴ *Dumas v. United States*, 620 F.2d 247, 22 (Ct. Cl. 1980).

¹⁵ Note for Board, not from advisory opinion: While this is the framework that the advisory opinion asserts the Board should apply, it is important to note that the BCMR is statutorily empowered to correct records, including NJPs, on behalf of the Secretary of Homeland Security if it considers it necessary to correct an error or remove an injustice based on a preponderance of the evidence. 10 U.S.C. § 1552(a); 33 C.F.R. § 52.2.

extensive appeal, the appeal was ultimately denied and the applicant has provided no additional compelling evidence that the NJP findings or punishment were erroneous or unjust. The CG did not commit an error injustice in awarding NJP to the applicant and properly followed its own regulations. As such, the applicant has failed to prove that the NJP was erroneous or unjust and that it should be overturned and stricken from the record.

d. The applicant has not provided sufficient evidence to meet the standard for correction of an OER.

- (1) As explained in *Hary v. United States*, the applicant must do more than merely allege or prove that an OER seems inaccurate, incomplete, or subject in some sense. The applicant must demonstrate, by competent evidence (1) a misstatement of a significant hard fact, (2) clear violation of specific objective requirement of statute or regulation, or (3) factors adversely affecting the rating which had no business being in the rating process. See *Hary v. United States*, 223 Cl. Ct. 10, 18, 618 F.2d 704, 708 (1981).
- (2) In the instant case, the applicant challenges five OERs with periods ending 31 March 2019 (semi-annual), 27 June 2019 (removal from Primary Duties), 30 September 2019 (Semi-annual), 17 December 2019 (concurrent), and 21 May 2020 (detachment of ROO). While the applicant alleges numerous erroneous statements contained within the OER's and OER replies, he has not sufficiently proven that they are misstatement of significant hard facts. Although the applicant may disagree with some of the statements, he has not provided sufficient evidence to overcome the presumption that the statements are correct and that the command completed the various evaluations and relies lawfully and in good faith. Similarly, although the applicant alleges harassment and bias, there is insufficient evidence of any factors adversely affecting the evaluations which had no business being in the rating chain. An investigation was conducted by Coast Guard District [] which did not substantiate the applicant's claims of harassment. Finally, the applicant has not provided sufficient evidence that any of the five evaluations contained clear violations of specific objective requirements laid out in statute or regulation.
- (3) Consequently, as the applicant has failed to prove that at least one *Hary* factor has been offended, the applicant has not sufficiently demonstrated error in his OERs, and has failed to overcome the presumption that Coast Guard administrators, in particular his rating chain, discharged their duties in marking the applicant correctly, lawfully, and in good faith.¹⁶

e. The applicant has not provided sufficient evidence of error or injustice with his non-selection and separation.

- (1) The applicant alleges error with the Promotion Year 2020 Selection Board's findings that the applicant met a basis for separation due to failing to keep pace of progress with contemporaries. As before, the applicant claims error and injustice with having to obtain the Advanced Damage Control certification and that this error was the reason he could not get qualified. As discussed above, the applicant fails to prove that it was erroneous or unjust for him to be required to obtain this certification. The applicant raised the issue already within the chain of command in his request to redress wrongs, and it was explained to him that 'required qualifications are within a Commanding Officer's discretion. The qualifications you were assigned to complete were consistent with those provided your peers, and reasonable for a commissioned officer assigned to a Fast Response Cutter.' Similarly, as discussed above, there is no evidence that the applicant was held to a different standard than any other Officer of Inport OOD/QMOW onboard [the cutter]. Multiple statements from crew onboard the cutter, obtained during investigations, discussed the applicant's attempts to obtain the Advanced Damage Control certification, and there was no indication that this was out of the ordinary or a requirement that only the applicant was tasked to accomplish.

¹⁶ *Arens v. United States*, 969 F.2d 1034, 1037 (1992); *Saunders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

- (2) Further, the Promotion Board also found that the applicant met the basis for separation due to one act of sexual harassment. As discussed in the NJP section above, the applicant was found to have violated the UCMJ due to his interactions with junior female personnel which violated the Sexual Harassment CAN 085/18. Consequently, it was not erroneous or unjust for the Promotion Board to find that sufficient bases were met for separation. The CG did not commit an error or injustice in separating the applicant and properly followed its own regulations.

The JAG concluded by recommending that the applicant should be granted alternate relief by removing superfluous language in the signature block of the May 19, 2019 CG-3307, and argued that as to all other requested relief that the applicant has not met his burden to establish that the Coast Guard committed an error or injustice. The JAG recommended that the applicant's requested relief should be denied as to the four CG-3307's, five OERs, NJP, and his discharge, and that he should not be awarded any backpay.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

The Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. In response, the applicant provided a response dated June 10, 2023, in which he disagreed with the Coast Guard's March 8, 2023 advisory opinion.

The applicant argued that the Coast Guard advisory opinion lacks content; contains numerous errors and excludes Coast Guard policies mentioned in his BCMR application (which includes over 500 pages); does not address the "Statement of Material Contentions" included with his application; does not provide specific comments on the evidence he submitted in his application; and claimed that, therefore, the only way he could meet the burden described in 33 C.F.R. § 52.24(b) was to provide the same information he had already included with his application, as noted below.

The applicant referenced a letter from Admiral S (Coast Guard Commandant) to the Chairman, Committee on Homeland Security dated October 28, 2020, which the applicant contended required "Coast Guard required Congressional oversight to implement its own policy that Investigator/fact-finders assigned to conduct harassment complaint inquiries must have received approved training," noting that the Coast Guard Civil Rights Manual, COMDTINST M5350.4D, May 20, 2019, at Chapter 3.F.2. provided that "Investigators/fact-finders assigned to conduct inquiries must have received Civil Rights and Civil Liberties approved training in investigating, interviewing, report writing, and investigating harassment allegations, including the legal requirements for claims on harassment."

The applicant asserted that in their report *Righting the Ship*, the U.S. House of Representatives Committee on Oversight and Reform and the Committee on Homeland Security found that the Coast Guard did not employ individuals who are credentialed in investigating allegations or harassment considered under the AHHI process; Coast Guard military leadership failed to "conduct prompt, thorough, and impartial investigations of allegations of harassment and bullying"; and citing COMDTINST M5350.4D at 3.F.2 training requirements, stated "Coast Guard has confirmed that no approved training actually exists, no individuals have received such training, and the individuals conducting inquiries now are not trained to do so."

The applicant references the Commandant's letter, which stated: "I am writing to notify you that the Coast Guard has implemented all recommendations from the ... December 2019 'Righting the Ship' majority staff report ..." The applicant argued, however, that the staff report did not include an action to reinvestigate harassment complaints completed by untrained investigators/fact-finders during the time period May 20, 2019 through October 28, 2020. The applicant further argued that "[i]t is shocking that the Coast Guard's action plan did not result in a review of the facts and circumstances surrounding alleged bullying of [the applicant by LT T] as reported in the Investigation Into Alleged Bullying Onboard [the cutter] dated 28 Jun 2019 ... and that if they had, at a minimum, they would have found it was not conducted by a trained investigator" and that this amounted to an injustice. The applicant further alleged it was an injustice to separate him from service knowing that the investigation into his alleged misconduct was done by an untrained investigator.

The applicant also provided what he characterized as a "CGIS Request for Assistance 23 October 2021." This includes email traffic, dated October and November 2021, between the applicant and a CGIS Field Office. The applicant contended that CGIS requested assistance with its investigation of LT T regarding allegations of sexual harassment made by former crew members of the CGC RY and asked if he would agree to an interview. The applicant alleged he submitted a 15-page written statement and the CGIS investigator acknowledged receipt, but that the investigation was separate from the one mentioned by the applicant, and he would reach out if he had any questions. The applicant alleged it was an injustice that 520 days after being separated from service he was contacted to request assistance in investigating allegations of sexual harassment against LT T. The applicant further alleged it was an injustice that the Coast Guard did not conduct a review of the facts and circumstances surrounding the bullying by LT T.

The applicant argued the March 20, 2019, April 20, 2019, and May 21, 2019 Page 7's are erroneous and should be removed from his record. Regarding the Page 7, dated December 20, 2018, the applicant argued that paragraph 2 does not apply to him and that it pertains to newly reported enlisted personnel. He claimed that when he was given the CG-3307 he was verbally told about completing the Advanced Damage Control qualification, but that the qualification was not listed on the CG-3307 because it was a command/unit requirement for all members to earn this qualification prior to earning Inport OOD and QMOW qualifications. He further claimed that he was given an outdated Inport OOD WQS by the [cutter] training Officer but that he did not notify the Command of this until he missed his first qualification deadline of March 20, 2019. The applicant then listed what he considered pertinent facts from the record that have already been detailed in the Summary of the Record and need not be rearticulated here.

The applicant noted the following CGC RY Instructions do not require Advanced Damage Control to be completed: Unit Training Instruction ([RY]INST 3502.1G), Cutter Navigation Standards ([RY]INST 3530.1I), and Standing Orders to the Officer of the Deck ([RY]INST 1601.2D). The applicant argued that the Command did not execute their duties correctly because there is no Command/Unit requirement to earn Advanced Damage Control Qualification in the Unit Training Instruction ([RY]INST 3502.1G), the Cutter Navigation Standards ([RY]INST 3530.1I), or the Cutter Navigation Standards ([RY]INST 3530.1I), none of which include Advanced Damage Control.

The applicant also claimed that the Command provided outdated Inport OOD WQS and stated that he completed the outdated OOD WQS on February 25, 2019, well before the qualification deadline of March 20, 2019 and that no qualified personnel who signed off the OOD WQS identified the fact that it was outdated until he did. The applicant alleged that the Command did not execute their duties in good fact because: (1) LT T signed a CG-3307, dated December 20, 2018 that stated in paragraph 2 that “E-5’s and above without previous cutter experience will qualify as Inport JOOD before breaking-in Inport OOD”; (2) the applicant signed the CG-3307 with the understanding that as an O-1 without previous cutter experience he was to qualify as an Inport JOOD before breaking-in Inport OOD; and (3) if the JOOD requirement was just for newly reported enlisted personnel as stated by LT F in her November 17, 2020 declaration, then there would be no reason for the applicant to acknowledge it.

The applicant also claimed that LT T made a false statement when he stated in writing that the unit Training and Qualification Manual and CO’s Standing Order established the requirement for Advanced Damage Control. He pointed to the Cutter Navigation Standards ([RY]INST 3530.1I as proof that LT T made a false statement, as an Underway OOD only required Basic Damage Control. He further alleged that the Command attempted to document verbal direction on completing damage control and the PRRB had already found in his favor and directed “Advanced Damage Control” be removed from the CG-3307 dated April 20, 2019. The applicant further argued that the Sector staff did not execute their duties in good faith because in response to his request for the cutter Instructions, Sector staff refused to provide the Instructions, leaving him to submit a FOIA request to obtain the requested information.

