DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2020-078

MSTC/E-7

FINAL DECISION

This proceeding was conducted under the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case upon receiving the completed application on February 12, 2020, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated April 15, 2022, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

SUMMARY OF THE CASE

The applicant is a former chief petty officer who received a General discharge for misconduct in 2016 with almost 19 years of service. He argued that his discharge with no retirement was erroneous and unjust because—

- the command climate was "toxic" throughout his tour and he was the target of a "witch hunt";
- the officer who investigated the allegations of sexual harassment against him was biased, colluded with a witness to create false and unreliable evidence, and lied in his report;
- as a result of the unjust investigation, his command erroneously and unjustly added two retroactive alcohol incidents to his record;
- his command falsely accused him of using the civil rights complaint process to retaliate against his primary accuser;
- the Administrative Separation Board (ASB) recommended the applicant's separation for "alcohol abuse" and alleged violations of Article 89 (Disrespect of a Superior Commissioned Officer) and Article 107 (False Official Statement) of the Uniform Code of Military Justice (UCMJ) based on unreliable and false evidence and no medical diagnosis of an alcohol abuse disorder; and
- the Final Reviewing Authority (FRA) who directed the applicant's discharge acted outside the scope of and in direct contradiction of the ASB's findings and recommendations.

The Board finds that the applicant's command acted appropriately by initiating an investigation into the sexual harassment complaints against him; documenting two past alcohol incidents in his record; and formally counseling him about misusing the civil rights complaint process to retaliate against his primary accuser. The Board also finds that the applicant has not proven by a preponderance of the evidence that the investigating officer was biased, colluded with a witness to create false evidence, or misled the ASB. The Board further finds that neither the ASB majority nor the FRA erred in finding by a preponderance of the evidence that the applicant could be discharged for alcohol abuse or for violating Articles 89 and 107, UCMJ, and could be subject to receiving a General discharge for misconduct with no retirement.

The Board finds, however, that reconsideration should be given to the applicant's claims and requests if he submits new evidence because the PIO and ASB reports in the BCMR record are incomplete. In addition, the Board finds that the applicant should have the opportunity to explain why, notwithstanding his misconduct, his General discharge should be upgraded to Honorable as a matter of clemency.

APPLICANT'S REQUEST FOR RELIEF

The applicant was discharged for commission of a serious offense on September 16, 2016, with almost 19 years of active service. Through counsel, the applicant asked the Board to correct his record and retire him from the Coast Guard by—

(a) correcting his date of separation from September 16, 2016, to October 6, 2017, which is the date he would have completed 20 years of service had he not been discharged for misconduct;

(b) awarding him constructive service for the period September 17, 2016, through October 6, 2017, and retiring him from the Coast Guard with an Honorable character of service and retired pay based on completion of 20 years of active service;

(c) correcting his type of separation on his DD 214 from discharge to retirement;

(d) correcting his reason for separation on his DD 214 from "misconduct" due to commission of a serious offense to one reflecting a voluntary retirement for sufficient years of service;

(e) correcting his reenlistment code to one that denotes retirement (RE-2);

(f) removing a CG-3307 ("Page 7")[1] dated October 26, 2015, that was prepared in retaliation for his having filed a civil rights complaint;

(g) transferring his Post-9/11 GI bill benefits to his dependent daughter because he did not receive the necessary time or transition assistance to effect this transfer before he was discharged; and

(h) awarding him all back pay and allowances he would be due as a result of these corrections.

[1] A Page 7 (CG-3307, "Administrative Remarks") is used to document in a member's record any formal counseling about conduct or performance, as well as other noteworthy events that occur during that member's military career.

The applicant stated that he should receive this relief because from 2013 to 2016, he was assigned to a unit with a toxic command climate and because the investigating officers, the ASB that recommended his separation, and the FRA who approved his General discharge made significant, prejudicial errors. His allegations are summarized below the Summary of the Record.

The applicant argued that his application is timely because the Coast Guard's failure to timely respond to a request for information under the Freedom of Information Act (FOIA) resulted in protracted litigation, and he did not receive the Coast Guard's response to his FOIA request for more than three years. The applicant argued that the Coast Guard's delay constitutes good cause for the Board to waive the issue of timeliness and consider his request on the merits.

SUMMARY OF THE RECORD

First Alcohol Incident

The applicant enlisted in the Coast Guard on October 7, 1997, at age 19. A Page 7 dated December 14, 2000, shows that he incurred his first "alcohol incident"[2] on December 8, 2000. The Page 7 states that his "use of alcohol may have been abusive. Specifically, you were found passed out in the female bathroom of a bar in [redacted location] and were escorted off the premises by a bar's [sic] employee." The applicant was counseled on the Coast Guard's alcohol use and abuse policies, underwent screening, and was advised that a second alcohol incident could result in his discharge from the Service.

The applicant also received another Page 7 dated December 14, 2000, which documents a poor mark for "Integrity" on his performance evaluation because when questioned about the alcohol incident he had been "completely dishonest about his involvement and blamed others. … In addition, [he] made disparaging remarks about his supervisor and other senior members of this command …"

The applicant's personnel file contains both positive and negative Page 7s. He was usually but not always recommended for advancement on his EERs and received several awards. By 2013, the applicant had switched ratings and advanced to E-6. He advanced to Chief Petty Officer (E-7) in June 2013, and on July 31, 2013, he reported for duty as a Chief at what became his final duty station.

On August 23, 2013, a female E-5 subordinate of the applicant wrote him an email stating that she apologized for having been "short with you earlier." She acknowledged that she could be "direct, abrasive, aggressive, stern, and I prize capability and achievement above all else. I have

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[2]COMDTINST M1000.10, the Coast Guard Drug and Alcohol Abuse Program Manual in effect in 2015, defines an "alcohol incident" as "[a]ny behavior, in which alcohol is determined, by the commanding officer, to be a significant or causative factor, that results in the member's loss of ability to perform assigned duties, brings discredit upon the Uniformed Services, or is a violation of the Uniform Code of Military Justice, Federal, State, or local laws. The member need not be found guilty at court-martial, in a civilian court, or be awarded non-judicial punishment for the behavior to be considered an alcohol incident." A member who incurs an alcohol incident must undergo screening for addiction. Both the alcohol incident and the screening are documented on Page 7s. A member who incurs a second alcohol incident is normally processed for separation and a third alcohol incident requires separation processing.

zero patience for incompetence, laziness, or excuses. … I am unfortunately an angry person, but outside of work I am generally very pleasant."

On November 7, 2013, the same female E-5 subordinate wrote the applicant another email. She stated that she had "needed time to think and cool off before communicating these things." She then wrote the following:

> 1 – I am a little disgusted that you suggested I cover up the fact that I'm gay on my E-resume. You should not be telling me to hide who I am for any reason, nor should we assume that anyone in the Coast Guard is prejudice[d], especially not someone in such a prominent and influential position. I understand that you meant well, but this was not the right way to go about it. I enlisted prior to the repeal of Don't Ask/Don't Tell. I know what it's like to have to lie to my friends and lie to the Coast Guard about who I am. I will not do it again.
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> 2 – My marks were dropped because of my bad attitude. … I appreciate our conversation yesterday. I understand why my marks were dropped. I just think I should've been talked to about this instead of waiting two months to tell me through my marks.

In early February 2014, a female junior officer (FJO) arrived at the applicant's unit and became his immediate supervisor. The JFO needed housing and had four cats, and the applicant gave her the name of his landlord. The landlord agreed to let her keep her four cats and offered her half of a duplex, which she accepted. The applicant lived in the other half of the duplex. Their garages shared a common wall.[3] In April 2014, LCDR L became the new head of their office.

First Investigation: October 2014 PIO's Report

According to the report of a Preliminary Inquiry Officer (PIO) dated October 30, 2014, the applicant and two other enlisted members were investigated for various UCMJ offenses related to alleged intoxication after LCDR L reported that they appeared to be drunk at a local golf tournament. The applicant was investigated for alleged violations of Article 86, Absence Without Leave (AWOL); Article 111, Drunken or reckless operation of a vehicle; and Article 134, Drunkenness and incapacitation for performance of duties through prior wrongful indulgence. The PIO interviewed people who had participated at the tournament on October 10, 2014, but none of the witnesses stated that they had seen the applicant drinking a lot of alcohol or driving home in an intoxicated state. LCDR L told the PIO that the applicant had appeared to be drunk, with slurred speech, at the golf tournament and also at a Coast Guard Day celebration in August 2014. He recommended that the applicant be screened for alcohol abuse. Aside from LCDR L, only a chief warrant officer told the PIO that he thought the applicant had been drinking at the tournament based on the applicant's attitude during a conversation they had. Given the lack of evidence of how much alcohol the three members had drunk, the PIO recommended that the charges under Articles 111 and 134 be dismissed.

Regarding the AWOL offense, LCDR L told the PIO that on October 16, 2014, the applicant had arrived at work two hours late one morning; that he had initially attributed his lateness to having gone on a date the night before and having "F'd up"; that on the phone, the applicant had

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[3] Photographs in the record show that the applicant's and the FJO's driveways were side by side, and their garages shared a common wall. Their respective living quarters were on either side of the garages, and their front porches and doors were on opposite sides of the building, facing away from each other.

sounded like he had just woken up; and that he thought that the applicant had been unable to report for duty on time due to overindulgence. The applicant claimed, however, that he had taken a prescribed sleeping pill too late the night before, after his date, and so had overslept. The PIO concluded that the AWOL offense was supported by a preponderance of the evidence because the applicant had not timely contacted LCDR L. But the applicant had not been late to work before and had provided a plausible explanation as to why he had not timely called his supervisor. The PIO recommended that the CO not prefer the charge.

FJO's Civil Rights Complaint and the Military Protective Order

On Monday, March 2, 2015, the FJO filed a civil rights complaint against the applicant, claiming that he had sexually harassed her. She filed the complaint after an incident on Friday, February 27, 2015, when the applicant had asked her three times to accept his assistance in charging her truck battery despite her refusals. Her original written complaint is not in the record before the BCMR. After receiving this complaint and other allegations from female members of the unit, the command moved the applicant to work in a different office.

On March 5, 2015, the applicant and his CO signed a Military Protective Order (MPO) ordering him to have no direct or indirect communications with the FJO until April 3, 2015. The MPO states that because they were neighbors, the applicant was ordered to stay at least 20 feet away from the FJO's doorway and windows and to retreat to a distance of 50 feet if she was entering or leaving her home or vehicle or remain inside his own vehicle or home and not attempt to communicate with her.[4] The MPO also required him to surrender his firearms to Coast Guard Investigative Services. Also on March 5, 2015, the applicant was advised on a Page 7 that as the subject of an MPO he was prohibited from accessing or possessing firearms or ammunition for the duration of the MPO.

On a Page 7 dated March 13, 2015, the applicant's command ordered him to abstain from alcohol until further notice because he was "under medical evaluation and [had] received command direction for further screening." He was referred for additional screening, which resulted in no diagnosis of alcohol abuse or addiction. However, he was not presented with the Page 7 for signature until March 18, 2015, by which time his screening was over, and so the XO removed the order to abstain on April 22, 2015, after consulting a JAG.

According to the applicant, after consulting a JAG, the command removed the MPO and the order to surrender his weapons from his record on April 24, 2015, after the MPO had expired.

Second Investigation: May 5, 2015, PIO's Report on the FJO's First Complaint

A PIO's report dated May 5, 2015, includes evidence and findings about the FJO's complaint and other allegations against the applicant. During the investigation, other inappropriate conduct allegedly committed by the applicant was brought to light and investigated. The report

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[4] The applicant stated that he refused to sign the original version of this MPO because it made no allowance for their sharing a duplex house and would have required him to find other housing since they lived next door to each other. The applicant stated that after the MPO was modified to allow him to continue living in his house, and he was forced to sign it.

indicates that the PIO interviewed 14 witnesses and made numerous findings of fact, opinions, and recommendations. However, the applicant did not submit some of the exhibits, including the statement of a different female junior officer, dated March 16, 2015, who was said by other members to have had difficulties with the applicant; and the statement of a gay female E-5, dated March 16, 2015, whose two 2013 emails to the applicant are summarized above.[5] On the first page, the PIO stated that the interview notes had been

> taken by me in the presence of the interviewee. At the conclusion of the discussion, the interviewee reviewed the notes to ensure their accuracy and completeness. After agreement from each interviewee that the notes accurately reflected the conversation, I save the file and did not make any further changes to the text. There are signatures on most of these exhibits; however [the applicant] has been advised by his legal counsel to not sign the notes from his interview. Additionally, I have contacted interviewees and I am still waiting on the signatures from a few of them, which I will provide upon receipt. [The list of the exhibits without signatures included the interview notes of Mr. W.]

FJO's Statement to the PIO

The FJO told the PIO in an interview on March 16, 2015, that the alleged sexual harassment[6] began on a Saturday afternoon in February 2014 about two weeks after she had arrived at the unit. She was doing chores at home when the applicant arrived and told her about a neighborhood Mardi Gras block party that was going on. So she went to the party and met and socialized with neighbors. According to the FJO, the applicant was drunk at this party. He acted very friendly to her and "inject[ed] himself into her conversations with neighbors." At about 1900 hours, she left to work on her motorcycle in her garage. The applicant followed and kept trying to talk to her. He started pacing back and forth and told her, "I want to say something, but I'm not sure that I should," so she told him not to say anything more. He then apologized for having been "brash, short and rude at work" to her and explained that he was "so sexually attracted to you that I don't know how to balance that." She told him that he should not have said that. He apologized, and she told him that they would talk about it on Monday at work. She told the PIO that she knew that he was drunk and told him that she could let it go if he would let it go. According to the FJO, she had noticed him staring at her breasts earlier in the day when she was gardening, and so she told him that he should also stop that. She told the PIO that in response, the applicant "giggled" and replied, "Oh, you noticed?" She replied, "Yes."

The FJO told the PIO that at a barbecue at a civilian friend's house in June 2014, a civilian asked her if she was interested in dating the applicant. The civilian told her that he had never seen the applicant look or talk to a woman the way he did with the FJO. She told the civilian that she was the applicant's supervisor and was not interested in dating him.

Over the next few months, according to the FJO, the applicant became increasingly difficult, disrespectful, unresponsive, and non-compliant in the office. But he made no sexual advances or innuendos towards her while at work. For his September 2014 EER, the applicant objected to

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[5] The applicant also did not submit this member's written statement to the ASB, dated November 25, 2015.

[6] Chapter 2.C.2.b. of the Coast Guard Civil Rights Manual, COMDTINST M5350.4C, defines "sexual harassment" as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when: … Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."

her being on his rating chain, claiming she lacked experience, so she was removed. Their Department Head, LCDR L, knew about some of the applicant's inappropriate conduct toward the FJO and therefore lowered some of his marks on that EER. The FJO stated that when the applicant appealed his marks, the CO, who had previously been unaware of that inappropriate conduct, told the applicant that he was lucky not to have been awarded NJP and should not be contesting his EER marks.

The FJO told the PIO that a couple of months later, LCDR L counseled her about having been late to work and told her that someone had reported that the FJO was leaving her house in the middle of the night. LCDR L asked why she was leaving home in the middle of the night, and the FJO told him that she was coming to the office to catch up on work. As a result, the FJO concluded that the applicant was spying on her.

The FJO told the PIO that on February 10, 2015, she was home sick for the day when the applicant walked over to her side of the duplex, peered in her window, and asked if she was feeling okay. This also made her feel uneasy.

The FJO stated that on February 27, 2015, her truck battery had drained and so she was in her driveway fixing it with a jump pack. The applicant kept asking her about it and kept offering to lend her his battery charger. She kept refusing his offers, and then when she stopped responding to him, he asked her if she was ignoring him. He finally went inside his house, but five minutes later he knocked on her door, and she opened it to find the applicant and a Senior Chief there, whereupon the applicant continued to press his help on her. Therefore, according to the FJO, she became assertive and told him that she did not want or need his help. She told him that that all their interactions had been negative, challenging, frustrating, and detrimental to her progress, as she had "carried the weight of it all at work. So, no, I do not want or need your help. I don't understand why you are not getting it." The Senior Chief then apologized to her, and they left. The FJO stated that she did not notice whether the applicant was intoxicated at the time. The FJO signed the PIO's notes and stated that they were "an accurate representation of the interview."

Female E-5's Statement to the PIO

A female E-5 was interviewed by the PIO from 0919 to 1024 hours on March 16, 2015. She stated that they were playing music at a bar on February 16, 2015. She stated that the applicant came to some of their gigs, one to three times a month. Civilian friends of theirs also came. On February 16, 2015, she stated, one of their civilian friends, Mr. W, had pulled her husband aside and told him that the applicant had made many inappropriate comments about her and that he was going to make sure that she and her husband, who was also an E-5, were not stationed together for their next tour of duty so that the applicant could break them up and marry her. Her husband informed her of Mr. W's warning on their way home from the bar. The female E-5 also told the PIO that the applicant had "lots of issues with women" and that she had already told her chain of command that she no longer wanted to work alone with the applicant. She "[d]oesn't want to be alone with him ever." She signed these notes and stated that they were accurate.

Male E-5's Statement to the PIO

The female E-5's husband, who was also an E-5 assigned to the unit, told the PIO in an interview from 1025 to 1049 hours on March 16, 2015, that he had never seen the applicant sexually harass anyone. However, at a bar on February 16, 2015, his civilian friend, Mr. W, had warned him that the applicant had said he was going to ensure that the E-5 and his wife were transferred to different units when their tour of duty ended that summer so that he could make the female E-5 his wife. He also stated that Mr. W was "apprehensive" about speaking to the Coast Guard and did not want to get involved in the case. Therefore, the PIO asked the E-5 to call Mr. W, "ask if he wouldn't mind speaking with the PIO and answer two questions, 'Did [the applicant] really make this statement to you about the [E-5s'] next tours and about breaking up their marriage?' and 'Was [the applicant] drunk at the time that he made this statement to you.'" At the end of this interview, the E-5 telephoned his friend Mr. W, who "agreed to speak to the PIO about this incident." The E-5 signed a statement saying that these notes are "an accurate statement" of the interview.

