

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2022-067


Commander (Retired)

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on August 4, 2022, and assigned the case to the staff attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision dated May 31, 2024, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT’S REQUEST

The applicant is a former Commander (CDR/O-5) in the Coast Guard, who had been selected for promotion to Captain (CAPT/O-6) but was removed from the promotion list and retired as a Lieutenant (LT/O-3) on July 31, 2021, with a General—Under Honorable Conditions¹ character of service for “Unacceptable Conduct.” He asked the Board to correct his record by—

- Changing his rank/grade to CAPT/O-6 or, at a minimum, to CDR/O-5;
- Upgrading his discharge characterization from General to Honorable;
- Awarding him back pay and allowances retroactive to his retirement date and reduction to LT
- Correcting Blocks 25, 26, and 28 on his DD-214 as follows:
 - Block 25: Separation Authority as Article 1.C of COMDTINST M1000.1
 - Block 26: Separation Code applicable for “Sufficient Service for Retirement”
 - Block 28: Sufficient Service for Retirement

¹ There are five types of discharge: three administrative and two punitive. The three administrative discharges are honorable, general—under honorable conditions, and under other than honorable (OTH) conditions. The two punitive discharges—bad conduct and dishonorable—may be awarded only as part of the sentence of a conviction by a special or general court-martial.

- Removing all adverse information from his official military record, including a CG-3307 (“Page 7”) dated October 25, 2019.

A summary of the applicant’s allegations is provided below the Summary of the Record.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on August 10, 1993, and served on active duty for five years before attending Officer Candidate School. On December 18, 1998, the applicant was commissioned an Ensign.

On June 18, 2000, the applicant was promoted to Lieutenant Junior Grade (LTJG).

On December 18, 2002, the applicant was promoted to Lieutenant (LT).

In December 2004, the applicant married his now ex-wife who is the mother of his two daughters, who were born in 2006 and 2011 and were at the center of the allegations made against the applicant.

Youngest Daughter’s Fall & Subsequent Investigations

On December 1, 2011, the applicant’s nine month old daughter received injuries to her head due to a fall down the stairs while under the applicant’s care. She was taken to the emergency room where she was later airlifted to a nearby university hospital. As a result of the fall, an investigation was opened by the State’s Department of Children and Family Services (DCF).

On or about December 5, 2011, DCF interviewed the applicant regarding his daughter’s injuries. The relevant portions of DCF’s interview are recorded below:

He reported that he claims responsibility for allowing himself to get into that position and when [ex-wife] would not move, he spit in her face at which point she moved and he left. Father wept as he admitted this to this worker.² Father also reported that he was willing to accept whatever consequences that may follow for that incident that he has admitted to this worker. Father admitted that the arguments with his wife have been getting worse.

...

Father described further how when mother has been in some angry rages, she has said she is going to divorce him. Father reported also how mother has threatened to call his boss on him about various things. Father reported that this has all taken its toll on him.

...

² This is the spitting incident later referenced in the Highest Grade Held (HGH) determination board and relied upon by the HGH in its determination that the applicant did not serve honorably as a Lieutenant Commander (LCDR). The full incident is not recorded here because the complete transcript of DCF’s interview with the applicant was not provided. The document starts at Page 15 out of 30.

Investigator [redacted] then began inquiring with father about what [injured infant] had been wearing at the time of the accident. Father reported it was a “onesy.” Father reviewed how he cared for and then dressed [injured infant] after her bath. He acknowledged that sometimes they put lotion on the child but he denied doing so last night. Father then described [injured infant] as very “wiggly” and commonly arching her back when she’s being carried.

During this questioning, there began to be long periods of silence between father’s responses. At one point he broke down crying profusely and stating “I’m such a bad dad” a few times. Father was asked why he’s a bad dad? After some further silence he stated “It doesn’t matter cause my marriage is ruined.” Father then began shaking his head side to side and while sobbing stated “no, that’s not how it happened.” He was given the opportunity to speak further and proceeded to report that he never dropped [injured infant], but rather she must have crawled past him while he was giving [oldest daughter] her bath. Father continued to cry dramatically as he told us how he did not know until he heard [injured infant] crying and the crying was not coming from her room where he had left her. Father reported that he did not hear any fall down any stairs, but he found her screaming at the bottom of the staircase.

Father proceeded to explain how angry he was at himself for allowing that to happen, and also for initially lying about the way she fell.

Father’s emotions calmed. When asked for clarification on what father was reporting, due to distortion regarding his crying at the time, he explained again that he was tending to [oldest daughter] in the tub and ran out of the bathroom when he heard her crying. He realized she was not in the room he had left her and found her crying at the bottom of the stairs. Father reported that all of the rest of the story is true.

Father explained that he does not understand how it happened. He reported that as he bathed [oldest daughter], he checked on [injured infant] twice and found her content in the room. Father denied that this has ever happened before. Father reported that he knew [injured infant] was mobile and he should have put her in her playpen or put up the baby gate.

Upon further discussion regarding the incident, family dynamics, and why father lied initially, he reported that he made up the first story due to his inability to talk with mother and he would not have been able to tell her what really happened. Father further reported that mother would have seen what really happened, as more irresponsibility on his behalf.

Father was extremely apologetic for having lied. He broke down at times regarding the fact that he is a professor at the Coast Guard for Morals and Ethics and he behaved in such a way. Father apologized to [local police department] for having given false statement last night as well.^[3]

...

On December 5, 2011, DCF investigators interviewed the doctor caring for the applicant’s injured daughter, Dr. A. Dr. A reported the following:

Dr. [A] reported that the skeletal exam on [injured infant] was negative. She reported that the first MRI was a “quick pic.” She reported still that this showed that the subdural blood was the same age and therefore there is no old bleed as previously thought. Dr. [A] reported that she is asking for a second “real” MRI today. She explained that on Friday, the ophthalmology exam showed retinal hemorrhages that are not as extensive as seen with shaken-baby-syndrome but more than they would expect from a fall. She explained that these midrange symptoms can be consistent with abuse or accidental fall. This worker asked about any marks on

³ According to a later CGIS report, in a recorded 911 call on the night of the injury, the applicant had repeatedly stated that the infant had fallen from his hands and down the stairs.

the child, which Dr. [A] confirmed that the chart had indicated [injured infant] did present initially with marks on her forehead and side of the head; and were described as red mark abrasions.

This worker inquired about Dr. [A] assessment of the family dynamics. She described such as “scary toxic” and explained that mother appears so anxious to capitalize on any reason to suspect the teenage son of something. She explained that when the ophthalmology report showed the hemorrhaging on Friday, mother seemed “excited” that this was consistent with it being shaken baby syndrome.

Dr. [A] reported that two things standing out for her are the story change for father, and the toxic relationship, however the latter makes one understand the initial lie.

Dr. [A] reported that it appears MGPs [maternal grandparents] are against father as well.

This worker reviewed in detail the significant aspects of father, [oldest daughter] and [applicant’s son] interviews.

Dr. [A] reported that the baby looks great and she’s at the verge of accepting the story of the fall at this point based on all the information she’s heard. The last step is the full MRI that is to occur this afternoon.

12/5/11 TC FROM SW [social worker] [S] AT [university hospital]

She reported that they are looking at possible discharge tomorrow afternoon. She further reported that in polling staff, this is not documented, but staff do not have a good impression of mother. Mother was described as always on the phone and not responding to [injured infant] when the baby reaches for her. Mother was assessed to be more interested in her phone calls than tending to her baby. Staff noted that both father and [applicant’s son] responded appropriately when [injured infant] reached out to them and staff had no concerns. MGM [maternal grandmother] had also expressed her concern to staff about the baby being discharged home due to concern for father and the fact that he is not telling the whole story. SW [S] reported that some of this information is in the residents’ notes dated 12/4/11.

On December 6, 2011, Coast Guard Investigative Services (CGIS) initiated an investigation into allegations made by the applicant’s ex-wife that the applicant had made false statements to authorities regarding injuries to his infant daughter.

On December 13, 2011, CGIS investigators interviewed the applicant’s wife at the time (“ex-wife”), about the night of her daughter’s injuries. The ex-wife explained that on the night of the accident she received a call from her step-son and was told that her youngest daughter had slipped and fallen, and when she asked him questions about what had happened, he acted defensive and irritated. The ex-wife told investigators that she had felt there were problems with the applicant’s description of events from the beginning. According to the ex-wife, doctors had explained to her that there was evidence of a previous brain hemorrhage, which they believed was indicative of abuse. The ex-wife stated that her daughter had to be flown to a university hospital and that on her drive there with the applicant he began to act in a manner that she characterized as “overly theatrical.” The ex-wife claimed that after arriving at the hospital they were questioned by a resident doctor about what happened when the applicant refused to answer the doctor’s questions and later complained to the doctor’s supervisor about the questioning. The ex-wife told investigators that she did not believe the applicant’s account of events and believed that the step-son was somehow involved and the applicant was just covering for him. However, the ex-wife noted that investigators told her the step-son had been cleared of any involvement. Similarly, the ex-wife told investigators the initial diagnosis indicating a prior hemorrhage on the brain was determined to be a misdiagnosis. The ex-wife alleged that on December 3, 2011, her oldest

daughter asked her why the applicant had lied about what happened to the youngest daughter and told her that the applicant had not been watching the youngest daughter prior to her fall. The ex-wife then went on to tell investigators that on December 4, 2011, the applicant had admitted to her that he had lied to police about the incident and that he had actually been bathing their oldest daughter when the youngest daughter fell down the stairs. The ex-wife stated that the applicant told her he had lied because he was scared she would be mad at him if she knew what actually happened.

Divorce

On December 23, 2011, the applicant's ex-wife filed for divorce from the applicant. The divorce was finalized in February 2013. The custody disputes between the applicant and his ex-wife that followed the divorce were contentious, with the ex-wife wanting sole custody of the children and the ability to move the children out of state. The local police department was called out to the applicant's home on several occasions by the applicant's ex-wife or her parents due to her and the applicant arguing.

Investigation into False Official Statements

On February 24, 2012, two CGIS investigators S/As attempted to interview the applicant regarding the statements he had made on the night of his daughter's fall. The applicant was told he was suspected of having made a false official statement and provided his Uniform Code of Military Justice (UCMJ) Article 31(b), Miranda/Tempia rights. The applicant was told that he had the right to have an attorney present prior to and during any questioning. The applicant acknowledged his rights, both verbally and in writing, but declined to be interviewed without the benefit of counsel. Upon the applicant's declination, CGIS investigators terminated the interview.

On April 5, 2012, CGIS investigators received and reviewed DCF's "Notification of Investigation Results" dated January 18, 2012. The report detailed findings in connection with allegations of neglect by the applicant with regard to the injuries his nine month old daughter had sustained on December 1, 2011. The report concluded that DCF had substantiated allegations of physical neglect by the applicant.

Between May 9, 2012, and May 14, 2012, the applicant's ex-wife provided to CGIS all available medical records related to the infant daughter's December 1, 2011, injuries.

On May 20, 2012, the ex-wife's mother ("maternal grandmother or MGM") wrote a 5-1/2 page letter to Coast Guard Rear Admiral (RADM) S, wherein she accused the applicant of domestic abuse, using threats and intimidation on his oldest daughter's therapist, using his Coast Guard position to threaten and intimidate his ex-wife, abandoning his injured infant daughter while she was still in the hospital, lying to investigators, and physically abusing his children. The MGM also spoke poorly of the applicant's son, still a juvenile at the time, and alleged that he had engaged in sexual misconduct while at school and that the applicant had rewarded him instead of punishing him. The MGM told RADM S that doctors from both hospitals were adamant that her granddaughter's bleeding from behind the eyes was consistent with shaken baby syndrome. According to the MGM, her granddaughter's treating physicians told her that her granddaughter

had suffered extensive bleeding in the brain and that it could only have been caused by blunt force trauma to the head. The MGM accused local police officers of closing the case into her granddaughter's injuries and not investigating it thoroughly because they were acquaintances of the applicant's. The MGM alleged that had the applicant and his son been interrogated by professionals, the outcome of the case would have been different. The MGM alleged to RADM S that the applicant had never cared about his daughters until after her daughter filed for divorce, was intentionally depriving her daughter of financial help, and had vowed to leave her daughter destitute and homeless. The MGM told RADM S that the applicant would succeed in gaining custody of the children if he went unchecked by the Coast Guard. Finally, the MGM told RADM S that the applicant was forcing her daughter to remain in his home state, with their daughters, instead of allowing her daughter to move out of state with the MGM and the maternal grandfather (MGF) where they would all be safe and supported. The MGM essentially pleaded with RADM S to force the applicant to allow her daughter and the applicant's daughters to leave his home state and move to the MGM's home state. The MGM ended her letter with the following:

I am ever hopeful that the USCG will do the right thing. The Coast Guard has a moral obligation to protect this family; to ensure their safety. If the baby has just one more head injury it will be all over. My daughter, her children, my grandchildren deserve to be protected from [applicant] and [applicant's son]. [Applicant] and [applicant's son] both exhibit classic sociopathic behaviors. I have observed this family dynamic, waiting and believing the systems would work. I am now going to take a more aggressive role as a parent and grandparent to ensure that my daughter and my granddaughters are kept safe. I am giving the Coast Guard every opportunity to take responsibility and take action.

On June 8, 2012, allegations of abuse were made to DCF by a Coast Guard Family Advocate Specialist in response to the MGM's letter to RADM S.

On July 13, 2012, a CGIS agent completed a review of the 911 call placed by the applicant, wherein the applicant repeatedly stated that his infant daughter had fallen from his hands and down the stairs.

On July 18, 2012, investigators interviewed Commander (CDR) P, who stated that she was contacted by the applicant on the night his infant sustained injuries and the applicant told her that the injuries were the result of him having dropped his infant daughter on the stairs. According to CDR P, the applicant provided her with no other explanation for his daughter's injuries in subsequent conversations.

In August of 2012 the applicant was notified that he would be temporarily removed from his duties at the Coast Guard Academy while an investigation into allegations of abuse made against him by his ex-wife and her mother was conducted.

On September 12, 2012, DCF reversed its substantiation of neglect against the applicant in the brain injury sustained by his infant daughter while in his care.

In January 2013, the Coast Guard found the allegations made against the applicant to be unsubstantiated and returned him to his duties at the Coast Guard Academy.

In February 2013, the applicant's divorce from his ex-wife was finalized.

On April 1, 2013, the CGIS agent received a Report of Adjudication (ROA) completed by CDR A. The ROA stated that the applicant had received no punitive action but was relieved as an Academic Honor Officer at the Academy and had received counseling as a result of the incident. The applicant continued to serve at the Academy and received strong performance evaluations until his tour of duty ended in June 2015.

Commander Promotion

On October 1, 2014, the applicant was promoted to Commander (CDR/O-5).

Allegations of Sexual Abuse Against Applicant's Son

On December 22, 2015, the applicant's ex-wife reported that her youngest daughter—the same daughter who had sustained the head injury in 2011—stated that she had been sexually assaulted by her half-brother between December 16, 2015, and December 21, 2015.

On or around December 23, 2015, the applicant was questioned by local authorities about the allegations made against his son. The applicant was asked if he had left his son alone with his youngest daughter and allegedly replied he had not. (Later, during his court-martial, the evidence showed that his stepson and youngest daughter had been left alone together, but the applicant also submitted a recording showing that he was never actually allowed to answer the question presented by the CGIS agent because the agent questioning him continued to interrupt him. No charges or administrative actions were initiated against the applicant for this alleged false official statement.)

On December 23, 2015, the applicant's son reported to the local police station to be interviewed by detectives. The detectives recorded the following:

On 12/23/2015 I conducted a videotaped interview of [applicant's son] at the [local police department]. [Applicant's son] had been contacted by his father [applicant], and advised to come to the police department for an interview.

Upon arrival to the Police Department [applicant's son] was advised that he was free to leave at any time. [Applicant's son] asked if he needed his father present for the interview and asked several times what the interview was about. [Applicant's son] stated that he figures one of the girls probably said he did something to them. When [applicant's son] was told that it was [youngest daughter] that alleged he did something he reported that he was surprised and that he thought [oldest daughter] would be the one making the allegations. [Applicant's son] reported that [oldest daughter] has been having some problems lately and doesn't like him.

Contrary to what [applicant] had reported, [applicant's son] reported that he was responsible for watching [youngest daughter] for a short time over the weekend while his father went somewhere with [oldest daughter]. [Applicant's son] denied anything inappropriate happening and stated that he just played video games while [youngest daughter] played by herself in the toy room.

[Applicant's son] reported that he believed this was all coming from his step mother [redacted]. [Applicant's son] described [ex-wife] as crazy and that he kind of expected something like this right around the holidays. [Applicant's son] agreed to submit to a polygraph test.

On December 23, 2015, a DCF investigator conducted a videotaped forensic interview of the applicant's youngest daughter. The summary of the youngest daughter's interview is provided below:

At approximately 3:50 seconds into the interview during the repor [sic] building, [youngest daughter] states "Sometimes...my brother touched my private parts and stuff I don't like," "it's inappropriate, I don't want boys to touch my private parts." [Youngest daughter] proceeds to keep asking to draw [applicant's son]. Investigator [M] puts up the drawings and asks [youngest daughter] to show her the private. [Youngest daughter] responds by pointing between her own legs and saying, "inside of it." [Youngest daughter] then points to the vagina on the drawing and identifies that as her private. [Youngest daughter] then says "I've seen a penis before and identifies the penis on the drawing. Investigator [M] asks [youngest daughter] whose penis she has seen and she responds, "the brother."

[Youngest daughter] reported that the incident happened in her house in her dad's room. [Youngest daughter] said that [applicant's son] stood right in her face and "touched it" she reported that "he put his hand in my private." [Youngest daughter] said she didn't know what to do so she called her dad using SIRI and he said "stop to [applicant's son]," and that [applicant's son] told her dad "I didn't touch [youngest daughter's] private parts" but that he was lying. [Youngest daughter] reported that her dad came home and smelled [applicant's son's] finger and said, "Definitely you touched [youngest daughter's] private parts." [Youngest daughter] reported that her dad told [applicant's son] "you have to go in your room because I'm not going to say anything about it." [Youngest daughter] recalled it happening one time and she believed the police came.