The applicant argued that the action by LT T and LT F in creating the Page 7, dated March 20, 2019, was unjust because it was used by the Promotion Year (PY) 2020 Selection Board, which convened on November 13, 2019, and resulted in a determination that he was not fully-qualified for promotion to Lieutenant (Junior Grade) and met causes for separation based on: “[f]ailure to keep pace or progress with contemporaries” and the negative CG-3307 he received on March 20, 2019 in which he was counseled for inability to meet qualification deadlines.

The applicant argued that, as described by the PRRB, it was unjust for the PY 2020 Selection Board to determined that he failed to keep pace or progress with his contemporaries because Advanced Damage Control (WQS 307, WQS 308, WQS 301, WQS 311, WQS 312, and WQS 313) was not a Coast Guard prerequisite for WPC-154 Inport OOD or Quartermaster of the Watch, and that Advanced Damage Control was a cutter specific command/unit requirement for all members to earn Advanced Damage Control qualification prior to earning Inport OOD and QMOW qualifications. Finally, the applicant alleged that it was unjust that the Selection Board used the CG-3307 in its determination that the applicant failed to keep pace or progress with contemporaries and excluded from the analysis that the Advanced Damage Control Qualification is a cutter requirement for all members to earn prior to earning Inport OOD and QMOW qualifications; that the CG-3307 he signed on December 20, 2018 included a March 20, 2019 qualification deadline for Inport OOD and QMOW, and that the Advanced Damage Control Qualification was not listed on the CG-3307, dated December 20, 2018, because it was a command/unit requirement for all members to earn Advanced Damage Control qualification prior to earning Inport OOD and QMOW qualifications.

The applicant next contended that the Coast Guard advisory opinion's recommendation to amend the CG-3307, dated May 19, 2019, is not acceptable and the Board should instead remove the document from his record. The applicant contended there were multiple violations of Coast Guard policies during the investigation into his alleged misconduct.

The applicant claimed that the Coast Guard failed to produce any evidence that LT T acknowledged receipt of a report of potential harassment from the junior enlisted female members and there is also no evidence that LT T conducted an informal investigation, preliminary inquiry, or any formal investigation into accusations of sexual harassment, fraternization, and lying. In addition, the applicant claimed that there is no document(s) dated May 19, 2019 that substantiate observations of the command; multiple complaints being brought to the attention of the Command cadre from separate members of the crew, specifically the junior enlisted female members with multiple claims of inappropriate touching during conversations, inappropriate remarks, and interactions that have caused them to feel uncomfortable and unsafe in the workplace; and direction to have no contact with the four female junior enlisted members in any setting alone until further notice. There is no document to substantiate that the applicant refused to sign the CG-3307 or that he "grabbed the paper and attempted to run away with it across the mess deck to write personal comments." There is no evidence that LT T articulated in writing the basis for the determination of whether harassment occurred, and the evidence reviewed to reach that determination. The applicant argued that the Investigation into Allegations of Misconduct Under the UCMJ dated June 4, 2019, contains no evidence, dated May 19, 2019, from any of the applicant's subordinates that describe inappropriate comments. The applicant argued that the records described in [RY] CG-3307 dated May 19-20, 2019, were never provided to him and this has negatively impacted his career in the Coast Guard. He claimed that the District [] investigated the allegation of harassment against him while onboard the cutter and found the allegations to be unsubstantiated. Finally, the applicant alleged that the CCTV coverage evidence he requested was found but never provided to him.

The applicant alleged that at the time the NJP was imposed that he was not a member of the command under the commanding officer who imposed the punishment and pointed to evidence: (1) that email dated September 17, 2019 in which Sector staff stated: "I have not received a response from [] to-date concerning my tasking to create the amendment for these"; (2) PERS2's email that indicates that as of September 17, 2019 the applicant's TDY orders had not been amended, and that as a result, the August 1, 2019 amended date in block 26 of the TDY orders is false. The applicant therefore alleged that his NJP was not conducted in accordance with COMDTINST M5810.1G (2.I.4).

The applicant contended that his decision to accept NJP was not a knowing or voluntary decision. He alleged that he made several attempts to speak to a military attorney, but none responded to his request concerning the right to demand court-martial and NJP procedures. He also alleged he was pressured based on when the NJP was scheduled to make a decision. The applicant argued that consistent with COMDTINST M5810.1G, prior to imposition of NJP the member must be allowed to examine documents and other evidence that the NJP authority will examine and consider in determining whether to impose evidence, which he was not.

Regarding the OER for the rating period November 20, 2018 to March 31, 2019, the applicant contended that his supervisor and XO, LT F¹⁷, falsely stated in her November 17, 2020 declaration that she had written the comments on the OER. The applicant claimed LT T had told him during OER counseling on May 7, 2019, that he had written all comments on the OER, including the section completed by the XO. Further, the applicant alleged the XO did not dispute that LT T had written the supervisor comments during the ROO OER reply process.

The applicant alleged that his OER for the rating period April 1, 2019 to June 27, 2019 was in error because LT T signed as the applicant's supervisor, which he was not, and CAPT B, the Sector [] Commander, signed as his reporting officer, which he was not; LT T was his Commanding Officer. The applicant further alleged that the RO signed the OER on September 23, 2019, which was contrary to Coast Guard policy. The applicant claimed PSC had subsequently changed the signature date from September 23, 2019 to October 20, 2019. The applicant further alleged that because of this error it was unjust that he had to wait 216 days to receive the validated OER, and this resulted in his inability to submit a Reported-On Officer Reply until January 30, 2020.

The applicant alleged that his OER for the rating period June 28, 2019 to September 30, 2019 contained an error in that it states in Section 3 "MBR not observed due to authorized TDY to Sector [] Enforcement for entirety of period. See concurrent OER." According to the applicant, the error with this OER was that he was not TDY to Sector [] during the entirety of the OER period, because the applicant was on Temporary Duty (TDY) Orders on May 26, 2019 for one day, and this order was amended on August 1, 2019 until December 9, 2019. The applicant argued that this OER should be corrected to remove these errors. The applicant argued that Sector [] staff violated Coast Guard policy when they backdated the amendment on his TDY orders which expired on May 26, 2019 to August 1, 2019. He argued that the amendment date of August 1, 2019 is not possible based on PERS2's email dated September 17, 2019 which indicated that as of that date the orders ended on May 26, 2019 and had not been amended. The applicant also argued that he was not TDY to Sector [] for the entire of the OER period June 28, 2019 through September 30, 2019 because (1) Sector [] did not issue or amend his TDY Travel Orders during the OER period until after September 17, 2019 and (2) based on PERS2's email, the earliest he would have received TDY Travel Orders assigning him to Sector [] was September 18, 2019. The applicant also alleged that it was unjust that his Command did not provide him with a validated copy of his OER for this period until May 20, 2020, 233 days after the OER period ended and this resulted in his inability to submit a Reported-On Officer OER Reply until May 21, 2020.¹⁸

Citing to PSCINST M1611.1D, the applicant alleged that it was error for him to receive a concurrent OER for the time period June 28, 2019 to December 17, 2019. Citing to PSCINST M1611.1D, the applicant stated that on April 27, 2020, he emailed PSC OPM-3 requesting guidance on the OER for period June 28, 2019 to December 17, 2019 because the date reported was incorrect. In response, PSC OPM-3 stated he reached out to the RO who indicated that TDY orders were issued; the RO was the Sector [] Enforcement Chief. However, the applicant reports,

¹⁷ The applicant's supervisor was promoted from LTJG to LT after the OER for the period ending March 31, 2019 was completed, but before the November 17, 2020 declaration.

¹⁸ According to the applicant, he received the validated OER on May 30, 2020. This OER was validated on April 8, 2020

that during this period he received the following orders: (a) from June 28, 2019 to September 17, 2019, no TDY order; (b) from September 18, 2019 to November 22, 2019, on TDY orders to Sector []; (c) from November 23, 2019 to December 8, 2019, no TDY orders; (d) from December 9, 2019 to December 17, 2019, on TDY orders to Sector []. Accordingly, the applicant argued that the OERs contained the following errors: (1) There is no record that the applicant received TDY Travel Orders effective June 28, 2019; (2) There is no records that the applicant was under approved amended TDY Travel Orders from 28 Jun 2019 to September 17, 2019; (3) There is no record that the applicant was under approved TDY travel orders from November 23, 2019 to December 8, 2019; (4) There is no record that the applicant reported to Sector [] under TDY travel orders effective June 28, 2019. According to the applicant, his Reporting Officer (LCDR C) stated that he provided LCDR C with a summary of what transpired on September 11, 2019, which he did not dispute, that stated “Two bad OERs; Next OER not going to be spectacular because can’t go from 2’s and 3s to 6s and 7s; makes it look inflated; don’t expect straight 7s; probably get 4s and 5s with some 6s; I am doing good;” “Can’t fight for me to commence Response Officer qualifications because I am not owning up to it; has a little more footing if I admit.”

The applicant also alleged that LCDR C stated that the applicant would have to admit to the UCMJ violations which were part of the June 27, 2019 Mast before he could recommend commencing Response Officer qualifications. In addition, the applicant alleged that the comments of his supervisor were not his own (i.e. (1) the comment “Mbr’s actions created a negative atmosphere and fear of reprisal within the workspace” is not a comment. LT L provided a draft OER and submitted it. (2) He could provide no examples of the comment “Interpersonal relationships negatively affect others w/in workspace.” (3) He could not speak to the comment “Has inhibited cooperation w/in workplace affecting productivity.” The applicant identified the following errors in this OER: (1) LT L stated that he could not provide any examples to support his comments he signed, attesting they were his own; (2) LT L stated at a December 18, 2019 meeting with the applicant that he had nothing to critique him on, to keep it up he is doing well, and that this does not align with the comments on November 22, 2019. The applicant further alleged that pursuant to PSCINST M1611.1D, that by signing the Reporting Officer attests that their comments are their own but instead were made by command above LCDR C (OER Reporting Officer). According to the applicant, LCDR C told him that CAPT B, Sector [] Commander, is ensuring that the applicant’s OER is being written in a certain way to support a recommendation for revoking his commission; the applicant also alleged that LCDR C could not explain the marks because they were not his own.