Mr. W's Statement to the PIO

According to the PIO's notes, in an interview from 1050 to 1057 on March 16, 2015, Mr. W confirmed that at the bar the applicant had told him that he was going to ensure that the married E-5s were transferred to different units and then marry the female E-5 himself but could not confirm whether the applicant was intoxicated at the time. Mr. W said that he had "an occasional acquaintance" with the applicant, who "had made several remarks over the past couple of months about [the female E-5] (i.e. positive remarks). However, on this evening, [Mr. W] couldn't keep silent any longer and had to tell [the male E-5] about what [the applicant] had just said to him."

Senior Chief's Statement for the PIO

The Senior Chief stated that he had not personally witnessed the applicant sexually harassing anyone. On February 27, 2015, the Senior Chief said, he did not see the applicant drinking before the incident in which the applicant had offered the FJO assistance with her truck battery three times. He stated that when he went to the FJO's front door with the applicant and the FJO refused their help, the applicant appeared disappointed by the FJO's rejection. The Senior Chief also stated that the female E-5 in their office had come to him with her concern about the applicant's comment about breaking up her marriage, but when asked if she wanted to file a complaint, she had declined. He also stated that another female junior officer had occasionally tasked the applicant's subordinates directly, and he had been frustrated by dealing with her. The Senior Chief signed the PIO's notes and stated that they are "true."

LCDR L's Statement to the PIO

LCDR L told the PIO that he had seen the applicant drinking at an event on Coast Guard Day, August 4, 2014, and that the applicant's speech had been slurred by the end of the day. Then, at a local golf tournament on October 10, 2014, the applicant had appeared to be drunk and had slurred speech. However, he knew that the applicant would be riding back to the unit in a van and did not worry about his level of intoxication.

Then on October 16, 2014, LCDR L stated, the applicant did not show up for work on time. At 0820 hours, the applicant called on the phone and his voice was garbled, as if he had just woken up. When LCDR L called him back and reminded the applicant about a meeting, the applicant stated that he had "F'd up." When LCDR L was counseling him about it later that day, the applicant said he had been with a girl the night before and talked about his date. Then the applicant claimed he had taken an Ambien too late, which had caused him to oversleep. LCDR L was afraid that alcohol might be "taking over" the applicant's life and told him that alcohol consumption could cause members to miss work. LCDR L thought that the applicant was making bad decisions and should be screened and get treatment. LCDR L recommended that the applicant self-refer for screening and treatment, but the applicant denied having a problem with alcohol consumption, and the CO did not order him to get screened.

LCDR L also told the PIO that he had never personally witnessed the applicant sexually harass a member but one of his E-5 subordinates[7] had previously told him that the applicant had "made comments to her and treated her differently because she was a female." The E-5 told LCDR L that the applicant had alluded to her "sexual orientation as a reason for her to complain and expect special treatment" at evaluation time.

LCDR L told the PIO that another E-5 had asked him if the applicant "had any power regarding her and her husband's future assignments" and he had assured the E-5 that the applicant did not have such power.

Regarding the FJO, LCDR L noted that the applicant did not like working for her or with her and had insisted that the FJO be removed from his rating chain for his EER in 2014. LCDR L signed the PIO's notes and stated that the PIO's summary of the interview was "true and correct."

Ensign's Statement to the PIO

A female Ensign who had worked in the same office as the applicant and the FJO told the PIO in her interview that she had not personally witnessed or experienced sexual harassment by the applicant. She had, however, observed that the FJO's and the applicant's working relationship was "strained." She further described it as "borderline rebellious, tough to work with, unprofessional." The Ensign stated that she thought their poor working relationship stemmed from an incident in the spring of 2014, which the FJO had told her about. Specifically, the FJO had told her that the applicant had become drunk at a block party and then told the FJO that he did not know how he would be able to work with her because he was sexually attracted to her. The FJO had been shocked and told him that they had to maintain a strictly professional relationship.

The Ensign further stated that in February 2015, the FJO had told her that when she was sick at home one day, the applicant had looked through her window and asked if she was okay, which had "creeped" her out. Then on February 27, 2015, even after the FJO had told him that she did not want his assistance with her truck or his battery charger, he had approached her a second time with the battery charger in hand, which she again declined to borrow. And then after

[7] This is not the female E-5 that was married to the male E-5, but a different female E-5 whose statements to the PIO report dated May 5, 2015, and to the ASB were not submitted by the applicant.

she had gone into her house, the applicant had come to her door with another member and told her they were there to help. This third approach had agitated her, and she again refused help.

The Ensign also noted in her statement to the PIO that during an all-hands meeting following a Defense Equal Opportunity Management Institute (DEOMI) survey, the CO had been upset and said "something to the effect of, 'If you don't like it here, you can get out of the Coast Guard," which he had later apologized for. She stated that the CO was nice but socially awkward. At the end of the interview, the Ensign signed the PIO's notes under a statement that they were "accurate of the interview that was conducted."

Female E-6's Statement to the PIO

A female E-6 who worked in the same office stated that she had not witnessed the applicant sexually harass anyone, but female subordinates had complained about him. In addition, she had overheard the applicant tell a male E-6 that he had seen "the new female MK3 at the boat house and how he had seen her at the gym and said, 'She's attractive. I don't know why they would send her to the boathouse and that would be nothing but trouble.'" She stated that the applicant was seen as "[v]ery emotional, seen as bi-polar. Poor at compartmentalizing."

Male E-6's Statement to the PIO

A male E-6 stated that he had never witnessed the applicant sexually harass a female member; that he could not recall the applicant's comment about an attractive female being assigned to the boathouse; and that he had seen the applicant "walking around on eggshells when interactive with female members." The E-6 signed the PIO's notes as "an accurate summary of the interview that was conducted."

Male E-7's Statement to the PIO

A male E-7 stated that he did not socialize with the applicant outside of work and had never seen him intoxicated or witnessed him sexually harassing anyone. He stated that the applicant and the FJO did not get along. He had heard that the applicant had told her he found her attractive and thought that the incident "might be the original reason for their rift." The E-7 signed the PIO's notes as "an accurate reflection of the interview conducted."

LCDR S's Statement to the PIO

LCDR S stated that he had never witnessed or heard about the applicant sexually harassing anyone. When the FJO reported the incident of March 1, 2014, she told them that the applicant had told her "he was going to have a tough time working with her because he found her sexually attractive." The XO had determined that it was a "dead issue between both parties and nothing further would be pursued administratively." LCDR S stated that he did not socialize with the applicant and had not seen him intoxicated but he named another female junior officer who had "had similar working difficulties with" the applicant. LCDR S signed the PIO's notes as "an accurate summary of the interview that was conducted."

PIO's Notes of the Applicant's Interview

The PIO made notes of his interview with the applicant on March 17, 2015, but the applicant did not sign or initial them. The PIO first advised the applicant of the allegations and charges and of his rights, and the applicant completed the advisement form to show that he agreed to answer questions without consulting an attorney. According to the PIO, during the interview, the PIO began to suspect that the applicant was making a false official statement by denying having said that he wanted to break up his subordinate E-5s' marriage. Therefore, the PIO stopped the interview to revise the advisement form to include a charge under Article 107, UCMJ, False Official Statement, and he asked the applicant to recomplete the form. The applicant had then spoken to his attorney for about 25 minutes and agreed to make a statement about the alleged comment about breaking up the E-5s' marriage. The PIO reported that he had written down the applicant's statement on that topic verbatim but that on the advice of counsel, the applicant had declined to initial the PIO's copy.

According to the PIO's notes, during the applicant's interview, he stated that the FJO was "very combative" with the petty officers and so he "tried to limit his interactions with her" unless she needed something. He stated that he had 17 years of experience and she had been "placed in a bad position with no experience or knowledge." Regarding their relationship, the applicant stated that they had "started off okay" despite sharing the duplex, and he had loaned her his trailer, his battery charger, his leaf blower, and his Wi-fi. He stated that he would not have loaned her these things if he had not liked her.

Regarding his addressing her through the window when she was sick, the applicant stated that he had not intentionally looked through the window at her. When asked if he understood why she would have been annoyed by his repeated offers to help her with her truck on February 27, 2015, he said that he would not have tried a third time if the Senior Chief had not been there, and he had thought that she would be more likely to accept his help if the Senior Chief was with him. He explained that he was "trying to be a good neighbor and a good shipmate."

According to the PIO's notes, the applicant stated that he had told the FJO she was attractive at a party in 2014 where they had both "had some beers" and they were discussing "how to meet people." The applicant denied ever having leered at the FJO's breasts. The applicant also denied having said that he intended to break up the marriage of the E-5s and marry the woman himself. The applicant stated that on February 18, 2015, the female E-5 had told him what her husband had been told about the applicant intending to break them up. The applicant told her that he had never said that and then he had approached the male E-5 and assured him that he would never say that.

PIO's Findings of Fact in Investigation of FJO's Original Complaint

The PIO's report, dated May 5, 2015, shows that the PIO made numerous findings of fact based on witness interviews and emailed statements and correspondence:

- **Alleged comments about breaking up the E-5s' marriage**: The PIO found that on or about February 16, 2015, the applicant had been drinking at a local bar and was conversing

with a civilian, Mr. W, when he had stated, regarding two married E-5s, that he was "going to make sure that they are not going to be stationed together following this summer's transfer. I'm going to make [the E-5 female] my wife." Mr. W stated that the applicant did not appear intoxicated at the time and did not appear to be joking. Mr. W later reported the applicant's comments to the male E-5, who told his wife, the applicant's subordinate, on their way home. When the female E-5 confronted the applicant about his comments on February 18, 2015, he denied having made them. The applicant then confronted the male E-5 and demanded to know who had told him about the alleged comments. The male E-5 refused to say and instead told the applicant that he thought "it was just miscommunication or confusion" and that he was "not too concerned about it." The female E-5 told the PIO that she did not feel comfortable being alone with the applicant and had already asked the command not to have to work with the applicant alone. The applicant denied having made the alleged comment about breaking up his subordinate's marriage.

- **Alleged comments about and to a lesbian subordinate**: The PIO found that the applicant had made inappropriate comments to LCDR L about another female E-5 assigned to their office. This E-5's statement to the PIO was omitted from the copy of the PIO's report that the applicant submitted. The PIO noted that according to LCDR L, the applicant had told him that this E-5 "expected to receive special treatment for her EER marks" because of her sexual orientation. In addition, the E-5 had reported (although the applicant did not submit her statement to the BCMR) that while at a bar with crewmates in the summer of 2013, the applicant had dropped something on the floor and put his hand on her thigh while reaching down to pick the item up. She did not report it "because he was drunk" and she "wanted to give 'him the benefit of the doubt.'" However, he drove his motorcycle home that evening. According to the PIO, the E-5 had also stated that on many occasions, the applicant "would remark directly to her as to the attractiveness of women in the vicinity," and she "dreaded being alone with him because [she] always anticipated an uncomfortable/awkward/inappropriate conversation."

- **Alleged comments and interactions with the FJO**: The PIO noted that the FJO stated that her working relationship with the applicant had become strained almost immediately after she arrived at the unit in February 2014. Early on, the applicant had loaned her a trailer, a battery charger, a leaf blower, and his Wi-fi, and he had once picked up medicine for her from a pharmacy when she was ill. But in late February 2014, during an "Industry Day" event in which members socialized with industry personnel and their spouses at local bars, the FJO had noticed that the applicant was becoming "increasingly and aggressively drunk." When she was leaving, he tried to get her to stay at the bar and take shots with him, but she refused and left. She had not reported his behavior to the command.

  Then on March 1, 2014, the PIO found, the FJO was gardening in her front yard when the applicant approached, and she noticed that he was trying to look down her shirt. When she told him to stop staring at her "tits," and he had "giggled" and remarked that she had noticed. The applicant had denied this incident. Also, the FJO recalled him saying to her, after returning home from a block party, "I want to say something, but I'm not sure that I should. I am so sexually attracted to you that I don't know how to balance that." When asked about this comment by the PIO, the applicant offered as an explanation that he had

been drinking. The FJO had reported this incident to her supervisor on March 3, 2014, and her supervisor reported the matter up to the unit XO, but no measures except "informal counseling" were taken. The FJO herself conducted this counseling session with the applicant on March 10, 2014, and concluded that they should "move forward in a professional manner."

The PIO found that in the summer of 2014, the applicant asked for the FJO to be removed from his rating chain for his EER, and she was removed. The applicant became upset when he received lower marks on his EER in September 2014 because of his actions on March 1, 2014.

In February 2015, the PIO stated, on a day when the FJO was sick at home, the applicant came home at lunchtime, approached her living room window, and looked inside, where she was lying on her couch. He addressed her and asked if she was alright. The FJO "felt uncomfortable with his peeping into her home." According to the applicant, he had approached her window to play with her cat, who was sitting in the window.

On February 27, 2015, the PIO stated, the applicant came home from a party and saw the FJO working on her truck in her driveway because the battery was dead. He offered to help her, and she declined. He went into his house and returned with a battery charger, but she again refused his help. Then the applicant knocked on her door with the Senior Chief beside him, and she became visibly upset and again declined his assistance. At some point she said something like, "You've ruined my life. You've ruined my career. You've ruined my time here. I hate living here. I don't want to borrow anything from you ever again. I won't ask to borrow anything from you again. Don't offer to lend me anything again." The FJO explained that she "felt uncomfortable with [the applicant's] physical proximity and persistency despite requests to be left alone. She feared for her safety" and so requested an MPO. The PIO noted that the FJO had moved out of the duplex, and the MPO had expired.

- The PIO also noted some miscellaneous allegations of inappropriate comments that the applicant had made about female members and overly personal topics of conversation. One allegation was that the applicant had told an E-5 that he was consistently circumventing his chain of command because the two female junior officers in the office were "stupid" and that it "was not uncommon for him to make negative comments about the two female [junior officers] in front of subordinates."

PIO's Opinions and Recommendations

Based on his findings of fact, the PIO provided the following opinions and recommendations:

- The applicant's conduct on March 1, 2014, had met the definition of an alcohol incident and should be documented as such. In addition, he should be sent for screening.
- The applicant had shown disrespect to a superior commissioned officer, in violation of Article 89, UCMJ, by (1) referring to the FJO as "stupid"; (2) referring to another female

junior officer as "stupid"; (3) staring at the FJO's breasts on March 1, 2014; and (4) telling the FJO he was sexually attracted to her on March 1, 2014.

- The applicant had "created an offensive environment[8] for three of the females working at the command by making repeated comments to or about them based on their being women." The PIO stated that the applicant had made such comments over the course of two years at the unit and that his comments had increased in severity.
- Mr. W, who had reported the applicant's comment about breaking up the E-5s' marriage, was "sincere and believable" during the interview and did not have a reason to fabricate the statement. The PIO concluded that Mr. W was more believable than the applicant's denial. Therefore, in denying having made the comments, the applicant had made a false official statement to the PIO in violation of Article 107, UCMJ.
- The applicant should receive non-judicial punishment (NJP) for four specifications under Article 89, UCMJ, and one under Article 107.
- The PIO concluded that there was insufficient evidence to charge the applicant with assault consummated by battery, abusive sexual contact, dereliction of duties, cruelty or maltreatment, or drunken or reckless operation of a vehicle.

Second Alcohol Incident Documented

On a Page 7 dated June 8, 2015, the CO advised the applicant that he had determined that the applicant had incurred an alcohol incident on March 1, 2014. The CO wrote that the applicant's

> consumption of alcohol was determined to be a significant and/or causative factor in your approaching your direct supervisor, a female commissioned officer, and despite her urging you to remain silent as to what you were struggling to say, you chose to ignore her advice and continued to state to her, "I am so sexually attracted to you that I don't know how to balance that." This conduct constitutes a violation of the Uniform Code of Military Justice.
>
> You were previously counseled on Coast Guard policies concerning alcohol use and abuse as well as the serious nature of an alcohol incident. The unit Command Drug and Alcohol Representative (CDAR) arranged an appointment with a provider on 12 MAR 15 who was to determine the nature of your relationship with alcohol. It was directed that you abstain from the use of alcohol until your screening and assessment were completed.
>
> This is considered your second documented alcohol incident. Your first documented alcohol incident occurred on 08 May 2000. Your second alcohol incident occurred on 01 MAR 2014. You will be process for separation in accordance with Chapter 2 of the Coast Guard Drug and Alcohol Abuse Program, COMDTINST M1000.10 (series).

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[8] Chapter 2.C.2.b. of the Civil Rights Manual, COMDTINST M5350.4C, states that prohibited "sexual harassment" includes unwelcome "verbal or physical of a sexual nature" when it "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive environment." It also states that the harasser may be a coworker as well as a supervisor or agent of the Coast Guard. And Chapter 2.C.2.c. states the following:

> *Hostile environment* sexual harassment encompasses all other situations addressed in the definition of sexual harassment above, whether the offender is a supervisor or a coworker. To meet the definition of a hostile environment, the harassment must be so severe and pervasive that a reasonable person would view the environment as hostile, offensive, or abusive.

The CO also noted on this Page 7 that the applicant had undergone screening and had been directed to abstain from alcohol until his screening and assessment were complete. The CO advised the applicant that he would be processed for separation because it was his second documented alcohol incident. The applicant acknowledged receipt with his signature but wrote that the contents of the Page 7 were inaccurate.