Investigator [M] asked [youngest daughter] to tell her more about the time [applicant's son] touched her private. [Youngest daughter] began pointing at her vagina and stated, "He like pointed and then he touched it and then he hurt it with his foot." When Investigator [M] asked [youngest daughter] to explain how he hurt it with his foot [youngest daughter] replied while pointing to the vagina on the drawing and said "...hand goes into a girls (while pointing to vagina), it can move all the way to there (while pointing up above the pubic area), like he opened up the skirt ([youngest daughters] demonstrated while lifting up her own skirt) and he took off my pants and the he part it and then he touched it." When Investigator [M] asked [youngest daughter] to clarify what his foot did, [youngest daughter] said [applicant's son] kicked it and his foot went on the side of her "gina" and that last night when she took a bath, it hurt.

The interview and the drawings were tagged as evidence.

On December 28, 2015, local police investigators called the applicant's new wife at her place of employment. The applicant's new wife stated that the youngest daughter had not disclosed anything to her about the applicant's son touching her inappropriately. The new wife stated that because she is a nurse, she is a mandated reporter and had she been told that the youngest daughter had been touched inappropriately she would have contacted DCF. The new wife further stated that she had never had any suspicions of the children being abused but stated that the girls' mother is "very vindictive" and "likes drama." Finally, the applicant's new wife made it very clear that she still owns her own home and does not rely on the applicant financially and that if she had suspected the applicant or his son of any involvement with allegations of sexual assault she would not be with the applicant.

On December 30, 2015, the applicant's phone carrier emailed local investigators information from the applicant's phone. The records showed that the applicant had 24 incoming and outgoing calls between December 19, 2015, through December 20, 2015. Investigators were able to identify all of the phone numbers. The records revealed that the applicant received an incoming call from his son on December 19, 2015, at 5:43 p.m., after the applicant had called his son the same day at 11:30 in the morning. Investigators stated that there did not appear to be any

unsolicited phone calls from the applicant's son to the applicant on the dates requested. According to investigators, the other phone calls the applicant received did not appear to be pertinent to the investigation.

On January 14, 2016, local police investigators received the youngest daughter's medical records from her December 23, 2015, visit to the emergency room, after she was brought in by her mother because the youngest daughter was complaining of vaginal itching. At this point the mother reported that the youngest daughter may have been sexually assaulted. The youngest daughter was diagnosed with vulvovaginitis, which is a nonspecific infection of the vulva or vagina that is common with young children and can be associated with toileting hygiene. The youngest daughter's exam was otherwise normal, with no signs of trauma noted.

In January 2016, the applicant recorded a conversation he had with his youngest daughter wherein she admitted to the applicant that her mother (applicant's ex-wife) thinks the applicant and the applicant's son did things they did not do. The youngest daughter stated, "[Mom] thinks [applicant's son] pulled his pants down...to show his private parts and he didn't do that. Mom thinks he did that and I don't think it's okay...and that not true, she actually lied about that. And she is lying about that stuff."⁴

Allegations of Sexual Abuse Against Applicant

In November 2016, after local authorities decided not to prosecute the applicant's son due to a lack of evidence and the unreliability of the youngest daughter's statements, the applicant's ex-wife made new allegations of sexual abuse against her youngest daughter, but this time she claimed her youngest daughter had stated that she was sexually assaulted by the applicant. This led to a new investigation into the applicant and a new court order granting his ex-wife sole custody of their children.

On December 5, 2016, the applicant's youngest daughter underwent a forensic interview with local police officers regarding the allegations she made against the applicant. During this interview, she offered no disclosures or corroboration of sexual abuse. Investigators stated that during the forensic interview, the applicant's youngest daughter used inappropriate language for her age and claimed to remember things she could not possibly have remembered. For example, the youngest daughter stated that she remembered when the applicant threw her down the stairs and attempted to remove a tube from her mouth when she was in the hospital. Investigators noted that these memories would have to have been from when the youngest was nine months old and suffered her traumatic brain injury. Finally, investigators stated that they felt the applicant's ex-wife had "officer shopped" to try to get the response she wanted.

On December 7, 2016, an Investigating Social Worker (ISW) and the Social Worker Supervisor (SWS) met to discuss the applicant's family case and noted that both daughters had undergone forensic interviews. The ISW noted his concerns that the children were being coached.

⁴ This information was obtained from a recording the applicant submitted as evidence during his court-martial.

The notes further stated that the applicant's youngest daughter made no disclosures and the applicant's oldest daughter made the same disclosures to him that she did to the court.

On December 20, 2016, the ISW, SWS, and Program Manager (PM) met to discuss the applicant's family case. It was determined that DCF did not have enough evidence to substantiate sexual abuse at that time due to the circumstances surrounding the disclosures made by the youngest daughter. DCF members noted that they would need to see what direction local police would take. The ISW, SWS, and PM substantiated emotional neglect by both parents due to custody issues. The case was transferred for ongoing services.

On October 24, 2017, the applicant's ex-wife was notified that the applicant had filed for visitation rights and for psychological evaluations of his daughters.

On October 25, 2017, the day after the ex-wife was notified of the applicant's intent to seek visitation with his daughters, a Coast Guard Sexual Assault Response Coordinator (SARC) received a report of sexual assault from a civilian, Mr. W.⁵ The SARC reported the alleged sexual assault to the Coast Guard's Health, Safety and Work-Life Center (HSWL) who then contacted CGIS. Mr. W identified himself as a friend of the applicant's ex-wife. Mr. W reported that he had witnessed the applicant's oldest daughter break down and claim that the applicant had sexually assaulted her in the woods. As a result of these allegations, CGIS opened a full investigation into the allegations.⁶

On October 26, 2017, the applicant's commanding officer (CO) emailed the applicant and informed him that an allegation had been made that he had sexually assaulted his oldest daughter, aged 11 at the time. The CO ordered the applicant to have no contact with his children for 30 days.

On November 6, 2017, the applicant's ex-wife contacted CGIS agents and told them that the applicant had committed mortgage fraud. To support her claims, the ex-wife submitted a copy of the applicant's mortgage loan signed on August 27, 2015,⁷ wherein he claimed to be a single man but had actually been married since May. As a result of the ex-wife's claims, CGIS agents called the applicant's mortgage company and spoke with a Mr. S, who requested the agents get a subpoena. However, before hanging up with Mr. S, CGIS agents asked Mr. S if the marriage status of a mortgage applicant had an impact on whether a mortgage was granted or not. Mr. S explained that an applicant's marital status affects only the interests other parties may have in a property,

⁵ This same individual was the applicant's and ex-wife's accountant and was the individual who notified her that the applicant had allegedly liquidated a mutual fund that was acquired during her marriage with the applicant. In addition, this individual admitted to investigators on December 12, 2017, that he had begun spending time socially with the applicant's ex-wife, her parents, and the applicant's daughters in 2014 or 2015.

⁶ By this time, the applicant's daughters had been in the sole custody of his ex-wife for at least a year. It is unclear whether the applicant lost custody of the daughters as a result of the allegations made against his son.

⁷ At this point the applicant had been divorced from his ex-wife for almost four years. It is unknown how she obtained this private and confidential mortgage loan document.

whether or not the spouse was listed on the mortgage, and one's marital status typically did not impact whether a mortgage was or was not granted.⁸

On November 16, 2017, and November 15, 2017, CGIS agents contacted a Coast Guard legal office and informed them that the applicant's ex-wife had requested their assistance in obtaining a Military Protective Order (MPO) after the applicant's ex-wife expressed concern about her and her daughters' safety. The applicant's ex-wife stated that the current DCF safety plan, which prevented the applicant from having contact with his children, was set to expire.

On November 20, 2017, the applicant's CO contacted him and told him that the investigation into the allegations was moving forward and extended the applicant's No Contact Order.

On December 12, 2017, CGIS agents interviewed Mr. W,⁹ who explained that he first met the applicant's ex-wife in 2013 when she came in to file her 2012 tax return. Mr. W claimed that the first time the ex-wife disclosed her personal issues to him was in 2013, when he worked with her on an issue involving the applicant's Thrift Savings Plan as a result of her divorce from the applicant. According to Mr. W, after he had filed the ex-wife's 2013¹⁰ tax return, the IRS contacted him and requested that the ex-wife file a paper copy of her return. Mr. W alleged that when he spoke to the IRS regarding the ex-wife's return, they did not tell him specifically what the problem was. Mr. W claimed that the IRS did ask if there was anyone who would have signed the ex-wife's signature to the return, such as a child or spouse, but did not specifically state that there was an issue with the signature. Mr. W told CGIS agents that the IRS would not provide that kind of information and that the issue was ultimately resolved by the ex-wife, who eventually received her tax refund. However, Mr. W claimed that there was another issue with the ex-wife's tax return in 2015, after the ex-wife's 2014 tax return was rejected by the IRS because the applicant claimed his daughters' daycare expenses. Mr. W explained that the issue was remedied after the ex-wife removed the daycare expenses from her return. Finally, after he was asked by CGIS agents, Mr. W disclosed that he was aware of a mutual fund account held by the applicant. According to Mr. W, he discovered the mutual fund during the normal course of his duties and noticed that the fund had been invested in during the applicant's marriage and was liquidated after the divorce. Mr. W stated that he knew the ex-wife was not aware of the mutual fund, so he told her about the fund.

⁸ On April 3, 2024, the Board reached out to the applicant's attorney requesting additional information on the applicant's August 27, 2015, mortgage. The applicant explained that he had begun the mortgage process in April of 2015, prior to his marriage to his new wife which occurred on May 26, 2015. The applicant's statements are supported by Regulation B of the Home Mortgage Disclosure Act (HDMA) which requires lenders to collect information regarding an applicant's ethnicity, race, sex, marital status, and age where the credit sought is primarily for the purchase or refinancing of a dwelling that is or will be the applicant's principal residence and will secure the credit. Given that the applicant has no control over how the loan documents are drawn up and that lenders are required to ask for an applicant's marital status, it is reasonable to believe that at the time the applicant initiated either his refinance or purchase, he was a single man.

⁹ See Footnote 5.

¹⁰ Mr. W claimed the issue with the ex-wife's IRS filing took place in 2014, which means the 2013 tax return was returned by the IRS.

Mr. W did not have any documents pertaining to the mutual fund, but told CGIS investigators that he would gather the information and provide the documents at a later date.

On December 20, 2017, Mr. W returned to CGIS agents and provided documents associated with the mutual fund. He also provided CGIS with a financial statement from the state Superior Court, which was apparently filed in 2013 and did not contain any information about the mutual fund.

On February 12, 2018, the applicant's divorce attorney submitted a letter to the ex-wife's attorney with an attachment from the trust officer of a national bank and trust company explaining that the mutual fund at issue here belonged to the applicant's aunt. Furthermore, the trust officer stated that the applicant was not gifted any units of ownership in this mutual fund until June 17, 2015, and again on January 1, 2016. The applicant's attorney informed the ex-wife's attorney that he expected the ex-wife's attorney to withdraw his motion, with prejudice, in family court immediately.

On April 2, 2018, the ex-wife's attorney responded to the applicant's attorney and stated that he would withdrawal his motion within the next day or so.

On April 9, 2018, the applicant's oldest daughter told forensic investigators that the applicant had sexually assaulted her younger sister and threatened to kill her younger sister if she told anyone about the abuse. She further stated that the applicant had sexually assaulted her while in the woods in the back of her house.

On June 18, 2018, the applicant was interviewed by CGIS agents. Prior to his interview, the applicant was informed of his Article 31(b) Miranda/Tempia rights. The applicant waived his rights and agreed to be interviewed. The applicant denied having ever sexually assaulted his daughters.

Individual Meritorious Service Medal

On June 27, 2018, the applicant received an individual Meritorious Service Medal (Gold Star in Lieu of Second) for his "Exceptionally Meritorious Achievement and Superior Performance of Duties" from July 2015 through June 2018 from his Coast Guard District Commander, RADM T. The applicant received the following laudatory comments:

Commander [Applicant] is cited for meritorious service in the performance of duty as Response Department Head, Coast Guard Sector [redacted], from July 2015 to June 2018. Demonstrating keen foresight in executive leadership as Search and Rescue (SAR) Mission Coordinator, he directed 1,550 SAR cases resulting in 300 lives saved, 1,400 assisted, and \$225 million dollars in property saved. Recognizing 75% of Sector SAR cases began as 911 calls, he coordinated 54 agreements with 175 agencies and trained 911 operators on a standardized and automated process to gather critical distress information and quickly transmit it to the Coast Guard, which ensured a seamless and rapid initiation of SAR response that has been lauded at international SAR forums. He drove the innovative integration of data analysis and human-derived intelligence, resulting in nine substantial fisheries violations and enhanced vessel targeting. This enhanced targeting led to improved vessel safety and an increase in the success rate of identifying non-compliance from 11 % to 28% in 11,000 boardings over the last three years. He championed the development and implementation of the [redacted] District ([redacted]) paddlecraft [*sic*] Safety Initiative in which Sector

conducted 74 % of the 983 [redacted] boardings. This level represents 1,400% more boardings than were completed Coast Guard-wide, and the initiative resulted in an 11 % reduction in paddlecraft related fatalities. Commander [Applicant's] dedication and devotion to duty are most heartily commended and are in keeping with the highest traditions of the United States Coast Guard.

Polygraph Examination

On July 12, 2018, the applicant consented to undergo a polygraph examination. Before the polygraph examination, the applicant was again given his Article 31(b) rights. The applicant waived his rights and agreed to be questioned by CGIS agents. The applicant was advised that he was being investigated for “sexual assault, false statements, and assault.” The applicant informed the CGIS agent that he was represented by counsel and that his attorney was aware that the applicant was participating in the examination. The applicant stated he did not wish to consult with his attorney before proceeding. Following completion of the applicant’s Article 31(b) rights, the CGIS agent presented the applicant with CGIS 5594 Form, entitled, “Consent to Undergo Polygraph Examination.” This form outlined the applicant’s rights and included the following warning, “Anything I say or do during the polygraph may be used against me in administrative, military justice, or federal judicial proceedings.” The form also informed the applicant that at any time during the examination he could withdraw his consent. The applicant acknowledged that he understood his rights and signed the form. The CGIS agent explained to the applicant that the polygraph examination was a “specific issue polygraph,” and the specific issue was to determine if he had ever molested his children. The agent further explained to the applicant that the polygraph examination would include irrelevant, relevant, and comparison questions. Examples of each type of question were given to the applicant. Finally, the applicant was told that he would first review all of the questions the special agent was going to ask during the examination. The applicant stated that he understood the procedures and what was expected of him.

During the pre-examination phase of the questions, conducted without sensors, the applicant was asked if he had “ever considered lying about an unnatural sex act?” To which the applicant stated he had not. The agent asked a follow-up question, “Did you ever consider lying about any sexual activity with an adult ... something that you did, that you thought about lying?” The applicant answered, “Yes,” and explained that he had visited an adult bookstore. The special agent followed up by asking the applicant if he had only visited the adult bookstore one time. The applicant responded, “No, I did it a few times ... between the divorce falling apart and 2016—so a three year period—I went to an adult bookstore.” As a result of these answers, the agent changed his question to, “Other than what you’ve told me did you ever consider lying about any sexual activity with an adult ... something that you did, that you thought about lying?”

Shortly after this review, the CGIS agent attached the polygraph sensors to the applicant and began the examination. At 10:48 a.m., the agent asked the applicant if he was ready to continue, but the applicant did not answer. He put his head down appearing to be upset. The special agent approached the applicant when the applicant told the special agent that he felt very sweaty, hot, and uncomfortable. At this point, the agent immediately removed the blood pressure cuff from the applicant, and without further prompting, the applicant stated, “Not about the questions about [youngest daughter], but now I just feel like I have a huge amount of anxiety about these other things that I did.” Afterwards, the following conversation took place:

Special Agent: "What do you mean these other things you did?"
 Applicant: "When I told you about the adult bookstore, it's embarrassing."
 Special Agent: "Want to take a break? Go walk around for a little bit?"
 Applicant: "I just feel like a bad husband because I did that...it's got me all upset."
 Special Agent: "But we've talked through that. Is there something else that we haven't talked through that's causing you concern?"
 Applicant: "Yeah."

At this point, the special agent removed the rest of the polygraph sensors from the applicant, and then continued the conversation with the applicant.

Special Agent: "So let's talk through it. What is it?"
 Applicant: "[No response]."
 Special Agent: "Just a couple of guys sitting here."
 Applicant: "I know."
 Special Agent: "Let me ask you this, does it fit the question in that you lied about whatever it was?"
 Applicant: "So, you know, I went to the adult bookstores so that I could..."
 Special Agent: "Masturbate in the booths?"
 Applicant: "Yeah."
 Special Agent: "Meet someone?"
 Applicant: "Yeah. It bothers me that I did that."
 Special Agent: "What of those things did you do?"
 Applicant: "Those things. I would watch a movie. I would masturbate. I would never meet someone directly, I definitely had people put their hands through and stuff like that."
 Special Agent: "This was a booth situation?"
 Applicant: "Yeah."
 Special Agent: "And they reach through and masturbate you?"
 Applicant: "Yeah."
 Special Agent: "Did you ever have sex with them through the wall?"
 Applicant: "Yeah. It bothers me that I did that. Not, not, not like..."
 Special Agent: "Intercourse."
 Applicant: "No, no...I used condoms. I'm just embarrassed that I let people do that to me."
 Special Agent: "This was in 2016?"
 Applicant: "Yeah, I mean, I told you it was up to that point. I did it before that, I did it multiple times."
 Special Agent: "How many times is multiple?"
 Applicant: "I don't know...a dozen."
 Special Agent: "Anything else?"
 Applicant: "Yes. I did have sex with some other than [ex-wife]. Once. Just once, but I did it. I didn't really have sex with [ex-wife] anyway, who am I kidding?"
 Special Agent: "So only the one time you cheated on her?"
 Applicant: "Mmm hmm."
 Special Agent: "Someone you knew? A prostitute, what?"
 Applicant: "Yeah, not anyone I knew. A prostitute."
 Special Agent: "Did she question you about it?"
 Applicant: "No, she didn't."
 Special Agent: "So there was no lying?"
 Applicant: "So I didn't lie about it. She didn't even know about it."