The applicant alleged that on July 3, 2019 his father advised him that he had submitted a complaint to the DHS OIG regarding alleged bullying/harassment against the applicant. He further stated that shortly after his mother contacted Sector [] that the staff officer sent an email notifying his alleged harasser. He further stated this the alleged harasser was now in his immediate chain of command and that this made “pursing this issue” problematic. Citing COMDTINST M5350.4D Art. 3.D, the applicant argued that retaliation or harassment of an employee because he or she discloses information is prohibited. The applicant alleged that he was retaliated against for reporting to OIG.

The applicant alleged that it was unjust that he was not provided with a validated copy of his OER for the period June 28, 2019 to December 17, 2019 until 191 days after the OER period

ended on June 25, 2020 and that this resulted in the applicant being inability to submit a Reported-On Officer OER Reply until June 29, 2020.

With respect to the OER for the rating period from October 1, 2019 to May 21, 2020, the applicant alleged numerous errors. He was not assigned to Sector [] from October 1, 2019 to December 17, 2019. He received Permanent Change of Station (PSC) orders transferring him from CGC RY to the Sector [] Response Department effective December 18, 2019 and this is reflected on the OER for period October 1, 2019 to May 21, 2020. He reported on December 18, 2019. For period October 1, 2019 to December 17, 2019 (78 days) his performance was reported on two OERs: OER for period October 1, 2019 to May 21, 2020 (Detachment/PCS of ROO OER) and OER for period June 28, 2019 to December 17, 2019 (Concurrent OER). The applicant explained that these two OERs indicate that he was assigned to Sector [] and, as a result, he should not have received a concurrent OER. He pointed out that both OERs documented performance at Sector [], not a different unit, and that both OERs were completed by the same OER Supervisor and OER Reporting Officer, not a different rating chain. He also alleged that this OER contained errors and submitted a Reported-On Officer OER Reply on August 6, 2020 about which the OER Reporting Officer commented that the remainder of the applicant's reply contains "serious misrepresentations of facts."

Regarding the nonselection for promotion, the applicant supported his arguments by citing to the *Engles* test,¹⁹ but the *Engles* test is no longer the standard for evaluating an officer's record because it was superseded by 14 U.S.C. § 2120 that allows for Special Selection Boards. Accordingly, the applicant's arguments and citations regarding the *Engles* test will not be summarized here.

The applicant alleged numerous errors related to the handling of the investigation into his allegation of bullying by LT T. The applicant contended Sector [] received a complaint that he was being harassed on May 19, 2019, but CAPT B delayed acknowledging receipt of the report of potential harassment until June 4, 2019. He claimed that, after receiving the complaint that the applicant was being harassed, CAPT B did not respect the applicant's confidentiality, but rather contacted CGC RY command. The applicant also alleged CAPT B did not immediately conduct an investigation upon receipt of May 19, 2019 complaint. The applicant further alleged that the PIO investigating the alleged harassment did not the requisite Civil Rights and Civil Liberties approved training. The applicant claimed that, because Sector [] violated the Coast Guard's harassment complaint procedures, it cannot be ruled out that he was bullied by work interference, undermining performance, and verbal abuse.

APPLICABLE LAW AND POLICY

Title 10, U.S.C. § 1034, Protected Communications; Prohibited or Retaliatory Personnel Actions, states:

(b) Prohibition of retaliatory personnel actions.--(1) No person may take (or threaten to take) an unfavorable personnel action, or withhold (or threaten to withhold) a favorable personnel action, as a reprisal against a member of the armed forces for making or preparing or being perceived as making or preparing—

¹⁹ *Engles v. United States*, 678 F.2d 173, 177 (Ct. Cl. 1982).

...
(ii) an Inspector General (as defined in subsection (j)) or any other Inspector General appointed under chapter 4 of title 5;

(iii) a member of a Department of Defense audit, inspection, investigation, or law enforcement organization;

(iv) any person or organization in the chain of command;

...
(2)(A) The actions considered for purposes of this section to be a personnel action prohibited by this subsection shall include any action prohibited by paragraph (1), including any of the following:

(i) The threat to take any unfavorable action.

(ii) The withholding, or threat to withhold, any favorable action.

(iii) The making of, or threat to make, a significant change in the duties or responsibilities of a member of the armed forces not commensurate with the member's grade.

The Coast Guard Civil Rights Manual, COMDTINST M5350.4D (May 2019), Chapter 3 “Civil Rights Policies: Affirmative Obligations and Prohibited Practices” discusses civil right programs and policies of general application to all Coast Guard personnel.

Art. 3.C.2. Defining Prohibited Harassment. Harassment that is prohibited includes, but is not limited to, unwelcome conduct, whether verbal, nonverbal, or physical that has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, offensive, or hostile environment on the basis of an individual's protected status, which includes: race, color, religion, sex (including gender identity, sexual harassment, pregnancy, sexual orientation), national origin, age, disability, protected genetic information, marital status, parental status, political affiliation, retaliation or any other basis protected by law

...
3.D. Whistleblower Protection. Retaliation or harassment of an employee or applicant for employment because he or she discloses information that is reasonably believed to evidence violations of law, rule or regulation, gross mismanagement, gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety is prohibited.

...
3.F. Harassment Complaint Procedures. . . The following are reporting procedures for aggrieved parties and witnesses:

1. Any aggrieved party or witness of behavior that is considered prohibited harassment should report the inappropriate conduct to their chain of command. All employees are required to ensure confidentiality to the extent possible.

2. Persons whose complaints are not promptly investigated may contact the Coast Guard Civil Rights Directorate (CRD). Investigators/fact-finders assigned to conduct inquiries must have received Civil Rights and Civil Liberties approved training in investigating, interviewing, report writing, and investigating harassment allegations, including the legal requirements for claims of harassment.

...
4. Reports of harassment will be treated confidentially, to the extent possible, consistent with good order and discipline. The Coast Guard does not tolerate retaliation against any individuals for reporting harassment or assisting another individual in reporting harassment.

...
6. The CO/OIC of Coast Guard units are required to take the following steps upon notification of a complaint of prohibited harassment:

a. Acknowledge receipt of a report of potential harassment (*see Appendix I*) and take appropriate actions to ensure safety of the aggrieved party, including contacting local law enforcement, base security forces, or emergency medical care, if necessary.

...

f. Respect the confidentiality of individuals reporting harassment or providing information relating to harassment to the extent permitted by law and consistent with good order and discipline. In addition, the CO/OIC must take appropriate measure to prevent reprisals for any reported harassment or information provided during the investigation of alleged harassment. Confidentiality must be extended to all parties. Written material must be stored appropriately so as to not expose information publicly.

g. Unless CGIS has initiated an investigation, immediately conduct an informal investigation, preliminary inquiry or formal investigation as appropriate and in accordance with the Administrative Investigations Manual, COMDTINST M5830.1 (series).

h. If an investigation substantiates behaviors of prohibited harassment or shows other misconduct occurred, initiate in appropriate cases, administrative or disciplinary actions that may include punishment under UCMJ for military personnel

j. Notify the complainant of the disposition of the investigation and whether or not corrective action has been taken without disclosing the specific nature of any adverse employment action taken

Article 8 of the Coast Guard Administrative Remarks Manual, COMDTINST M1000.14D (June 2015)²⁰, provides the following guidance on the issuance of CG-3307s (Page 7's):

Art. 8.j. Authorized personnel may issue Administrative Remarks, Form CG-3307, documentation for incidents within two years of the date of the incident, or within two years of the date that the command knew, or should have known, about the incident.

...

Art. 8.l. If a member refuses to sign an Administrative Remarks, Form CG-3307 entry, after being counseled regarding its content, the words "member refused to sign" must be entered in the member's signature block along with the date counseled.

COMDTINST M5000.3B, U.S. Coast Guard Regulations (1992) states:

Art. 4.1.2. The responsibility of the commanding officer for that command is absolute, except when, and to the extent relieved there from by competent authority, or as provided otherwise in these regulations. At the commanding officers discretion, portions of that authority may be delegated . . . but such delegations of authority shall in no way relieve the commanding officer of continued responsibility for the safety, efficiency, and well-being of the command.

Art. 4.1.12. The commanding officer is responsible for maintaining discipline on board the unit and to this end shall: (1) Initiate such inquiry as may be necessary to make a proper disposition of any reported offenses, in accordance with the Manual for Courts-martial and the Military Justice Manual (COMDTINST M5810.1 series). (2) Maintain a unit punishment book in compliance with the Military Justice Manual (COMDSINST M5810.1 series). (3) Describe the means by which members of the crew may make any request, report, or statements to the commanding officer for personal receipt and consideration.

The Manual for Courts-Martial, Part V (Nonjudicial Punishment), provides the following guidance on the nature of punishments issued at NJP and a member's right to appeal:

5.c. Nature of Punishment.

²⁰ The manual was revised, effective May 2019. Both versions contain the same language.

(1) *Admonition and reprimand.* Admonition and reprimand are two forms of censure intended to express adverse reflection upon or criticism of a person's conduct. A reprimand is a more severe form of censure than an admonition. When imposed as nonjudicial punishment, the admonition or reprimand is considered to be punitive, unlike the nonpunitive admonition and reprimand provided for in paragraph 1g of this Part. In the case of commissioned officers and warrant officers, admonitions and reprimands given as nonjudicial punishment must be administered in writing. In other cases, unless otherwise prescribed by the Secretary concerned, they may be administered either orally or in writing.

...

7. Appeals.

a. *In general.* Any Servicemember punished under Article 15 who considers the punishment to be unjust or disproportionate to the offense may appeal through the proper channels to the next superior authority.

b. *Who may act on appeal.* A "superior authority," as prescribed by the Secretary concerned, may act on an appeal. When punishment has been imposed under delegation of a commander's authority to administer nonjudicial punishment (see paragraph 2c of this Part), the appeal may not be directed to the commander who delegated the authority.

c. *Format of appeal.* Appeals shall be in writing and may include the appellant's reasons for regarding the punishment as unjust or disproportionate.

d. *Time limit.* An appeal shall be submitted within 5 days of imposition of punishment, or the right to appeal shall be waived in the absence of good cause shown. A Servicemember who has appealed may be required to undergo any punishment imposed while the appeal is pending, except that if action is not taken on the appeal within 5 days after the appeal was submitted, and if the Servicemember so requests, any unexecuted punishment involving restraint or extra duty shall be stayed until action on the appeal is taken.

The Coast Guard's Military Justice Manual, COMDTINST M5810.1G (January 2019), Chapter 2, discusses nonjudicial punishments (NJP).