On a second Page 7 dated June 8, 2015, the applicant was advised that he had undergone alcohol screening on March 12, 2015, because of his alcohol incident dated March 1, 2014. The Page 7 states that he had been advised of Coast Guard policies regarding alcohol and support plans. The applicant signed it to acknowledge receipt but wrote that he disagreed with its "contents and purpose."

On June 30, 2015, the FJO was discharged from active duty based on her two non-selections for promotion and was transferred to the Reserve.

Third Investigation: PIO's Report on the Applicant's Own Civil Rights Complaint

On July 2, 2015, the applicant filed a civil rights complaint, alleging that the FJO's speech had constituted a "hate incident" against him when she rebuffed his offer to help her charge her truck battery on February 27, 2015. As a result, a third PIO was appointed to investigate this complaint. (A few days later, the FJO filed another complaint alleging that the applicant's complaint was retaliatory for her original civil rights complaint. As a result, a fourth PIO was appointed to investigate her complaint of retaliation.)

The report for the third investigation is dated August 5, 2015. The PIO noted that his investigation was complicated by its overlap with a pending investigation and by the FJO's failure to re-engage with the PIO after she had provided one "unofficial statement" on July 9, 2015, before the PIO had advised her of her Miranda/Tempia rights. Therefore, he was not including that statement because upon being advised of her rights, the FJO had exercised her right to consult counsel and had not made any further statements. The PIO also noted that because of the potential overlap between investigations, he had been instructed to limit his investigation to the alleged hate incident on February 27, 2015, and any other hate incident that the applicant might identify. Upon inquiry, however, the applicant had stated that the incident on February 27, 2015, was the only hate incident he was presenting.

The PIO wrote that he had interviewed both the applicant and the Senior Chief[9] who had gone with the applicant to the FJO's front door on February 27, 2015, to offer her a large battery charger. Both stated that the applicant had consumed a few beers that day as it was his birthday. After spending the afternoon at a woodworking shop, the applicant and the Senior Chief had arrived at the applicant's home sometime between 1900 and 2000 hours. At that time they saw the FJO working on her truck in her driveway. She had a jump pack to jumpstart the battery. As the Senior Chief entered the applicant's home, he heard the applicant ask the FJO if she needed help, and the FJO replied "No." The applicant then offered to lend her his battery charger, which

[9] By the time of this interview, the Senior Chief had been promoted to Chief Warrant Officer, but to minimize confusion, this decision will continue to refer to him as a Senior Chief.

she had borrowed before, and she again said "No." The applicant said he perceived that she was annoyed, but he thought she was annoyed at the truck. A little while later, the applicant told the Senior Chief that he wanted to offer his battery charger to the FJO again because it would work faster. The applicant also asked the Senior Chief to go with him to talk to the FJO because he thought she might be "more receptive" in the presence of the Senior Chief. When they knocked on the FJO's door, she opened it and greeted the Senior Chief but then "went off" on the applicant, telling him that she hated him and that he had ruined her life, her career, and her time at the unit. She told him that she did not want to borrow anything from him ever again and she did not want him to offer things for her to borrow.

The applicant told the PIO that the FJO had verbally assaulted him because he was male, and he thinks she has "a problem" with males. The Senior Chief told the PIO that the FJO pointed out that she had already told the applicant that she did not want his help and had told him to leave her alone. The Senior Chief also stated that the FJO had claimed that the applicant was "the sole reason she was not performing well at the unit" and that her chain of command had told her not to engage with him. When the outburst ended, the Senior Chief apologized for having bothered her, and they left.

The PIO concluded that no hate incident had occurred because the evidence did not show that the FJO's speech and conduct had been motivated by the applicant's gender. He noted that the FJO had conversed with the Senior Chief amicably. He also concluded that the evidence did not show that the FJO was trying to intimidate the applicant or trying to incite the Senior Chief against the applicant. He stated that the incident was motivated by negative tension between the FJO and the applicant and was unrelated to any protected category of the applicant.

On September 1, 2015, the Convening Authority signed a memorandum stating that the applicant's complaint was unsubstantiated.

Notice of Involuntary Separation Proceedings

On August 6, 2015, the applicant's CO notified the applicant that he was initiating action to discharge him involuntarily for alcohol abuse and/or commission of a serious offense.[10] The CO stated that the applicant had incurred three alcohol incidents and that recent investigations had

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[10] Article 1.B.17.b.(3) of COMDTINST M1000.4, the Military Separations Manual in effect in 2015, states the following:

> Commission of a Serious Offense. Commission of a serious offense does not require adjudication by non-judicial or judicial proceedings. An acquittal or finding of not guilty at a judicial proceeding or not holding non-judicial punishment proceeding does not prohibit proceedings under this provision. However, the offense must be established by a preponderance of the evidence. Police reports, CGIS reports of investigation, etc. may be used to make the determination that a member committed a serious offense.
>
> (a) Members may be separated based on commission of a serious military or civilian offense when:
>
> (1) The specific circumstances of the offense warrant separation; and
>
> (2) The maximum penalty for the offense or closely related offense under the UCMJ and Manual for Courts-Martial includes a punitive discharge. The escalator clause of Rule for Courts-Martial 103(d) shall not be used in making this determination.

substantiated sexually harassing behaviors by the applicant, including offensive and sexist statements towards three female members and four instances of disrespecting a superior commissioned officer in violation of Article 89, UCMJ. The first two allegations stated that the applicant had referred to two different female Coast Guard members as "stupid." The third alleged that the applicant had stared directly at the breasts of an officer, and the fourth concerned the applicant's comments on March 1, 2014, about the FJO being sexually attractive to him. The CO also stated that the applicant had made a false official statement in violation of Article 107, UCMJ when denying to the PIO that he had told someone that he intended to separate and break up the marriage of two E-5s so that he could marry the female E-5 himself. The CO noted that the applicant had more than eight years of service and so was entitled to an ASB and to legal representation.

Fourth Investigation: PIO's Report on FJO's Retaliation Complaint

On August 28, 2015, a fourth PIO issued a report on the FJO's complaint that the applicant's complaint had been retaliatory for her original complaint of sexual harassment and that he had also retaliated by harassing her based on her gender. The PIO had interviewed several members of the unit and stated that the witnesses' memories had not been specific about what the applicant had said about the FJO since her initial complaint or when he had said it. LCDR L could recall the applicant making derogatory comments about the FJO and the comments referenced her gender, but LCDR L could not recall the dates or specific wording of those derogatory comments. An E-5 claimed that the applicant had tried to undermine the FJO's authority and told the crew to ignore the FJO's instructions, but these comments did not appear to be based on the FJO's gender. Several members denied having heard the applicant make derogatory comments about the FJO. The PIO wrote that the FJO's complaint was based on her assumption that the applicant's complaint was retaliatory and not on anything the applicant had said to her about planning to retaliate. And no one interviewed had heard the applicant state that he was filing the complaint to retaliate against her.

Nevertheless, the PIO opined that the FJO's complaint of retaliation was substantiated. The PIO stated that although there was insufficient evidence from witnesses to support the claim, "one can reasonably conclude that if [the applicant's complaint filed on 2 July 2015] is found to be unsubstantiated then the motive for this claim comes into question and becomes suspect, given the timing of when the claim was submitted and the circumstances that substantiated [the FJO's] initial civil rights claim."

Regarding the FJO's complaint of harassment based on her gender, the PIO noted that two witnesses had stated that the applicant had engaged in derogatory verbal conduct directed at the FJO and that he had created a climate in which enlisted members believed that they could ignore the FJO's instructions. Therefore, the applicant may have violated Article 89 of the UCMJ by disrespecting a superior commissioned officer.

The CO reviewed the PIO's report and found that the FJO's complaint of retaliation and harassment based on gender had been substantiated. The CO stated that he was therefore issuing the applicant a negative Page 7 to document the retaliation and harassment in his record.

On a Page 7 dated October 26, 2015, the applicant was counseled about "having utilized the EEO complaint process in a retaliatory manner" by filing a complaint against the FJO in July 2015. The CO stated that an investigation had concluded that the applicant's civil rights complaint was made in retaliation for the FJO's previous complaint against him, which had been substantiated. The applicant refused to sign this Page 7.

Applicant's Article 138 Complaint

On September 29, 2015, the applicant submitted a request for redress of grievances to his CO in accordance with Article 138 of the UCMJ. He stated that the alcohol incident issued in June 2015 for his conduct on March 1, 2014, had been based on the perception of a single individual (the FJO) who had already filed a complaint against him. The applicant noted that he had contested the accuracy of the Page 7 documenting the alcohol incident when it was presented to him. He stated that the investigation was "unsound" because a key witness was never questioned, and he attached a sworn statement from that witness, Mr. D.

Mr. D's statement is dated August 21, 2015. Mr. D stated that he was with the applicant at a party on March 1, 2014, and they were playing a board game called washers. The FJO came to the party "for a little while," ate and drank and hung out with them, and then left. The applicant had drunk two or three beers. Later, Mr. D had walked home with the applicant to help him carry his washer boards. At the applicant's house, they saw the FJO, and the applicant told her that

> the guys she was playing washers with thought she was hot or sexy. He told her that he agreed that she [was] attractive and should not have a problem finding a nice [location redacted] man. Then he apologized to her. Said he shouldn't have told her that. She smiled at him and said I know you think I am. … I did not think he was drunk or under the influence.

CO's Reply to Applicant's Article 138 Complaint

On October 13, 2015, the applicant's CO replied to his request for redress of grievances under Article 138 of the UCMJ. The CO stated that the applicant had requested removal of his second alcohol incident based upon a new witness statement from Mr. D and claimed that that statement would prove that the second alcohol incident was false. The CO stated that he had read Mr. D's statement and found that the alcohol incident was still supported by a preponderance of the evidence. The CO noted that in the new statement, Mr. D had acknowledged that the applicant had been drinking alcohol and made an inappropriate comment to a superior commissioned officer. The CO also noted that when the applicant had appealed his EER marks, he had made comments to the CO and other members of the command acknowledging that he had made inappropriate comments on March 1, 2014, that "should never have been uttered." Therefore, the CO refused to remove the second alcohol incident from the applicant's record.

District Commander's Response to Article 138 Complaint

On November 17, 2015, the District Commander responded to the applicant's request for redress for the actions of his CO and a subsequent addendum that the applicant had sent. The District Commander noted that the applicant had asked him to convene a new investigation into the events of March 1, 2014; to remove the second alcohol incident from his record; and to per-

manently transfer the applicant to another unit. The District Commander stated that the written statement of Mr. D "actually substantiates the facts uncovered during the 5 May 2015 investigation as provided by other witnesses" because Mr. D had confirmed that the applicant drank alcohol and made inappropriate comments to the FJO on March 1, 2014. The District Commander stated that the extant investigation was sufficient to support the actions of the CO, and the applicant's request to convene a new investigation was denied. Likewise, the District Commander denied the applicant's request to remove the second alcohol incident for his conduct toward the FJO on March 1, 2014, and stated that it was supported by the investigation. The District Commander also denied the applicant's request for a permanent transfer to another duty station because the District Commander was not authorized to grant such a transfer request.

Third Alcohol Incident Documented

When preparing for the ASB, the Recorder ran a criminal background check and discovered that the applicant had been arrested for DUI by civil authorities on April 10, 2010, but no alcohol incident had been entered in his record at the time, contrary to policy.[11] On a Page 7 dated December 2, 2015, the applicant's CO documented this 2010 arrest as a third alcohol incident. He noted that according to a sheriff's report, the applicant had been arrested after failing field sobriety tests and was found to have a blood alcohol content (BAC) of 0.15, which was almost twice the legal limit for the jurisdiction. The applicant had not reported his arrest to his chain of command. According to a March 2016 statement of the applicant for a command climate investigation, in lieu of conviction on the DUI charge, he had received probation for 18 months with no loss of driving privileges and, upon completing probation, the charge was dismissed. The applicant acknowledged that he should have reported his arrest to his command.

Administrative Separation Board Hearing

The ASB[12] convened on December 10 and 11, 2015. An ASB's report must include findings of fact and opinions based on reasonable inferences from the matters of record and recom-

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[11] Under both the Drug and Alcohol Abuse Program Manual, COMDTINST M1000.10, and the Personnel Manual in effect in 2010, COMDTINST M1000.6A, a DUI offense must be documented as an alcohol incident in the member's military record, and the member need not have been convicted.

[12] Article 1.B.22.a. of the Military Separations Manual, COMDTINST M1000.4, states that an ASB is "body appointed to provide findings of fact, opinions, and recommendations to assist the discharge authority in making informed decisions. In all cases, the board identifies any bases for discharge, recommends either retention in the Service or discharge, and recommends the type of discharge certificate to be issued in the event the final action of the discharge authority is to direct separation of the member."

According to Article 1.E.1. of the Administrative Separation Board Manual, COMDTINST M1910.1, the "guiding principles" of an ASB when deciding whether to discharge someone are as follows:

> a. Coast Guard members do not have a right to remain in the Coast Guard, or retain their current rate, regardless of their length of service or the personal hardships the administrative action might cause.
>
> b. A board's primary consideration is "What is in the best interests of the Coast Guard?" Boards should focus on the respondent's fitness to serve and be a valuable asset to the Coast Guard. Boards should not be guided by consideration of the needs of individual commands or of the respondent.
>
> c. Sound personnel management and ordinary concepts of fairness demand that a decision to separate, … a member must be carefully considered, and that a member entitled to a hearing must be provided an opportunity to be heard, to present evidence, and to challenge evidence that will be included in the record. The requirements in this Manual, Coast Guard policy, and U.S. law

mendations that are consistent with the findings and opinions, and it may include majority and minority reports with separate findings, opinions, and recommendations.[13]

Every ASB must make recommendations regarding the following:

- whether there is a basis for separating the member and, if so, what are the grounds for separating the member (e.g., Alcohol Abuse and/or Commission of a Serious Offense);
- whether the member should be separated or retained in the Service;
- what characterization of service and type of discharge the member should receive if separated;
- whether the member should be placed on probation and, if so, what the terms of the probationary period should be; and
- if the member has more than 18 years of service, whether the member should be allowed to remain on active duty until he or she can retire with 20 years of service before being separated.[14]

The applicant was represented by an attorney who was qualified under Article 27(b) of the UCMJ. The evidence before the ASB included numerous written witnesses' statements, Page 7s, and other documents from the applicant's official record; copies of Coast Guard policies; PIO reports; a sheriff's 2010 DUI report; the FJO's HIPAA privacy waiver and medical records; and various memoranda, letters, and emails. The Recorder presented numerous documents and written statements but just one in-person witness to testify, LCDR L, while the applicant's attorney presented several witnesses and fifteen positive character references. However, the statement of the gay female E-5 who had complained about the applicant, dated November 25, 2015, was not submitted to the BCMR by the applicant and so is not summarized here. Likewise, the statement of a female junior officer who reportedly had trouble with the applicant was not submitted to the BCMR.

Many of the witnesses praised the applicant's performance and leadership, denied having seen him sexually harass anyone, and disparaged the FJO's performance and leadership. The applicant opted to make an unsworn oral statement to the ASB.

FJO's Impact Statement for the ASB

The FJO told the ASB that her professional progress had been immensely hindered by the applicant's contempt and uncooperativeness in the office. She stated that over time she became

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pertaining to board proceedings shall be administered equitably and in good conscience by all participants of a board hearing.

d. Because board hearings are intended to assess an individual member's fitness to continue to serve in the Coast Guard (or, as applicable, to determine whether he or she should continue to serve in his or her current rate), boards should not make recommendations based on considerations of general deterrence (e.g., "to send a message to the fleet").

[13] COMDTINST M1910.1, Article 7.B.6.

[14] COMDTINST M1910.1, Administrative Separation Board Manual, Chap. 7.B.6.

"more and more uncomfortable and apprehensive" as she was "trying to solicit simple respect and cooperation." As a result, she stated, she lost her confidence and ambition, was slow to complete her qualifications, was passed over a second time for promotion, and was involuntary separated from active duty.[15] The FJO stated that she was being treated for several stress-related medical conditions and had undergone severe financial strain as a result of having to move four times in three years.

Senior Chief's Statement for the ASB

In a statement for the ASB dated December 15, 2015, the Senior Chief wrote that he had spent much of February 27, 2015, with the applicant because it was the applicant's birthday. He stated that the applicant had been drinking alcohol and wanted the FJO to use his battery charger, which was bigger than the one she was using to charge her truck's battery. The Senior Chief also stated that he had received several complaints about the applicant from female members of the command. The female members had claimed that the applicant had "made comments" but that they had not wanted to file official complaints.

Statement of an E-6 to the ASB

An E-6 who had worked with the applicant and the FJO strongly criticized the FJO's leadership and performance and highly praised the applicant. He stated that the applicant would "bend over backwards" for his subordinates, including the females, and that the applicant "walked on eggshells for some females not to cross the line." The E-6 stated that one of the applicant's accusers "was over sensitive with anything of a sexual or racial nature and [the applicant] would step in and stop it if other guys were about to cross the line."

Statement of an E-5 to the ASB

An E-5 who had worked with them stated that the applicant was respectful to both his superiors and subordinates and treated everyone equally and politely. He stated that the FJO acted superior to everyone but was not as professional as the applicant. The E-5 stated that the FJO had once told him that the applicant had hit on her in her driveway and that she had told him to go inside, but the E-5 thought she was joking because she had laughed, although she did mention it twice.

ASB's Findings of Fact

The ASB's report is dated December 17, 2015. The Board issued numerous findings based on "the preponderance of the evidence," including the following:

- The applicant was not disputing the basis for his first alcohol incident, which he had incurred in December 2000.

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[15] The record indicates that before transferring to the unit, the JFO had not successfully completed pilot training and had already been non-selected for promotion in 2013. After being non-selected for promotion a second time in September 2014, by law, the FJO had to be discharged from active duty no later than June 30, 2015.