Charges Referred to General Court-Martial

On May 15, 2019, the applicant was charged with violating the following articles of the Uniform Code of Military Justice (UCMJ): Article 107—False Office Statement (Charge I),

Article 120(g)—Aggravated Sexual Contact with a Child (Charge II), Article 120(b)—Rape and Sexual Assault of a Child (Charge III), Article 133—Conduct Unbecoming an Officer and a Gentlemen (Charge IV), and Article 134—Obstructing Justice (Charge V). However, at his court-martial, the Coast Guard only proceeded with Charges III and V.

Captain Selection

On August 1, 2019, the applicant was selected for promotion to Captain (O-6) for the 2020 Promotion Year.

Page 7

On October 25, 2019, the applicant received a negative Page 7 due to the disclosures he had made during his polygraph examination. The applicant was presented with the Page 7 on October 28, 2019, but refused to sign. The Page 7 reads as follows:

25 OCT 2019: Following my review of reference (a) a criminal investigation completed by the Coast Guard Investigative Service (CGIS), I have determined, by a preponderance of the evidence, that you engaged in conduct unbecoming an officer and a gentleman.

In July 2018, you were interviewed by (CGIS), as the subject of a criminal investigation into allegations of sexual misconduct. Prior to your questioning, you were advised of your rights under Article 31(b) of the Uniform Code of Military Justice. You acknowledged your understanding of those rights verbally and in writing.

During the interview with CGIS, you admitted that you had sexual intercourse with “a prostitute” while still legally married. You also admitted that on multiple occasions, between 2014 and 2016, you went to an adult bookstore in [redacted], in order to engage in sexual acts with strangers. Specifically, you admitted, on various occasions to masturbating strangers and being masturbated by strangers in a section of the adult book store in a public establishment. You admitted to engaging in these sexual acts over a dozen times.

Your actions exhibited more than a lack of judgment, they were indecent, demonstrated an utter lack of decorum, and have seriously compromised your standing as an officer. Your actions were a serious deviation from the standards of conduct under which we all serve, and are in direct contradiction to our values.

Special Board Action

On October 30, 2019, CDR F with the Personnel Service Center (PSC) issued a memorandum, “Proposed Special Board Action,” wherein he notified the applicant that he had initiated action pursuant to the Officer Accessions, Evaluations, and Promotions Manual, COMDTIST M1000.3A, and 14 U.S.C. § 2122(a),¹¹ to convene a Board of Officers to recommend whether he should be permanently removed from the 2020 Promotion Year Captain Active Duty Promotion List (ADPL). CDR PSC informed the applicant that the board would review his Electronic Personnel Data Record (EPDR), including the October 25, 2019, Page 7, and all documents permitted under Documents Viewed by Coast Guard Officer Promotion and Special

¹¹ 14 U.S.C. §2122(a) states, “The President may remove the name of any officer from a list of selectees established under section 2121 of this title.”

Boards Manual, COMDTINST 1410.2. The applicant was invited to submit comments on his behalf to the board.

On November 20, 2019, the special board convened and determined, after reviewing the applicant's EPDR and all relevant documents, that the applicant should be removed from the PY2020 Captain Active Duty Promotion List. The board stated that the applicant had admitted to various acts of misconduct over an extended period of time which cast serious doubt that he possessed the moral aptitude required to serve in the next higher grade. The board believed that the applicant had demonstrated a lack of core values on several occasions as documented in the October 25, 2019, Page 7, wherein it was found that he had admitted to adultery by having intercourse with a prostitute while married and admitted to more than a dozen acts of sexual misconduct, including lewd behavior in a public space, specifically, masturbating and being masturbated by strangers in an adult bookstore.

Pursuant to 14 U.S.C. § 2122(c), the applicant's removal from the PY2020 ADPL Captain Promotion List constituted a non-selection. This was the applicant's first non-selection to Captain.

Polygraph Statements Partially Suppressed

On March 10, 2020, the military judge granted, in part, the applicant's request to suppress the statements he made during the polygraph examination regarding his actions in an adult bookstore and his encounter with a prostitute. The military judge provided the following legal analysis:

At the outset, it is clear that the statements the accused made regarding his interactions with the "glory hole" and with a prostitute did not constitute spontaneous admissions. The accused began his interview with S/A [B] at 0905 in which he was provided Article 31(b) rights advice and polygraph examination rights advice. An hour into the discussion, the accused answers questions from the investigator regarding his sexual experience, particularly whether he ever lied to anyone regarding his interactions. Further, the accused made his admissions to S/A [B] regarding his conduct in the bookstore and with the prostitute only after questioned by S/A [B]. As such, the admissions cannot be considered spontaneous.

Because the admissions were not spontaneous, the analysis then turns to whether the accused was sufficiently warned of the nature of the accusations against him. The Court will apply the *Simpson* factors in determining if the accused was properly alerted to the nature of the accusation as required by Article 31(b). Turning to the first factor, the Court finds that the accused's conduct at the adult video store and his interactions with a prostitute was not a part of a continuing sequence of events. Although the questioning took place within the same two-hour interview, the alleged misconduct regarding the accused's infidelity with a prostitute took place at least four years prior to the interview, and the accused's interactions at the adult book store also took place between three and five years prior to the interview. Further, although these actions occurred during the same time frame of the allegations of sexual misconduct against his minor children, it is clear these consensual sexual activities took place privately, outside of the home with unknown participants, without any involvement with his children. Most importantly, it is clear to the Court that the intent of the "comparison questions" regarding his sexual interactions were designed to capture how the accused's vitals would appear during the expected untruthful answer, not to elicit statements of "sex assault, false statements, and assault," as were provided in the Article 31(b) rights. This factor weighs against the Government.

...

This facts in this case are distinguishable to those in *Redd*. Here, unlike *Redd*, the conduct in the adult bookstore, although indecent and criminal under the UCMJ, are highly distinguishable to that of non-consensual sexual contact with a minor. The adult bookstore conduct and consensual sexual contact with a prostitute involve consenting adults engaging in sex acts in a private, or semi-private place, whereas sexual contact with minors would never involve consent. Further, the Court does not agree with the Government that the conduct is sufficiently related merely because they involve sexual conduct and criminal under the Code. Such a reading into Article 31(b) is too broad [and] defeats the purpose of Article 31, and is inconsistent with the holding in *Simpson*. 54 M.J. at 284. This factor weighs against the Government.

Lastly, the Court agrees that prior to the interview, S/A [B] did not have prior knowledge of the accused's sexual interactions at the adult bookstore or with a prostitute. There was no evidence before the Court that indicates that any investigator knew of any of this conduct by the accused. That is further strengthened by S/A [B] credible testimony that he did not realize the accused's conduct in the store constituted a violation of the UCMJ. However, during the interview, there was significant discussion between S/A [B] and the accused regarding the accused's previous sexual activity. These discussions occurred both prior to and during the polygraph examination. Prior to the polygraph examination, the accused informed S/A [B] that he had frequented adult bookstores, these pre-polygraph statements would be admissible against the accused. However, during the polygraph examination, at 1048 the accused appeared upset. S/A [B] knew enough to approach the accused and ask him further questions. The relevant colloquy begins:

Special Agent: "So let's talk through it. What is it?"
 Applicant: "[No response]."
 Special Agent: "Just a couple of guys sitting here."
 Applicant: "I know."
 Special Agent: "Let me ask you this, does it fit the question in that you lied about whatever it was?"
 Applicant: "So, you know, I went to the adult bookstores so that I could..."
 Special Agent: "Masturbate in the booths?"

At this point, the Court finds S/A [B] had enough knowledge that further questioning would reasonably result in an incriminating response. This is evident as S/A [B] finishes the accused answer by stating, "masturbate in the booths?" As such, new Article 31(b) warnings should have been given to the accused at this point. They were not. Further questioning after this point were a violation of the accused Article 31(b) rights and in violation of M.R.E. 305(c). As such, any statements made after S/A [B] reassures the accused by stating "just a couple guys sitting here," are inadmissible against the accused in accordance with M.R.E. 304 and M.R.E. 305(c). Statements made by the accused during the pre-polygraph portion of the interview are admissible.

Acquittal

On February 4, 2021, the applicant was acquitted of all charges by members of a General Court-Martial.

Voluntary Retirement Request

On February 18, 2021, the applicant submitted a memorandum, "Request for Voluntary Retirement."

Highest Grade Held Determination Notification

On March 5, 2021, CDR F with PSC-OPM issued a memorandum, "Highest Grade Held Determination Notification," wherein he notified the applicant of action pursuant to Article 1.C.12.

of the Military Separations Manual, COMDTINST M1000.4, to determine the highest grade in which the applicant had served satisfactorily throughout his time in the Coast Guard. It was explained to the applicant that a board of officers would be convened in order to make a recommendation to the Commandant about the applicant's pay grade in retirement. The applicant was further informed that the special board would review his EPDR, including the October 25, 2019, Page 7, and all other relevant documents as defined by the Documents Viewed by Coast Guard Officer Promotion and Special Boards Manual, COMDTINST 1410.2. The applicant was told that the Commander of PSC is authorized to initiate special board action when information of an adverse nature is discovered, which in his case was the information in the October 25, 2019, Page 7. The memorandum explained that PSC—the discharge authority—would determine the appropriate type of discharge and characterization the applicant would receive and that upon request, he would be provided copies of all records and documents that would be forwarded to the special board. Finally, the applicant was told that he had the right to submit a statement to the board, so long as it was delivered through his chain of command within 21 calendar days of receipt of notification. CDR F explained that the applicant's request for a voluntary retirement prior to his mandatory retirement date of June 30, 2021, was on hold pending the results of the HGH determination.

On March 12, 2021, the applicant emailed Lieutenant (LT) R with PSC's Officer Personnel Management (OPM) division, who was in charge of managing special boards and requested copies of the materials the special board would be reviewing.

On March 12, 2021, less than an hour after the applicant requested the materials the special board would be reviewing, LT R responded to the applicant and stated, "Yes Sir, I will compile all the documents and send them to you via large file transfer. I will need to route through legal and will forward them to you early next week."

Third Individual Meritorious Service Medal

On March 25, 2021, the applicant received an individual Meritorious Service Medal (Gold Star in Lieu of Third) for his "Exceptionally Meritorious Achievement and Superior Performance of Duties" from July 2018 through March 2021 from the Deputy Commandant for Personnel Readiness, RADM T.¹² The applicant received the following laudatory comments:

Commander [Applicant] is cited for meritorious service in the performance of duty as Program Analyst for the Deputy Commandant for Mission Support (DCMS), Resource Directorate, from July 2018 to March 2021. He oversaw FY21-23 budget development for Engineering and Logistics, leading analysis of 24 Resource Proposals totaling \$422M, directly resulting in over \$60M in on-budget resourcing in support of aviation engineering. He also shrewdly assessed the missionization requirements for five new C130J aircrafts, engaged stakeholders, and secured \$58M in future acquisition funding, which preserved critical funding for operations and maintenance. Further, he methodically drove a comprehensive, multi-year analysis to develop a sophisticated staffing model for 4700+ billets at CG Bases, resulting in a vital tool that facilitates staff re-leveling and quantifies future staffing needs. As Executive Secretariat for the Deputies Council (DPC), he pre-briefed the DPC Chair on a weekly basis and assimilated flag-level discussion into memoranda and DPC minutes, effectively organizing complex, short fuse enterprise initiatives. A supportive

¹² This is not the same RADM T from the applicant's Second Meritorious Service Medal.

leader, his mentoring of CG members was critical to building team cohesion, while also serving as a reliable sounding board within the directorate. His tireless initiative, robust performance, and enterprise-wide impact are a fitting culmination to 28 years of honorable and dedicated service. Commander [Applicant's] dedication and devotion to duty are most heartily commended and are in keeping with the highest traditions of the United States Coast Guard.

Continuation of HGH Proceedings

On March 26, 2021, having still not received any of the documents requested and unaware of what records the board would review but needing to meet the 21 day calendar deadline outlined in his initial notification, the applicant submitted his response to the HGH board and requested that he be allowed to retire at his current grade and be given an Honorable characterization of service. The applicant argued that pursuant to Military Separations Manual, COMDTINST M1000.4, retirement at an officer's current grade is appropriate "[w]hen an officer's record, in spite of performance or conduct issues, is otherwise so meritorious as to demonstrate the officer served satisfactory in the grade currently held, the officer should be retired in that grade. This presumption applies equally to CG PSC-OPM and any special board convened." The applicant respectfully requested that the special board review his record, which, according to the applicant, established that he had exceeded that standard. The applicant then noted his superior performance as CDR as reflected in his previous Officer Evaluation Reports.

On March 26, 2021, the applicant received a positive endorsement from RADM T, who requested that the applicant retain his current grade of Commander (O-5) and be allowed to retire with an Honorable characterization of service. RADM T stated that the applicant had exceeded the performance required in his current rank during his time in the unit. According to RADM T, during the applicant's assignment, he had continued to perform admirably demonstrating the greatest care and concern for his professional and personal responsibilities. RADM T stated that despite the serious nature of the allegations raised against the applicant, he continued to exceed his professional obligations, kept his chain of command apprised of matters related to his court-martial, and maintained his positive attitude in a situation that would have crippled many military members and parents. Finally, RADM T highlighted the fact that the applicant had been acquitted of all charges associated with the allegations that resulted in the court-martial.

On March 30, 2021, the applicant again emailed LT R, this time asking when his HGH board would be held. That same day, LT R responded and informed the applicant that his HGH board would be meeting on Thursday, April 8, 2021, and that the board would provide a recommendation that day or the following day if necessary. The lieutenant also informed the applicant that the HGH's recommendation was just that, a recommendation, which would be forwarded to the Commandant, who was the final approving authority.

On April 8, 2021, at 7:30 a.m., the HGH board convened.

On April 8, 2021, at 8:32 p.m., approximately 13 hours after the HGH board had convened, the applicant received an email from the special board's lieutenant providing him with all documents reviewed by the HGH Board. Specifically, the lieutenant stated, "Attached are all the matters of record presented to the Highest Grade Held board." Included in this email was an attachment named "Board Tabs" which included approximately 600 pages of documents

pertaining to the sexual allegations made against the applicant, journal entries allegedly made by his daughters, divorce proceeding documents, letters from his ex-wife and her mother to various officials, emails between his ex-wife and DCF officials, emails between the ex-wife and her attorney, psychological evaluations of the applicant, his ex-wife, and their daughters, medical documents, handwritten notes and timelines from his ex-wife's mother, his ex-wife's notes on DCF cases, his ex-wife's allegations against DCF officials, lawsuit filings, IRS documents, the applicant's home refinancing documents, and CGIS investigative reports and interview summaries.¹³ Most importantly, none of the documents included in Tabs A-G included the Page 7 that prompted the HGH board.

On April 9, 2021, the applicant submitted a memorandum, "Objection to OPM Procedures for Highest Grade Held Determination Board," wherein he objected to OPM's failure to follow its own policies established in the Military Separations Manual, COMDTINST M1000.4. The applicant explained that he had proactively requested copies of materials that would be reviewed by the HGH board on March 9, 2021, but the materials were not provided to him until well after the deadline for submission of his personal statement had passed and the board had already convened. The applicant explained that he was entitled to see what the board would see but was only provided with the contested October 25, 2019, Page 7. Moreover, the applicant objected to the grossly misrepresentative materials provided to the HGH board. With regard to the grossly misrepresentative documents contested by the applicant, the following statements made by the applicant are relevant:

I object to the grossly misrepresentative nature of the redacted and limited information provided to the Highest Grade Held Determination Board referenced in (Enclosure 2). I have been directly prejudiced in this process. I have been provided no opportunity to respond to the misrepresentative series of documents and files provided to the board. Reference (c)¹⁴ 7 "...outlines portions of the record and matters of record that...special boards may view." Specifically, in reference (c) 7.g.2(a), "[t]he board may be provided any record relevant to the intended purpose of the board. The opinions of criminal investigators are not usually provided to a special board, but the statement of witnesses upon which those opinions are based should be provided to the board if relevant to the purpose for which the board is convened." The materials provided to the board omitted relevant evidence that the board should be provided, the data is far from complete to allow the board to make their determination. 7.g.2(c) and (d) states that "All relevant data sets connected to the purpose of the special board should be available...The officer under consideration may introduce these items, through the officer's communication to the board." The board shall consider "[o]nly those portions of an investigation...that are used to establish or demonstrate the existence or nonexistence of facts." I was not afforded the opportunity to provide relevant data sets to rebut the information provided to the board. I object

¹³ The documents contained in Tabs A-G which were submitted to the HGH board for review, contained highly inflammatory and explicit material involving child sexual abuse, of which the applicant was acquitted through multiple investigations and a court-martial. Because the prejudicial and explicit materials involved minor children and were not probative of the misconduct that prompted the contested Page 7 and HGH board, namely the adult bookstore and prostitute, these documents will not be summarized here. In addition, the Board will note that of the 600 pages of highly prejudicial and inflammatory documents reviewed by the HGH board, only a few obscure sentences noted the concerns various officials had that the applicant's ex-wife and her parents were coaching the applicant's daughters, evidenced by the adult language used by the young girls and memories the youngest daughter claimed to have but could not have had given that she was only nine months old when the injuries occurred.

¹⁴ Reference (c) is the Documents Viewed by Coast Guard Officer Promotion and Special Boards Manual, COMDTINST 1410.2.

to the failure to follow procedures that have been apparently overlooked while convening this board. The lack of compliance with policy for this board is a blatant violation of my rights.

...