Art. 2.B.1. Commanding officers and officers-in-charge of Coast Guard units. All commanding officers may impose NJP upon personnel assigned to their units . . . A Coast Guard "unit" is a separately identified Coast Guard organizational entity, under a duly assigned commanding officer or officer-in-charge, provided with personnel and material for the performance of a prescribed mission. A commanding officer's authority to impose NJP may be withheld or limited by a superior commanding officer or the Secretary.

2.G.11.b. Decision to dispose at NJP. If the commanding officer decides a matter should be disposed of at NJP, he or she will cause the member to be notified of the intended action and appoint a mast representative . . .

...

2.H. Right to Demand Trial by Court-Martial in lieu of NJP.

1. By member not attached to or embarked on a vessel. If the matter will be forwarded for NJP, a member who is not attached to or embarked on a vessel must be informed that he or she has a right to demand trial by court-martial in lieu of NJP. He or she must also be informed of the right to consult with an attorney before accepting or rejecting NJP. Acknowledgment of Rights – Acceptance of NJP (Enlisted Member Attached to Shore Unit), Form CG-5810A, or Acknowledgment of Rights – Acceptance of NJP (Officer Attached to Shore Unit), Form CG-5810B should be used to document that the member was notified of his or her rights and whether the member demanded court-martial in lieu of NJP.

...

2.c. Consultation with an attorney. The command may, in its sole discretion and if it will not unreasonably delay the proceedings, arrange for the member to consult with a military attorney or provide the member the opportunity to consult with a civilian attorney at the member's own expense prior to imposing NJP to allow the member to obtain information about the NJP process. Facilitation of the consultation with an attorney can be accomplished by contacting the command's servicing legal office for the appropriate contact information

.....

...

2.I. Member Representation at NJP.

1. Background. A mast is not an adversarial proceeding. It is different from a court-martial; a member has no right to be represented by an attorney at mast. However, the member may obtain the services of an attorney or any other person, at no expense to the government, to appear as the member's spokesperson. See MCM, Part V, Para.4.c.(1)(B) and Subsection 2.I.5.

2. Consultation with counsel for members not attached to or embarked on a vessel. A member not attached to or embarked in a vessel will be afforded the opportunity to consult with counsel in order to make an informed decision, prior to making an election to accept NJP or demand trial by court martial in lieu of NJP. Failure to offer the member an opportunity to consult with counsel prior to making an election to accept or refuse NJP precludes the use of that NJP for sentence enhancing purposes in any future court-martial of the member. This limitation was set forth in the case of *United States v. Booker*, 5 M.J. 238, 243 (C.M.A. 1977). The command should facilitate the consultation with the attorney by contacting the command's servicing legal office for the appropriate contact information . . . The consultation may be telephonic. A member does not have a right to consult a particular military attorney, and the attorney made available need not be certified in accordance with Article 27(b), UCMJ. The member may also retain a civilian attorney at no expense to the government provided the proceeding is not unduly delayed.

...

5. Mast representation.

a. Appointment. mast representative will be appointed to assist the member in preparing for and participating in the mast proceedings, unless the member affirmatively declines appointment of a mast representative. . . .

...

c. Role of mast representative. The mast representative serves primarily to assist the member in preparing for and presenting the member's side of the matter and to speak for the member, if the member desires. The mast representative may question witnesses, submit questions to be asked of witnesses, present evidence, and make statements inviting the commanding officer's attention to those matters he or she feels are important or essential to an appropriate disposition of the matter. In addition, the mast representative may make a plea for leniency, and to that end, may solicit and submit statements regarding the reputation of the member at the unit as well as other matters in extenuation or mitigation.

...

2.J. Examination of Documents and Evidence. Prior to imposition of NJP the member must be allowed to examine documents and other evidence that the NJP authority will examine and consider in determining whether to impose NJP. If a command is concerned that permitting examination will compromise an interest such as a victim's or witness' privacy, or an ongoing law enforcement investigation, the command should contact the servicing legal office. However, the commanding officer may redact documents or place limitations on examination or disclosure of documents to protect any interests . . . To avoid delays during the mast itself, the member and the member's designated mast representative should be provided the opportunity to review such materials, including the Report of Offense and Disposition and Record of Non-judicial Punishment, Form CG 4910, the PIO's report and any witness statements, prior to the mast . . . Alternatively, the commanding officer may review the documents and evidence with the member during the mast hearing

...

2.K. Mast Procedures.

...

7. Burden and standard of proof. The standard of proof required in order to award punishment at NJP is a preponderance of evidence

...

14. Examination of evidence and witnesses by the commanding officer and member. The commanding officer may decide that the Report of Offense and Disposition and Record of Non-judicial Punishment, Form 4910, PIO report, or other available evidence is sufficient to establish the offense without calling witnesses. There is no requirement that a commanding officer call witnesses. Further, if the member asks for witnesses, the commanding officer is not obligated to call the witness unless the witness is relevant and not cumulative, reasonably available, and necessary for a full and fair proceeding

15. Questions by the commanding officer. Generally, the commanding officer calls and questions each witness and may call witnesses in any order or sequence. The commanding officer may also keep witnesses separated or direct them to not discuss the case among themselves or with others but is not required to do so. The commanding officer may use any procedure to develop the facts and circumstances surrounding the alleged offenses (e.g., question and answer, open narrative). Witnesses may be questioned about any prior oral or written statements. The commanding officer may allow the executive officer or any of the other attendees to suggest questions to be asked of a witness.

17. Questioning by member. After the commanding officer finishes questioning a witness, the member or the member’s mast representative should be allowed to question the witness. The commanding officer may control the proceedings as necessary to ensure that any questioning helps to discover the truth of the allegations against the member, avoids wasting time, and protects a witness from harassment or unnecessary embarrassment. The commanding officer may also require the member or the member’s mast representatives to submit questions in writing prior to the mast, or orally at the mast, for the commanding officer to ask a witness. The commanding officer may prohibit a spokesperson from questioning witnesses if in the commanding officer’s opinion such questioning would turn the mast into an adversarial proceeding.

...

20. Opportunity for member’s statement. The member should be offered an opportunity to make a statement about the alleged offenses after all of the witnesses have been questioned and other evidence considered . . .

...

22. Findings. If the commanding officer determines based on a preponderance of the evidence that the member committed one or more offenses, the commanding officer should announce, in layman’s terms, what offenses the member committed.

...

32. Member’s right to appeal. If the commanding officer imposes NJP, he or she must inform the member of the right to appeal.

...

2.U. Appeal of NJP.

1. Basis and time limit to appeal. A member who received NJP may appeal if he or she considers the punishment imposed “unjust” or “disproportionate” to the acts of misconduct for which punished. Any appeal must be submitted in writing within 5 calendar days of the imposition of the punishment, or the right to appeal is waived in the absence of good cause shown . . .

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

...

2.X. Effect of Errors.

1. When punishment is invalidated. Failure to comply with these regulations does not invalidate punishment imposed under Article 15, UCMJ, unless the error materially prejudiced a substantial right of the service member on whom the punishment was imposed.

The Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A, (January 2018), Chapter 5, Officer Evaluation System (OES), states the policies and standards for conduct performance evaluations for Coast Guard officers.

Art. 5.B. Roles and Responsibilities

2. Commander (CG PSC) has overall responsibilities for the OES. Administrative servicing of OERs is accomplished by Commander (CG PSC-OPM-3) or Commander (CG PSC- RPM-1). Servicing of an officer’s personnel record is accomplished by Commander (CGPSC-BOPS-C-MR).

3. Commander (CG PSC-OPM-3) or Commander (CG PSC-RPM-1) must:

b. Review and validate OERs for administrative and substantive errors with attention given to inconsistencies between the numerical evaluations and written comments (if applicable).

(1) May return any OER requiring significant correction or redaction to the appropriate member of the rating chain.

(2) Correct OERs containing minor administrative errors or as directed by judicial or administrative adjudications without return to the rating chain.

...

f. Grant or deny exceptions to policies and standards as permitted in this Chapter.

...

5.E. Occasions for Regular OERs. A regular OER is a report that qualifies for continuous chronological coverage of the reported-on officer’s commissioned service.

7. Removal from Primary Duty (RPD).

a. This OER must be submitted when permanently removing an officer from their primary duties as a result of conduct or performance which is substandard or as directed by the permanent relief authority’s final action on a permanent relief for cause request in accordance with Reference (q), Military Assignments and Authorized Absences, COMDTINST M1000.8 (series).

b. The OER will be defined as derogatory and must follow the policies and standards for derogatory OER stated in Article 5.H. of this Manual.

c. Reassignment not constituting RPD as provided in Reference (q), Military Assignments and Authorized Absences, COMDTINST M1000.8 (series), is not derogatory and therefore does not require a RPD OER.

...

5.F. Occasions for Non-Regular OERs. The OERs listed in this Article do not count for continuity.

1. Concurrent. A concurrent OER is an OER submitted outside of the regular submission schedule in addition to a regular OER and thus does not count for continuity.

a. The unit to which the reported-on officer is permanently attached is always responsible for ensuring that OER continuity is maintained with regular OERs. The permanent unit’s OER is never considered a concurrent report.

b. Concurrent reports may be submitted only when the officer is:

(1) On active duty and performing temporary duty (TDY) away from a permanent station while being observed by a senior officer other than the regular reporting officer, (e.g., senior aviator deployed aboard a Coast Guard icebreaker). In this case, the concurrent report normally will be written upon the detachment of the TDY officer and cover only the period of temporary duty. This is an optional OER and will be submitted at the discretion of the TDY command. A TDY concurrent OER must be for a period of at least 60 days.

...

3. Subsequent to Disciplinary Action.

b. This OER must be submitted when an officer receives non-judicial punishment which is not subject to appeal or when the final reviewing authority's action on an investigation includes direction that an OER must be prepared

...

e. If the conduct resulting in the court-martial, non-judicial punishment, or investigation occurs during the current reporting period, a Subsequent to Disciplinary Action OER is not required if the process is completed, i.e., not subject to further review, by the time that the regular report is due to be submitted for the current period (within 30 days from the end of period of report). The basis for the court-martial, non-judicial punishment, or investigation must be reported in the regular report.

...

5.H. Derogatory OERs. A derogatory OER is any regular or non-regular OER that indicate the Reported-on officer has failed in the accomplishment of assigned duties.

1. Derogatory reports are only those OERs which:

a. contain a numerical mark of one in any performance dimension, and/or

b. contain an "unsatisfactory" mark by the reporting officer in comparison scale or rating scale, and/or

c. documents conduct or performance which is adverse or below standard and results in the removal of a member from their primary duty or position.

...