- The applicant was disputing the basis for the second alcohol incident, which was incurred on March 1, 2014, and documented on a Page 7 dated June 8, 2015. Specifically, he was contesting "the factual basis of alcohol being a causative factor" for the incident. However, multiple witnesses, including the applicant's own witnesses, had affirmed that he had consumed alcohol at the party on March 1, 2014, before the incident.
- The applicant had contested his second alcohol incident through an Article 138 complaint, but the District Commander had upheld the CO's determination.
- The applicant had received his third alcohol incident on December 2, 2015, for a DUI arrest in April 2010. The applicant had not reported his arrest to his command and had refused to acknowledge the Page 7 documenting this third alcohol incident.
- Each of the three alcohol incidents documented in the applicant's record met the definition of an alcohol incident and were properly characterized as such. Each of the incidents brought discredit on the Coast Guard.
- The PIO's investigation of the FJO's original complaint had resulted in a recommendation that the applicant be awarded NJP for five UCMJ violations, including four specifications (charges) under Article 89 and one under Article 107 for making a false official statement to the PIO that was contradicted by many witnesses. But the CO had not awarded the applicant NJP and had instead initiated his separation.
- An Ensign had testified that the applicant had referred to the FJO and another junior officer as "stupid" and the applicant had not denied it.
- Evidence showed that the applicant had stared at the FJO's breasts and made unwelcome, sexually suggestive comments to the FJO on March 1, 2014. The testimony of a civilian eyewitness had corroborated the FJO's claims about the applicant's sexually suggestive statements.
- Some members had reported that the applicant had "made other uncomfortable and suggestive comments about" a female E-5 subordinate and so the applicant had been transferred to a different work section.

ASB's Opinions and Recommendations

Regarding the applicant's retention or separation and grounds for separation, the ASB made the following opinions and recommendations:

- The ASB had unanimously found that the applicant had incurred three alcohol incidents, and so there were grounds for discharging him for unsuitability due to alcohol abuse in accordance with Article 1.B.15.b.(5) of COMDTINST M1000.4.
- There was *not* enough evidence to find that the requirements for a misconduct discharge due to commission of a serious offense under Article 89 of the UCMJ had been met based on allegations that the applicant had called a junior officer "stupid." Nor was there enough evidence to find that he had stared at the FJO's breasts.
- The ASB had unanimously found that the preponderance of the evidence proved one violation of Article 89 of the UCMJ in that the applicant had made sexually suggestive

comments to the FJO and that the requirements for a misconduct discharge due to commission of a serious offense had therefore been met. The members stated that these comments were unprofessional and "contributed to an already uncomfortable work environment."

- A majority of the ASB members agreed that the preponderance of the evidence also proved that the applicant had violated Article 107 of the UCMJ by making a false official statement to the PIO when he denied having said that he wanted to break up an E-5's marriage. The majority found that the requirements for a misconduct discharge due to commission of a serious offense for violating Article 107 had therefore been met, but one member did not.

The ASB recommended that the applicant be separated based either on alcohol abuse or commission of a serious offense. The ASB checked a box for "Honorable," added an asterisk, and explained that if the applicant's discharge were based on alcohol abuse or on just one commission of a serious offense—the violation of Article 89, UCMJ—then the applicant's character of service should be Honorable, but if the FRA agreed with the majority of the ASB that the applicant had committed two serious offenses—violations of both Article 89 and Article 107, UCMJ—then the applicant's character of service should be General Under Honorable Conditions.

The ASB stated that the applicant should not be placed on probation, marked a box with a recommendation for retirement and then further explained the following about the recommendation regarding retirement:

- If the FRA opted to separate the applicant for alcohol abuse, then the ASB recommended that he be permitted to retire voluntarily upon reaching 20 years of service, in lieu of immediate separation.
- If the FRA opted to separate the applicant for commission of a serious offense based only on a violation of Article 89, UCMJ, the ASB recommended that he be permitted to retire voluntarily upon reaching 20 years of service, in lieu of immediate separation.
- If the FRA opted to separate the applicant for commission of a serious offense based only on a violation of Article 107, UCMJ, the ASB recommended that he be permitted to retire voluntarily upon reaching 20 years of service, in lieu of immediate separation.
- But if the FRA agreed with the majority of the ASB and separated the applicant for commission of a serious offense based on violations of both Article 89 and Article 107, UCMJ, then the applicant should be discharged and *not* afforded the opportunity to retire.

Minority Report of ASB

In a Minority Report attached to the ASB Report, one member explained that he agreed with the ASB report except that he did not think that the evidence supported a finding that the applicant had made a false official statement to the PIO when he denied having told Mr. W that he wanted to break up his female subordinate's marriage. Therefore, he recommended that the applicant receive an Honorable discharge and be allowed to retire. He stated that the applicant's performance had been good overall, but he had brought discredit to the Service and is "a weak link in the chain." He stated that he had also considered the applicant's large sacrifices over the years,

and he noted that he thought that the applicant's actions were not egregious or malicious "but rather misguided and fear driven."

Applicant's Rebuttal to the ASB Report

On December 31, 2015, the applicant's attorney submitted a rebuttal to the report of the ASB, which was included in the proceedings. He argued that the FRA should not agree that the charge under Article 107 was substantiated and a proper basis for a misconduct discharge because the charge rested entirely on the claim of a civilian about what the applicant had said at a bar. And Mr. W never provided a written statement, was not under oath, and never initialed the PIO's summary of his interview to show that it was accurate. Instead, the PIO had relied on a short telephone conversation that he apparently recorded without Mr. W's knowledge. Moreover, Mr. W was never made available to the applicant's attorney or to the ASB for questioning. The attorney argued that Mr. W's memory of the night in question is dim and he might have been intoxicated. Therefore, the attorney argued that Mr. W's statement is unreliable and cannot rise to the level of a preponderance of the evidence.

Commanding Officer Forwards ASB Proceedings to FRA through the District Commander

The CO stated that he had reviewed the record and found that the evidence presented to the ASB would support a discharge for either Alcohol Abuse or Commission of a Serious Offense. The CO agreed with the majority that the applicant should receive a General discharge and stated that "his actions do not warrant that he receive the privileges and benefits afforded to those who serve for twenty years honorably." But the CO also wrote, "[w]ith regard to the issue of voluntary retirement, I agree with the [ASB]. I recommend that [the applicant] be afforded the opportunity to voluntarily retire as long as he serves the remainder of his enlistment adhering to the Coast Guard's core values of honor, respect, and devotion to duty. However, should he again fail to adhere to these core values, I recommend he immediately be processed for discharge, his service characterized at most as General (under honorable conditions) and he not be afforded the opportunity to voluntarily retire, regardless of how close he is to twenty years [of] service."

District Commander Forwards ASB Proceedings to FRA

On February 12, 2016, the District Commander reviewed and forwarded the ASB's report and recommendations to the Final Reviewing Authority at Coast Guard Headquarters. The District Commander concurred with the majority's recommendation that the applicant receive an immediate General discharge. He stated that he did not concur with any of the recommendations that included retirement. The District Commander stated that the applicant had not acted in a manner commensurate with his position as a senior enlisted leader, that the applicant had been the cause of multiple resource-sapping investigations, that the applicant had failed to uphold the Coast Guard's core values, and that he had "not positively addressed an apparently longstanding issue with alcohol." The District Commander noted that had the applicant not hidden his April 2010 DUI from the Coast Guard—a "major integrity issue—then the applicant would have been separated then and would not have been allowed to continue his service in the Coast Guard past 2010. The District Commander concluded that the applicant should *not* be allowed to remain in

the Service until he qualified for retirement while negatively affecting the workforce with his continued service.

Command Climate Investigation[16]

The applicant submitted dozens of statements and investigator's notes from a command climate investigation conducted in March 2016. The vast majority of these concern disagreements about operations, low promotion rates, comparisons to and interactions with another unit, and other members' personnel matters, and they are irrelevant to the issues in this case. The applicant submitted a 9-page statement about the investigations and proceedings against him. When asked about how the command handled civil rights complaints, a few members echoed some of the applicant's concerns, mentioning the number of investigations and their focus on members' alcohol consumption. Two called the investigations a "witch hunt."

Action of the Final Reviewing Authority on the ASB Report

On August 17, 2016, the FRA took final action on the ASB's report.[17] The FRA approved the report and noted that the recommendations were complex because for each issue, such as the character of service and whether to allow the applicant to retire, the ASB had to include multiple contingencies depending on what basis for discharge the FRA chose to adopt and whether the FRA agreed with the majority or the minority. The FRA stated that he had decided to implement

> the Recommendations that received the concurrence of a majority of the Board Members. A majority of the Board Members recommend that a preponderance of the evidence supports separation, with a General Discharge, because [the applicant] violated UCMJ Articles 89 and 107. A majority of the Board Members also recommended that [the applicant] should not be placed on probation, and should not be permitted to retire.

The FRA stated that he had reviewed the applicant's attorney's rebuttal, which claimed that a violation of Article 107, UCMJ, was not supported by a preponderance of the evidence. The FRA stated, however, that he had reviewed the evidence and agreed with the majority of the ASB that this charge was supported by a preponderance of the evidence. The FRA noted that in addition to the PIO's summary of the unsworn statement of Mr. W who claimed that the applicant had told

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[16] The applicant submitted statements from this investigation, but not the report itself.

[17] Article 1.B.22.d. of the Military Separations Manual, COMDTINST M1000.4, states that Commander, PSC is the discharge authority for all administrative separations and that

> [w]hen Commander (CG PSC) receives the record of administrative discharge proceedings, he or she will review the board record and approve or disapprove the board's findings of fact, opinions, and recommendations in whole or in part. Commander (CG PSC) may disapprove findings and opinions if they were made based on incomplete evidence, contrary to the evidence the board considered or to law or regulation, a misunderstanding or misapplication of written policy, or otherwise clearly in error. If Commander (CG PSC) disapproves the findings of fact, opinions, or recommendations, he or she may:
>
> (1) Amend, expand, or modify findings of fact and opinions or take final action other than that recommended without returning the record, if evidence of record supports that action and the final action states the specific reasons; or
>
> (2) Return the record to the board for further consideration with a statement of the specific reasons to disapprove the findings of fact, opinions, or recommendations.

him at a bar in February 2015 that he wanted to break up the E-5s' marriage and marry the female E-5, the majority of the ASB had also relied on other claims that the applicant had made similar "uncomfortable and suggestive comments" about the same female E-5 on other occasions. In addition, the FRA concluded that the evidence showed that the applicant had created an offensive work environment for three female members with "unwelcomed verbal, nonverbal and physical conduct that clearly fall under the definition of "Prohibited Harassment," and had misused the complaint process to retaliate against and further harass the FJO. Therefore, the FRA ordered that the applicant be discharged from the Coast Guard with a General discharge for misconduct due to Commission of a Serious Offense based on his violations of both Article 89 and Article 107, UCMJ.

Request for Stay of Discharge

On September 2, 2016, the applicant's attorney asked the Commandant to stay the applicant's discharge. He wrote that the FRA's decision to discharge the applicant was based on a finding that the applicant had made a false official statement by lying to the PIO about whether he had told a civilian that he intended to separate and break up his married E-5 subordinates so that he could marry the female E-5. He pointed out that the PIO's notes of his telephonic interview with Mr. W had not been signed by Mr. W, whereas in his report, the PIO had written that he had sent copies of his notes of interviews to the interviewees for signature and was still waiting for some of the interviewees to return signed copies of his notes. The attorney noted that the ASB and FRA had relied on the PIO's notes about his telephone interview with Mr. W even though Mr. W had never signed them.

The applicant's attorney claimed that the PIO's notes of the alleged interview with Mr. W—the only one who allegedly heard the applicant's alleged comment about breaking up the E-5s' marriage—were falsely misleading. He stated that on August 26 and 29, 2016, one of the applicant's attorneys had called and spoken to Mr. W, and during those calls, Mr. W denied ever speaking with the PIO or any other investigating officer. He also stated that he was never asked to review any notes of such an interview. In addition, Mr. W told the applicant's attorney that he had recently been contacted by a JAG, who had told Mr. W that the Coast Guard had a recording of a phone call and that he if tried to change his story, "he would be subpoenaed, prosecuted, and put in jail." Mr. W also told the attorney that the PIO had told him that the Coast Guard had been trying to separate the applicant "for years" and that they could separate him "with or without" Mr. W's statement and that his statement was only the "cherry on the top."

The applicant's attorney argued that the PIO had violated the rules in the Administrative Investigations Manual, M5830.1A, by not being thorough and impartial, by not avoiding suggesting the existence or non-existence of material facts, and by making a recording of a phone call that has not been produced, although he admitted that a PIO is allowed to submit unsigned notes of a telephone interview with a witness. In fact, he stated, the PIO himself made four false official statements in his report by claiming on the first page of his report that he (1) took notes in front of the witnesses; (2) had the witnesses review the notes; (3) had the witnesses verify the notes; and (4) contacted the witnesses to sign the notes, when he had done none of those four things for Mr. W. The attorney also argued that Mr. W's claim that someone told him that the Coast Guard had been trying to separate the applicant "for years" shows that the PIO was not impartial. Finally, the

attorney pointed out that the PIO's notes do not state whether Mr. W had been drinking, how close he was to the applicant when he heard the alleged statement, whether there was music playing at the time, or whether the venue was very noisy.

The attorney also faulted the Recorder for not ensuring that Mr. W testified in person before the ASB so that the board members could have assessed the credibility of Mr. W.

On September 2, 2016, Deputy Command, Personnel Service Center replied on behalf of the Commandant and denied the requested stay. He stated that the FRA's decision was supported by evidence and that the attorney's new information "does not support a decision to retain [the applicant] in the Coast Guard."

Transcript of Private Investigator's Conversation with Mr. W

On September 12, 2016, a private investigator approached Mr. W who had allegedly been told by the applicant that he wanted to separate his married E-5 subordinates and marry the female himself. According to a transcript of their conversation, Mr. W did not want to talk about it and asked the private investigator if he had a warrant. But with many vague promptings by the private investigator, Mr. W made the following statements:

> all I did was tell a friend of mine what he said about his wife in a bar one night. That's all I said. … So his livelihood is – is – is his own mouth. … Because he's got sexual harassment charges against him 3 different times. … Which I had no idea. … No – Nobody came and interviewed [me]. … Yeah, I'm just out of it because all I did was tell a friend of mine one night. He said something derogatory about his wife and I didn't even know who this guy was. But little did I know that he was in the coast guard with them. … And he had already been previously sexually harassing her at work. … I didn't know that either. … DWI's and everything I'm finding out that he's kept from the Coast Guard. … Yeah, I guess you could say they were interviewed by me because, uhm, my buddy [the male E-5] was in the Coast Guard, and – he called me from the coast guard station and asked me what he had said and I told him. – there could have been somebody else in the room listening. … And they go my statement so that's all there is to it. I know that they got my statement and the Coast Guard said if he keeps harassing me and anybody else does, Coast Guard lawyer will back me. … I don't know the guy, I don't want to know the guy.

Applicant's Discharge

On a Page 7 dated September 16, 2016, the applicant acknowledged having received pre-separation counseling and printed information about his education benefits in accordance with COMDTINST 1760.9. He also signed a Page 7 about being counseled on types of discharges and the possible effects on various veterans' benefits.

On September 16, 2016, the applicant received a General discharge Under Honorable Conditions for "Misconduct" with an RE-4 reenlistment code (ineligible to reenlist) and a GKQ separation code, denoting a discharge for misconduct due to commission of a serious offense.

APPLICANT'S ALLEGATIONS

Command Climate and "Witch Hunt"

The applicant alleged that from his arrival at his final unit in August 2013 until his discharge, the command climate at this unit was toxic and "the subject of numerous command climate complaints," which resulted in numerous surveys and investigations. He submitted many statements from the unit's annual DEOMI reports and a 2016 command climate investigation, but not the reports themselves. Some of these statements had derogatory comments about the unit's leadership and their handling of his case. He submitted an email showing that in 2014, his commanding officer (CO), a Captain, had admitted to the District Chief of Staff that the results of a recent DEOMI survey "were worse than [he] expected" but that he had "fully accepted" them. However, the applicant noted that at the next unit all-hands meeting, the CO had announced that anyone who had complained on the 2014 DEOMI survey "could 'get out of the Coast Guard if they didn't like it,' or words to that effect."[18] He alleged that the 2014 DEOMI survey had revealed a low trust in the unit's leadership and a common perception that the leadership lacked cohesion.

The applicant stated that although the Coast Guard had sent consultants to try to address the command climate issues identified at his unit in 2014, the 2015 DEOMI survey results were again poor, although the issues of concern identified in this survey had changed. The applicant explained that some of the junior officers and chief warrant officers at the unit, including the FJO, had not received strong Officer Evaluation Reports due to delays in achieving qualifications and so they had not been selected for promotion. The CO noted in an email to the District Chief of Staff, which the applicant submitted, that one of those junior officers was the FJO and the CO wrote that she was "unfortunately the same JO that had been sexually harassed by [the applicant]." The applicant argued that this statement shows that the command had considered the alleged harassment to be "a mitigating factor in evaluating her performance."

The applicant noted in particular that comments in the crew's statements about the command climate had referred to the investigations of his alleged misconduct as an "attack" on him or "witch hunt" and that respondents had claimed that the command "blew things out of proportion"; investigated things they viewed as nonissues; made "a mountain out of a molehill"; demanded the names of members who had attended the golf tournament just so they could be questioned about whether the applicant had drunk alcohol; treated the FJO more leniently than the applicant; made members "walk on eggshells" for fear of being investigated; made members afraid to drink a beer; were "out to get people"; and had "knee-jerk reactions" to protect themselves. In addition, a couple of respondents had said that they did not want to raise issues with the command or testify at the ASB for fear of retribution and that the negative Page 7 that the applicant had received for filing his civil rights complaint had violated the applicant's rights and made members afraid to file such complaints. And a few respondents claimed that a Lieutenant at the unit who had been absent without leave (AWOL) had not been treated as harshly as the applicant.