On April 14, 2021, CAPT B with PSC OPM issued a memorandum in response to the applicant's objections and stated that the April 8, 2021, HGH board that convened to determine the highest grade honorably held by the applicant was in recess. The applicant was "afforded" another 10 business days to provide supplemental communications to the board. Finally, CAPT B stated that the applicant's HGH board would "reconvene" on April 26, 2021, or as soon as practical thereafter.

On April 23, 2021, the applicant submitted a supplemental statement to the HGH board objecting to OPM's handling of his board. The relevant portions of his statement are recorded below:¹⁵

1. [I] was not given the opportunity to see, review, or respond to the records provided to this board until 08APR21, when I received over 600 documents for the first time, after this board had already convened. Having finally had the opportunity to review these records, I am now further compelled to object to timing, scope, and form of these incomplete and grossly misrepresentative records that appear to have been selectively curated for this board's review. I further request to know who curated this selection of records for this board's review so that I can present additional relevant evidence of investigative bias. This 600+ page collection of records contains false allegations made by my ex-wife, unrelated to the reasons for initiating this board in reference (a),¹⁶ and excludes critical exculpatory evidence in my favor related to an indiscriminate array of slanderous allegations made in the records provided to this board. These records constitute a small fraction of nearly 10-years-worth of cherry-picked investigative materials and baseless allegations that were overwhelmingly proven false at my recent court-martial, which concluded on 4 February 2021. I have not just answered for these allegations at a court-martial, but also to the U.S. Coast Guard Security Center, which has already extensively reviewed evidence related to the allegations contained in the records provided this board and determined that I remain fit to retain my security clearance. (Enclosure 1). Because the records provided to this board exceed the scope of the notice provided in reference (a), were made available to me only after my deadline to respond to reference (a) and after this board convened, and the incomplete records now before the board misrepresent the truth of an indiscriminate array of false allegations against me, I am unable to meaningfully respond and have thus been irreversibly prejudiced by the agency's handling of my HGH Determination Board. I respectfully ask this board to approve my O-5 retirement with an honorable characterization of service both as an appropriate characterization of my service and to cure this prejudice.

...

3. The records this board has been provided do not comply with policy guiding special boards. Reference (c)¹⁷ 7.g.2 sets the scope of what materials special boards may review in this case. "The board may be provided any record relevant to the intended purpose of the board. The opinions of criminal investigators are

¹⁵ The applicant repeated several arguments throughout his supplemental statement to the HGH board. Accordingly, for efficiency only those portions of the applicant's supplemental statement that sufficiently record the applicant's objections and arguments will be recorded here.

¹⁶ Reference (a) is the Coast Guard's memorandum notifying the applicant that an HGH board had been ordered to review his complete record.

¹⁷ Reference (c) is the Documents Viewed by Coast Guard Officer Promotion and Special Boards Manual, COMDTINST 1410.2.

not usually provided to a special board, but the statements of witnesses upon which those opinions are based should be provided to the board if relevant to the purpose of the board.” Here, only select excerpts of critical witness statements have been provided to the board, including, for example, a statement from [redacted], while her subsequent, exculpatory statements from the same investigation were not provided to the board. (Enclosure 7). Additionally, “[o]nly those portions of an investigation (criminal, civil, administrative, CG Investigative Service) that are used to establish or demonstrate the existence or nonexistence of facts (e.g., statements of witnesses),” are provided to the board. The records provided to this board far exceed the scope of the purpose of this board, which was to address the CG-3307 as the only derogatory item of concern according to reference (a). In order to fairly defend against the indiscriminate array of allegations contained in the records before this board, I would need to submit my entire record of trial, from my recent court-martial, where I was fully acquitted. I am still awaiting the record of trial. Moreover, the records this board has been provided are incomplete and misleading.

...

On April 27, 2021, the HGH board reconvened to complete its April 8, 2021, deliberations. LT R was a non-voting member of this board. The relevant portion of the HGH’s report are summarized below:

7. The Board examined the official record and all relevant materials pertaining to CDR [applicant], [redacted employee number], USCG.

8. In accordance with Article 1.C.12.f., Military Separations, COMDTINST M1000.4, it is the opinion of at least a majority of the members of the Board that CDR [Applicant], [redacted employee number], USCG, last satisfactorily served in the grade of lieutenant (LT). The board considered the factors outlined in 1.C.12.h.(3) in that:

1. CDR [Applicant] did not satisfactorily serve in the grade of commander. This officer engaged in conduct unbecoming an officer and gentleman and conduct prohibited by military and civilian policy on multiple occasions. Specifically, CDR [Applicant] willfully participated in sexual acts at an adult bookstore as documented in a CG-3307 and by verbal admission by the member. Additionally, CDR [Applicant] made a false statement to police regarding his son’s presence and involvement in a substantiated sexual assault by his son against his daughter. These events, coupled with a pattern of lying and lack of judgment including a forged tax return and improperly filing a VA loan request as a single member while being married, established a well-defined trend of willful dishonesty, conduct unbecoming of an officer, and lying. These incidents met the standards outlined in the Military Separations Manual, COMDTINST 1000.4 (series), specifically 1.A.14.c(2)(c), 1.A.14.c(2)(d), 1.A.14.c(2)(e), and 1.A.14.c(2)(g).

The cumulative misconduct over this paygrade was severe, brought discredit upon the Coast Guard, and had significant impact on the associated friends and family. The officer’s record contains derogatory information, and the positive performance captured does not overcome the negative nature of misconduct. Each of the cited infractions cannot be constituted as legitimate mistakes or unusual errors in judgment; each incident was a willful act of misconduct, a series of willful acts of misconduct, or a series of willful acts of dishonesty.

2. CDR [Applicant] did not satisfactorily serve while in the grade of lieutenant commander. CDR [Applicant] willfully participated in sexual acts at an adult bookstore while in the grade of LCDR as documented in a CG-3307 and by verbal admission by the member. This behavior spans the paygrades of CDR and LCDR. CDR [Applicant] admitted to having sex with a prostitute while married. CDR [Applicant] lied to law enforcement officers regarding the events and nature of his infant daughter’s injury, which was inconsistent with his grade and brought discredit to the Coast Guard. The daughter’s injuries were severe as manifested in a Traumatic Brain Injury, and CDR [Applicant] intentionally deceived law enforcement officials on many levels including during the

initial 911 call and while explaining the circumstances to investigators. CDR [Applicant] also admitted to spitting on his wife, which is conduct unbecoming an officer and brought discredit upon the Coast Guard. CDR [Applicant's] egregious behavior, coupled with other examples of dishonest behavior, such as failing to disclose income received from a mutual fund during divorce proceedings as required, establishes a consistent pattern of documented dishonesty and bad judgment. These incidents met the standards outlined in the Military Separations Manual, COMDTINST 1000.4 (series), specifically 1.A.14.c(2)(c), 1.A.14.c(2)(d), 1.A.14.c(2)(e), and 1.A.14.c(2)(g).

The cumulative misconduct over this paygrade was severe, brought discredit upon the Coast Guard, and had significant impact on the associated friends, family, and the Coast Guard by disrupting the unit where he worked, distracting and taking time away from work and mission accomplishment. The officer's record contains derogatory information, and the positive performance captured does not overcome the negative nature of misconduct. Each of the cited infractions cannot be constituted as legitimate mistakes or unusual errors in judgment; each incident was a willful act of misconduct, a series of willful acts of misconduct, or a series of willful acts of dishonesty.

CDR [Applicant] has displayed dishonest behavior over at least 10 years that brings into question the officer's judgment and integrity. This board determined that CDR [Applicant] last satisfactorily served at lieutenant, and recommend the officer be retired at that grade.

On June 22, 2021, CDR F with PSC notified the applicant that the Commandant had approved the proceedings and findings of the HGH board and determined that the highest grade satisfactorily held by the applicant, based on his record of conduct, was O-3E. CDR F explained to the applicant that he would be retired at the rank of O-3E on June 30, 2021, in accordance with 14 U.S.C. § 2145(a)(1) and 14 U.S.C. § 2501(a) and (c)(1). In addition, the applicant was informed that he would receive a General—Under Honorable Conditions characterization of service pursuant to Article 1.A.2.c. of the Military Separations Manual, COMDTINST M1000.4.¹⁸

On June 23, 2021, the applicant filed for an extension on active duty because he was only notified of the HGH results and his pending retirement on June 22, 2021, giving him only eight days to prepare.

On June 29, 2021, CAPT S with PSC notified the applicant that his request to extend his enlistment had been approved, and he would now be retired on August 1, 2021.

On July 7, 2021, through counsel, the applicant again contested the handling and management of the HGH board, presenting the same arguments he had in the past, this time to Admiral S, and requested that a new HGH be convened or that he be retired as an O-5 and given an Honorable characterization of service.

¹⁸ The references cited and/or relied upon in CDR F's memorandum included only the applicant's initial March 26, 2021, memorandum wherein he requested retirement at his current rank of O-5 and an Honorable characterization of service. The applicant's initial memorandum was based solely on the Page 7 as none of the other documents reviewed by the board had been provided to him despite his request to receive them. CDR F's memorandum did not include the applicant's April 9, 2021, memorandum objecting to the HGH's handling or his April 23, 2021, supplemental statement to the HGH board. The fact that these supplemental memorandums were not identified or referenced indicates that they might not have been forwarded to or viewed by the Commandant before he made his final determination in the applicant's case.

On July 13, 2021, the applicant's attorney received a response from RADM G, who informed her that the Commandant's determination is final and not subject to appeal. RADM G stated, however, that if the applicant believed that there is an erroneous or unjust entry in his military record, he could submit an application to this Board. Finally, RADM G stated that the applicant's attorney should direct any questions to the Staff Judge Advocate, CDR J.

The applicant was retired on July 31, 2021, with a General—Under Honorable Conditions characterization of service, a narrative reason for separation as “Unacceptable Conduct,” and a separation code of “RNC” which denotes a “voluntary retirement authorized by, but not required by law, when a member performs acts of unacceptable conduct (i.e. moral and/or professional dereliction) not otherwise listed.”

APPLICANT'S ALLEGATIONS

Removal from Captain Promotion List

Through counsel, the applicant explained that in the notification letter sent to him on October 30, 2019, he was advised that a Special Board would convene to determine if he should be permanently removed from the Promotion Year 2020 Captain Active Duty Promotion List (ADPL). The letter advised the applicant that the Special Board would review his Personnel Data Record (PDR) as well as “all documents as defined by reference (e),” but according to the applicant, to date, he has no idea exactly what evidence the board considered when it reviewed his case. The applicant alleged that the board report failed to document the exact nature of the records it considered, and it was clear from the Special Board report of November 20, 2019, that it considered the same allegations made that led to the negative Page 7, that is, statements made to investigators that were made in violation of his constitutional rights. The applicant argued that as the military judge ruled, there was no question that CGIS investigators were required to give the applicant additional Article 31(b) warnings but failed to do so and thereby violated his constitutional rights.

The applicant stated that Article 7.b. and 7.g. of the Documents Viewed by Coast Guard Officer Promotion and Special Boards Manual, COMDTINST M1410.2, references the exact documents a Special Board convened to determine if an officer should be removed from a promotion list should review. Specifically, Article 7.b. of COMDTINST M1410.2 states, “Promotion boards are restricted to record entries made after the officer's original commissioning date and those entries dealing with performance as an officer,”¹⁹ and Article 7.g. states, “Special

¹⁹ Article 7.b. of COMDTINST M1410.2 states, “ADPL Promotion Boards. Promotion boards are restricted to record entries made after the officer's original commissioning date and those entries dealing with performance as an officer. All other documents or information from before the commissioning date is masked from view. Documents and data sets permitted to be viewed by ADPL promotion boards are outlined in the attached enclosure. Rules governing communications to the board are set forth in references (a) and (e). Ensign OERs for candidates for promotion to the grade of O-4 and above shall be masked from view of ADPL selection boards.” (Reference (a) is the Personnel Manual, COMDTINST M1000.6 (now obsolete) and reference (e) is Schedule of Active Duty Promotion List (ADPL) and Inactive Duty Promotion List (IDPL) Officer Personnel Boards and Panels, COMDTINST 1401.5 (series)).

boards that are convened to determine if an officer should be removed from a promotion list shall follow the guidelines set forth for ADPL promotion boards.”

The applicant claimed that the special board considered the October 25, 2019, negative Page 7, which the applicant argued is facially inaccurate. The applicant stated that the negative Page 7 claimed that he was “advised of [his] rights under Article 31(b) of the Uniform Code of Military Justice [UCMJ]” and that he “acknowledged [his] understanding of those rights verbally and in writing.” The applicant alleged that this was a complete misstatement of the circumstances of the interrogation. On the contrary, the applicant claimed, the CGIS investigators violated his rights in that they did not give him the proper Article 31(b) warnings. To support his claim, the applicant cited the judge’s decision, which stated the following:

[N]ew Article 31(b) warnings should have been given to the accused at this point. They were not. Further questioning after this point were [sic] a violation of the [accused’s] Article 31(b) rights and in violation of M.R.E. [Military Rules of Evidence] 305(c)...The Article 31(b) rights provided to the accused were not sufficient to notify him of the accusations against him following the [accused’s] admissions to S/A [CGIS Investigator]...

The applicant claimed that the negative Page 7 was blatantly wrong in that it claimed proper rights were given to him and he waived such rights, but that did not happen at all because CGIS agents failed to give him proper notification before they interrogated the applicant about the matters addressed in the Page 7. The applicant argued that the CGIS agents’ misconduct in their handling of his interrogation cannot be overlooked or excused. The applicant argued that the agents’ job was to properly orient him as to the nature of the accusations against him so that he, as the accused, could make a voluntary and informed decision whether to speak with the agents, but that did not happen in this case. The applicant alleged that the CGIS agents intentionally violated his rights in order to get a statement from him. Accordingly, the applicant argued, he did not make a voluntary statement and the statements made to CGIS should not be used against him. The applicant further argued that the special board’s recommendation that he should be deprived of his promotion is also improper because it relied on involuntary and factually inaccurate evidence.

The applicant alleged that based on the timing of the negative Page 7 one can only conclude that it was issued for the sole purpose of blocking his well-deserved promotion. The applicant explained that the PY20 ADPL Captain Selection Board was held on July 8, 2019, and the board results were published on August 1, 2019, yet despite CGIS having conducted an investigation in this matter since July 2018, the Coast Guard took no adverse action regarding the applicant or his official military record until October 25, 2019, more than 14 months after the investigation commenced. The applicant stated that then, after issuing the negative Page 7, a special board action was immediately convened, highly suggestive that the only reason the Page 7 was issued was to adversely affect his promotion. The applicant argued that since the only evidence relied upon to issue the Page 7 was the involuntary statements made in violation of his right to remain silent, the Page 7 was improper and should therefore be removed from his record.

Highest Grade Held Determination Board Errors

The applicant alleged that he was deprived of due process, fairness, and equity during the HGH board process, and because of this violation, the HGH board’s determination must be set

aside. The applicant stated that once set aside he is entitled to be returned to his full paygrade, and all retirement backpay returned to him. The applicant claimed that the HGH was wrought with errors and thus, their determination invalid. The applicant argued that the HGH board was erroneous because: 1) he did not receive adequate notice prior to the convening of the HGH board, 2) he did not receive all of the documents the HGH board would consider before it commenced, 3) the HGH board failed to consider his objections and rebuttals, and 4) the HGH board considered irrelevant evidence from outside his official military record.

The applicant stated that pursuant to Article 1.C.12.h.2.(d) and (e) of the Military Separations Manual, COMDTINST M1000.4, an officer facing an HGH board “may submit a statement to the special board within 21-days of notification,” and “will, upon request, be provided copies of records or documents to be forwarded to the special board.” The applicant stated that despite his requests to be provided with all records to be reviewed by the board, the Officer of Personnel Management (OPM) did not provide him with the requested records. The applicant explained that although he provided a statement and objections to the board procedures, since he was not provided with the 600+ pages of documents before he submitted his statement and objections, he was not fully aware of all the matters the board would be considering prior to its commencement. According to the applicant, the only matter referenced in his notification letter was the one-page negative Page 7.

The applicant argued that under Article 1.C.12.h.3(a) and (c) of COMDTINST M1000.4, the board is to consider the nature of the derogatory information and the severity of such information, but in his case, he had no notice or opportunity to address the derogatory information because OPM failed to provide the requested documents. The applicant contended that he was essentially left in the dark as to what to address with the board because OPM failed to send him records until after the board had already convened and concluded. The applicant explained that he had no opportunity before the board members commenced their review of the matter to object, comment, or submit anything in rebuttal to the materials the board would consider. The applicant claimed that it is clear from the emails between himself and an OPM Lieutenant assigned to his case, which include the Secretary’s affirmation of the board’s decision, his case was reviewed by the HGH board before he ever received the documents, and they disregarded his rebuttal and concluded their review before he could ever respond to the 600+ pages of records. The applicant argued that the HGH process was unfair and prejudicial to him since its members concluded their review of the matters before them before he had the opportunity to review and respond to the documents it was reviewing. The applicant contended that by the time he could respond, the well was already poisoned before he ever had the chance to present his side of the story.

The applicant further contended that it was wholly improper, unfair, and unjust for the board to consider the entirety of the CGIS investigation, and other improper evidence that included a myriad of unofficial, unsubstantiated (and completely far-fetched) complaints filed by his ex-wife, civilian police reports, child protective service agency records pertaining to his son, polygraph records, divorce records, IRS documents, notes from his children, emails with Family Court, his daughter's neuropsychological assessment, Department of Children and Families agency records pertaining to his two daughters, and “logs” kept by his ex-wife. The applicant claimed that none of those materials were maintained in his official military personnel record, yet the HGH Board was provided with them and presumably considered these messy divorce and highly

contested child custody matters, unfounded allegations by his ex-wife, and other highly prejudicial documents that have no basis in law or fact and are not maintained in any official personnel record.