5.I. Prohibited Comments. The rating chain must not:

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.

...

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.

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. [Correction of OERs and Military Records] of this Manual. This includes requests to have the OER, or a part thereof, removed from the record

The Officer Evaluation System Procedures Manual, PSCINST M1611.1D (January 2018 – Change 1), prescribes the procedures for completing the Officer Support Form (OSF) and Officer Evaluation Report (OER).

Art. 1.A. The Rating Chain. The rating chain provides the assessment of an officer's performance and value to the Coast Guard through a system of multiple evaluators and Reviewers who present independent views and ensure fairness, accuracy and timeliness of reporting. It reinforces decentralization by placing responsibilities for development and performance evaluation at the lowest levels within the command structure. The rating chain consists of the Reported-on Officer, the Supervisor, the Reporting Officer, and the Reviewer (if applicable).

1.A.2. Supervisor.

- a. Designation. The Supervisor is normally the individual to whom the Reported-on Officer reports to on a daily or frequent basis and from whom the Reported-on Officer receives the majority of direction and requirements.
- b. Responsibilities. The Supervisor shall:
 - (1) Evaluate the performance of the Reported-on Officer in the execution of their duties.
 - (2) Provide direction and guidance to the Reported-on Officer regarding specific duties and responsibilities.
 - (3) Discuss at the beginning of the period, upon request, or when deemed necessary, the Reported-on Officer's duties as prescribed by Article 1.A.1 of this Manual and areas of emphasis.
 - (4) Provide timely performance feedback to the Reported-on Officer upon that officer's request during the period, at the end of each reporting period, and at such other times as the Supervisor deems appropriate.
 - ...
 - (6) Counsel the Reported-on Officer during and at the end of the reporting period if requested, or when deemed appropriate, regarding observed performance. Discuss duties and responsibilities for the subsequent reporting period and make suggestions for improvement and development.
 - (7) Provide mid-term counseling as requested by the Reported-on Officer.

1.A.3. Reporting Officer.

- a. Designation. The Reporting Officer is normally the Supervisor of the Supervisor.
- b. Responsibilities. The Reporting Officer shall:
 - (1) Evaluate the Reported-on Officer based on direct observation, the Officer Support Form (OSF), Form CG-5308, other information provided by the Supervisor, and other reliable reports and records.
 - (2) Prepare Reporting Officer section of the OER and describe the overall potential of the Reported-on Officer for promotion and special assignment such as command.

(3) Ensure the Supervisor fully meets responsibilities for administration of the OES. . . . The Reporting Officer shall not direct that an evaluation mark or comment be changed, unless the comment is prohibited under Article 5.I. of reference (a) and Article 4.B. of this Manual. Instead, they have the option to select 'Do Not Concur' and explain why in the Reporting Officer Comments block.

Art. 6. Derogatory Reports.

A. General.

2. Derogatory reports are OERs that indicate the Reported-on Officer has failed in the accomplishment of assigned duties. Derogatory reports are only those OERs which:

- a. Contain a numerical mark of one in any performance dimension, and/or
- b. Contain an 'Unsatisfactory' mark by the Reporting Officer on the Comparison Scale, and/or
- c. Document conduct or performance which is adverse or below standard and results in Removal from Primary Duties (RPD) or Relief for Cause (RFC). Refer to Chapter 10 of this Manual for RPD/RFC OER procedural guidance [which then directs the reader back to Chapter 6 of the Manual for Derogatory Reports procedural guidance].

B. Preparation.

5. Processing CG-5310B.

- a. After the Supervisor has signed the OER, including any necessary comments on the Comments Form, CG-5315, the Supervisor provides a copy to the Reported-on Officer requesting that the Reported-on Officer prepare an addendum.
- b. The Reported-on Officer's addendum does not constitute an official request for correction of a record but provides the Reported-on Officer an opportunity to explain the failure or provide their view of the performance in question. Commenting or declining comment does not preclude the Reported-on Officer from filing an official request for correction of the record . . . or submitting a Reported-on Officer OER Reply Refer to Appendix D for an outline of the OER addendum process.
- c. After completing the addendum, the Reported-on-Officer forwards the OER along with the addendum to the Supervisor. The Supervisor must be afforded the opportunity to address the Reported-on Officer's addendum. In all cases, the rating officials each endorse the addendum by signature at a minimum. The Supervisor will then forward the OER and attachments to the Reporting Officer.
- e. The Reporting Officer ensures that the evaluation of the Reported-on Officer is consistent and that the derogatory information is substantiated. If the Reporting Officer finds otherwise, they return the report to the Supervisor for additional information and/or clarifying comments. Substantive changes to the OER require its return to the Reported-on Officer to provide another 14-day opportunity for the Reported-on Officer to revise the addendum.
- f. If no substantive changes are required and after the addendum process has been completed the Reporting Officer signs and dates the OER.
- g. The Reported-on Officer must review and sign (handwritten or electronic signature) the OER after the Reporting Officer

i. Addendum comments should be performance-oriented, either addressing performance not contained in the OER or amplifying the reported performance. All prohibited comments outlined in Article 5.I. of Reference (a) and Article 4.B. 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.

...

Art. 17. Reported-On Officer OER Reply

A. General

1. 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 . . . A Reported-on Officer OER reply does not constitute a request to correct their record.

2. 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 Reference (a) and Article 4.B. 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.

3. Submission of Replies. Reported-on Officer’s OER Reply must be submitted to CG PSC-OPM-3 or CG PSC-RPM-1 via the original rating chain

4. Timeline for Submission of Replies to Supervisor. Replies must be submitted to the Supervisor within 21 days from receipt of the validated OER from CG PSC-BOPS-CMR, Military Records Section. Replies based upon receipt of local copies will not be accepted.

5. Timeline for Submission of Reply to Commander (CG PSC). The OER Reply should be processed by the rating chain to arrive at CG PSC-OPM-3 or CG PSC-RPM-1 not later than 30 days after the date the Reply was submitted to the Supervisor.

...

Art. 18. Review of OERs at CG Personnel Service Center

Correction of OERs.

Administrative Information. CG PSC-OPM-3 or CG PSC-RPM-1 may make changes to the administrative data of an OER; no notification is required to the Reported-on Officer and/or the original rating chain.

5. All changes to the original OER must be initialed.

...

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. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice. The applicant stated in his application that he discovered the error or injustice on May 7, 2019 and the signature on his application is dated November 21, 2021. Therefore, the application is timely because it was filed within three years of the applicant's discovery of the alleged error or injustice in the record, as required by 10 U.S.C. § 1552(b).

3. The applicant requested a 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.²¹

4. The applicant asked the Board to correct his record by: (1) removing the negative Page 7's he received dated March 20, 2019, April 20, 2019, May 19, 2019, and May 21, 2019; (2) removing the OERs he received for the periods November 20, 2018 to March 31, 2019, April 1, 2019 to June 27, 2019, June 28, 2019 to December 17, 2019, and October 1, 2019 to May 21, 2020; (3) overturning the results of the NJP that occurred on June 27, 2019 and removing all associated records, including a Punitive Letter of Reprimand dated August 30, 2019; (4) restoring his commission as an Ensign in the Coast Guard Reserve; (5) correcting his DD Form 214 signed on May 15, 2020 at sections 12.b, 26, and 28; (6) ordering all military pay and entitlements for the period May 22, 2020 to the date the BCMR directs his Commission restored; and (7) assigning him to a Coast Guard unit as a Reservist.

5. 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.²² 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."²³ Further, 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.²⁴

6. Harassment (Bullying) Investigation. The applicant contends that the investigation into his allegations of harassment (bullying) on the part of LT T was conducted improperly and, if the policies and procedures of COMDTINST M5350.4D had been appropriately followed, his claims would have been substantiated. Specifically, the applicant alleged that, after being notified by his mother on May 19, 2019 that he was being bullied aboard CGC RY, Sector command and CAPT B did not immediately acknowledge receipt of the potential harassment, conduct an

²¹ *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).

²² 33 C.F.R. § 52.24(b).

²³ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

²⁴ 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."

investigation, or ensure the applicant's confidentiality as required by COMDTINST M5350.4D, Art. 3.F. Instead, the applicant alleged CAPT B informed his command (the alleged perpetrator) and did not acknowledge or initiate an investigation until the applicant himself filed a report of harassment on June 4, 2019. Further, the applicant alleged that the investigating officer lacked the required Civil Rights and Civil Liberties approved training to conduct the investigation. As such, the applicant claimed that it cannot be ruled out that he was bullied by LT T. While the applicant does not ask for any specific corrections with respect to the June 2019 harassment investigation or its findings, because these allegations are woven through many of his claims of error and injustice, the Board will address those contentions below.

7. The Board finds the applicant has failed to prove by a preponderance of the evidence an error or injustice with respect to how the report of bullying was handled by the Coast Guard or the findings and outcome of the harassment investigation. The Board finds the greater weight of the evidence, including the applicant's own timeline of events in a document entitled "17 Jun 19 Meeting Notes," reflects the applicant made a complaint, through his mother, only after being confronted by his command regarding allegations of misconduct on May 19, 2019, specifically his sexual harassment of junior enlisted members onboard the cutter. During the day of May 19, 2019, CGC RY command received multiple reports about the applicant engaging in inappropriate conduct with female junior enlisted members and confronted the applicant regarding the allegations at approximately 9:45 PM that evening. The applicant contacted his parents at approximately 10:15 PM to relay the discussion and at 11:32 PM the applicant's mother contacted Sector Command to express her concerns for her son's well-being.

8. Upon receiving and acknowledging the complaint from the applicant's mother, CAPT B immediately took action to ensure the applicant's safety by notifying CGC RY command.²⁵ Given that the cutter was underway and conducting a patrol, the Board finds this was an appropriate course of action. The evidence does not reflect that CGC RY command failed to preserve the applicant's confidentiality regarding the reported harassment or that the applicant was reprimed against based on this information. Sector command also forwarded the information the applicant's mother and father provided regarding the alleged bullying to the investigating officer who was investigating the applicant's alleged sexual harassment to be included as part of the investigation. CAPT B acknowledged and directed a harassment investigation into the applicant's claims on June 4, 2019, following the applicant's report of bullying by LT T.²⁶ To the extent the applicant argues that he was prejudiced by the delay between when his mother called regarding his well-being and the start of the harassment investigation, the Board finds that is unsupported by the other evidence of record and that the applicant's harassment claims were thoroughly investigated.