The applicant noted, however, that the unit's Department Heads' responses on the 2015 DEOMI survey were significantly different, as they thought that the command climate issues in

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[18] The applicant submitted a statement from a junior officer who supported this claim and said that the CO was visibly upset and later apologized for this inappropriate comment.

2014 had been taken seriously, they felt supported by the CO and XO, and they did not fear retribution. They also thought that the incident of a Lieutenant being AWOL had been handled well, and they only disagreed about whether the applicant should have been charged and tried for his alleged offenses. They also claimed that the Page 7 that the applicant had received in response to his civil rights complaint was appropriate. However, the Sector Command Master Chief had recommended that the Sector and District staff "keep close tabs on the situation" because of the 2014 and 2015 survey results and the CO's statement that he "was tired of chasing climate survey results" and was not going to spend his final year as a CO changing things at the unit because of comments in a command climate survey.

The applicant also submitted a statement from a member of the District staff, who wrote that the command had forwarded the applicant's appeal of his September 2015 Enlisted Evaluation Report (EER) to the District without four enclosures that the applicant had listed on his memorandum. When he called and asked the XO about the enclosures, the XO sounded unfamiliar with the appeal and said that he was too busy to ask the applicant for the enclosures and that if the District staff wanted the enclosures, they would need to get them directly from the applicant. After being told that it was the unit command's responsibility to make sure that the EER appeal package was complete, the XO agreed to obtain them and sent an email to the applicant asking him to submit his enclosures directly to the District staff and apparently did not care that the CO had not been able to review the enclosures before forwarding the appeal with his endorsement to the District staff.

The applicant concluded that the evidence from the DEOMI reports, command climate investigation, and emails that he submitted prove that throughout his time at his final unit, he had been "the subject of many unsubstantiated, biased, and inaccurate allegations and investigations, some of which served the purpose of fulfilling the command's 'witch hunt' against him."

Applicant's Claims about Investigation of Alcohol Abuse in October 2014

The applicant stated that the "witch hunt" began in October 2014, when he was accused of and investigated for having incurred two alleged "alcohol incidents." The applicant stated that LCDR L tried to get the command to refer him for alcohol abuse "based on two entirely specious allegations." The allegations were investigated and the investigating officer found the allegations to be "unsubstantiated." He also alleged that LCDR L was the only witness who subsequently corroborated the FJO's allegations against him in 2015, and he did so without providing "specific facts or details." The applicant stated that the October 2014 investigation of his alleged alcohol abuse created tension among the crew, who "grew concerned that they would also somehow end up in trouble for no reason."

Applicant's Allegations about the FJO's First Complaint and Its Investigation

The applicant stated that when the FJO filed her complaint following an interaction between them on February 27, 2015, she had recently not been selected for promotion to Lieutenant and had "continued to fail to meet her professional qualifications." He also stated that her complaint concerned misconduct—sexual harassment while under the influence of alcohol—that

had allegedly occurred over a year earlier and that she had previously said she had put "behind her."

The applicant alleged that the FJO's complaint caused his command to initiate an investigation and to take actions that constituted punishment, misplaced retaliation, and harassment. Specifically, the command relocated his desk; ordered him to undergo alcohol screening; ordered him to have no contact with the petty officers in the office he had previously been assigned to; tried to force him to sign a Military Protective Order (MPO) to keep away from the FJO even though she lived next door to him; threatened to jail him if he refused to sign the MPO; forced him to sign the MPO after it was modified to allow him to remain in his own home; prepared a Page 7 that required him to surrender his firearms; and prepared another Page 7, dated March 18, 2015, that required him to abstain from drinking alcohol. The applicant stated that he challenged the validity of the MPO, the order to surrender his weapons, and the order to abstain from alcohol. The CO claimed that the orders were lawful but told him he could file an Article 138 complaint against the CO to contest the orders. Subsequently, the CO rescinded the order to abstain from alcohol on April 15, 2015; terminated the MPO on April 24, 2015; and allowed him to reclaim his weapons. The applicant stated that the CO reversed these orders after consulting counsel.

The applicant alleged that the command extensively investigated the FJO's complaint against him. The Lieutenant who served as the Preliminary Inquiry Officer (PIO) for the FJO's complaint not only investigated the FJO's complaint but "sought additional complaints" against the applicant by asking about other potential offenses.

Applicant's Claims about His Own Civil Rights Complaint and Its Investigation

Regarding his own complaint against the FJO about an alleged "hate incident," the applicant noted that the PIO had written in his report that his investigation had inevitably dove-tailed with two other investigations relating to the incident and the parties involved. The applicant alleged that because of the potential overlap in the investigations, the investigation of his own complaint was "restricted to the specific event identified in his complaint – the exact same February 27, 2015, interaction which had prompted [the FJO] to file a complaint against [the applicant] seeking an MPO." The PIO had concluded, however, that the FJO's outburst had resulted from negative tension between the applicant and the FJO and did not relate to a protected category or qualify as a hate incident.

Applicant's Claims about FJO's Second Civil Rights Complaint Against the Applicant

The applicant noted that in the FJO's second complaint against him, she alleged that he had made negative comments about her gender and that his own civil rights complaint dated July 2, 2015, was retaliatory for her first complaint in that he wanted her to have to experience being investigated. The applicant noted that the PIO could not find witnesses to substantiate the latter claim, and he alleged that the claim about him having made negative comments about her gender was substantiated based only on LCDR L's vague corroboration of this claim. LCDR L, he noted, was the same officer who had initiated investigations of the applicant's alleged alcohol abuse in October 2014 and who had corroborated the FJO's allegation of harassment. And as a result of the PIO's findings, he received a negative Page 7. But this Page 7 not only counseled him on the

allegation that the PIO had found to be substantiated but also censured him for his alleged reprisal against the FJO—a claim that the witnesses had not substantiated. The applicant argued that this Page 7 was itself retaliatory, was prohibited by the Civil Rights Manual, and so was erroneously included in the record reviewed by the ASB and the FRA.

Applicant's Claims about the Third Alcohol Incident

The applicant stated that in August 2015, he was informed that he was being processed for separation and was entitled to a hearing before an ASB. Before the ASB convened in December 2015, however, the Coast Guard further investigated his past, looking for other grounds to discharge him, and discovered that he had been arrested for driving under the influence (DUI) in 2010. The applicant complained that he was unjustly issued a third alcohol incident retroactively for this arrest even though he had not been convicted and the DUI charge had been judicially dismissed after his probation ended.

Allegations about the ASB and the Alleged Violation of Article 107, UCMJ

The applicant alleged that the ASB relied on weak, false, and misleading evidence. He noted that the ASB was presented with three possible grounds for discharging him, which he addressed separately: unsuitability due to alcohol abuse based on his alcohol incidents and two alleged commissions of a serious offense, specifically alleged violations of Article 107, False Official Statement, and Article 89, Disrespect Toward a Superior Commissioned Officer, of the UCMJ.

The applicant stated that the record shows that his chain of command considered the charge under Article 107—an integrity violation—to be the most serious charge against him. He was found to have made a false official statement because he denied to the PIO that he had told a civilian in a bar on February 16, 2015, that he was going to ensure that the married E-5s were transferred to different units that summer so that he could break up their marriage and marry the female E-5 himself. But his attorney argued, this charge of false official statement could only be sustained if the applicant had actually told Mr. W at the bar that he wanted to break up the marriage of his E-5 subordinates so that he could marry the female E-5, which he has always denied. And he argued that the evidence supporting the male E-5's claim about what Mr. W is weak, unreliable, and false.

Moreover, one of the applicant's attorneys stated, in two telephone calls with her in August 2016, Mr. W had made many statements that undermined the credibility of the PIO and his summary of his interview with Mr. W. In this attorney's affidavit about those telephone calls, she stated the following about her first conversation with Mr. W on August 26, 2016:

- Mr. W had denied having ever spoken to an investigator or anyone in the Coast Guard about alleged wrongdoing by the applicant.
- After getting to know the applicant better in 2016 and learning that the PIO had produced interview notes for the ASB about what Mr. W had allegedly said about what the applicant had told him at the bar, Mr. W had called the male E-5 "to find out exactly what information the CG had." (The attorney did not address in her affidavit what Mr. W and the E-5 had

discussed except that Mr. W said that the E-5 had told him that someone else from the Coast Guard would contact him.)

- Mr. W told her that on August 22, 2016, a female JAG had called Mr. W on speaker phone and had "played a recording of him speaking with [the male E-5]." The attorney stated that Mr. W told her that at the time the recording was made in 2015, he had not known that anyone else was listening when he spoke to the E-5, had not known that his call with the E-5 was being recorded, and was certain that he had never spoken to an investigator.
- But when the applicant's attorney asked him about the content of the recording that the female JAG had played over the phone, Mr. W stated that he could not recall whether the PIO had introduced himself during the recorded call or whether the PIO had told him that the call was being recorded. (The attorney did not address in her affidavit what Mr. W reported having said about the applicant's statements in the bar during the recording.)
- In addition, the attorney stated that Mr. W told her that the female JAG had told him that if he recanted his story about what the applicant had said, he could be subpoenaed, prosecuted, and jailed. And he was told that his statement about what the applicant had said was just the "cherry of the sundae" as to why the applicant was being separated.

According to the attorney's affidavit, during another telephone call with Mr. W on August 29, 2016, he told her the following:

- On August 26, 2016, Mr. W had called the telephone number from which he had been called by a female JAG on August 22, 2016, and a man had answered. Mr. W had made the call to request that no one contact him again about this matter. A man had answered. He could not recall the man's name but when the applicant's attorney asked if it was the PIO, Mr. W replied, "'yes, that sounds familiar,' or words to that effect."
- Mr. W told her that during this phone call, the male (presumably the PIO) had told him that he had been "unnecessary as a witness" at the ASB because the applicant "was being separated for '12 pages of alcohol related misconduct and criminal activities, including DUIs,'" which Mr. W had not previously known. Mr. W also stated that the male had claimed that the Coast Guard had been trying to separate the applicant "for years" based on negative information. According to the applicant's attorney, Mr. W said that it had sounded like the applicant "had an extensive criminal history."
- Mr. W adamantly denied having ever been asked by the PIO to review his interview notes and sign his name to them.

Based on this affidavit and the PIO's report, the applicant's attorney argued that on the first page of his report, the PIO fraudulently claimed that all of his notes of the witnesses' interviews had been made in the presence of the interviewees and that he either had received or was expecting to receive their signatures to confirm the accuracy of his notes. The attorney noted that this procedure was not followed in Mr. W's case, as the evidence clearly shows that the PIO's notes were taken when the male E-5 called Mr. W on behalf of the PIO, and Mr. W denied having received a request from the PIO to sign his notes. He noted that Mr. W also denied having spoken to the PIO. The attorney stated that the erroneous claim about how all of the interviews were conducted on the first page of the report would have misled the members of the ASB to believe

that the notes of Mr. W's interview were reliable and accurate, whereas the evidence shows that the PIO's notes were taken telephonically and that Mr. W denied having spoken to the PIO and denied having been asked to sign the notes.

The applicant argued that absent Mr. W's statement, the male E-5 was the primary accuser against the applicant regarding what he said to Mr. W. He argued that in getting the E-5 to phone Mr. W on his behalf, the PIO colluded with the E-5 to create unreliable evidence against the applicant. Therefore, the PIO "tricked" Mr. W into providing a statement for his investigation. He also argued that the E-5 must have conducted the interview himself and not told Mr. W that the PIO was listening to their conversation because sixteen months later, Mr. W denied having spoken to the PIO in his initial conversation with the applicant's attorney. He also argued that the PIO's notes do not prove whether the PIO was present to hear the telephone call, whether he actually heard either side of the conversation between the E-5 and Mr. W, whether the questions asked of Mr. W were the same as those quoted in the PIO's report, or what was the context his bulleted notes of the alleged "interview."

The applicant also argued that the PIO's notes show that the PIO ignored Coast Guard guidance about how investigators should conduct interviews by, for example, failing to begin the interview with open-ended questions; asking Mr. W to corroborate the E-5's statement about what Mr. W had said; allowing the male E-5 to be present during the interview with Mr. W; and allowing the E-5 to conduct the interview. The applicant argued that the PIO's failure to follow the guidelines and collusion with the E-5 shows "gross bias" on the part of the PIO and "extreme efforts to establish misconduct allegations" against the applicant. The applicant claimed that the E-5 was motivated to assist the PIO in establishing the applicant's misconduct in order to "maneuver[] himself and his wife into a position to gain command sympathy and support, thereby likely avoiding any change of station orders that might result in geographic separation."

The applicant argued that the PIO did not try to get Mr. W's signature on his notes because he knew that he had obtained the information without Mr. W's knowledge or consent. The applicant pointed out that Mr. W denied having been told that the purpose of the call was to obtain an official statement for the investigation, that the conversation was being recorded, or that anyone besides the E-5 was hearing their conversation. The applicant claimed that the PIO's notes only indicated that Mr. W had "confirmed" what the male E-5 had claimed about the applicant and did not explicitly state what Mr. W had confirmed. In addition, the applicant pointed out that the PIO's notes indicate that Mr. W could not confirm that the applicant had been intoxicated at the bar that night, whereas in his report, the PIO wrote that Mr. W had stated that he did not "believe" that the applicant had been intoxicated at the time, and the PIO's notes of the alleged interview do not claim that Mr. W stated that he did not believe that the applicant was joking, although the PIO wrote it in his report. The applicant also claimed that Mr. W had only just met the applicant that evening and was himself intoxicated and so cannot accurately recall the applicant's statement. And he claimed that in finding that the applicant had made a false official statement to the PIO about what he said to Mr. W, the ASB majority and the FRA had referred to nonexistent evidence as supporting the PIO's findings. Nor could he present these defects to the ASB because by the time he discovered them, the ASB had made its recommendation and the FRA "had no interest in turning back from the decision in hand."

In addition, the applicant noted, the PIO made a finding that the applicant had made "other uncomfortable comments" about the married female E-5, which is not supported in the record. The PIO cited the gay female E-5's statement as supporting this finding, but the applicant did not submit that statement as evidence and instead claimed that her statement "merely reiterates the identical accusation the [married E-5s] had already made against [the applicant], that he had commented he wished [the married E-5] wasn't married."

The applicant concluded that the PIO's report regarding what Mr. W said at the bar on February 16, 2015, is fraudulent and inaccurate and cannot therefore support a finding that that the applicant lied to the PIO about what he said to Mr. W in the bar that night. Therefore, he argued, the applicant did not violate Article 107, UCMJ, by making a false official statement, and it was not a proper basis for discharging him. He argued that because the charge under Article 107 was considered the most significant, he should not have been separated with a General discharge and instead should have been retained and allowed to retire with 20 years of service.

Allegations about the ASB and the Alleged Violation of Article 89, UCMJ

The applicant's attorney noted that the FJO had not qualified as a pilot before she arrived at the unit and had been twice non-selected for promotion when she accused the applicant of sexual harassment. The attorney argued that the record shows that the FJO was "a failure as an officer, yet she openly blamed her deficiencies on [the applicant] and turned him into a scapegoat." And their chain of command "did exactly the same thing." He argued that the CO's email noting that the applicant had been twice non-selected and had also been sexually harassed is evidence that the CO considered raising her evaluation marks based on her claim of sexual harassment despite her record of poor performance.

The applicant's attorney also argued that the record shows that the FJO showed questionable judgment in choosing to live beside the applicant; fraternized with the applicant and other members; attended parties she knew he would be attending; and accepted favors and borrowed items and Wi-fi from him. He noted that they had socialized at the same events even after the applicant had allegedly sexually harassed her on March 1, 2014, by telling her he was sexually attracted to her. He stated that the FJO's description of her conduct at these parties differs from that of witnesses who had no motive to lie and call into question the truthfulness of her statements.

Regarding the March 1, 2014, alcohol incident and charge of disrespect, the applicant argued that his telling the FJO that the neighbors she had been playing washers with at the Mardi Gras block party had thought she was "hot" and that she should have no difficulty finding a nice local guy "naturally flowed" from the neighborly and friendly relationship they had developed at that early stage. Moreover, the applicant had immediately realized that he might have overstepped and apologized for what he had said. However, the FJO told a much different story to her chain of command and other members, claiming that the applicant had been extremely intoxicated and had told her that he was so sexually attracted to her that he did not know how to handle it. And the XO, upon hearing the FJO's claims, had decided that no alcohol incident had occurred. Nevertheless, when the FJO filed her civil rights complaint a year later, the CO decided that the applicant had incurred an alcohol incident on March 1, 2014, and later the PIO and ASB found that the applicant had disrespected her in violation of Article 89 by making "sexually suggestive"

remarks even though the only witness to this interaction had not supported the FJO's claim about what the applicant had said to her. Nevertheless, the PIO and the ASB relied on the FJO's "hyperbolic account" of the incident.

Allegations about the ASB and the Alcohol Incidents

The applicant argued that it was erroneous and unjust for the ASB and FRA to determine that his "alcohol abuse" was grounds for separation when the first incident had occurred in December 2000; the second incident (chronologically) was the DUI charge on which he had not been convicted and could have had expunged if he had acted timely; and the third incident was based merely on the applicant having drunk alcohol earlier in the day, as the ASB did not say that alcohol was a contributing factor in the applicant's conduct on March 1, 2014. Moreover, the applicant pointed out that the ASB found that the three alcohol incidents were not sufficient reason not to allow him to retire. The applicant also stated that a diagnosis of alcohol abuse may only be made by a medical professional, and he was never diagnosed with alcohol abuse. Therefore, he argued, alcohol abuse was not grounds for discharge.