The applicant stated that Article 1.C.12.h.3.(a) of COMDTINST M1000.4 states the HGH board will consider the following factors: “The nature of the derogatory information or misconduct documented in the officer’s military record.” The applicant claimed that none of the 600 plus pages considered by the HGH board except for the factually inaccurate Page 7 were matters documented in his official military record. The applicant contended that any of the records were clearly not official records, such as his ex-wife’s logs, his daughter’s “I hate daddy” letters, and extensive divorce filings. The applicant argued that the conduct of the HGH board was absurd, and conducted solely because his general court-martial determined that he was not guilty of the offenses levied by his ex-wife and children. The applicant alleged that the Coast Guard was determined to “convict” him and hold him accountable for baseless, crazy allegations by a vindictive ex-wife. The applicant explained that the allegations from his ex-wife and daughters were processed at general court-martial, and he was fully acquitted of the alleged misconduct. According to the applicant, the testimony at trial made his ex-wife’s motive and biases clear as they pertained to this matter. The applicant alleged that had he been made aware before the HGH Board convened that the Board would consider allegations of misconduct for which a court-martial had already determined his innocence, he could have submitted numerous good character letters and favorable evidence to the board, similar to what he presented during his general court-martial proceedings that led to his acquittal. In addition, the applicant stated that he could have submitted the record of trial, which established the complete fabrication of the allegations laid against him by his ex-wife.

The applicant stated that the record of trial in this case was clear: his ex-wife had a financial motive for falsifying allegations against him, as she had filed a \$45,000,000 lawsuit against the State of Connecticut for its purported mishandling of the allegations she made against him. The applicant claimed that his ex-wife was so displeased by the outcome of the trial, as it now endangered her frivolous lawsuit against the State of Connecticut, that she and her family filed baseless complaints against the military judge and the defense counsel who represented him at the court-martial, complaining that they had committed violations of the law through their actions during trial. The applicant stated that his ex-wife and parents even went as far as to criticize their daughters’ Victims Legal Counsel for their purported failures. The applicant explained that fortunately, the Coast Guard cleared those members of his general court-martial from all allegations levied against them by his ex-wife.

The applicant stated that after the HGH board issued its results, he objected again on the grounds that the process was unfair and contrary to policy and instruction. As a result of his objections, the applicant requested that the board results be set aside and that he be retired as an O-5 with an Honorable characterization of service, but unfortunately, his requests for relief were wrongly denied. The applicant argued that his military record is replete with honor, courage, commitment, service, and steadfast devotion to his duty, but sadly has lived under the cloud of the baseless allegations by his ex-wife for years, spending hundreds of thousands of dollars in legal fees to defend himself. The applicant stated that he was not found guilty of any crime, yet the HGH board used the same allegations to warrant a reduction in his paygrade and a discharge Under Honorable Conditions, neither of which were appropriate in this case.

The applicant explained that he was reduced in rank without a hearing, without a court finding of misconduct, and without the opportunity to defend himself. Moreover, he was given a less than honorable discharge and his DD-214 reads as if he was administratively separated for misconduct, none of which was true. The applicant argued that even more importantly, even as he faced court-martial, his commanding officer gave him multiple outstanding fitness reports. In addition, the applicant stated that he received a Meritorious Service Medal after his complete acquittal. The applicant claimed that his service over the 28 years in the Coast Guard was demonstrably and undoubtedly noble, demonstrated by his officer evaluation reports (OERs), which state without question that he served his country with pride and distinction, leading to no other conclusion that his service throughout his 28 years was honorable.

DD-214 Errors

The applicant explained that during his retirement processing, he was provided with a draft copy of his DD-214 and immediately upon review he realized that the draft contained significant errors. The applicant claimed that despite these errors, the Coast Guard issued the final version of his DD-214 with legally and factually inaccurate information.

First, the applicant stated that his retirement was based upon his properly submitted retirement request, not due to misconduct, nor was his retirement paperwork submitted in lieu of administrative separation. The applicant argued that because he was retiring, the applicable regulation was Article 1.C. of COMDTINST M1000.4, “Retirement,” but the Coast Guard erroneously relied upon Article 1.A.14 of COMDTINST M1000.4,²⁰ which is the misconduct provision. The applicant further argued that because he was not administratively separated for misconduct, and reference in Blocks 25 and 28—Separation Authority and Narrative Reason for Separation—to Article 1.A.14. and “Unacceptable Conduct,” are improper. The applicant explained that Article 1.A.14.c is clearly titled “Causes for Separation” and then goes on to enumerate the many reasons to separate for misconduct. The applicant argued that the first sentence in this article is instructive, which states, “The causes for separations prescribed in this Section are also applicable to officers processed under Articles 1.A.7, 1.A.8, 1.A.10, 1.A.11, 1.A.19, or 1.A.20 of this Manual.”²¹ The applicant stated that he was not separated under any of the referenced articles and therefore, any reference to misconduct is inappropriate.

VIEWS OF THE COAST GUARD

On January 10, 2023, a judge advocate (JAG) for the Coast Guard submitted a memorandum prepared by the Personnel Service Center (PSC) and asked the Board to accept

²⁰ Article 1.A.14 of the Military Separations Manual, COMDTINST M1000.4, is the separation provision for “Separating Regular Coast Guard Officers for Cause.”

²¹ The Board could not locate this sentence in the applicable separation manual. The first sentence in Article 1.A.14.a. of COMDTINST M1000.4 is “Pursuant to authority contained in 14 U.S.C. §321-§327, this Article contains regulations to separate commissioned Regular Coast Guard officers with greater than five years commissioned service for cause,” and the first sentence in Article 1.A.14.c.1. is, “The existence of one or more of these or similar conditions may require removing an officer for substandard performance of duty or failure to meet standards prescribed by the Commandant.”

PSC's findings and analysis as the Coast Guard's advisory opinion. In accordance with PSC's recommendation, the JAG recommended the Board deny relief in this case.

Applicant's Claims of Error Regarding Page 7

In response to the applicant's claim that the negative Page 7 was erroneous and unjust, PSC explained that in accordance with Article 9.f. of the Administrative Remarks, Form CG-3307, Manual, COMDTINST M1000.14D,²² Captain (CAPT) J had the authority to issue the contested Page 7 because he was the Commanding Officer of Military Personnel for Coast Guard Headquarters, where the applicant was assigned at the time. PSC explained that at the time, the applicant refused to sign the Page 7, which was annotated in ink by Commander (CDR) W, as required by Article 9.i. of COMDTINT M1000.14D.²³ Accordingly, PSC argued that the October 25, 2019, Page 7 was issued in accordance with policy.

PSC explained that criminal court proceedings, such as a court-martial, apply a strong presumption of innocence in order to protect the constitutional rights of the defendant, which includes the potential loss of life, liberty, or property. PSC further explained that a strong presumption of innocence can only be overcome at a court-martial by the presentation of evidence considered under strict evidentiary standards that prove beyond a reasonable doubt that all elements of the crime have been met. However, PSC stated, in administrative proceedings, such as the Special Board that removed the applicant from the Captain Promotion List, the Military Rules of Evidence do not apply, which means an administrative board can consider evidence that courts-martial cannot. For example, PSC explained that administrative boards may consider evidence obtained in violation of a member's Article 31(b) rights. PSC stated that the reason for this allowance is because an administrative board has no power to "punish" the member; nor can an administrative board take a member's constitutionally protected rights to life, liberty, or property away. PSC argued that the applicant had no constitutional right to be promoted to Captain, especially when his misconduct dramatically proved that he had failed to meet the moral professional standards to be a Captain in the Coast Guard. PSC claimed that the Special Board was required by service regulation to review the Page 7 in the applicant's military record, along with all other documents properly presented to that board. According to PSC, had the Special Board failed to do so, it would have committed an error.

Applicant's Claims that the Coast Guard Improperly Removed him from Promotion List

PSC explained that the applicant was selected for promotion to Captain during the July 8, 2019, Captain Selection Board, but when the Board convened the applicant had not yet received the negative Page 7, which was not issued until October 25, 2019, and therefore, the selection

²² Article 9.f. of COMDTINST M1000.14D states, "Deputy/Assistant Commandants and Commanding Officers may sign Administrative Remarks, Form CG-3307 entries..."

²³ Article 9.i. of COMDTISNT M1000.14D states, "If a member refuses to sign an Administrative Remarks, Form CG-3307 entry, after being counseled regarding its content, the words "member refused to sign" must be entered in the member's signature block along with the date counseled."

board was unaware of his prior misconduct. PSC explained that the authority and requirements found in Article 3.A.12.f. of the Officer Accessions, Evaluations, and Promotion Manual, COMDTINST M1000.3A,²⁴ are broad. According to PSC, an officer does not need to be convicted of an offense to meet the threshold of disqualification from promotion. PSC claimed that its office determined that the additional matter cast substantial doubt on the moral and professional qualifications of the applicant and therefore his ability to serve as a Captain. PSC stated that the applicant was given adequate notice that a Special Board would be convened to review his military record, which included the October 25, 2019, Page 7. PSC contended that the applicant was given the opportunity to submit a personal statement to the board, which was the appropriate method of explaining and disputing the contents of the Page 7, but the applicant chose not to do so.

PSC explained that the special board was convened in accordance with policy, including three board members who were Captains (O-6s) and senior to the applicant, who ultimately found that the applicant should be removed from the Captain Promotion List. PSC stated that the board report refers only to the Page 7 as the source of their recommendation, and the Page 7 contained no information about a pending court-martial or any criminal charges. PSC argued that the board's scope was only to make a recommendation to the Commandant of the Coast Guard in accordance with 3.A.12.f.4. of COMDTINT M1000.3A.²⁵ PSC stated that ultimately, the Commandant found that removing the applicant from the Captain Promotion List was appropriate and forwarded the report to the Secretary of Homeland Security, who agreed with the recommendation and permanently removed the applicant's name from Captain Promotion List. Accordingly, PSC argued that the applicant was properly removed from the Captain's Promotion List.

Applicant's Claims of Error Regarding his Reduction in Rank

PSC explained that on March 5, 2021, the applicant was notified that a Highest Grade Held determination board had been initiated to determine which grade he last served in satisfactorily in accordance with Article 1.C.12 of the Military Separations Manual, COMDTINT M1000.4.²⁶ PSC further explained that the applicant requested to receive copies of all documents that were to be forwarded to the HGH board and to submit a statement to the HGH board, which he did on March 26, 2021, as outlined in policy. However, PSC argued, the applicant failed to inform the board in his March 26, 2021, personal statement that the statement was incomplete pending receipt of the copies of documents to be reviewed by the board. PSC explained that the Office of Personnel Management (OPM) notified the applicant on March 30, 2021, that his HGH board was scheduled to convene on April 8, 2021, and though the applicant again submitted communications to the board, he still failed to inform the board that he had yet to receive the records he requested. PSC

²⁴ Article 3.A.12.f. of COMDTINST M1000.3A states, "each officer in the chain of command or Commander (CG PSC-OPM) is responsible for delaying a promotion if they know the appointee has disqualified themselves after being placed on a promotion list. Disqualification here means any circumstance which casts doubt on the moral or professional qualifications of the officer concerned."

²⁵ Article 3.A.12.f.4. of COMDTINST M1000.3A states, "The president of the board will forward a report of the board proceedings containing a recommendation to the Commandant on whether or not the officer should be promoted, along with reasons for the recommendation. If the Commandant finds removal from the promotion list appropriate, they will forward the report with endorsement to the Secretary of Homeland Security."

²⁶ Article 1.C.12. of COMDTINST M1000.4 outlines the procedures and requirements for officer retirements.

stated that the HGH board was held on April 8, 2021, and on that date the applicant was given copies of the documents that were to be reviewed by the board.

As a result of not receiving the documents, on April 9, 2021, following the HGH board, the applicant submitted a memorandum contesting OPM's handling of the HGH board for failing to comply with Coast Guard regulations. PSC claimed that to address the applicant's objection and to give him ample opportunity to address the board again, OPM notified the applicant on April 14, 2021, that he would be given additional time to supplement his statement to the HGH board. The applicant submitted his supplemental statement to the board on April 23, 2021. PSC stated that the HGH board was reconvened on April 27, 2021, and the board reviewed the applicant's supplemental statement. According to PSC, the board members were polled and asked whether they could consider the applicant's supplemental statement and make a fair and impartial finding, notwithstanding their previous findings. PSC claimed that the board members confirmed that they could and would remain impartial and set aside their previous findings.

PSC stated that based upon the supplemented record, including all comments from the applicant, the HGH board made new findings and determined that the applicant did not satisfactorily serve at the grade of O-5 due to his conduct as documented in the October 25, 2019, Page 7; lying to the police during the course of their investigation; and improperly filing of a VA loan request and forged tax return which showed a pattern of willful dishonesty and misconduct. In addition, the HGH board determined that the applicant did not satisfactorily serve in the grade of O-4 due to his conduct as documented in the October 25, 2019, Page 7 which spanned both O-5 and O-4 paygrades, another false statement to police (CGIS) for a separate investigation, and failure to disclose his income during divorce proceedings. According to PSC, the HGH board determined that due to the applicant's willful acts of misconduct and trends of dishonestly, he had last honorably served in the grade of O-3E. PSC claimed that the HGH board did not base their recommendation on any of the subject matter for which the applicant faced court-martial. PSC explained that the board's report was forwarded to the Commandant, who agreed with the board's findings and directed that the applicant be retired as an O-3 (Lieutenant).

PSC argued that the applicant's objections to not having received the requested documents in a timely manner was addressed by providing him with additional time to respond to the board after having been given ample time to review the records submitted to the board and submit a supplemental statement.

Allegations by the Applicant of Being Issued Incorrect DD-214

PSC explained that Article 1.A.2.b. of the Military Separations Manual, COMDTINST M1000.4, specifies that the service generally grants an Honorable discharge to officers under circumstances which would warrant such a discharge for enlisted members. PSC stated that following the HGH board, OPM convened a panel of officers to conduct a record review of the applicant Electronic Personnel Data Record (EPDR), including the all the documents furnished to the HGH board, to determine the characterization of service the applicant should receive and the panel determined that the applicant did not meet the standards for an Honorable discharge and thereby approved a General—Under Honorable Conditions characterization for the applicant's time on active duty. According to PSC, A General—Under Honorable Conditions discharge is not

a punitive discharge. For all of the reasons outlines above, PSC recommended the Board deny relief in this case.

APPLICANT'S RESPONSE TO VIEWS OF THE COAST GUARD

On June 1, 2023, the Chair sent the applicant a copy of the Coast Guard's advisory opinion and invited him to respond within thirty days. On June 12, 2023, the applicant's attorney requested an extension, which was granted. The Chair received the applicant's response on August 15, 2023.

Through counsel, the applicant contended that the drafters and endorsers of the advisory opinion go to great lengths to cite multiple Coast Guard instructions, rules of evidence, and board procedures in support of the contention that the processes in question were all administratively and procedurally compliant with the rules, but studiously ignored are the concepts of fairness, concepts of justice, and concepts of right and wrong. The applicant stated that he does not accept that the Coast Guard complied with its own rules and regulations despite assertions to the contrary by the drafters of the advisory opinion. The applicant claimed that the entire process was clearly not in compliance with the procedural rules because the arguments of regularity and compliance rely entirely upon the proper issuance of the Page 7, which set the entire course of events into motion.

The applicant stated that in paragraph 4.a. of the advisory opinion the drafters were clearly aware that the basis for the issuance of the Page 7 is problematic for the government. The drafters simply cite the rule and state the Commanding Officer had the authority to issue a Page 7. However, they do not address the contents of the Page 7, the proper basis for issuing a Page 7, or any of the objections posed by him in his petition. Rather, the advisory opinion merely stated that the CO had the authority to issue the Page 7, but then, for some reason, the advisory opinion references the refusal of the applicant to sign the Page 7. The applicant argued that a refusal to sign is entirely proper and contemplated by the instruction. The applicant stated that the advisory opinion then goes on to conclude that the Page 7 in question should remain in his official record. The applicant argued that from this assertion, which lacks a factual or legal basis to support its position, every other argument made by Coast Guard flows.

The applicant explained that the problem with the Coast Guard's position is that the issuance of the Page 7 is not only wholly improper because it is factually inaccurate and plainly unfair under any concept of legality, morality, or ethics. The applicant claimed that the drafters of the advisory opinion wholly ignore that the facts alleged in the Page 7 were the subject of a General Court-Martial that was pending when the CO issued the Page 7. At that time, the Coast Guard had determined that the best way to resolve the issue of guilt or innocence regarding the allegations made against him was a court-martial. The applicant stated this begs the question why the CO felt compelled to issue a Page 7 when he knew the matter was going to a court martial. The applicant questioned the Coast Guard's position, asking under what concept of fairness and justice is it proper to simply deem a person guilty of an offense through a Page 7, knowing that the court-martial finder of fact has been tasked with doing the same thing? The applicant contended that the Page 7 was simply a recitation of allegations and accusations made during the court-martial, but what makes this even more unconscionable is the applicant was acquitted of all pending charges following his court martial. The applicant stated that the Coast Guard apparently feels it was proper to simply tar a man's reputation and ruin his career based on mere allegations, even after he was

acquitted at trial. The applicant argued that the Coast Guard's position is not only unconscionable, but also offensive.

The applicant continued, arguing that paragraph 4.b. and its subsections are yet more of the same, a complete disregard of the facts and impropriety of the Page 7 and citation to the rules with no context. The applicant claimed that an administrative Special Board can review a properly presented Page 7, but this Page 7 should never have been presented as it should never have existed, therefore, the Page 7 was not properly presented to the board. The applicant stated, instead, the Page 7 is the product of unjust and improper conduct by the applicant's commanding officer, who adjudged him as guilty while at the same time knowing he was pending a trial. The applicant contended that under these facts how can an officer ever really be clear of allegations laid against him. The applicant further contended that a career-ending Page 7 was issued before trial on the merits, with no opportunity for him to defend himself or be heard. Moreover, the applicant stated that it was not enough for the Coast Guard to assert his guilt, but then give him no opportunity to defend himself or be heard. The applicant explained that because he was potentially facing decades in prison as a result of a court-martial, despite the prospect of an unrebutted Page 7 appearing in his record, he prudently exercised his rights to remain silent. The applicant alleged that despite the pending trial and the applicant choosing to exercise his right to remain silent, the Coast Guard used his exercise of that right against him when it stated in its advisory opinion, "Then [Applicant] refused to sign the CG-3307..."