9. With respect to the alleged lack of appropriate training on the part of the investigating officer, the Board finds the applicant has failed to prove by a preponderance of the evidence that the investigation was improperly conducted or that it would have changed the outcome of said investigation. The applicant's claims of harassment (bullying) on the part of LT

²⁵ COMDTINST M5350.4D, Art. 3.F.6.a. The actions taken by CAPT B, Sector Commander, related to the harassment complaint are outlined in the First Endorsement memorandum, subject: Formal Article 138, UCMJ, Complaint.

²⁶ *Id.*, Art. 3.F.g.f.

T were thoroughly investigated and found to be unsubstantiated. The investigating officer conducted interviews of 24 current and former crewmembers of the CGC RY and found the applicant's allegations of bullying disproven by witness interviews and that the disciplinary actions against the applicant by LT T were for a legitimate military purpose – ensuring crewmembers became qualified in their primary duties. The findings and outcome of the investigation were reviewed by District command, who noted that the situation detailed in the investigation indicates performance challenges on the part of the applicant, and not bullying on the part of LT T.

10. Finally, the Board finds the applicant's allegations regarding bullying to ultimately be a red herring. The applicant's unrelated and substantiated sexual harassment of multiple junior enlisted members is wholly contrary to the Coast Guard's core values and warranted disciplinary action and his subsequent removal from the service.

11. Negative Page 7's (CG-3307's) dated March 21, 2019, April 20, 2019, and May 21, 2019. The applicant has made multiple claims as to why these Page 7's, which document his failure to meet qualification deadlines for Inport OOD and QMOW, are erroneous and unjust. The applicant asserted that, as an O-1 with no cutter experience, he should have been allowed to qualify on Inport JOOD before the Inport OOD qualification. The applicant claimed that he was originally given outdated Watchstation Qualification Standards that inhibited his ability to complete the qualification requirement. Additionally, he asserted that completion of Advanced Damage Control prior to Inport OOD and QMOW qualification was only a unit/command specific requirement, and not required by overarching Coast Guard policy or the specific cutter's Instructions.

12. The Board finds these allegations outweighed by the other evidence of record. The evidence reflects that the applicant was on notice shortly after he came onboard the cutter, as documented in the December 20, 2018 Page 7, that he had to qualify as Inport OOD and QMOW by specific deadlines. Those deadlines were extended on two occasions to afford him an additional 60 days to complete the qualifications. The evidence reflects the cutter crew and leadership made numerous attempts to assist him with these qualifications. Nor does the applicant deny that he failed to meet said deadlines. Further, with respect to the Advanced Damage Control qualification requirement, the applicant did not identify one policy, and the Board could find none, to support the proposition that required qualifications are not within the CO's discretion. The evidence reflects the applicant failed the Advanced Damage Control board four times and the QMOW board twice. As such, there was no error with his command issuing him the negative Page 7's for failing to meet the qualification requirements. The Board also finds the qualification requirements do not otherwise amount to an injustice warranting relief. Ultimately, the applicant appears to be arguing that the requirements were unfair because of his lack of cutter experience or tries to shift the blame for his failure to qualify onto others. However, there is nothing in the record to reflect the applicant was given different qualification requirements, including with respect to Advanced Damage Control²⁷, than any other junior officer on board the CGC RY. The command and crew also offered him copious assistance and multiple extensions in meeting these requirements. The evidence of record, including a March 28, 2019 email from LT T, reflects the applicant would blame the crew for his failure to meet deadlines, use his position as an officer to shirk duties, and

²⁷ To the extent there was any error or injustice with respect to the reference to Advanced Damage Control in the CG-3307, dated April 20, 2019, the Board notes it has already been remedied by the PRRB, which directed that reference be removed from the document.

blatantly disregarded their opinions, instructions, and feedback. As such, the Board finds the applicant has failed to satisfy the burden of proof that any of these documents are erroneous or unjust and relief should be denied.

13. Negative Page 7 (CG-3307) dated May 19, 2019. The applicant claims this Page 7 is erroneous and unjust because there is no evidence LT T conducted an investigation prior to issuing him the Page 7 and there were no documents supporting the allegations of harassment, fraternization, and lying. The applicant alleged there was no contemporaneous documentation or evidence to support issuance of the Page 7. The applicant further contended that there was no evidence that he refused to sign the document or “grabbed the paper and attempted to run away with it across the mess deck to write personal comments.” He claimed that the CCTV footage he had requested, but was not provided would substantiate his version of events. The Board finds the applicant has failed to demonstrate by a preponderance of evidence that there is any erroneous or unjust information contained within the body of the May 19, 2019 Page 7. In March 2019, LT T spoke with the applicant about how his actions in speaking only with the female junior enlisted members onboard had created a perception of fraternization. On May 19, 2019, multiple members of the crew came forward to report the applicant’s inappropriate touching and remarks during conversations. Further, a subsequent investigation substantiated the applicant’s misconduct towards junior enlisted female members onboard the CGC RY.

14. However, the Board does find that the applicant is entitled to partial relief with respect to the superfluous language underneath the signature block on the May 19, 2019 Page 7. The Administrative Remarks Manual provides that, “[i]f a member refuses to sign an Administrative Remarks, Form CG-3307 entry, after being counseled regarding its content, the words ‘member refused to sign’ must be entered in the member’s signature block along with the date counseled.”²⁸ It was contrary to policy for LT T to add in the additional commentary of “MBR grabbed paper and attempted to run away with it across messdeck to write personal comments.” The Board agrees with the recommendation of the advisory opinion that this language should be removed from the May 19, 2019 Page 7.

15. Nonjudicial Punishment. The applicant has made multiple claims of error and injustice with respect to the NJP conducted by the Sector Commanding Officer on June 27, 2019. The applicant alleged that, at the time of the NJP was imposed, he was not a member of the command under the commanding officer who imposed the punishment. The applicant contended that his decision to accept NJP, instead of demanding trial by court-martial, was not a knowing or voluntary decision because he had made several attempts to speak to a military attorney, but none responded to his request concerning his options. The applicant alleged he was not allowed to review documents prior to the NJP or to question witnesses during it. The applicant has also claimed that his Mast representative did not represent him, but instead pressured him to accept the NJP, admit guilt, and accept responsibility. As such, the applicant requests the Board set aside the NJP and associated punitive letter of reprimand.

16. The Board finds the applicant has failed to demonstrate by a preponderance of the evidence an error or injustice warranting the requested relief. While the TDY orders were amended several times, the applicant was TDY from the CGC RY to Sector [] effective May 26, 2019.

²⁸ COMDTINST M1000.14D, Art. 8.1.

Further, the CGC RY is a subordinate unit of Sector [] and the CAPT B was the Sector Commander. As such, the evidence reflects the applicant was subject to the jurisdiction of the commanding officer, CAPT B, who imposed the NJP punishment.²⁹

17. Regarding the allegation that his election of NJP was not knowing and voluntary, the Board finds that the applicant has failed to demonstrate an error or injustice warranting the requested relief. The evidence reflects that the applicant was notified on June 26, 2019 that the commanding officer had chosen to pursue NJP. He was informed of his right to demand trial by court-martial. He was informed of his right to consult with an attorney concerning the right to demand court-martial and NJP procedures, if it did not unduly delay the reasonable scheduling of Mast, prior to deciding whether to demand trial by court-martial.³⁰ On June 26, 2019, the applicant acknowledged this notification and his rights, indicated his desire to have a Mast representative be appointed and did not demand trial by court-martial. Under member elections, by his initials and signature dated June 27, 2019, the applicant acknowledged that he understood the rights and information provided to him and indicated he would accept nonjudicial punishment along with a handwritten note that he requested to speak to an attorney on June 26, 2019, had not received a reply, and still desired to speak with an attorney. In a July 23, 2018 First Endorsement regarding the applicant's appeal of nonjudicial punishment, CAPT B noted that the applicant was notified of the Mast greater than 24 hours in advance and she considered the request for delay to be prejudicial to good order and discipline and did not grant it. The Board finds that the applicant's rights were explained to him, nothing precluded him from demanding trial by court-martial, and CAPT B acted within the scope of her authority and appropriately exercised her discretion when she found delay would be prejudicial to good order and discipline and denied the applicant's request.

18. Regarding the alleged issues with his Mast representative, the inability to examine evidence, and other allegations that his rights were prejudiced, the Board found these claims contradicted by the other evidence of record. The Board finds CAPT B's description of the events surrounding the NJP to be persuasive evidence that the applicant was allowed to examine evidence³¹ and mast procedures³² were followed and that this account is supported by the evidence of record. CAPT B notes, and the evidence reflects, that the applicant requested and was appointed a Mast representative – CDR L. The applicant refused to speak with CDR L until two hours before the Mast and informed her that he only wanted her to read the witness questions he had prepared. In reviewing the questions prepared by the applicant, the Board finds CAPT B acted within the scope of her authority when she: determined that many of the applicant's proposed questions were unrelated to the matter being considered and would be prejudicial to good order and discipline; decided to summarize and ask those questions that would be pertinent to whether the applicant committed the offenses; and decided that she would be the only person to question witnesses at Mast.³³ The evidence reflects the applicant was afforded the opportunity to make a statement or offer items in extenuation or mitigation and elected not to make a statement.³⁴ The applicant was

²⁹ COMDTINST M5810.16, Art. 2.B.1.

³⁰ *Id.* 2.H.2.c. ("The command may, in its sole discretion and if it will not unreasonably delay the proceedings, arrange for the member to consult with a military attorney . . . to obtain information about the NJP process.")

³¹ *Id.*, Art. 2.J.

³² *Id.*, Art. 2.K.

³³ *Id.*, Art. 2.K.14 and 15.

³⁴ *Id.*, Art 2.K.20.

also provided all documents prior to the NJP.³⁵ The applicant also submitted a lengthy appeal that was reviewed and ultimately denied.³⁶ The Board concurs with the advisory opinion that the greater weight of the evidence reflects the Coast Guard properly followed its own regulations when it awarded NJP to the applicant. The Board finds the applicant has failed to demonstrate by a preponderance of the evidence an error or injustice with the NJP process that materially prejudiced a substantial right.³⁷ As such, relief should be denied.