Allegations about the FRA's Decision

The applicant argued that the FRA's final decision "was outside the scope of, and in direct contradiction to, the [ASB's] findings and recommendations." The applicant stated that according to the format of required form used for an ASB's report, only one space is provided for a single recommendation for the character of discharge and only one space is provided for a single recommendation regarding retirement. He argued that the format therefore prohibits an ASB from making alternative recommendations, as the ASB did in this case. Because the ASB filled the initial recommendation spaces with recommendations for an Honorable discharge and retirement, the applicant argued, the FRA was required to ignore the ASB's detailed written "equivocating" explanations of its recommendations based on whether the FRA agreed with the majority or minority regarding the UCMJ violations and grounds for separation. The applicant argued that because the FRA misread the ASB's recommendations and did not acknowledge the ASB's single recommendations for an Honorable discharge and retirement, the FRA had acted outside of and in direct contradiction to the ASB's findings and recommendations.

Applicant's Conclusion

The applicant concluded by summarizing his arguments and by stating that the FRA's final action and his General discharge with no retirement were erroneous and unjust given his almost 19 years of honorable service. He stated that the FRA's final action was based on an "incorrect factual premise" that the majority of the ASB had recommended a General discharge with no retirement whereas the format shows that the single recommendation that the ASB had actually made was for an Honorable discharge with retirement. He stated that his General discharge has negatively affected his ability to gain employment, including his employment in the federal civil service, which would allow him to apply his 19 years of military service toward a civil service retirement.

The applicant highlighted in his conclusions that "most egregiously," when Mr. W called the PIO in August 2016, the PIO had admitted to Mr. W that the Coast Guard had been trying to

get rid of the applicant "for years" and had violated the Privacy Act by telling Mr. W about personal information in the applicant's record.

VIEWS OF THE COAST GUARD

On September 16, 2020, a judge advocate (JAG) submitted an advisory opinion in which he recommended that the Board deny relief in this case. In so doing, he JAG adopted the findings and analysis in a memorandum on the case prepared by the Personnel Service Center (PSC).

PSC noted that all members of the ASB had agreed that the evidence supported separating the applicant for either alcohol abuse or misconduct due to his commission of a serious offense, specifically a violation of Article 89, UCMJ, disrespecting a superior commissioned officer. Further, the majority of the ASB had also found that the applicant could be separated for commission of a serious offense for violating Article 107 by making a false official statement. PSC stated that the ASB majority and the FRA did not err in finding that the preponderance of the evidence supported findings that the applicant had violated both Articles 89 and 107, UCMJ.

PSC stated that although the ASB form provides slots for only one recommendation regarding retirement and the characterization of service, the ASB in this case had reached a split decision and so provided written explanations of their contingency recommendations depending on the FRA's decisions. Also, PSC noted, the majority of the ASB had clearly recommended a General discharge without retirement if the FRA agreed with the majority that the applicant had violated Article 107 as well as Article 89, UCMJ. Moreover, PSC noted, the recommendations of the ASB were not binding on the FRA.

In response to the applicant's claims about his 2010 and 2014 alcohol incidents, PSC stated that the applicant's CO was the proper authority for determining that these two incidents met the definition of an alcohol incident, and the Page 7s in the record show that the CO did so. PSC stated that ASB "cannot ignore a proper designation of an alcohol incident" by a CO, and so the basis for the applicant's discharge for unsuitability due to alcohol abuse was supported by a preponderance of the evidence in the record.

Regarding the applicant's request for retirement, PSC noted that no member has an inherent right to retire if he fails to uphold the high standards expected of military members. PSC stated that retaining and awarding a retirement to members found to have committed serious offenses would be inequitable to the majority of service members who closely adhere to the Coast Guard's core values. PSC also stated that being close to retirement is not a "safe haven" for members to commit misconduct. PSC stated that the applicant did not serve 20 years and, even if he had, the majority's recommendation to not allow him to retire because of his violation of Article 107 is supported by a preponderance of the evidence. PSC noted that the FRA considered not only the applicant's alcohol incidents and violations of Article 89 and 107 but the fact that he had "created an offensive environment for three female workers" and committed unwelcomed verbal and nonverbal conduct that fell under the definition of Prohibited Harassment. PSC noted that the FRA had also considered the evidence that the applicant had retaliated against the FJO by filing his own civil rights complaint. PSC also stated that the FRA's decision was reviewed and "found to be within policy."

Regarding the applicant's request concerning his education benefits, PSC stated that contrary to the applicant's claim, he had ample time to transfer his benefits to his dependents before he was discharged. PSC also noted that veterans separated with a General characterization of discharge are not entitled to education benefits and so his General discharge precludes the use of those benefits by the applicant or his dependents.

Therefore, PSC recommended denying relief.

The JAG stated that the FRA was not bound by the ASB's recommendations but in this case the FRA nevertheless followed the ASB majority's written recommendation by awarding the applicant a General discharge without retirement for commission of two serious offenses, violations of Article 89 and 107, UCMJ. The JAG stated that the FRA's decision was not unjust "give the nature, severity, and frequency of misconduct present in Applicant's record."

With respect to the applicant's claims about a toxic command climate and "witch hunt," JAG stated that "[g]eneralized discord and opinion of an uninformed crew do not equate to a … 'witch hunt.'" The JAG also noted that the applicant has not shown how the command climate is relevant to his own actions regarding the FJO. Moreover, the FRA was not a member of the command and conducted an independent, neutral and detached review of the evidence before deciding to deny the applicant a retirement. The JAG argued that this denial was not erroneous; nor was it unjust given the number of alcohol incidents and other negative Page 7s in the applicant's record, as well as the substantiated sexual harassment complaint and his use of the civil rights process to retaliate against the FJO.

Regarding the Page 7 dated October 26, 2015, which documents the applicant's retaliation by filing a civil rights complaint, the JAG noted that the PIO found that if the applicant's own civil rights complaint was found to be unsubstantiated, then the circumstances would make it reasonable for the command to find that his complaint had been retaliatory, as the FJO alleged.

The JAG argued that the applicant has not shown that the ASB majority erred by finding that the applicant had violated Article 107. The JAG noted that Coast Guard regulations allow PIOs to conduct telephone interviews, use other members as intermediaries, and include unsigned, summarized notes of interviews in their reports. Article 4.C.4.b. of the Administrative Investigations Manual, COMDTINST M5830.1A expressly states that an investigation "is not bound by formal rules of evidence applicable to courts-martial, and may collect, consider, and include in the record any credible (reasonably believable) evidence that is relevant to the matter under investigation. … A witness statement may be signed by the witness, but may also be certified by an investigator to be either an accurate summary of, or a verbatim transcript of, an oral statement made by the witness." And the JAG noted that when the applicant sought an injunction in federal court to stay his discharge, the court summarized all the evidence on the interactions between the PIO and Mr. W and found that the applicant had not shown a likelihood of success on the merits. The court stated that Mr. W "continued to claim that [Applicant] made the initial statement regarding [the married E-5s] which [Applicant] was found to have falsely denied making and which is the underlying basis of the Article 107 violation." The court also noted that the applicant could have raised these issues during the ASB but failed to do so. And the court concluded that

the applicant had "not give[n] the Court any reason to doubt that, based on the record before it, the Coast Guard made a reasoned decision to separate Plaintiff."[19]

The JAG stated that all three of the applicant's alcohol incidents met the definition for an alcohol incident. The JAG stated that the definition does not require that alcohol be the proximate cause of the poor conduct, only a "significant or causative factor." The JAG noted that the records support the CO's findings that the applicant had incurred these alcohol incidents. In addition, in response to the applicant's Article 138 complaint about the March 1, 2014, alcohol incident, the District Commander had denied the applicant's request and had noted that his witness, Mr. D, had actually confirmed that the applicant had been drinking alcohol at the block party before telling the FJO that he found her attractive. In addition, the JAG noted that at the ASB, the applicant had admitted to the alcohol incidents and had admitted telling the applicant that she was attractive. The JAG stated that the applicant's apology for his misconduct during the ASB and his current claims that the alcohol incidents are false "cannot be reconciled." The JAG argued that the BCMR should find no error or injustice with regards to the alcohol incidents.

The JAG further stated that Article 1.A.2.b. of COMDTINST M1000.10 explains that in the Coast Guard "alcohol abuse" is both "a general term for the misuse of alcohol which interferes with the user's health, safety, job performance, family life, or other required social adaption" and "a medical diagnosis." The JAG stated that in this case, the applicant's three alcohol incidents substantiated a basis for an unsuitability discharge due to alcohol abuse, as authorized in the Military Separations Manual, COMDTINST M1000.4, which does not require a psychiatric diagnosis.

The JAG also noted that the applicant had failed to show that he did not have time to transfer his education benefits to his dependent before he was discharged and so he has not proven an error or injustice in that regard.

The JAG concluded that the applicant has not proven that his General discharge and lack of retirement constitute an error or injustice.

Affidavit of the FRA

The JAG included with the advisory opinion a sworn statement by the FRA dated September 13, 2016. The FRA stated that he had approved a General discharge without retirement for the applicant based on the ASB majority's recommendation and his own "review of the record that he committed the offenses." The FRA stated that he had concluded that the applicant had violated Article 107, as well as Article 89, based on other evidence that the applicant had made "uncomfortable and suggestive comments," as well as the PIO's notes of Mr. W's interview. The FRA noted that the ASB was able to assess the applicant's own credibility on this issue when he chose to make an unsworn statement to the ASB.

The FRA stated, however, that even if the majority of the Board had agreed with the minority, found no violation of Article 107, and recommended retirement for the applicant, the FRA would have taken action contrary to that recommendation and ordered that the applicant be

[19] *Id.*

separated with a General discharge without retirement. In fact, the FRA stated, he would have made the same decision even if he himself had determined that the applicant had not violated Article 107 because of the multiple bases for discharge in the record. The FRA noted in this regard that the applicant had created an offensive environment for three female workers, engaged in retaliation, and failed to learn from verbal counseling after the March 1, 2014, incident, which was designed to correct his harassing behavior. Therefore, the FRA claimed, there "was not a reasonable prospect for rehabilitation." In this regard, he noted that the ASB had unanimously recommended separation without probation.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On February 11, 2021, the applicant's attorney responded to the view of the Coast Guard. He asked the Board to disregard the recommendations in the Coast Guard's advisory opinion and "focus on the truer errors and injustices" the applicant has suffered.

The attorney argued that the Coast Guard's "blemished history of mishandling investigations and failing to hold senior leadership accountable" (emphasis removed) is a significant issue in his case that was ignored in the advisory opinion. He stated that in 2018, a LCDR assigned to the Academy had filed a whistleblower complaint of reprisal and that the report found that the Coast Guard's military leadership had failed to conduct prompt, thorough, and impartial investigations; failed to hold officials accountable for deficient and incomplete investigations; and failed to take corrective action to address retaliation against whistleblowers.

The attorney stated that while the applicant's case may not be identical to this whistleblower's case, "there are many parallels." He alleged that after underperforming and being non-selected for promotion, the FJO "gained victim status" by filing her complaint. He also alleged that the command raised her OER marks because of her allegations.

The attorney stated that the applicant filed his own complaint because he "believed he was being unfairly targeted by a false allegation … based on a very harassing and demeaning encounter he had with [the FJO]." The applicant stated that the command climate survey was "replete" with comments about the command's maltreatment of the applicant as some had echoed his claim that he was the subject of a "witch hunt"; some had called it an "attack"; some had said the complaints were "mishandled"; and some had said that the applicant's and FJO's dislike had "spiraled out of control." The attorney alleged that the command climate investigation showed that nearly everyone in the command agreed that there was a disparity in the treatment of the applicant and the FJO.

The attorney argued that the command climate investigation is not irrelevant, as the Coast Guard claimed, because it showed the following:

- The FJO was a poor performer who had twice not been selected for promotion;
- After the FJO filed her complaint in March 2015, the command tried to help her by raising her OER marks, which shows that she had a motive to lie about the alleged sexual harassment; and

- The Page 7 dated October 26, 2015, which accused the applicant of filing a retaliatory civil rights complaint, showed the command's own willingness to retaliate and the lengths the command would go to to discharge the applicant.

In addition, the applicant argued that he could not have presented these issues to the ASB because the command climate investigation had not yet been completed when the ASB convened.

The attorney stated that the applicant "maintains his innocence" of the alleged violations of Article 89 and 107. He asked, "are the alleged offenses for which he was ultimately separated something that would cause one to completely disregard nearly 19 year of service? The answer is 'No.'" The applicant also claimed that because the command climate investigation had not yet been completed, the FRA had no insight into the "true toxicity" at the unit and so no reason to question the finding and recommendations in the PIO's report or the ASB.

The attorney stated that while he admitted to commenting on the applicant's attractiveness, she had "overreacted" and "taken things out of context." Moreover, he argued, because the FJO had "depart[ed] substantially from the required standards appropriate to that officer's rank or position," she had lost the protection of Article 89, in accordance with the "unprotected victim" defense in part IV-18 of the Manual for Courts-Martial. The attorney argued that the FJO had "wholly departed from the requisite standards of her rank" by being "overly friendly and personally advantageous," in that she "borrowed his tools, had him fix her car, socialized and consumed alcohol with him, used his Wi-Fi, had him pet sit her cats, asked him to run errands for her, etc." He argued that her conduct toward the applicant "bordered on fraternization, of which *she*—the superior officer—would be held the most responsible" and so lost the protections normally afforded a superior officer under Article 89. The attorney also claimed that the applicant's comments on March 1, 2014, had not been considered offensive by the FJO and she had agreed to let it "roll off" her shoulders.

Regarding the Article 107 charge, the attorney argued that just because Mr. W believes he heard a particular comment does not mean that the applicant absolutely said it. He noted that they were at a bar with a band playing music and had consumed alcohol. He noted that the PIO had not asked Mr. W how easy or hard it was to hear what the applicant was saying or how much alcohol he had consumed. The applicant claimed that what he actually said was that the married E-5s were about to transfer, that co-location of married couples was not guaranteed, and that "there was a concern they would not be able to move" to their desired local and "it was unfortunate the brand would have to break up." The attorney argued that with this context, it would be understandable if Mr. W had misinterpreted their conversation.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was not timely filed within three years of the applicant's discharge.[20] But the Board may excuse the untimeliness of an application if it is in the interest of justice to do so.[21] In *Allen v. Card*, 799 F. Supp. 158 (D.D.C. 1992), the court stated that the Board should not deny an application for untimeliness without "analyz[ing] both the reasons for the delay and the potential merits of the claim based on a cursory review"[22] to determine whether the interest of justice supports a waiver of the statute of limitations. The court noted that "the longer the delay has been and the weaker the reasons are for the delay, the more compelling the merits would need to be to justify a full review."[23] In this case the applicant was discharged in 2016 and applied to the Board just four years later in 2020. Moreover, the record shows that the Coast Guard did not timely respond to the FOIA request by which he gathered the evidence he has submitted to the Board. Therefore, the Board finds that it is in the interest of justice to excuse the untimeliness of the application and consider the case on the merits.

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.[24]

3. The applicant alleged that his General discharge without retired pay after almost 19 years of service was erroneous and unjust for several reasons. When considering allegations of error and injustice, the Board begins its analysis in every case by presuming that the disputed information in the applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.[25] 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."[26]

4. **October 2014 Investigation**: The applicant alleged that the October 2014 investigation was baseless and the start of a "witch hunt" by the command to discharge him. The record shows that the applicant was one of three members that LCDR L had reported being intoxicated at the golf tournament. Although the PIO found the possible charges to be unsubstantiated because he could not find witnesses who reported seeing the applicant overindulge in alcohol, a chief warrant officer did support LCDR L's claim that the applicant had appeared to be intoxicated. The Board finds no grounds for concluding that this investigation was the start of a "witch hunt" against him or an attempt to have him discharged.

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[20] 10 U.S.C. § 1552(b).
[21] 10 U.S.C. § 1552(b).
[22] *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).
[23] *Id*. at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).
[24] *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (finding that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).
[25] 33 C.F.R. § 52.24(b).
[26] *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

5. **FJO's Neighborly Interactions with the Applicant**: In early February 2014, the FJO was assigned to the applicant's unit and she rented a house with a garage that shared a common wall with the applicant's garage. Their driveways were side by side, but their front doors were around the corners, facing opposite from each other. The record shows that the FJO borrowed several things from the applicant as his new neighbor, including his trailer, charger, and Wifi. In addition, at some point during her first year at the unit, the applicant picked up a prescription medication for her at a local pharmacy when she was ill. The record also shows that because they lived in the same neighborhood, the FJO and the applicant occasionally attended the same Mardi Gras events and parties, but there is no evidence that they attended these events together or interacted as a romantic couple.

6. **March 1, 2014, Alcohol Incident**: The applicant alleged that on March 1, 2014, he told the FJO only that he and others found her attractive and that he did so in the context of a conversation about finding romantic partners in that area. The record shows, however, that the FJO reported his conduct to her supervisor shortly afterward and that the applicant was counseled about it informally based on the XO's recommendation. There is no evidence that the applicant disputed the FJO's account of their interaction at the time, and according to LCDR S's statement, the FJO's statement to the PIO about what the applicant had said to her that day was the same thing that she told her supervisors shortly after the incident in March 2014. The Board agrees with the PIO that the preponderance of the evidence shows that the applicant had been drinking alcohol at a party before he told the FJO that men she had been playing "washers" with at the party had said she was "hot" and that he himself was so sexually attracted to her, he did not know how to "balance that."

The applicant thereafter asked that the FJO be removed from his rating chain and she was, but he apparently received lower marks on his 2014 EER because of that incident. In addition, the record shows that the FJO had recently been removed from flight training, lacked experience for her assigned duties, and sometimes did not communicate well with the enlisted members. The record shows that their working relationship became very strained and somewhat "rebellious." Also, at some point, the applicant told his subordinates to ignore her instructions.