The applicant claimed that in paragraph 4.c. of the Coast Guard's advisory opinion, the Coast Guard used the fact that he did not make a statement to the special promotions board regarding his Page 7 against him. However, as already noted by the applicant, the drafters were well aware that at the time the applicant was enduring a court-martial with the potential of decades of imprisonment. The applicant asked whether those who drafted the advisory opinion really believed it would have been prudent for any accused pending a court-martial to make any statements to the government during this time. The applicant alleged that the process was designed to deprive him either of his right to remain silent while pending trial or his right to assert his rights in response to the Page 7 and the board. The applicant further questioned why the Coast Guard issued the Page 7 at that time and what compelling government interest existed that required a Page 7 to be issued prior to the resolution of a court-martial. According to the applicant, had he been convicted at trial, the Page 7 would have been moot because he would have been a convicted felon. The applicant contended that issuing the Page 7 served no governmental purpose. The applicant claimed that nothing was accomplished other than to validate accusations and interfere with the exercise of his rights. He further claimed that the government chose to put its thumb on the scales of justice and as result of their actions, the Page 7 appears petty and vindictive.

Regarding paragraph 4.d. of the advisory opinion, the applicant argued that he had requested copies of the matters to be submitted to the HGH board on March 29, 2021, as was his absolute right, because his intent was to submit a statement to the board after reviewing the matters that were to be considered by the board. The applicant stated that the advisory opinion asserts that he was provided with the matters to be considered by the board, and while this assertion is factually accurate, the advisory opinion failed to mention one salient fact: he was provided the material after the board had already convened and was in session. The applicant stated that the government waited until the provision of the requested material served no purpose other than to allow the

government to assert it complied with the rule and his request. The applicant argued that the Coast Guard's last minute attempt to provide him with the requested documents certainly did not help him in any way. The applicant contended that the Coast Guard once again impeded his ability to assert his right to be heard.

The applicant further contested paragraph 4.d.vi. of the advisory opinion wherein it asserted that he was provided "with all relevant documents," but then later in paragraph 4.d.vii., it acknowledged that the material was provided after the board, which was not in compliance with the rule. According to the applicant, in response to his objection, they reconvened the board, but what is more important, is that the Coast Guard reconvened the board with the same members. The only step the Coast Guard took to ensure fairness was to seek so-called assurances from the board members that they would simply ignore the decisions previously made by the same members, and would now fairly and impartially reach an entirely new decision. The applicant argued that this was utter nonsense because the board had already made their decision.

The applicant claimed that the reconvened board was not making a new decision, but rather the board was being asked by the applicant to un-decide something they had already decided. The applicant argued that there is a fundamental difference between deciding something as an initial matter and then reconsidering a decision based on new information. The applicant further argued that the process employed by the Coast Guard was demonstrably unfair to him and placed a burden upon him to convince the members to change their opinions, despite their assertions that they could be freshly impartial, which was improper under the rules. The applicant claimed that the proper approach would have been to convene an entirely new board that could consider all the evidence not burdened by preconceived opinions at which they had already considered and concluded.

Regarding paragraph 4.d.ix. of the advisory opinion, wherein the Coast Guard claimed that after the special board reconvened it based its decision upon the supplemental record, including statements submitted by the applicant, the Page 7, and other allegations made by the ex-wife, the applicant challenged this Board to find any of the misconduct alleged in the Page 7. The applicant contended that allegations made by a disgruntled ex-wife as part of a bitterly contested divorce have no place in the advisory opinion or as any part of the basis for the board to make a decision for a highest grade held determination. The applicant argued likewise, the allegations against his minor son, unrelated to the allegations against him, should never have been a part of the HGH board. The applicant once again noted that the allegations and evidence from the trial resulted in an acquittal, and much of the evidence was deemed totally unreliable and never even admitted at trial. Additionally, the applicant contended that he was not charged with any of the allegations cited by the Coast Guard in its advisory opinion. The applicant argued that the use of these unsupported, unvalidated, and unreliable allegations in support of this advisory opinion and the ultimate decision of the board amply demonstrates the many manifest ways this process was entirely unfair and unjust. According to the applicant, it also demonstrates the depths to which the government will sink to support a decision that is clearly wrong.

The applicant alleged that the Coast Guard cited allegations made by his ex-wife in support of its decision in his case, but the record demonstrates that his ex-wife had not been a credible source of information and her allegations have been downright unbelievable. To demonstrate his ex-wife's lack of credibility, the applicant submitted additional evidence to his application for

relief. Specifically, the applicant took issue with the HGH board considering allegations made against his minor son. The applicant again contested the fact that the board had this information in its custody in the first place and argued that it should never have been used to decide the highest grade honorably served by the applicant. The applicant stated that, even more egregiously, the allegations and statements made by the ex-wife to the Department of Children and Families (DCF), which were determined by the judge to be unbelievable, were presented to the HGH board. To support his claims, the applicant cited to a September 30, 2021, final decision from DCF, wherein it found that the allegations against the applicant's minor son were unsubstantiated. The DCF decision stated, "The record reflects that the divorce and custody issues have been contentious. There is a record of the mother making allegations against the father, including an allegation that the father hurt the child in 2011 that was later unsubstantiated." The applicant noted evidence revealed during the DCF investigation, wherein his youngest daughter was recorded stating that the ex-wife had actually "lied about stuff." The applicant also cited the following DCF decision conclusions:

While the child may not have had a motive to fabricate, the record is replete with evidence that the mother was involved in a contentious custody battle and had a motive to coach the child to make fabricated allegations. The mother's influence on what the child reports is apparent in several allegations that the child made. Although seven months old at the time of the incident when she fell, the child says that the father pushed her down the stairs when her mother was not there and "He refused to tell her for weeks" and he has been "really doing hurtful things to us." These are not the words of this child. She was too young to recall this, and the language she uses is adult language: "he refused to tell her for weeks" and he has been doing "really hurtful things to us." These are the words of the mother, not the child.

The applicant noted that DCF granted his son's appeal and stated, "The mother had motives to attempt to manipulate and coach the child to make a fabricated story...The more mature language provides further evidence that these were not the child's words, but something coached and repeated by the mother." The applicant stated that his statement attached to the response, in addition to the DCF decision in his son's case, demonstrates the lengths that his former wife will go in her noncompliance with court orders and interference with his visitation with his children. The applicant argued that his ex-wife's motives must be questioned, and this Board should not rely on her unsubstantiated claims when making determinations about him.

In addition to his memorandum, the applicant submitted a personal statement to the Board covering events that had taken place since his retirement. The applicant explained that on May 24, 2023, he entered into an agreement with his ex-wife that would allow her to relocate the children to Florida under the condition that the children undergo an evaluation by a doctor chosen by a Guardian Ad Litem, with the evaluation taking place as soon as possible. The applicant stated that the purpose of the evaluation was to determine a reunification plan. According to the applicant, on July 24, 2023, the Guardian Ad Litem requested that a status conference be held due to the ex-wife's failure to follow through with the mandated evaluation of the applicant's daughters. The applicant claimed that the status conference had resulted in another order for the evaluation to take place as soon as possible. However, on August 1, 2023, the Guardian Ad Litem filed for another status conference because of his ex-wife's continued failure to comply with the order for the evaluation, but the status conference was cancelled when the ex-wife finally decided to comply with the court order.

APPLICABLE LAW AND POLICY***Federal Statutes***Title 14 U.S.C. §2120a. Special Selection Review Boards.a. In General.

1. If the Secretary determines that a person recommended by a promotion board for promotion to a grade at or below the grade of rear admiral is the subject of credible information of an adverse nature, including any substantiated adverse finding or conclusion described in section 2115(a)(3) of this title that was not furnished to the promotion board during its consideration of the person for promotion as otherwise required by such section, the Secretary shall convene a special selection review board under this section to review the person and recommend whether the recommendation for promotion of the person should be sustained.

Title 14 U.S.C. §2121. Promotions; Appointments.

...

(f)(1) The promotion of an officer may be delayed without prejudice if any of the following applies:

(A) The officer is under investigation or proceedings of a court-martial or a board of officers are pending against the officer.

(B) A criminal proceeding in a Federal or State court is pending against the officer.

(C) The Secretary determines that credible information of an adverse nature, including a substantiated adverse finding or conclusion described in section 2115(a)(3), with respect to the officer will result in the convening of a special selection review board under section 2120a of this title to review the officer and recommend whether the recommendation for promotion of the officer should be sustained.

(2)(A) Subject to subparagraph (B), a promotion may be delayed under this subsection until, as applicable –

(i) the completion of the investigation or proceedings described in subparagraph (A);

(ii) a final decision in the proceeding described in subparagraph (B) is issued; or

(iii) the special selection review board convened under section 2120a of this title issues recommendations with respect to the officer.

(B) Unless the Secretary determines that a further delay is necessary in the public interest, a promotion may not be delayed under this subsection for more than one year after the date the officer would otherwise have been promoted.

Title 14 U.S.C. § 2122. Removal of Officer from List of Selectees for Promotion.

(a) The President may remove the name of any officer from a list of selectees established under section 2121 of this title.

(b) If the Senate does not consent to the appointment of an officer whose name is on a list of selectees established under section 2121 of this title, that officer's name shall be removed from this list.

(c) An officer whose name is removed from a list under subsection (a) or (b) continues to be eligible for consideration for promotion. If he is selected for promotion by the next selection board and promoted, he shall be given the date of rank and position on the active duty promotion list in the grade to which promoted that he would have held if his name had not been removed. However, if the officer is not selected by the next selection board or if his name is again removed from the list of selectees, he shall be considered for all purposes as having twice failed of selection for promotion.

Title 14 U.S.C. §2145. Regular Lieutenant Commanders and Commanders; Retirement for Failure of Selection for Promotion.

(a) Each officer of the Regular Coast Guard serving in the grade of lieutenant commander or commander, who has failed of selection for promotion to the grade of commander or captain, respectively, for the second time shall:

(1) if he has completed at least 20 years of active service or is eligible for retirement under any law on June 30 of the promotion year in which his second failure of selection occurs, be retired on that date; or

(2) if ineligible for retirement on the date specified in clause (1) be retained on active duty and retired on the last day of the month in which he completes twenty years of active service, unless earlier removed under another provision of law.

Coast Guard Instructions

The Documents Viewed by Coast Guard Officer Promotion and Special Boards Manual, COMDTINST M1410.2, provides the following guidance on what documents are permitted to be viewed by special boards:

1. PURPOSE. This Instruction amplifies current law and policy as to what constitutes an officer's record for the purposes of promotion and special boards convened for officers in the U.S. Coast Guard and the Coast Guard Reserve.

...

5. DISCUSSION.

a. The purpose of a special board governs the scope of information to be provided to the board. ***The board is provided records relevant to the intended purpose of the board.*** The opinions of criminal investigators are not usually provided to a special board, but the statement of witnesses upon which those opinions are based should be provided to the board if relevant to the purpose for which the board is convened. ***This ensures equity throughout the process depending on the goals of the board.*** Promotion boards tend to be limited to a narrow focus on performance of duties as a commissioned officer. Special boards are far broader, giving the board sufficient information to evaluate the entire officer's career in relation to the decision to be made. [Emphasis added.]

...

7. POLICY. The following outlines portions of the record and matters of record that promotion or special boards may view. If the specific form or data set is not set forth in this Instruction, it shall be masked from view of the members during a particular board.

...

g. Special Boards. Special boards consider issues unique to a particular circumstance in making special determinations. These determinations include but are not limited to revocation of commission, determination of highest grade held, removal from a promotion list, or reversion to permanent grade. Because of this, there are a variety of concerns unique to these boards in relation to the record before each board:

(1) Special boards that are convened to determine if an officer should be removed from a promotion list shall follow the guidelines set forth for ADPL promotion boards. The only exception is that communications to the board are not restricted in their length and content.

(2) For all other special boards: (a) The board may be provided any record relevant to the intended purpose of the board. The opinions of criminal investigators are not usually provided to a special board, but the statement of witnesses upon which those opinions are based should be provided to the board if relevant to the purpose for which the board is convened.

(b) Communications to the board are not restricted in their length and content.

(c) All relevant data sets connected to the purpose of the special board should be available. Portions of the data sets masked from view may be made visible as matters of record if they are relevant to the issues that brought about the special board (e.g., a false official statement made on a security clearance document). The officer under consideration may introduce these items through the officer's communication to the board.

(d) Only those portions of an investigation (criminal, civil, administrative, CG Investigative Service) that are used to establish or demonstrate the existence or nonexistence of facts (e.g., statements of witnesses).

Article 3.A. of the Coast Guard Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A, provides the following guidance on officer promotions:

3.A.12. Procedures to Promote Officers.

a. Promotions. Under this Article, the President, by and with the advice of the Senate, promotes all regular officers to the grades of lieutenant commander and above and all integrated reserve officers to the grades of commander and above. The President alone promotes regular officers to lieutenant and below and integrated reserve officers to lieutenant commander and below. Promotions are authorized in this manner. Commander (CG PSC-OPM-1) publishes the Officer Promotion Authorization Listing (OPAL) monthly by general message. The OPAL authorizes commanding officers or officers exercising administrative control to promote commissioned officers, ensign through captain, and chief warrant officers to the next higher grade. A letter from the Commandant authorizes flag officer promotions; the OPAL announces them. In all cases, either a copy of the OPAL or the letter authorizing the promotion shall be delivered to the officer concerned.

...

f. Delaying Promotion. Each officer in the chain of command or Commander (CG PSC-OPM) is responsible for delaying a promotion if they know the appointee has disqualified themselves after being placed on a promotion list. Disqualification here means any circumstance which casts doubt on the moral or professional qualifications of the officer concerned, including pending action by a board of officers, courts-martial, or investigative proceedings (14 U.S.C. § 271(f)). The following actions will take place in this event:

(1) Reporting Requirement. A complete report of the circumstances recommending removing the selectee from the promotion list under Article 3.A.4. of this Manual shall be sent to Commander (CG PSC-OPM). If the promotion letter is used for notification, include it if received; a copy of the OPAL need not be included. The selectee shall be furnished a copy of the report and required to acknowledge receipt. Attach a signed copy of the acknowledgment as an enclosure to the report.

(2) Notification Requirement if Initiated by CG PSC. If Commander (CG PSC-OPM) initiates delaying a promotion, they shall advise the officer concerned in writing of the reasons for so doing and require acknowledgment of receipt.

(3) Board of Officers. The Commandant shall refer the case to a board of officers to recommend to the President whether to remove the selectee from the promotion list. The officer concerned will be afforded 10 calendar days notice of the proceedings, and may communicate by memorandum to the board via Commander (CG PSCOPM-1) in accordance with Article 3.A.6.h. of this Manual.

(4) Board Findings and Subsequent Actions. The president of the board will forward a report of the board proceedings containing a recommendation to the Commandant on whether or not the officer should be promoted, along with reasons for the recommendation. If the Commandant finds removal from the promotion list appropriate, they will forward the report with endorsements to the Secretary of Homeland Security (acting as the alter ego of the president), who is the final reviewing authority. If the Commandant determines that removal is inappropriate, the case is closed, and the promotion delay cancelled.

Article 1 of the Military Separations Manual, COMDTINST M1000.4, provides the following guidance on characterizations of service for officers:

1.A.2.b. The Service generally grants an Honorable Discharge to officers under circumstance which would warrant such a discharge for enlisted members. The following standards govern issuing honorable discharge certificates:

- (1) Acceptance of unqualified resignations as described in Article 1.A.5.a. of this Manual.
- (2) Discharge because of failure of selection for promotion.
- (3) Administrative separation for cause for reasons specified in Article 1.A.14.c.(1) of this Manual.
- (4) Other conditions generally resulting in an honorable discharge for enlisted members.

Article 1.C.12. of the Military Separations Manual, COMDTINST M1000.4, provides the following guidance on officer retirements and highest grade held:

1.C.12. Grade or Rate in Which Retired.

1.C.12.a. General Authority. The Coast Guard must make a grade determination to certify the retired grade of every officer and enlisted member prior to retirement. The retirement approving authority will administratively review the record of each member scheduled to retire to certify the highest grade or rate satisfactorily held during their Coast Guard service. A member's retired grade

determination is normally final at the time certification is made. However, in limited circumstances officer grade determinations may be reconsidered after retirement (see par. 1.C.12.i. of this Manual). The legal authorities for this policy are 10 U.S.C. § 1370, 10 U.S.C. § 1371, 10 U.S.C. § 1372, 10 U.S.C. § 12771, 14 U.S.C. § 294, 14 U.S.C. § 333, 14 U.S.C. § 334, 14 U.S.C. § 362, and 14 U.S.C. § 705.

(1) Any commissioned officer, except a chief warrant officer, who retires under any provision of 14 U.S.C. retires from active service with the highest grade he or she held (if different from their permanent grade) for at least six months while on active duty in which, as the Commandant determines, the member performed duty satisfactorily. This does not alter the two-year service requirement due to a permanent change of station in Article 1.C.9.a.(1)(a) of this Manual. **Officers retired under this subsection will have their retired pay calculated in accordance with the regulations contained in Chapter 16 of Reference (b), Coast Guard Pay Manual, CIM 7220.29 (series) available on the Coast Guard Portal.**

...

(3) For officers, derogatory information that may result in retirement at a lower grade includes, but is not limited to, court-martial conviction, civilian conviction, non-judicial punishment, relief for cause, removal from primary duties, or a derogatory officer evaluation report.

(4) Commanding Officers who are aware of derogatory information in an officer's military record may submit a memo to CG PSC-OPM or CG PSC-RPM to recommend that an officer, including a warrant officer, be considered for retirement in a lower grade. As noted in Article 1.C.12.f below, unless an enlisted member requests to retire in a previously held officer grade, enlisted members will automatically be retired in the grade held at retirement.