19. Contested OERs. The applicant contested five OERs for the periods ending March 31, 2019 (semi-annual OER), June 27, 2019 (RPD OER), September 30, 2019 (semi-annual OER), December 17, 2019 (concurrent OER), and May 21, 2020 (detachment of reported-on officer OER), alleging that they contain administrative and substantive errors and injustices, were not completed in accordance with policy, and should be corrected/removed from his record. The Coast Guard argued that these OERs were completed within policy and that the applicant has not provided sufficient evidence to meet the standard for correction of an OER citing to *Hary v. United States*³⁸ for the following reasons: the applicant has failed to prove that at least one *Hary* factor has been offended; the applicant has not sufficiently demonstrated error in his OERs; the applicant has failed to overcome the presumption that Coast Guard administrators, in particular his rating chain, discharged their duties in marking the applicant correctly, lawfully, and in good faith. The Coast Guard further argued that: “While the applicant alleges numerous erroneous statements contained within the OER’s and OER replies, he has not sufficiently proven that they are misstatement of significant hard facts.” The Coast Guard also argued that the applicant “has not provided sufficient evidence to overcome the presumption that the statements are correct and that the command correctly completed the various evaluations and replies lawfully and in good faith.” The Coast Guard highlighted the fact that “although the applicant alleges harassment and bias, there is insufficient evidence of any factors adversely affecting the evaluations which had no business being in the rating chain.” In support, the Coast Guard argued that an investigation conducted by Coast Guard District command did not substantiate the applicant’s claims of harassment. Finally, the Coast Guard noted that “the applicant has not provided sufficient evidence that any of the five evaluations contained clear violations of specific objective requirements laid out in statute or regulation.”

When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed evaluation in an applicant’s military record is correct 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.³⁹ 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.”⁴⁰ To be entitled to relief, 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

³⁵ *Id.*, Art. 2.K.14.

³⁶ *Id.*, Art 2.U.

³⁷ *Id.*, Art. 2.X.

³⁸ *Hary v. United States*, 223 Cl. Ct. 10, 18, 618 F.2d 704, 708 (1981).

³⁹ 33 C.F.R. 52.24(b).

⁴⁰ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979.)

violation of a statute or regulation.⁴¹ As discussed at Chapter 4.A.2 of the Coast Guard Officer Evaluation System Procedures Manual, “the OER is a series of forms used to document the performance and potential of Coast Guard officers. . . . Inherent in this duty is the commitment of rating chains [i.e. the Reporting Officer and Supervisor,] to ensure the integrity of the system by giving close attention to accurate marking, narrative assessment, and timely reporting.” The Board finds that the facts regarding the applicant’s performance as noted in the contested OERs are accurate as demonstrated by the record in this case and the OERs do not contain significant administrative or substantive errors. In addition, the applicant’s poor performance is further attested to in the declarations provided by a Supervisor (LT F) and Reporting Officer (LT T) (taken as part of the PRRB process). As discussed in Chapter 1.A of the OER manual, the Reported-on Officer is the subject of the OER and “[t]he rating chain provides the assessment of an officer’s performance and value to the Coast Guard through a system of multiple evaluators and Reviewers who present independent views and ensure fairness, accuracy, and timeliness of reporting. . . . The rating chain consists of the Reported-on Officer, the Supervisor, the Reporting Officer, and the Reviewer (if applicable).” The Board shall address the allegations with respect to each OER below.

- a. **OER 1: Semi-Annual OER for the period ending March 31, 2019.** The applicant received a Semi-Annual OER for period of report December 10, 2018 to March 31, 2019, signed by his Supervisor (LT F) and Reporting Officer (LT T) on May 7, 2019, which documents the applicant’s observed performance for 108 days. The applicant alleged that this Semi-Annual OER contained errors and injustices, was not completed in accordance with Coast Guard policy, and should be removed from his record. He stated that, consistent with policy, he chose not to submit a Semi-Annual OER for this period because he had no prior cutter experience, and he was still working to achieve a number of qualifications.

The Board notes that a semi-annual OER is a type of regular OER; “[a] regular OER is a report that qualifies for continuous chronological coverage of the Reported-on officer’s commissioned service.”⁴² The applicant argued that this semiannual OER submission was optional for newly commissioned officers who have been assigned at their first unit for less than 120 days. The applicant is incorrect in his assertion that it is within his discretion as to whether or not he was to receive this semi-annual OER. Per policy, the discretion as to whether to complete the semi-annual OER for a newly commissioned officer, such as the applicant, lies with the applicant’s command, not the applicant.

The Board finds that OER 1 was completed consistent with policy regarding the completion of semi-annual OERs in that it included a description and numerical assessment of the applicant’s primary duties as a Support/Weapons Officer, Deck Watch Officer; provided detailed written commentary on the performance of the applicant’s duties and a ranking of the applicant on the comparison scale; and included comments from the Reporting Officer in support of the marks provided in the OER. In addition, the First Endorsement to this OER by the applicant’s CO states:

⁴¹ *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).

⁴² PSCINST M1611.1D, Chapter 8.B.

Due to the frequency of negative counseling [referring to the negative Page 7's issued to the applicant], severity of incidents noted during the period, and lack of effort in correcting course it was determined an OER was necessary to document [the applicant's] substandard performance and conduct throughout the period to ensure an accurate record of the member's performance was kept for future consideration during promotion boards and selection panels. Following completion of the OER and counseling of [the applicant], he informed me via email that he was refusing to sign the OER based on disagreeing with the assigned marks. The applicant argued that the supervisor's signature on the OER was changed from May 7 to May 9, 2019; this date change is not contrary to policy. Consistent with policy, the RO annotated the applicant's refusal to sign⁴³ the OER in his Reporting Officer comments and noted that he stands by his previously stated recommendation that member is not suited for positions of greater leadership or responsibility.

As such, and consistent with policy, the OER is signed by the applicant's Supervisor and Reporting Officer, and the RO annotated the OER to reflect that the applicant refused to sign. Also, consistent with policy, the applicant's poor performance took place during the regular reporting period, so the CO documented it on a regular, albeit optional, OER as permitted by policy. The applicant's poor performance is documented on the Page 7's he received during this time period. Further, although optional, it was within the discretion of the command to document the applicant's poor performance in earning required qualifications on a semi-annual OER. LT T in his Fist Endorsement to the OER, states:

Due to the frequency of negative counseling, severity of incidents noted during the period, and lack of effort in correcting course it was determined an OER was necessary to document [the applicant's] substandard performance and conduct throughout the period to ensure an accurate record of the member's performance was kept for future consideration during promotion boards and selection panels."

The Board further finds that the applicant's claims that his command acted contrary to policy in not providing him mid-term counseling associated with this OER lacks merit. Pursuant to PSCINST M1611.1D, Chapter 3.C, "The Reported-on Officer [not the Command] is responsible to ensure this mid-term counseling session takes place and is documented." The applicant's factual allegations also lack merit, including his claims that his Supervisor (LT F) did not write her own comments to the OER, but instead they were written by the Reporting Officer (LT T);⁴⁴ that his Supervisor had perjured herself in her November 17, 2020 declaration; and that his Reporting Officer (LT T) had told him during OER counseling on May 7, 2019, that he had written all the comments on the OER, including the section completed by the Supervisor (LT F). Other than the applicant's bald allegations, there is nothing in the record to suggest that the applicant's Supervisor did not write her own comments or that his Reporting Officer had written all of the comments on the OER.

In sum, the Board finds that the preponderance of the evidence shows that OER 1 was completed in accordance with Coast Guard policy and that, based on the record in this case,

⁴³ The OER period was changed to begin November 20, 2019 with the same end date. The OER beginning November 20, 2019 is initialed a at the date, and is the version that includes the notation "Mbr refuses to sign OER." The signature date for both OERs is May 7, 2019.

⁴⁴ PSCINST M1611.1D, Art. 4.E.3.a. ("The Supervisor's signature verifies . . . that their comments are their own and reflect the Reported-on Officer's performance during the period of report.")

that this OER ending March 31, 2019 was not 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 and, therefore, the applicant has failed to prove by a preponderance of the evidence that he is entitled to relief.

b. OER 2: RPD OER for the period ending June 27, 2019.

For the rating period of April 1, 2019 to June 27, 2019, the applicant received a RPD OER, which noted at section 2.a of the OER that the Command issued it “due to Sub-Standard performance and/or conduct and is a derogatory report per Article 5.H.1., member removed from primary duties on 27JUN19. Officer received NJP on 27JUN2019 for violation of UCMJ Articles 92 [failure to obey an order or regulation] & 133 [assault]. Awarded a Punitive Letter of Reprimand.”

PSCINST M1611.1D, Chapter 10, discusses RPD OERs. Pursuant to Chapter 10.A.2., the Commandant, commanding officers, higher authorities within the chain of command, convening authorities, and Reporting Officers may direct this report. As noted at Chapter 10.B: “This OER must be submitted when permanently removing an officer from their primary duties as a result of conduct or performance which is substandard or as directed by the permanent relief authority’s final action on a permanent relief for cause request in accordance with reference (f), Military Assignments and Authorized Absences, COMDTINST M1000.8 (series).” As the applicant was permanently removed from his primary duties, the Board finds that issuance of this OER is consistent with policy. Also consistent with policy, the OER reflects that “All performance dimensions are evaluated; at least one performance dimension is marked to document performance or conduct that is sub-standard.” Further, a copy of the August 30, 2019 Punitive Letter of Reprimand issued by CAPT B, Coast Guard Sector, is referred to and attached to the OER as required by policy.

The record reflects that on October 8, 2019 the applicant as the Reported-on Officer submitted extensive comments to the OER, stating that he did not violate Articles 92 and 133 and will not admit to actions he did not commit. He argued that his command was to blame for his performance failures. He also claimed that on May 25, 2019, he exercised his right to counsel with a lawyer before answering questions or making a statement about his performance and conduct and that it was not explained to him when he made the election that he forever gave up these rights and a report would be completed without them. The applicant further claimed that he sent an email on June 12, 2019, stating that he wanted to provide a statement and have a military lawyer present but that he received no reply.

The Board notes that the applicant’s contentions were thoroughly addressed by the Supervisor and Reporting Officer during the OER Reply process. The Board finds that the greater weight of the evidence reflects that the applicant was removed from primary duties for not meeting command expectations and blatant disregard of the Coast Guard core values. While the applicant disagrees with the evaluations, the Board finds he has failed to demonstrate by a preponderance of the evidence that the evaluation and the replies were completed lawfully and in good faith. Further, as discussed extensively above, the

applicant's claims of mistreatment and bullying were thoroughly investigated and found to be unsubstantiated.

The Board also finds that the applicant's claim that the rating chain for OER 2 was improper to be outweighed by the other evidence of record. In accordance with COMDTINST M1000.3A, CG PSC-OPM-3 retains the authority to approve exceptions to policy and change the rating chain on a case-by-case basis. In this case, the evidence reflects the cutter XO who would have served as the Supervisor was newly reported and did not observe the applicant during the relevant rating period. In accordance with Coast Guard policy, the rating chain was appropriately modified to have LT T serve as Supervisor and CAPT B as Reporting Officer.