In June 2015, after reviewing the FJO's complaint and learning for the first time the details of the applicant's conduct on March 1, 2014, the CO documented it as an alcohol incident. The Board agrees with the PIO and the CO that the applicant's conduct on March 1, 2014, met the definition of an "alcohol incident"[27] because there is substantial evidence that he had drunk alcohol at the Mardi Gras party and his consumption of alcohol was a significant or causative factor in his inappropriate comments to her, which were disrespectful to her as a superior commissioned officer and discrediting to the Coast Guard. The Board finds that it is extremely unlikely that any chief petty officer would make such comments to a commissioned officer whom he had known for only about two weeks unless he was under the influence of alcohol. Therefore, the applicant has not shown that the Page 7 documenting this alcohol incident, dated June 8, 2015, is either erroneous

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[27] COMDTINST M1000.10 defines an "alcohol incident" as "[a]ny behavior, in which alcohol is determined, by the commanding officer, to be a significant or causative factor, that results in the member's loss of ability to perform assigned duties, brings discredit upon the Uniformed Services, or is a violation of the Uniform Code of Military Justice, Federal, State, or local laws. The member need not be found guilty at court-martial, in a civilian court, or be awarded non-judicial punishment for the behavior to be considered an alcohol incident."

or unjust. Because it was the applicant's second alcohol incident, policy required the CO to process him for separation.[28]

7. **February 27, 2015, Incident**: The record shows that on February 27, 2015, the applicant and a Senior Chief arrived at the applicant's house and saw the FJO charging her truck's battery with a jump pack. Before entering his house, the applicant offered to help her, and she declined. Then he brought out his battery charger and offered to help her again, and she declined a second time. At some point, when she did not respond to him, he asked her if she was ignoring him. Then he went into his house and asked the Senior Chief to come with him. By the time they returned to the driveways, the FJO was inside her own house. The applicant took the Senior Chief to her front door with him, and when the FJO opened the door, the applicant offered his help a third time. This third offer caused the FJO to get visibly upset, and she accused him of ruining her time at the unit with hostility and ruining her career. She also told him that she never wanted to borrow anything from him ever again and did not want him to offer to lend her anything ever again. The applicant later told the PIO that he had realized that she was irritated but thought that she was irritated about her truck battery, not him.

8. **May 5, 2015, PIO's Report and Notes of Mr. W's Interview**: The May 5, 2015, PIO's report contains at least one error. The applicant alleged that errors in the report prove that the PIO was biased against him and not impartial. The Board agrees with the applicant that there is an erroneous statement regarding how the interviews were conducted on the first page. In addition, there are differences in language between the PIO's notes of interviews and his findings, and it is not clear why the PIO referenced some of the exhibits for some of his findings. But the Board is not persuaded that the PIO was biased against the applicant. Moreover, the ASB and the FRA reviewed the entirety of the PIO's report, including the referenced exhibits, not just the PIO's findings. The record shows that the ASB and the FRA could and did review the PIO's exhibits and draw their own conclusions as they did not agree with the PIO on all points. The Board also notes that the applicant submitted incomplete copies of the PIO's report and of the ASB's report to the BCMR for review and specifically omitted statements by the lesbian E-5 and a female junior officer (not the FJO).

Regarding the erroneous statement in the PIO's report, on the first page, the PIO wrote that he had made notes of his interviews in the presence of the witnesses and either had already obtained their signatures verifying the accuracy of his notes or was awaiting receipt of their signatures. At the end of this sentence, the PIO referenced the exhibit numbers for all his interview notes, including the exhibit with his notes of Mr. W's interview. Therefore, the PIO's statement on the first page erroneously ignored the fact that the interview of Mr. W was telephonic. Also, about sixteen months later, Mr. W denied to the applicant's attorney that he had been asked to sign the PIO's notes of his interview, and so it is unclear if he was.[29] But the lack of Mr. W's signature on the PIO's notes does not cast significant doubt on their accuracy given his repeatedly professed

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[28] COMDTINST M1000.10, Article 2.B.8.

[29] The Board notes that according to the applicant's attorney, Mr. W originally denied having been interviewed at all but later admitted to having recently heard a recording of his interview with the PIO and then told her that he could not recall whether the recording showed that he knew he was talking to the PIO or knew that the call was being recorded but did not claim that only he and the E-5 spoke during the recording.

reluctance to be involved in the investigation and his subsequent conversations with the applicant's attorney and the private investigator, as explained below.

The applicant argued that the PIO's erroneous statement about how the interviews were conducted misled the ASB and the FRA about the reliability of the PIO's notes of Mr. W's interview. However, given the statement of the male E-5, which the E-5 signed and verified to be accurate, the Board is not persuaded that the ASB or the FRA was misled about the nature or reliability of Mr. W's interview. The PIO's interview notes clearly show that during the male E-5's in-person interview with the PIO which began at 1025 hours on March 16, 2015,

- the E-5 told the PIO that his friend Mr. W did not want to get involved in the investigation and told the PIO that, according to Mr. W, the applicant had said that he was going to ensure that the E-5 and his wife were transferred to separate units so that they would break up and the applicant could marry his wife;
- the PIO noted the E-5's interview ending at 1049 because at 1050 hours the E-5 called Mr. W on the PIO's behalf and asked Mr. W to answer two questions for the PIO;
- the two questions concerned whether the applicant had been intoxicated on the evening of February 16, 2015, and whether Mr. W had heard the applicant state that he was going to have the married E-5s transferred to different units so that he could break up their marriage and marry the female E-5, who was his subordinate;
- Mr. W agreed to answer those two questions for the PIO;
- when the PIO asked Mr. W the two questions, Mr. W did not confirm the applicant's intoxication at the bar but did confirm that he had heard the applicant say, regarding the married E-5s, "I'm gonna make sure that those two leave here this summer going to different units … I'm gonna make her my wife," or words to that effect; and
- Mr. W also told the PIO that he had heard the applicant say "positive" things about the female E-5 before, but on this evening, he "couldn't keep silent any longer and had to tell [his friend, the male E-5] about what [the applicant] had just said to him."

Although the applicant argued that the notes of Mr. W's statement should be considered unreliable, the applicant's own evidence, including his attorney's affidavit about what Mr. W told her sixteen months later and the transcript of the private investigator's interview with Mr. W, actually supports the PIO's finding that Mr. W heard the applicant state on February 16, 2015, that he was going to have the married E-5s transferred to different units so that he could marry the female E-5 himself. Mr. W told the applicant's attorney that he had heard a recording of his interview, and he did not deny the accuracy of the recording. Nor did he claim that the PIO had not spoken to him and did not ask him the two questions during the recording.

In addition, according to a transcript the applicant submitted, Mr. W indicated that the applicant had ruined his own career when he had spoken to Mr. W about the married E-5s that night, as he told the applicant's private investigator that

> all I did was tell a friend of mine what [the applicant] said about his wife in a bar one night. That's all I said. … So his livelihood is – is – is his own mouth. … Yeah, I'm just out of it because all I did

> was tell a friend of mine one night. He said something derogatory about his wife and I didn't even know who this guy was. But little did I know that he was in the coast guard with them … Yeah, I guess you could say they were interviewed by me [sic] because, uhm, my buddy [the male E-5] was in the Coast Guard, and – he called me from the coast guard station and asked me what he had said and I told him. – there could have been somebody else in the room listening. … And they got my statement so that's all there is to it.

Although the applicant complained that the PIO failed to ask Mr. W about whether there was loud music playing at the time, whether Mr. W was intoxicated, or how well he could hear the applicant in the bar on February 16, 2015, the Board notes that the applicant's attorney and private investigator both had opportunities to ask Mr. W these questions and apparently did not or did not include his answers in their documents for the BCMR. And the applicant himself could have raised these issues when he made his unsworn statement to the ASB, even though Mr. W apparently either declined to testify or was not asked to testify by the Recorder and the applicant's own attorney.

Therefore, the Board finds that the applicant has not proven by a preponderance of the evidence that the PIO, the ASB majority, or the FRA committed an error or injustice in finding that the preponderance of the evidence showed that at a bar on February 16, 2015, the applicant told Mr. W that he was going to ensure that the married E-5s were transferred to separate units that summer so that he could marry the female E-5 (after the E-5s broke up) even though the applicant did not actually have the authority to decide where they were next transferred.

9. **<u>Fourth PIO's Report and Page 7 Regarding Retaliation</u>**: The applicant alleged that the PIO's August 28, 2015, report and his CO erroneously concluded that his own July 2, 2015, complaint against the FJO about an alleged "hate incident" was retaliatory for her original civil rights complaint against him. The PIO's report shows that the applicant had made derogatory comments about the FJO, but no witness stated that the applicant had said that he was filing his complaint in retaliation for the FJO's complaint. The PIO noted, however, that "one can reasonably conclude that if [the applicant's complaint filed on 2 July 2015] is found to be unsubstantiated then the motive for this claim comes into question and becomes suspect, given the timing of when the claim was submitted and the circumstances that substantiated [the FJO's] initial civil rights claim." The CO apparently agreed with this reasoning because the applicant's complaint had not been substantiated, and the CO signed a Page 7 dated October 26, 2015, which counseled the applicant about having filed a retaliatory civil rights complaint. Although the applicant claimed that the Page 7 itself was reprisal and prohibited by the Coast Guard Civil Rights Manual, he failed to cite any chapter in that manual that prohibited the Page 7.

The applicant's complaint about a "hate incident" was unsubstantiated because the FJO's outburst on February 27, 2015, was not based on the applicant's gender but on his conduct. Therefore, and given that the alleged "hate incident" occurred on February 27, 2015, but the applicant waited until July 2, 2015—after he had been told by the command that he would be processed for separation based on his second alcohol incident, which was based on the FJO's statements to the PIO about the applicant's conduct on March 1, 2014—the Board finds that the applicant has not proven by a preponderance of the evidence that the PIO or the CO erred by concluding that the preponderance of the evidence showed that the applicant had filed his complaint on July 2, 2015, in retaliation for the FJO's original complaint. Therefore, the applicant has

not shown that the Page 7 dated October 26, 2015, was erroneous or unjust or that it should not have been in the applicant's record when it was reviewed by the ASB.

10. **Third Alcohol Incident**: The applicant alleged that the Page 7 dated December 2, 2015, which documents a third alcohol incident in his record (albeit the second chronologically) was retaliatory for his having filed an Article 138 complaint against his CO. The record indicates that in preparation for the ASB, the Coast Guard ran a criminal background check on the applicant and so discovered his arrest for DUI in 2010. The applicant has not shown that it is unusual or illegal for the Coast Guard to run criminal background checks on its members who are appearing before an ASB. Moreover, both Article 20.A.4.e.3.c.(1) of the Personnel Manual in effect in 2010 and Article 1.C.5.c.(3)(a) of the Drug and Alcohol Abuse Program Manual in effect in 2015 require that a DUI offense be documented as an alcohol incident. There is no time limitation on this requirement, and the member need not have been convicted of the offense.[30] Instead, the CO must be satisfied that the preponderance of the evidence shows that the member committed the offense. In this case, the CO had the detailed report of the sheriff's office about the arrest, and the applicant admitted that in lieu of conviction, he received probation. Therefore, the preponderance of the evidence shows that the applicant was properly arrested for DUI and but received probation in lieu of a conviction. Accordingly, the Board finds that the alcohol incident documented on a Page 7 dated December 2, 2015, was not retaliatory as it is both supported by a preponderance of the evidence and required by Coast Guard policy.

11. **Command Climate**: The Board agrees with the Coast Guard that the command climate is essentially irrelevant to the issues in this case. There is evidence that in October 2014, the command investigated LCDR L's allegations that three members, including the applicant, had become intoxicated at a golf tournament. And LCDR L was not the only attendee who thought that the applicant might have been under the influence at the tournament. A chief warrant officer also told the PIO that he had concluded at the tournament that the applicant had been drinking based on the applicant's attitude toward him during a conversation.

There is also evidence that the command promptly investigated the FJO's allegations of sexual harassment in March 2015 and of retaliation in July 2015. Preliminary investigations are required by Coast Guard policy, however, whenever someone is suspected of a felony or files a civil rights complaint about sexual harassment or retaliation.[31] Because the investigations were required under the circumstances, the Board finds no credible evidence that the applicant's chain of command was involved in a "witch hunt" or "attack" on the applicant. Instead, the record shows that the applicant's chain of command initiated investigations when the circumstances and policy required that they do so and then took reasonable actions based on the results of the investigations. Although the applicant complained about the MPO and the order to surrender his weapons for the duration of the MPO, he has not shown that those actions were unauthorized or unreasonable.

The statements gathered by subsequent investigations show that some members of the command interpreted these investigations as a "witch hunt" or an "attack" on the applicant. But neither the DEOMI surveys nor the command climate investigation in 2016 was focused on the

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[30] COMDTINST M1000.10, Article 1.A.2.d.(1).

[31] Manual for Courts Martial United States, 2012, Rule 303 of the Rules for Courts-Martial, part II-19; Military Justice Manual, Article 1.B.3.; Civil Rights Manual, COMDTINST M5350.4C, Chapter 2.C.1.d.7.

applicant or the FJO, and the vast majority of the statements submitted by the applicant are about other members and other unrelated issues. The applicant has not proven by a preponderance of the evidence that his discharge from the Coast Guard was a direct or indirect result of a toxic command climate or "witch hunt."

12. **FJO's Motivation**: The applicant pointed out that several members made derogatory comments about the FJO's performance, and he alleged that the FJO was motivated to file a false claim of sexual harassment because of her own poor performance. He also alleged that the command raised her OER marks because of her complaint. Although there is evidence that the FJO had not performed well and that the FJO blamed the applicant for her poor performance at that unit, the sexual harassment is not a case of "he said/she said." Other witnesses substantially confirmed the FJO's allegations about what the applicant did and said on March 1, 2014, and February 27, 2015. In addition, by the time the FJO filed her first complaint against the applicant in March 2015, she had already been non-selected for promotion twice and so by law would be discharged from active duty no later than June 30, 2015.[32]

13. **Alleged Bias of the PIO**: The Board finds that the applicant has not proven by a preponderance of the evidence that the PIO who investigated the FJO's original complaint (or any of the other PIOs) was biased against him. First, the Board notes that the applicant did not provide any reason why the PIO would have been biased against him. The applicant did not cite any previous interactions with that PIO that would have biased him against the applicant. Second, although the PIO's report contains an erroneous statement on the first page about Mr. W's interview having been in person, this error is revealed and corrected in the PIO's notes of his interviews with Mr. W and the male E-5, which clearly show that the interview with Mr. W was telephonic. Third, given Mr. W's reluctance to participate in the investigation, the PIO's failure to follow guidance, for example, by allowing the E-5 to initiate and be present during the telephone call, by not starting the interview with open-ended questions, and by asking Mr. W to corroborate what the E-5[33] had said about what happened on February 16, 2015, is not evidence of bias against the applicant. Instead, it is evidence of the PIO's decision to accommodate a reluctant civilian witness who had already stated that he did not want to become involved in military affairs.

14. **Violation of Article 107, UCMJ, False Official Statement**: The Board finds that the applicant has not proven by a preponderance of the evidence that the ASB majority or the FRA erred in finding by a preponderance of the evidence that the applicant had made a false official statement to the PIO when he denied having told a civilian, Mr. W, at a bar on February 16, 2015, that he intended to ensure that the two married E-5s were transferred to different units that summer, instead of being co-located, so that they would break up and he could marry the female E-5. To make a false official statement, the applicant must have made an official statement or signed an official document knowing it to be false with the intent to deceive.[34] Any statement made in the

[32] 14 U.S.C. § 2142.

[33] The Board notes that the applicant's claim that the E-5 was motivated to collude with the PIO and to lie about what the applicant had told Mr. W is not supported by any evidence in the record. The command did not have the authority to determine the locations of the married E-5s' next billets, and there is no evidence that the command was contemplating recommending to Headquarters that the married E-5s be separated.

[34] 10 U.S.C. § 907; MANUAL FOR COURTS-MARTIAL UNITED STATES, 2012, part IV, para. 31, page IV-46.

line of duty is an "official statement" for the purposes of Article 107.[35] For the ASB to conclude that the applicant's denial constituted a false official statement, the ASB had to find that the preponderance of the evidence showed that the applicant made the alleged statement about the E-5s to Mr. W and that the applicant knowingly falsely denied to the PIO that he had made the statement to Mr. W with the intent to deceive the PIO.

While the evidence is not as strong as it could be, the Board finds that the CO and the ASB reasonably concluded that the preponderance of the evidence showed that the elements of an Article 107 violation had been met. As explained in finding 8 above, the applicant has not proven by a preponderance of the evidence that Mr. W misheard what the applicant said in the bar that night or that Mr. W lied when he told the E-5 and later the PIO what the applicant had said. Instead, the preponderance of the evidence shows that the applicant actually made the alleged statement about separating the married E-5s and marrying the female E-5 to Mr. W, although the applicant denied it when confronted by the E-5 two days later. In addition, the record shows that even after being officially warned by the PIO that he was suspected of having made a false official statement by denying having made the comment to Mr. W, the applicant again falsely denied having made the comment.

According to the ASB and FRA, they also relied on other statements in the record indicating that the applicant had made other inappropriate comments about this married female E-5. The applicant complained that there is no other evidence of inappropriate comments about this female E-5, and it is not clear what statements the ASB and the FRA are referring to. However, Mr. W told the PIO that the applicant had previously made "positive" comments about the female E-5 and that after hearing the comment about separating her from her husband, he "couldn't keep silent any longer" and had to tell his friend, the male E-5. In addition, the applicant did not submit some of the witness statements in the PIO's and ASB's reports, particularly those of the lesbian E-5 and another female junior officer.