(5) When the Commandant determines an officer did not serve satisfactorily in the highest grade held prior to retirement, that officers retired pay will be based on the highest grade satisfactorily held, as determined by the Commandant, and subject to the reduced retired pay calculations in accordance with 10 U.S.C. § 1407(f).

(6) When an officer's record, in spite of performance or conduct issues, is otherwise so meritorious as to demonstrate the officer served satisfactory in the grade currently held, the officer should be retired in that grade. This presumption applies equally to CG PSC-OPM and any special board convened.

...

1.C.12.h. Procedures to Certify Highest Grade or Rate on Retirement.

(1) If the retirement approving authority has reason to believe an officer should be considered for retirement in a lower grade, including an enlisted member who requested and was not approved to retire in a previously held officer grade, a special board of officers will be convened to make a highest grade satisfactorily held recommendation to the Commandant.

(2) When a highest grade held determination is referred to a special board of officers, the board must consist of at least three officers in the grade of commander or above who all are serving in a grade senior to that of the officer being considered. CG PSC-OPM must notify the officer being considered in writing of the following:

(a) The officer's retirement is being forwarded to a special board of officers for a retirement grade determination;

- (b) The factual basis for convening the special board;
- (c) The Commandant makes the final determination of satisfactory service;
- (d) The officer may submit a statement to the special board within 21-days of notification;
- (e) The officer will, upon request, be provided copies of records or documents to be forwarded to the special board; and
- (f) The officer has the right to waive or conditionally waive their entitlement to a special board of officers and request to be retired at a lower grade.

(3) The special board of officers will consider the following factors:

- (a) The nature of the derogatory information or misconduct documented in the officer's military record;
- (b) The impact any derogatory information or misconduct had on military effectiveness, military order and discipline, and morale;
- (c) The severity of the derogatory information or misconduct, including any discredit brought upon the Coast Guard or negative impact to other people;
- (d) The quality and length of the officer's service in each grade held;
- (e) The officer's entire military record, including past derogatory information or misconduct or poor performance and evidence of superior performance;
- (f) The distinction between legitimate mistakes or unusual errors in judgment, and willful acts of misconduct;
- (g) The recommendations of the officer's chain of command, if submitted; and

...

(4) The Commandant makes the final satisfactory service determination for officers, including warrant officers and enlisted members who request to retire in a previously held officer grade. The special board of officers acts in an advisory capacity and its recommendation must be considered as such.

1.C.12.i. Reconsideration of Previous Highest Grade Held Determination. Highest grade held determinations are normally final upon retirement. However, a determination can be reconsidered after retirement if substantial new evidence is discovered contemporaneous with, or within a short time following retirement and could result in a lower grade determination. For example, if an officer's misconduct while still in active service was not discovered or documented until after the officer's retirement, and such misconduct was not discoverable through due diligence, a new highest grade held determination may be completed. Also, a new highest grade held determination could be conducted if a previous determination was attained through fraud or if a mistake of law or mathematical miscalculation led to an improper retirement or highest grade held determination.

FINDINGS AND CONCLUSIONS

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

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

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.²⁷

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

4. The applicant made the following allegations: (a) The Coast Guard erroneously and unjustly relied upon admissions that were illegally obtained during a polygraph examination to issue him the October 25, 2019, Page 7; (b) The Coast Guard erroneously and unjustly relied upon the erroneous and unjust Page 7 to remove him from the PY2020 Captain Promotion List; (c) The Coast Guard erroneously and unjustly used the October 25, 2019, Page 7 to initiate an HGH board; (d) The HGH board was erroneously and unjustly convened even though the Coast Guard had not provided him with copies of the evidence to be considered, as required by policy; (e) The HGH board erroneously and unjustly reviewed highly prejudicial documents that were not relevant to the allegations that prompted the HGH board; (f) The Coast Guard erroneously and unjustly issued him a General—Under Honorable Conditions characterization of service when his record supports a Honorable characterization; and (g) The Coast Guard erroneously and unjustly gave him a narrative reason for separation of "Unacceptable Conduct" when he was voluntarily retired for having been twice passed over for promotion and a separation code of RNC which denotes "voluntary retirement authorized, but not required by law, when a member performs acts of unacceptable conduct (i.e. moral and/or professional dereliction) not otherwise listed." When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in the military record, and the applicant bears the burden of proving, by a preponderance of the evidence, that the disputed information is erroneous or unjust.²⁸ Absent evidence to the contrary, the Board presumes that

²⁷ *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

²⁸ 33 C.F.R. § 52.24(b).

Coast Guard officials and other Government employees have carried out their duties “correctly, lawfully, and in good faith.”²⁹

5. Polygraph Examination. The Board’s review of the record shows that on July 12, 2018, the applicant voluntarily reported to a CGIS office to submit to a “specific issue” polygraph examination. The examination was conducted by CGIS Special Agent (S/A) B. Not long after his arrival and short introductions, S/A B presented the applicant with his Article 31(b) rights via a CGIS-5810 Form, and advised the applicant that he was being investigated for “sexual assault, false statements, and assault.” Regarding the allegations of making a false official statement, S/A B further explained that “if you made a statement in the past that you know to be false, as you well know, that’s problematic,” after which the applicant acknowledged that he understood S/A B’s warnings. The applicant informed S/A B that he was represented by counsel and in response to S/A B’s questions, the applicant stated that his attorney was aware he was participating in the examination and that he did not wish to consult with his attorney before proceeding with the interview.

Following his Article 31(b) warnings, the applicant was presented with a CGIS-5594 Form, “Consent to Undergo Polygraph Examination,” which outlined the applicant’s rights, including, “anything I say or do during the polygraph may be used against me in administrative, military justice, or federal judicial proceedings.” This form also outlined the applicant’s right to withdraw consent at any time during the examination. The applicant acknowledged his rights and signed the form.

The specific issue polygraph examination generally contains three types of questions: irrelevant questions, relevant questions, and comparison questions. The relevant questions being, “Did you have any sexual contact with [youngest daughter]?” and “While under your care, did you have any sexual contact with [youngest daughter]?” The comparison questions were, “Other than what you told me, did you ever consider lying about an unnatural sex act?” and “Other than what you told me, did you ever consider lying about a sexual activity with an adult?” The primary purpose of the comparison questions was to elicit a lie from the applicant, which would then be used to compare against the answers to the relevant questions.

During the pre-polygraph review of the questions, S/A B asked the applicant if “you ever considered lying about an unnatural sex act?” to which the applicant responded in the negative. S/A B then asked a follow-up question, “Did you ever consider lying about any sexual activity with an adult...something that you did, that you thought about lying?” The applicant answered, “yes,” explaining to S/A B that he had gone to an adult bookstore. When asked by S/A B if the applicant had gone just once, the applicant stated, “No, I did it a few times...between the divorce falling apart and 2016—so a three year period—I went to an adult bookstore.”

As a result of this conversation, S/A B changed his proposed comparison questions to, “Other than what you’ve told me did you ever consider lying about any sexual activity with an

²⁹ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

adult...something you did, that you thought about lying?” After adjusting the wording of his questions, S/A B attached the polygraph sensors to the applicant and began the examination. Approximately 40 minutes after the pre-polygraph review, S/A B asked the applicant if he was ready to continue, but the applicant did not answer, instead he put his head down and appeared to be upset. At this point, S/A B walked toward the applicant, who stated that he felt very sweaty, hot and uncomfortable. S/A B then immediately removed the blood pressure cuff from the applicant, and without any further questioning, the applicant stated, “Not about the questions about [youngest daughter], but now I just feel like I have a huge amount of anxiety about these other things that I did.” At this point, the applicant and S/A B engaged in a conversation wherein the applicant implicated himself in misconduct outside the boundaries of the Article 31(b) warnings the applicant had been provided—namely, that he had engaged in sexual acts with strangers while visiting the adult bookstore and that he had solicited a prostitute on one occasion while still technically married.³⁰ S/A B stated that at no point did he suspect that the applicant’s answers regarding his conduct in the adult bookstore constituted a violation of the UCMJ.

At trial, the applicant objected to the use of the statements made during the polygraph examination, arguing that they deviated from the Article 31(b) warnings that he had been provided and should therefore be suppressed from his court-martial trial. On March 10, 2020, the presiding judge, CDR C, issued his findings, agreeing with the applicant in part, and ordered that any statements made following the pre-polygraph review be suppressed because they had violated the applicant’s due process rights against self-incrimination. The presiding judge rejected the Coast Guard’s argument that the Article 31(b) rights provided to the applicant were sufficient because they concerned sexual misconduct. The judge held, however, that “Such a reading into Article 31(b) is too broad, and defeats the purpose of Article 31, and is inconsistent with the holding in Simpson, 54 M.J. at 284. This factor weighs against the Government.” Accordingly, the court ruled that any statements made after S/A B stated, “Just a couple of guys sitting here,” were inadmissible against the applicant pursuant to Military Rules of Evidence (M.R.E.) 304³¹ and 305(c).³²

³⁰ Please see Pages 14 and 15 of this decision for a full record of the conversation between the applicant and S/A B.

³¹ M.R.E 304 states, “(a) *General rule*. If the accused makes a timely motion or objection under this rule, an involuntary statement from the accused, or any evidence derived therefrom, is inadmissible at trial except as provided in subdivision (e).

(1) *Definitions*. As used in this rule:

(A) “Involuntary statement” means a statement obtained in violation of the self-incrimination privilege or Due Process Clause of the Fifth Amendment to the United States Constitution, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement.

³² M.R.E 305(c) states, “(c) *Warnings Concerning the Accusation, Right to Remain Silent, and Use of Statements*.

(1) *Article 31 Rights Warnings*. A statement obtained from the accused in violation of the accused’s rights under Article 31 is involuntary and therefore inadmissible against the accused except as provided in subdivision (d). Pursuant to Article 31, a person subject to the code may not interrogate or request any statement from an accused or a person suspected of an offense without first:

(A) informing the accused or suspect of the nature of the accusation;

(B) advising the accused or suspect that the accused or suspect has the right to remain silent; and

(C) advising the accused or suspect that any statement made may be used as evidence against the accused or suspect in a trial by court-martial.

6. Page 7. The applicant alleged that the Coast Guard erred when it issued him the October 25, 2019, Page 7 because the statements relied upon by his command in issuing the Page 7 were collected in violation of his Article 31(b) rights. The applicant further contended that the Page 7 was erroneous and unjust because the Page 7 falsely claimed that he had been advised of his rights under Article 31(b) and that he acknowledged his understanding of those rights both verbally and in writing. The record shows that the applicant voluntarily submitted to a specific issue polygraph examination on July 12, 2018, to determine whether or not he had sexually assaulted his two young daughters. In an effort to gauge the applicant's truthful responses from his untruthful ones, the examiner employed what is known as comparison questions. In the applicant's case, the comparison questions were, "Other than what you told me, did you ever consider lying about an unnatural sex act?" and "Other than what you told me, did you ever consider lying about a sexual activity with an adult?" As a result of these comparison questions, and in an effort to be as honest as possible, the applicant implicated himself in misconduct at an adult bookstore and in soliciting a prostitute while still married to his ex-wife. Although the statements made to the examiner during the polygraph examination were later suppressed by a court-martial due to violations of the applicant's Article 31(b) rights, prior to their suppression, the Coast Guard relied upon these admissions to issue the disputed October 25, 2019, Page 7. According to the applicant, the Coast Guard's reliance on these illegally obtained statements was both erroneous and unjust, and therefore the Page 7 should be removed from his permanent record. However, the Page 7 is on its face factually accurate because, as it states, he was read Article 31(b) rights about "sexual misconduct" before he confessed to sexual misconduct. While a reader might infer that the rights warning was about the exact same sexual misconduct that was documented on the Page 7, the Page 7 does not actually say that. In addition, the Page 7 was issued in October 2019 and the applicant's Article 31(b) rights were not deemed insufficient until March 2020, five months later. Therefore, at the time of the Page 7's issuance, it was factually accurate and was not erroneous as claimed by the applicant.

Also, the applicant has failed to point to any law or policy that required the Page 7 to be removed based on the ruling from the military court. And as the Coast Guard argued, the applicant's CO had the authority to take administrative action by issuing the Page 7 based on the applicant's admission even though that admission was later deemed inadmissible at trial, where the rules of evidence apply. While the Board might find otherwise under other circumstances, in this case, the record shows that the applicant was warned that he was suspected of "sexual misconduct" and, prior to the start of the examination, the applicant was presented with two forms, the first was the CGIS-5810 Form, also known as the applicant's Article 31(b) rights, and a CGIS-5594 Form, "Consent to Undergo Polygraph Examination," wherein the applicant was warned that, "anything I say or do during the polygraph may be used against me in administrative, military justice, or federal judicial proceedings." Not only did this form warn the applicant that anything he said could be used against him in administrative proceedings, but it also outlined his right to withdraw his consent at any time during the examination. The record is clear that the applicant acknowledged his rights and signed the form.

In addition, the record shows that the applicant was aware of the severity of his admissions because he became anxious over the context of his admissions, so much so that he became "very sweaty and very hot, and uncomfortable." Without further prompting the applicant stated, "not about the questions about [youngest daughter], but now I just feel like I have a huge amount of

anxiety about these other things that I did.” At this point, the applicant could have stopped the examination, but he chose to continue, being on notice that any further statement could be used against him. Furthermore, the applicant clearly indicated to the examiner that he was represented by counsel, who was aware that he was participating in the examination, and he declined to have his counsel present during the examination. The applicant never invoked his right to counsel, even after he felt compelled to implicate himself in favor of full disclosure and honesty. The applicant was aware of his right to withdrawal his consent at any time and terminate the examination, but he willingly continued with the interview. Therefore, the Board finds that the applicant has failed to prove, by a preponderance of the evidence, that the Page 7 was erroneous or unjust and should be removed from his record.

7. Captain Promotion List. The applicant alleged that it was erroneous and unjust for the Coast Guard to rely on the disputed Page 7 to remove him from the Captain Promotion List. However, as stated above, the applicant has failed to prove that the Page 7 was erroneous or unjust. Article 3.A.12.f. of the Coast Guard Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A, states, “Each officer in the chain of command or Commander (CG PSC-OPM) is responsible for delaying a promotion if they know the appointee has disqualified themselves after being placed on a promotion list. Disqualification here means any circumstance which casts doubt on the moral or professional qualifications of the officer concerned, including pending action by a board of officers, courts-martial, or investigative proceedings (14 U.S.C. § 271(f)).”³³ Title 14 U.S.C. §2120a(1) states:

If the Secretary determines that a person recommended by a promotion board for promotion to a grade at or below the grade of rear admiral is the subject of credible information of an adverse nature, including any substantiated adverse finding or conclusion described in section 2115(a)(3) of this title that was not furnished to the promotion board during its consideration of the person for promotion as otherwise required by such section, the Secretary shall convene a special selection review board under this section to review the person and recommend whether the recommendation for promotion of the person should be sustained.

The Coast Guard has a vested interest in ensuring that those officers promoted, especially in such high ranks as Captain, embody the Coast Guard’s Core Values and will lead with integrity and honor. The applicant’s conduct in the adult bookstore was not in keeping with the Coast Guard’s Core Values and could have brought discredit upon the Coast Guard had his conduct been made public. Moreover, the record shows that the applicant was married to his third wife in May 2015, yet during the polygraph examination he admitted to visiting the adult bookstore up through 2016, while married to his third wife. Finally, the applicant’s solicitation of a prostitute was not only a violation of multiple articles under the UCMJ, but it was also illegal under state law where the applicant resided. And pursuant to Article 3.A.12.f. of COMDTINST M1000.3A, the applicant’s chain of command and the Commander of PSC were required to delay the applicant’s promotion once they knew that the applicant had disqualified himself through misconduct. This same article defines disqualification as, “any circumstance which casts doubt on the moral or professional qualifications of the officer concerned...” The requirement to delay an officer’s promotion is extended to the Secretary through 14 U.S.C. § 2121a(1), which states, “If the Secretary determines that a person recommended by a promotion board for promotion to a grade

³³ Now, 14 U.S.C. §2120. Promotions; Appointments.

at or below the grade of rear admiral is the subject of credible information of an adverse nature...that was not furnished to the promotion board during its consideration of the person for promotion as otherwise required by such section, the Secretary *shall* convene a special selection review board under this section to review the person and recommend whether the recommendation for promotion of the person should be sustained.” (Emphasis Added.)

The applicant’s conduct at the adult bookstore and his solicitation of a prostitute were circumstances that reasonably caused the Commander of PSC to doubt the moral and professional qualifications of the applicant, and PSC was therefore required to postpone the applicant’s promotion. Likewise, the Secretary was required to convene a Special Board once credible information of an adverse nature was known in order to determine if the applicant’s selection for promotion should be sustained. The statutes and regulations regarding this matter are compulsory not permissive, and thereby required action by all those with knowledge of the applicant’s misconduct. Although the admissions made by the applicant were later found by a tribunal to be inadmissible at trial, the admissions were nonetheless credible and required Coast Guard officials to take appropriate action to address the misconduct. Accordingly, the Board finds that the Coast Guard’s reliance on the Page 7 to convene a Special Board to determine if the applicant’s selection for promotion to Captain should be sustained was neither erroneous nor unjust. The applicant has not proven by a preponderance of the evidence that his removal from the promotion list should be reversed.