In sum, the Board finds that the preponderance of the evidence shows that OER 2 was completed in accordance with Coast Guard policy and that, based on the record in this case, that this OER ending June 27, 2019 was not 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 and, therefore, the applicant has failed to prove by a preponderance of the evidence that he is entitled to relief.

c. OER 3: Semi-Annual OER for the period June 28, 2019 to September 30, 2019 (observed 94 days)

For the period June 28, 2019 to September 30, 2019, the applicant received OER 3, a Semi-Annual OER. As noted above, a semi-annual OER is a type of regular OER; "[a] regular OER is a report that qualifies for continuous chronological coverage of the Reported-on officer's commissioned service."⁴⁵ This OER was signed by the applicant's Reporting Officer (LT T) and Supervisor (LT G) on October 15, 2019. OER 3 includes a summary of the applicant's duties as Deck Watch Officer, but does not contain any rating at part 3a. and at both the Performance of Duties block and Reporting Officer Comments section there is the notation: "Mbr not observed due to authorized TDY Sector [] for entirety of period. See concurrent OER." This OER includes a description of the applicant's primary duty as Deck Watch Officer, but the OER does not provide any rating information, referring to the concurrent OER for this information "due to authorized TDY to Sector [] for entirety of period. See concurrent OER" This OER covers a period of 94 days, with the end date (September 29, 2019) coinciding with the applicant's transfer to Sector.

The applicant argues that he was not assigned to Sector during the time period noted on OER 3, and that upon TDY to Sector that Sector and not CGC RY Command should have issued a Semi-Annual OER. As noted above, and the Board finds the preponderance of the evidence reflects that the applicant was detailed to Sector for this time period of OER 3 and that the applicant's rating chain remained the same while he was TDY to Sector. As such, the applicant was still permanently assigned to CGC RY Command. Therefore, as the applicant was TDY to Sector while still permanently assigned to CGC RY, his permanent command correctly issued a regular Semi-Annual OER for the purpose of

⁴⁵ PSCINST M1611.1D, Chapter 8.B.

continuity, accurately noting that the applicant was not observed during the time period associated with this OER.

In sum, the Board finds that the preponderance of the evidence shows that OER 3 was completed in accordance with Coast Guard policy and that, based on the record in this case, that this OER ending September 30, 2019 was not 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 and, therefore, the applicant has failed to prove by a preponderance of the evidence that he is entitled to relief.

d. OER 4: Concurrent OER for the period ending December 17, 2019.

A Concurrent OER, for the period June 28, 2019 to December 17, 2019 is the fourth of five OERS contested by the applicant. As explained at PSCINST M1611.1D. Chapter 13.B., “Concurrent OERs serve as a vehicle for documenting performance away from the permanent unit”, and “covers performance observed by a rating chain other than the permanent unit”, and “[is] written upon the detachment of the officer and cover only the period of temporary duty.” As such, “[t]he Concurrent OER provides a record of significant performance that was not directly observed by the rating chain from the permanent unit.”

Pursuant to COMDTINST M10000.3A.5.F.1, a concurrent OER is a Non-Regular OER that is “submitted outside of the regular submission schedule in addition to a regular OER and thus does not count for continuity.” As noted above, Section 5.F.1.a provides that the unit to which the reported-on officer is permanently attached is always responsible for ensuring that OER continuity is maintained with regular OERs. The permanent unit’s OER is never considered a concurrent report. Pursuant to 1.b. “Concurrent reports may be submitted only when the officer is: [] (1) On active duty and performing temporary duty (TDY) away from a permanent station while being observed by a senior officer other than the regular reporting officer . . . In this case, the concurrent report normally will be written upon the detachment of the TDY officer and cover only the period of temporary duty.” This is an optional OER and will be submitted at the discretion of the TDY command. A TDY concurrent OER must be for a period of at least 60 days.

As stated in the Summary of the Record, above, while the TDY orders were amended several times, the applicant was TDY from the CGC RY to Sector [] effective May 26, 2019; CGC RY is a subordinate unit of Sector [] and the CAPT B was the Sector Commander and therefore, the preponderance of the evidence reflects the applicant was subject to the jurisdiction of the commanding officer, CAPT B, while TDY. Consistent with policy, as the applicant was TDY to Sector, this OER documents his performance as observed by the Sector command during his time at Sector while away from his permanent unit for more than 60 days. As such, the issuance of this Concurrent OER completed by Sector Command based on the Command’s observance of the applicant’s performance was completed within policy.

In sum, the Board finds that the preponderance of the evidence shows that OER 4 was completed in accordance with Coast Guard policy and that, based on the record in this case,

that this OER ending December 17, 2019 was not 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 and, therefore, the applicant has failed to prove by a preponderance of the evidence that he is entitled to relief.

e. OER 5: Detachment OER for the period ending May 21, 2020.

On May 13, 2020, the applicant’s Sector Command signed a Detachment of Reported-On Officer OER for the applicant for the time period of report October 1, 2019 through May 21, 2020. This is the fifth and final contested OER. Pursuant to COMDTINST M1000.3A, Chapter 5.E.4.c.(2); the applicant received this OER consistent with his separation from the service. Pursuant to PSCINST M1611.1D, Chapter 8.C.3, an OER is due upon a Reported-on Officer’s separation from the service and upon separation is mandatory regardless of the period of report.

The Performance of Duties section of this OER contains the comment, “created undesirable work climate for subordinates & peers. Demonstrated lack of judgment & poor decision making; indifferent to CoC feedback on behavior/performance. Mbr continued to conduct self-motivated un-sanctioned investigations during work hours into personal issues, despite CoC direction of not doing so.” The Reporting Officer Comments to this OER state: “Not recommended for enlistment or re-commission in any follow-on military service. Not recommended for any federal position requiring a Secret or above security clearance; nor any position within the Federal Government which may require sound judgment or sensitive decision making.” The applicant received one mark of 5, fourteen marks of 4, one mark of 3, and two marks of 2, and a rating on the comparison scale of a marginally performing officer. The Reporting Officer marked the applicant as a marginally performing officer and did not recommend the applicant for enlistment or re-commission in any follow-on military service.

The applicant signed this OER on May 21, 2020, and the applicant’s Supervisor and Reporting Office both signed on May 13, 2020. The Supervisor comments noted a demonstrated lack of judgment and poor decision making and indifference to chain of command feedback on behavior and performance. The comments also noted the applicant continued to conduct self-motivated, unsanctioned investigations during work hours into personal issues despite chain of command direction otherwise. The command also noted that the applicant continually had gross misrepresentation of facts and discussions in official documents.

With respect to the OER, the applicant alleged numerous administrative and substantive errors in his OER Reply, which he characterized as gross mischaracterizations of fact by the Command. The applicant also argued that the DHS OIG complaint influenced the OER, and that he should be protected under the Military Whistleblower Protect Act (MWPA), 10 U.S.C. Section 1034. MWPA applies where a member of the United States Armed Forces who makes a “protected communication” regarding a violation of law or regulation. Here, the applicant alleged that his superiors retaliated against him as a service member making protected statements regarding his alleged violations of civil rights by his Command. There is nothing in the record to suggest that the applicant’s claim has merit;

the command's earlier investigation into the applicant's claims were determined to be unfounded.

On August 6, 2020, the applicant sent a Reported-on Officer Reply in which he disputed many of the comments and marks in the OER. On September 18, 2020, the applicant's rating chain for the OER with period ending 21 May 2020 provided a First and Second Endorsement to his Reply. These endorsements noted that performance counseling occurred with the applicant throughout the marking period. Final counseling was offered to and declined by the applicant. The endorsements further noted the applicant's reply "contains serious misrepresentations of facts. The OER stands as written."

The Board finds the applicant's numerous allegations and claims as to OER 5 are without merit and that the Command acted within policy in separating the applicant from service based on his documented performance failures and conduct, and that this OER was required by policy upon his separation from service. Accordingly, the Board finds that the preponderance of the evidence shows that OER 5 was completed in accordance with Coast Guard policy and that, based on the record in this case, this OER ending May 21, 2020 was not 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 and, therefore, the applicant has failed to prove by a preponderance of the evidence that he is entitled to relief.

After considering the arguments made by the applicant with regard to each contested OER, the Board finds that the applicant has not proven, by a preponderance of the evidence, that the OERs contain significant administrative or procedural errors or that the disputed OERs are erroneous or unjust; he has not proven by a preponderance of the evidence that these OERs were 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.⁴⁶ While the applicant clearly disagrees with the comments contained in the OERs, the Board finds he has failed to demonstrate an error or injustice that warrants granting relief. Accordingly, the applicant's request for relief as to these 5 OERs should be denied. The Board notes that all other errors not specifically identified by the applicant or noted in this opinion are minor discrepancies in his record and do not affect his overall duty status, pay, or benefits and therefore the Board finds that these alleged errors do not require correction.

20. Non-selection for Promotion and Separation. Finally, the applicant contends that the PY 2020 Selection Board's determination that he met a basis for separation due to failure to keep pace or progress with contemporaries was erroneous and unjust. The applicant argued that it was unjust for the selection board to make this determination because Advanced Damage Control was not a Coast Guard prerequisite for Inport OOD or QMOW, but rather a cutter specific command/unit requirement for all members to earn Advanced Damage Control qualification prior to earning Inport OOD and QMOW qualifications. The Board finds that the applicant has failed to demonstrate by a preponderance of the evidence an error or injustice with respect to the selection

⁴⁶ Article 4.B.11. of the OER Manual, COMDTINST M1611.1C, "Members of the rating chain shall not: Discuss Reported-on Officer's performance or conduct which occurred outside the reporting period except as provided in Article 5.E.7. and 5.F.3. of Reference (a) and Chapter 10 and Chapter 15 of the Manual.

board's findings. As discussed above, there is no evidence that the applicant was held to a different standard than any other officer or Inport OOD/QMOW onboard the CGC RY in being required to obtain the Advanced Damage Control certification. Further, this is but one of two independent causes for separation found by the selection board. The selection board also found the applicant met the basis for separation based on one act of sexual harassment, specifically, the substantiated sexual harassment of junior enlisted female members. Consequently, the Board finds it was not erroneous or unjust for the selection board to find the applicant met a basis for separation and recommend revocation of the applicant's commission. Nor was it erroneous or unjust for the Commandant to approve the selection board's recommendation and direct the applicant's discharge from the service. As such, relief should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of former ENS [REDACTED] for correction of his military record is denied and alternate relief is directed. The Coast Guard shall remove the superfluous language in the signature block of the May 19, 2019 CG-3307. The remainder of the requested relief is denied.

October 10, 2024