During the ASB, the applicant opted to make an unsworn statement to that board. He knew the contents of the PIO's notes and could have told the ASB about any circumstances that might have made Mr. W mishear what the applicant had said. The ASB had the opportunity to listen to the applicant's claims about the alleged false official statement and assess their veracity. Therefore, the BCMR is not persuaded that the ASB majority or the FRA were misled about the nature and reliability of the evidence when they decided that the preponderance of the evidence showed that the applicant had violated Article 107, UCMJ.

15. **Violation of Article 89, UCMJ, Disrespect of a Superior Commissioned Officer**: The applicant alleged that he did not disrespect the FJO on March 1, 2014, as the PIO, his CO, the ASB, and the FRA had found. Initially, he admitted that he had told her that she was attractive but did not admit to telling her that he found her so sexually attractive that he did not know how he was going to "balance that," or cope in the workplace. Nor did he admit to having stared at her breasts. The PIO found that the preponderance of the evidence showed that the applicant violated Article 89 four times by referring to both the FJO and another female junior officer as "stupid" and, on March 1, 2014, by staring at the FJO's breasts and telling her that he was so sexually attracted to her that he did not know how he was going to "balance that." The PIO

[35] *Id.*

noted that when asked about the alleged inappropriate comment, and the applicant had offered that he had been drinking alcohol. In addition, the FJO had reported his inappropriate comments on March 1, 2014, to her supervisor a couple of days later, and her superiors did not claim that the applicant had contested her version of his comments when they determined to have the FJO counsel him and then "put it behind her." The detail in the FJO's statement about what the applicant said to her on March 1, 2014, and her reply lends significant credibility to her claim, and so the Board finds that the PIO, the CO, the ASB, and the FRA did not commit error or injustice in finding that the applicant had violated Article 89 by a preponderance of the evidence.

In his response to the advisory opinion, the applicant claimed that the FJO had forfeited the protections of Article 89 by fraternizing with him. He argued the "special defense" under Article 89 applies and so the FJO was an "unprotected victim" because her borrowing his things, socializing with him, and having him pick up her medicine at a pharmacy show that her conduct toward him "under all the circumstances departs substantially from the required standards appropriate to that officer's rank or position under similar circumstances."[36] Therefore, he argued, the FJO had forfeited the protection of and entitlement to respect under Article 89, and he could not be guilty of disrespecting her.

The record shows that after moving into the adjacent house in mid February 2014, the FJO borrowed some of the applicant's things and his Wi-Fi, had him pick up a prescription for her at a local pharmacy when she was sick, and attended Mardi Gras block parties that the applicant had told her about. Except for the Mardi Gras parties, there is no evidence of when these things occurred, and no evidence that they all occurred during her first two weeks at the unit, before the March 1, 2014, incident. There is evidence that she attended a neighborhood Mardi Gras party the day of the March 1, 2014, incident, but no evidence that they attended that party together as a couple or that her behavior at the party was overly familiar with the applicant or constituted fraternization. In fact, the record shows that she neither arrived nor left that party with the applicant. Therefore, the Board finds that the "special defense" of "unprotected victim" against an Article 89 charge does not apply in this case.

Even if all of the alleged borrowings and the prescription pick-up had occurred in the two weeks before March 1, 2014, the Board is not persuaded that they would meet the standard for this special defense, which requires that the FJO's behavior "under all the circumstances departs substantially from the required standards appropriate to that officer's rank or position under similar circumstances."[37] They were essentially neighborly interactions, with no romantic overtones. They would have been inappropriate if the applicant did not encourage them or if they had occurred in significant numbers even if he did encourage them. But the applicant's conduct on February 27, 2015, when he repeatedly offered to lend her his battery charger and refused to take her "no" for an answer until the FJO got extremely angry in the presence of the Senior Chief, shows that the applicant would persistently offer to lend her things. In light of his behavior on February 27, 2015, the Board cannot conclude that the FJO necessarily initiated any of the instances of her borrowing and his helping her. The Board cannot conclude that the "special defense" of "unprotected victim" applies here, especially because there is no evidence that the FJO was overly

[36] Manual for Courts-Martial United States, 2012, part IV, para. 13.C.(5), part IV-18.
[37] Manual for Courts-Martial United States, 2012, part IV, para. 13.C.(5), part IV-18.

familiar with the applicant before the incident on March 1, 2014, or that she ever said anything sexual or romantic to the applicant.

16. **Alcohol Abuse as Basis for Separation**: Although the FRA opted to discharge the applicant for his two commissions of a serious offense, the ASB and the FRA also found that the applicant could be discharged for alcohol abuse. The applicant argued that this conclusion was erroneous and unjust because

- the ASB's report did not state that alcohol was a significant or causative factor in his conduct toward the FJO on March 1, 2014;
- the XO had not given him an "alcohol incident" at the time;
- the applicant was unjustly awarded an alcohol incident in 2015 for his DUI arrest in 2010 in retaliation for his Article 138 complaint; and
- an alcohol incident resulting in a violation of the UCMJ may contribute to a misconduct basis for separation but does not amount to "alcohol abuse" or a substance use disorder and he was never diagnosed with "alcohol abuse" by a medical professional.

The applicant's CO—not the XO or the ASB—was responsible for determining whether the applicant had incurred an alcohol incident on March 1, 2014, and for ensuring proper documentation of it on a Page 7 in his record.[38] As explained in finding 6 above, the evidence gathered by the PIO shows that the CO reasonably determined based on a preponderance of the evidence that the applicant's consumption of alcohol at the Mardi Gras party on March 1, 2014, had been a "significant or causative factor" in his decision to tell the FJO that he was very sexually attracted to her and did not know how to "balance that." Nothing in the ASB Manual, COMDTINST M1910.1, required the ASB to second-guess or make separate determinations about the applicant's alcohol incidents. Moreover, although the ASB did not repeat in its report the CO's determination that the applicant's consumption of alcohol had been a "significant or causative factor" in his behavior toward the FJO on March 1, 2014, the ASB did note that the applicant was contesting "the factual basis of alcohol being a causative factor" for the incident but that multiple witnesses, including the applicant's own witnesses, had affirmed that he had consumed alcohol at the party on March 1, 2014, before making the inappropriate and disrespectful statements to the FJO. The applicant has not shown that the CO's Page 7 documenting this alcohol incident in his record is erroneous or unjust or that the ASB's reliance on it was erroneous or unjust.

As noted above, the determination of whether a member has incurred an alcohol incident is the CO's to make, not the XO's.[39] Therefore, the fact that in 2014, the XO tried to resolve the matter by having the FJO counsel the applicant about his conduct on March 1, 2014, did not make the CO's determination, after reading the PIO's report in 2015, that the applicant had incurred an alcohol incident on March 1, 2014, erroneous or unjust.

Also, as explained in finding 10 above, the December 2, 2015, Page 7 documenting the applicant's 2010 DUI as an alcohol incident was not retaliatory nor erroneous nor unjust because

[38] COMDTINST M1000.10, Article 2.B.7.
[39] *Id.*

it was required by both the Personnel Manual in effect in 2010, COMDTINST M1000.6A, and the 2015 Drug and Alcohol Abuse Program Manual, COMDTINST M1000.10.

Finally, the applicant claimed that the Coast Guard policy regarding the term "alcohol abuse" had recently changed, and he submitted a copy of ALCOAST 146/14, which announced that members' medical diagnoses and treatment plans related to alcohol would be documented separately in the member's medical record and should no longer be entered in the member's personnel record. None of the Page 7s in the applicant's record state that he had been diagnosed with or treated for alcohol abuse. Instead, they include required comments stating that he had been counseled about the Coast Guard's alcohol use and abuse policies as required by the Drug and Alcohol Abuse Program Manual, COMDTINST M1000.10. The Page 7 documenting the applicant's first alcohol incident does state that his use of alcohol on December 8, 2000, "may have been abusive" but that is not a diagnosis and it predated ALCOAST 146/14 by more than thirteen years.

Article 1.A.2.b. of COMDTINST M1000.10 states that "alcohol abuse" is used as both "[a] general term for the misuse of alcohol which interferes with the user's health, safety, job performance, family life, or other required social adaptation" and "a medical diagnosis made by a physician, physician assistant, clinical psychologist, or a DoD or civilian equivalent Counseling and Assistance Center (CAAC) counselor…" Article 2.B.8. of COMDTINST M1000.10 states that members involved in a second alcohol incident are normally processed for separation under Article 1.B.15. of the Military Separations Manual, COMDTINST M10004, and Article 2.B.9. of COMDTINST M1000.10 states that members involved in a third alcohol incident "shall be" processed for separation under Article 1.B.15 of the COMDTINST M1000.4. Correspondingly, Article 1.B.15. of the COMDTINST M1000.4 authorizes discharges due to "alcohol abuse" and refers the reader to Article 2.B. of COMDTINST M1000.10, which requires separation processing for members who have incurred two or three alcohol incidents and does *not* require separation processing for members with a medical diagnosis of "alcohol abuse." Therefore, the Board disagrees with the applicant's claim that an alcohol incident involving a violation of the UCMJ could not provide a basis for a discharge for "alcohol abuse" under Article 1.B.15. of COMDTINST M1000.4. The term "alcohol abuse" as it appeared in the ASB record did not refer to a medical diagnosis but to the applicant's three alcohol incidents, to the required counseling on Coast Guard alcohol use and abuse policies, and to the clear authorization to discharge members for "alcohol abuse" following two or three alcohol incidents under COMDTINST M1000.4 and COMDTINST M1000.10.

The applicant has not proven by a preponderance of the evidence that the ASB or the FRA erred by finding that alcohol abuse was a proper basis for discharging the applicant in accordance with COMDTINST M1000.10 and COMDTINST M1000.4 and based on the alcohol incidents in the applicant's record,.

17. **Offensive Work Environment**: The applicant argued that the PIO, the ASB, and the FRA erroneously found that he had created an "offensive work environment" for three female members of his unit. The applicant was not discharged for creating an offensive work environment, but both the ASB and FRA found that he had done so, and in his affidavit to the BCMR, the FRA stated that even if he had determined that the applicant had not violated Article 107, UCMJ,

he would still have discharged the applicant, instead of allowing him to remain on active duty and retire with 20 years of service, because the applicant had created an offensive environment for three female workers, engaged in retaliation, and failed to learn from verbal counseling after the March 1, 2014, incident, which was designed to correct his harassing behavior. Because the FRA stated that the applicant's creation of an "offensive work environment" for three female members was one of three reasons why he would have denied the applicant the opportunity to remain on duty until he could retire even if the FRA had found that the applicant had not violated Article 107, UCMJ, the Board will address the applicant's complaint in this regard.

Creating an "offensive work environment" is one type of sexual harassment prohibited by the Coast Guard, and the harasser may be a coworker as well as a superior.[40] "To meet the definition of a hostile environment, the harassment must be so severe and pervasive that a reasonable person would view the environment as hostile, offensive, or abusive."[41] Sexual harassment may be overt or subtle.[42] One type of sexual harassment is "seductive behavior," which includes "any unwanted, inappropriate, and offensive sexual advance. Unwelcome, persistent requests for dinner, drinks, or dates, repeated unwanted sexual invitations, letters, phone calls, or other invitations, even though the respondent says 'no,' are examples of seductive behavior."[43] Another type is "gender harassment," which "consists of sexist statements and behaviors that convey insulting or degrading attitudes relating to sex or gender. Obscene jokes, offensive graffiti or photographs, or insulting remarks or humor about sex, sexual orientation, or gender are examples of gender harassment."[44]

The evidence that the applicant submitted shows the following:

- On March 1, 2014, after knowing his new supervisor, the FJO, for just a couple of weeks, he told her that he was so sexually attracted to her and he did not know how he was going to "balance that."
- The FJO reported that after she had counseled the applicant about his inappropriate conduct on March 1, 2014, he became increasingly difficult, disrespectful, unresponsive, and non-compliant in the office, even though she was his supervisor.
- Many members reported that the working relationship between the applicant and the FJO became noticeably "strained."
- An Ensign told the PIO that the working relationship between the applicant and the FJO had been "borderline rebellious, tough to work with, unprofessional" and attributed it to what the applicant had told the FJO on March 1, 2014. The Ensign verified the accuracy of the PIO's notes with her signature.
- At some point, the applicant told their subordinates to ignore the FJO's instructions, and in September 2014, he requested her removal from his rating chain.

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[40] COMDTINST M5350.4C, Chapter 2.C.2.b.

[41] *Id.*

[42] *Id.* at Chap. 2.C.2.d.

[43] *Id.*

[44] *Id.*

- The FJO reported incidents that showed why she felt that the applicant was spying on her. The applicant may well have heard her truck leaving in the middle of the night, as he alleged, but given the photographs in the record showing the layout of the duplex house in which each of them lived, his explanation of how he happened to see her cat in the window and accidentally saw the FJO laying on her couch, as well, is not credible.
- LCDR S told the PIO that the applicant had had similar issues with another female junior officer, and both the PIO and the Recorder for the ASB submitted statements from this other female junior officer, which the applicant did not submit to the BCMR.
- The married female E-5 had told the command that she would no longer work alone with the applicant because of comments he had made about her to her husband's friend, Mr. W.
- A lesbian E-5 had told the PIO (although the applicant did not submit her statements to the BCMR) that she "dreaded" having to work with the applicant because he would make comments to her about either her sexual preference or the attractiveness of other women.
- The applicant had called the FJO and another female junior officer "stupid" and had criticized the applicant in front of his subordinates.

In light of this evidence and given that the statements of the lesbian E-5 and the other female lieutenant junior grade that were included in the PIO's report and in the record before the ASB were omitted from the copies of those reports that the applicant submitted to the BCMR, the Board cannot conclude that the PIO, the ASB, or the FRA erred in finding by a preponderance of the evidence that the applicant had created an "offensive work environment" for three female members of his unit.

18. **FRA's Final Action: General Discharge Without Retirement**: The applicant argued that the format for an ASB report allows the ASB to make only one recommendation each regarding the character of discharge and retirement; that the ASB filled in those slots to recommend an Honorable discharge and retirement; that the required format prohibits an ASB from making alternative recommendations, as the ASB did in this case; and that the FRA erred by ignoring those first recommendations and relying on the ASB's detailed written explanations and alternative recommendations. Therefore, the applicant argued, the FRA was required to ignore the ASB's detailed "equivocating" explanations and alternative recommendations regarding retirement and his character of discharge based on whether the FRA agreed with the majority or minority regarding the UCMJ violations and grounds for separation.

The format for the ASB report appears as Appendix 7-1 in the ASB Manual, COMDTINST M1910.1. This format is referenced in Article 7.B.6. of COMDTINST M1910.1, "Completing the Board Report," which states "See Appendix 7-1 for a sample board report for an administrative separation board." Therefore, the format used by the ASB was based on a "sample" provided in the manual and nothing in the ASB Manual prohibits the ASB from adapting the sample to the needs of the ASB. Nor does any article in the ASB Manual prohibit the ASB from providing detailed alternative recommendations to the FRA depending on which of the ASB's findings the FRA agreed with. Moreover, the ASB Manual expressly authorizes ASB members to issue minority reports with alternative findings.

Based on the findings above, the Board further finds that the applicant has not shown that the FRA erred or committed an injustice in concurring with the ASB majority's written recommendation that the applicant should receive a General discharge without retirement because of his false official statement, disrespect of a superior commissioned officer, repeated alcohol incidents, and frequent inappropriate and harassing conduct with female members, despite his nearly 19 years of service. The applicant has not proven by a preponderance of the evidence that the FRA's decision was based on fraudulent or unreliable evidence or a misunderstanding of the ASB's report, or that it was the product of a toxic command climate, a "witch hunt," or bias on the part of the PIO.

Accordingly, the applicant has not proven by a preponderance of the evidence that his General discharge for misconduct without retirement in September 2016 was erroneous or unjust.

19. **Other Allegations and Arguments**: The applicant made numerous allegations and arguments with respect to the actions and attitudes of various officers involved in his discharge. For example, he made allegations about Privacy Act and FOIA violations and the command's imposition of an MPO and orders to surrender his weapons and abstain from alcohol. Those allegations and arguments not addressed above are considered to be not dispositive of the issue of whether the applicant's record should be corrected to reflect retirement with an Honorable character of service.[45] In particular, the legal remedies for violations of the Privacy Act and FOIA do not include awards of constructive service and retired pay.

20. **Education Benefits**: The applicant also asked the Board to correct his record to show that he transferred his education benefits to his dependent before he was discharged from active duty. He alleged that he did not have sufficient time to make the transfer before he was discharged. However, a member may transfer his education benefits to a dependent with only a few keystrokes in the Coast Guard's Direct Access database, and the applicant knew he was being processed for separation for approximately 13 months before he was discharged in September 2016. He also knew that the FRA had actually directed his separation a full month before his discharge. Therefore, the Board finds that the applicant has not proven by a preponderance of the evidence that his failure to transfer his education benefits to his dependent before his separation from active duty was erroneous or unjust.

21. **Reconsideration:** The Board notes that the record is not complete. In particular, witness statements are missing from both the PIO's report and the ASB's report. Under the BCMR statute, 10 U.S.C. § 1552, an applicant is entitled to reconsideration if he or she submits new evidence.

In addition, the Board notes, the applicant has not requested clemency.

22. Accordingly, the applicant's requests for relief should be denied but in accordance with 10 U.S.C. § 1552, reconsideration will be granted if the applicant submits new evidence.

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[45] 33 C.F.R. § 52.24(b); *see Frizelle v. Slater*, 111 F.3d 172, 177 (D.C. Cir. 1997) (noting that the Board need not address arguments that "appear frivolous on their face and could [not] affect the Board's ultimate disposition").

ORDER

The application of former MSTC [redacted] USCG, for correction of his military record is denied.

April 15, 2022

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