8. HGH Board. The applicant alleged that the Coast Guard’s handling of the HGH board was erroneous and unjust. For the following reasons, the Board agrees:

- a. Failure to Timely Provide Documents. The record shows that on March 5, 2021, the applicant was notified that an HGH board would be convened to determine the highest rank honorably held by the applicant. The record further shows that the notification informed the applicant that upon request, he was entitled to see whatever documents “*will be forwarded*” to the HGH board (emphasis added). Article 1.C.12.h.2.e. of the Military Separations Manual, COMDTINST M1000.4, clearly requires that the documents be provided to the officer well before the HGH board convenes. Finally, the record shows that a week later, on March 12, 2021, the applicant requested copies of all the documents to be reviewed by the HGH board. Within an hour of receiving the applicant’s request, LT R from OPM’s Special Boards office responded to the applicant and stated, “Yes Sir, I will compile all the documents and send to you via large file transfer. I will need to route through legal, and will forward them to you early next week.” Despite the applicant’s request and LT R’s commitment to provide the applicant the documents “early next week,” the record shows that LT R did not send the requested documents to the applicant until 13 hours after the HGH board convened on April 8, 2021. Because of this error, the applicant was unable to thoroughly address and rebut the allegations and derogatory information being presented to the board as was his right. The Coast Guard argued that the applicant was aware that he had not received the documents and could have said as much to the board, but the record indicates that it was LT R’s responsibility to ensure that the prescribed procedures were followed to ensure due process for the applicant, and the record clearly shows that she failed to fulfill that responsibility despite clearly being aware of it. Like the applicant, LT R was aware that she had failed to ensure due process by forwarding the

requested documents to the applicant, as required by policy, and yet said nothing about it to the HGH board when it convened.

The Board finds that the Coast Guard's failure to provide the applicant with copies of the voluminous documents submitted to the HGH board well before the board convened was both erroneous and unjust. Fundamental fairness requires that the applicant should have been provided with the documents he requested before the HGH board convened and given ample time to submit a statement after reviewing those documents.

Moreover, the Board notes that up until 8:32 p.m. on April 8, 2021, the applicant was under the impression that the October 25, 2019, Page 7 would be the only derogatory information reviewed by the board, which was a reasonable assumption given that he was told that the HGH board was convened because of the Page 7; civilian authorities had found the other derogatory information about the applicant in the Coast Guard's possession to be unreliable and uncredible; and he had been acquitted of all charges.

Article 1.C.12.h.2.e. of the Coast Guard Military Separations Manual, COMDTINST M1000.4, states that an officer subject to an HGH board will be provided copies of records or documents to be forwarded to the special board. The Coast Guard failed to follow this policy and its answer to this error and prejudice was simply to allow the applicant to submit a supplemental statement to the same board. However, for reasons more thoroughly addressed in the following finding, the Board finds that the Coast Guard's remedy was insufficient to cure the error and injustice committed by the Coast Guard.

- b. Prejudicial Documents. The applicant alleged that the documents reviewed by the HGH board were extremely prejudicial and had nothing to do with the announced reason for the HGH board, which was to determine when he had last served honorably in light of the facts presented in the October 25, 2019, Page 7. The Board agrees. The record shows that the notification of the HGH board to the applicant mentioned only the October 25, 2019, Page 7, and omitted any mention of the charges against him at court-martial or the evidence submitted to the court-martial. Yet the HGH board received and reviewed over 600 pages of documents that included highly inflammatory and prejudicial allegations and evidence that had already been deemed unreliable and uncredible by the civil authorities, including detailed testimony of child sexual abuse that had been "coached". Moreover, the 600+ pages included none of the exculpatory evidence that favored the applicant and led to his full acquittal at a general court-martial. Given that the 600+ pages were withheld from the applicant before the HGH board convened and included only the prejudicial, derogatory evidence deemed unreliable by the civil authorities and none of the exculpatory evidence that resulted in his acquittal, it can be inferred that the 600+ pages were compiled for the purpose of painting an extremely negative picture of the applicant to the HGH board members and reviewing authorities with no concern for their lack of credibility. The Board finds that the presentation of these materials to the HGH board was not in keeping with Coast Guard policy. Article 5.a. of the Documents Viewed by Coast Guard Officer Promotion and Special Boards Manual, COMDTINST M1410.2, states:

The purpose of a special board governs the scope of information to be provided to the board. The board is provided records relevant to the intended purpose of the board. The opinions of criminal investigators are not usually provided to a special board, but the statements of witnesses upon which those opinions are based should be provided to the board if relevant to the purpose for which the board is convened. This ensures equity throughout the process depending on the goals of the board. Promotion boards tend to be limited to a narrow focus on performance of duties as a commissioned officer. Special boards are far broader, giving the board sufficient information to evaluate the entire officer's career in relation to the decision to be made.

None of the 600+ pages submitted to the HGH board had any probative information about the misconduct documented on the Page 7, which was in the applicant's military record and the only document cited as the reason for the HGH board. Moreover, the documents reviewed did not constitute a "record" as defined by Article 5.c. of COMDTINST M1410.2, which states, "An officer's record consists of documents and data pertaining to all periods of Coast Guard and Coast Guard Reserve service, regardless of breaks in such service." The documents reviewed included matters that occurred outside the Coast Guard's jurisdiction, such as civil divorce proceedings that are often contentious and combative and therefore unreliable sources of information. The documents also included overwhelming and highly inflammatory and unsubstantiated allegations of sexual assault against a child with very little to indicate that the applicant's ex-wife and her parents had been found to have coached his daughters to make these allegations against him. The documents also failed to address the fact that the applicant was acquitted of all charges based on the exculpatory evidence that was not submitted to the HGH board. The allegations of sexual assault of a child alone were enough to prejudice a board beyond recovery, remedy, or cure, and the Coast Guard's prejudiced curation of the documents submitted to the HGH board painted such an inaccurate and prejudiced picture of the applicant. Therefore, the Board finds that the submission of these documents to the HGH board was both erroneous and unjust.

- c. Failure to Convene New HGH Board. The applicant contested the HGH board and requested that a new HGH board be convened or that he be allowed to retire as a Commander with an Honorable characterization of service. The Coast Guard denied the applicant's request on both fronts, instead stating that it would reconvene the same board that had already reviewed the extremely prejudicial and inflammatory documents based on a promise by the board members that they would review the record anew. The Board finds that based on the facts here, this remedy was insufficient. The applicant had to attempt to address inflammatory evidence, some of which DCF had already deemed unreliable and incredible and without immediate access to the exculpatory evidence that had led to his acquittal on all charges at Court-Martial. The applicant was entitled to an HGH board that was untainted by the prejudicial and inflammatory documents contained in the 600+ pages submitted by the Coast Guard before the members first convened. The Coast Guard erred in not convening a new board, with untainted board members. The applicant was greatly prejudiced by these errors and injustices and the Coast Guard's "remedy" was quite insufficient.
- d. Mutual Fund. The unreliability of the information contained within the 600+ pages is evident in the Coast Guard's erroneous reliance on allegations made by the applicant's ex-wife and her significant other during and after divorce proceedings. In the HGH's final

report, the board stated as fact that the applicant had failed to disclose income received from a mutual fund during divorce proceedings. The HGH board's finding is factually inaccurate as supported by documents the applicant submitted to the ex-wife's attorney on February 12, 2018, proving that the applicant did not receive the mutual funds until June 17, 2015, and January 14, 2016, long after their divorce had been finalized. Yet, these falsehoods were promulgated by the ex-wife and what evidence suggests was her significant other at the time and were accepted by the HGH board as truth. The HGH board's and reviewing authority's reliance on this material was clearly erroneous and unjust to the applicant.

- e. Loan Fraud. The HGH board also erroneously relied upon allegations made by the ex-wife that the applicant had committed loan fraud when he claimed on a VA loan that he was single, when in fact he was married at the time. However, had the CGIS investigator obtained a subpoena as requested by the loan officer, he would have learned that the applicant started the loan application in April 2015, prior to his new marriage in May 2015 and only closed on the loan in August 2015. Moreover, the CGIS investigator was told by the servicing mortgage company that the applicant's marital status would not have impacted his ability to get the loan. The applicant's claim that he filled out the application more than a month before his marriage is supported by Regulation B of the Home Mortgage Disclosure Act (HDMA) which requires lenders to collect information regarding an applicant's ethnicity, race, sex, marital status, and age where the credit sought is primarily for the purchase or refinancing of a dwelling that is or will be the applicant's principal residence and will secure the credit. Therefore, the preponderance of the evidence shows that the applicant was honest in answering the loan officer's question about his marital status when he started his application in April 2015 and he had no reason to lie about it. There is no evidence that the Coast Guard even tried to gather additional information to ensure that the allegations they received regarding the applicant's VA loan were accurate and substantiated. Instead, the record suggests that the Coast Guard and HGH board erroneously and unjustly relied almost entirely on the ex-wife's allegations, which were otherwise unsupported.
- f. 911 Call & Spitting in Ex-wife's Face. In its final report, the HGH board accused the applicant of a pattern of dishonesty as a result of his 911 call made immediately following his youngest daughter's fall down the stairs. According to the HGH board, because of the false official statements made immediately following his daughter's fall, the applicant did not serve honorably as a Lieutenant Commander and should therefore be retired as a Lieutenant. However, the record shows that the Coast Guard was aware of the applicant's false statements in December 2011 and yet continued to let him serve honorably for years. The record further shows that on December 6, 2011, CGIS initiated an investigation into the false official statements the applicant had made to multiple individuals immediately following his daughter's fall. On April 1, 2013, the Coast Guard closed the investigation and there is no evidence of any discipline being administered against the applicant as a result of the investigation's findings. In fact, he was retained in his position at the Academy and received strong performance evaluations until his tour of duty ended in June 2015.

Despite the Coast Guard's knowledge of the applicant's false official statements made in a panic on the night of his daughter's fall in 2011, he was not removed from his primary duties and he was promoted to Commander on October 1, 2014, despite the findings of the investigation. The Board finds that it was erroneous and unjust for the HGH board to, nearly ten years later, retroactively remove the applicant's promotion and accuse him of not having served honorably as a Lieutenant Commander for making false official statements ten years earlier, when other high ranking Coast Guard officials had investigated the alleged misconduct and found that it did not warrant any punitive action.

The same is true for the allegations that the applicant did not serve honorably as a Lieutenant Commander because he admitted to spitting in his ex-wife's face in an attempt to get out of a room. The Coast Guard knew of the applicant's conduct in 2011 when he admitted to the act to investigators following his daughter's fall. The Coast Guard cannot now claim he did not serve honorably as a Lieutenant Commander when it was aware of the alleged misconduct, yet chose not to document it, promoted the applicant to Commander, and allowed him to serve honorably for years after they became aware of it.

- g. Forged Tax Return. The HGH board also stated as fact that the applicant had forged tax returns to the detriment of what the board called a "single mother," yet there was no evidence of such misconduct other than allegations made by the ex-wife and her significant other. Surely had the applicant committed tax fraud, as claimed by the ex-wife, the Internal Revenue Service (IRS) would have sought legal action against the applicant, including civil penalties for his fraud. However, there is no evidence that the IRS made any claims of fraud against the applicant. Accordingly, the Board finds that it was erroneous and unjust for the HGH board to treat as fact allegations made by his ex-wife without obtaining independent evidence to support the claims.
- h. False Official Statements/Obstruction of Justice. The HGH board accused the applicant of making false official statements regarding leaving his son home with his youngest daughter. The applicant went before a general court-martial for these same allegations, referred as a charge of "Obstruction of Justice." However, the applicant stated multiple times throughout his trial that the allegations made were false, and at trial the allegations were refuted by a recording of his interview with investigators at the time. The applicant testified that he never had an opportunity to respond to the question because the investigator continued to interrupt him, and the recording was found to support his claim. Most significantly, the applicant was acquitted of these charges after submitting the recording into evidence at trial. Outside of the limited information presented in the prejudicial documents compiled for the HGH board, there was no evidence that the applicant actually made the alleged false official statement. And it appears from the record that the HGH board either did not receive this exculpatory evidence or discounted it, unlike the judge, without explanation. For the HGH board to state as fact, based only on its review of highly prejudicial and inaccurate information, that the applicant had committed misconduct for which he was found not guilty at a general court-martial, without mentioning or addressing the exculpatory evidence, was erroneous and unjust.

- i. Dishonesty. In its final report, the HGH board consistently accused the applicant of dishonesty throughout his Coast Guard career and used this claim of repeated dishonesty to find that he had not served the Coast Guard honorably in nearly 14 years.³⁴ The Board finds that the HGH board's conclusion and recommendation were based almost solely on the allegations of his ex-wife, her parents, and her friend, which civil authorities had found to be unreliable and uncredible. Regarding the HGH board's final recommendation and depiction of the applicant to the Commandant, this Board notes that the only reason the Coast Guard became aware of any of the applicant's misconduct was through his voluntary, independent disclosures to various authorities when questioned. He admitted to investigators in 2011 that during a heated argument with his ex-wife and after she refused to move away from the doorway and allow him to leave, he had spit in her face. He did not have to disclose this information to investigators at the time, but he did. The applicant also admitted to initially lying about how his daughter had sustained her injuries. However, there were also extenuating circumstances that led the applicant to lie. The record shows that the daughter's treating physician noticed what she described as a "scary toxic" family dynamic and noted that given the ex-wife's behavior, she could understand why the applicant felt compelled to lie about how his daughter had been injured. During the investigation into his daughter's fall, the applicant told investigators that his ex-wife was constantly threatening to call his superiors on him. The applicant's contentions are supported by the multiple letters written by the ex-wife and her mother to Coast Guard officials accusing the applicant of serious misconduct. Given these facts, the Board is in agreement with the treating physician that the applicant's family life was toxic and the ex-wife's threats caused the applicant to fear for his job, leading him to make a poor decision and lie about how his daughter came to be injured, which lie he later corrected on his own. Furthermore, the applicant admitted during his polygraph examination on another issue that he had visited an adult bookstore and solicited a prostitute. There is no evidence to suggest that when asked, the applicant lied or did not disclose the truth. Even though the admission was not the point of the investigation and was against his own self-interest, the applicant disclosed the truth. This does not reflect a pattern of dishonesty as described by the HGH board, but of truthfulness, because when asked, the applicant disclosed the truth or admitted to prior untruthfulness of his own accord, even when it was detrimental to his career, as evidenced by the polygraph examination.
- j. Commandant Review. The record shows that after the HGH board "reconvened" and issued its recommendations in the applicant's case, the file was sent to the Commandant, who is the final reviewing authority for the HGH board's recommendations. On June 22, 2021, CDR F with PSC-OPM issued a memorandum, "Highest Grade Held Determination Results," wherein he notified the applicant that the Commandant had approved the proceedings and findings of the HGH board and determined that the highest rank that the applicant had last served in honorably was Lieutenant (O-3E). The applicant was also informed that OPM (not the HGH board) had determined that the applicant should be retired with a General—Under Honorable Conditions characterization of service. The

³⁴ The HGH board concluded that the applicant had not served honorably since he was a Lieutenant. The applicant was last a Lieutenant on August 1, 2007.

documents referenced in this memorandum include the applicant's March 26, 2021, statement to the HGH board, but not the applicant's April 9, 2021, objection to the handling of the HGH board or his April 23, 2021, supplemental statement to the board. Given the errors and injustices committed in the selection and presentation of only highly prejudicial evidence to the HGH board proceedings, the Board finds that it is likely that his supplemental memoranda were not submitted to the Commandant for review.

9. Relief. Under 10 U.S.C. § 1552, the Board is authorized not only to correct errors but to remove injustices from any Coast Guard military record. For the purposes of the BCMRs, "injustice" is sometimes defined as "treatment by the military authorities that shocks the sense of justice but is not technically illegal."³⁵ The Board has authority to determine whether an injustice exists on a "case-by-case basis."³⁶ Indeed, "when a correction board fails to correct an injustice clearly presented in the record before it, it is acting in violation of its mandate,"³⁷ and "[w]hen a board does not act to redress clear injustice, its decision is arbitrary and capricious."³⁸

The record shows that from the beginning of the Coast Guard's investigation into claims the applicant sexually assaulted his children, the Coast Guard committed egregious errors that ranged from violating his constitutionally protected rights afforded under Article 31(b) of the UCMJ, which led to an unwarned admission of past misconduct, to prejudicing an HGH board with inflammatory, unreliable, and uncredible allegations of child molestation, which had nothing to do with the misconduct that purportedly required PSC to convene the HGH board. The Coast Guard's prejudicial actions and failure to recognize and remedy its errors when notified of them shocks the sense of justice and requires this Board to exercise its authority under 10 U.S.C. § 1552 to correct the applicant's record on behalf of the Secretary.

Pursuant to Article 1.C.12.i. of the Military Separations Manual, COMDTISNT M1000.4, highest grade held determinations are normally final upon retirement. The only exception to this is if a member should have received a lower rank and achieved a higher rank through fraud or a mistake of law. Furthermore, Article 1.C.12.b.6. of the Military Separations Manual, COMDTINST M1000.4, states, "When an officer's record, in spite of performance or conduct issues, is otherwise so meritorious as to demonstrate the officer served satisfactory in the grade currently held, the officer should be retired in that grade. This presumption applies equally to CG PSC-OPM and any special board convened." Here, the record is clear that the applicant's service to the Coast Guard was honorable in spite of the misconduct documented in the October 25, 2019, Page 7. The record also clearly shows that his service was unaffected by the turmoil in his personal life. Even in the midst of the fabricated allegations of child sexual abuse that went on for many years and a trial by court-martial, the applicant received two individual Meritorious Service

³⁵ *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976); *but see* 41 Op. Att'y Gen. 94 (1952), 1952 WL 2907 (finding that "[t]he words 'error' and 'injustice' as used in this section do not have a limited or technical meaning and, to be made the basis for remedial action, the 'error' or 'injustice' need not have been caused by the service involved.").

³⁶ Docket No. 2002-040 (DOT BCMR, Decision of the Deputy General Counsel, Dec. 4, 2002).

³⁷ *Roth v. United States*, 378 F.3d 1371, 1381 (Fed. Cir. 2004) (quoting *Yee v. United States*, 206 Ct. Cl. 388, 397 (1975)).

³⁸ *Boyer v. United States*, 81 Fed. Cl. 188, 194 (2008).

Medals for his service to the Coast Guard. In addition, the applicant received positive endorsements, including one from his supervisor, RADM T, who recommended that the applicant be retired as a Commander and receive an Honorable characterization of service. The applicant's military record was so strong that absent the October 25, 2019, Page 7, he would have been promoted to Captain, which demonstrates his meritorious service. Accordingly, the Board finds that the Coast Guard should expunge from the applicant's records any and all documents pertaining to the HGH board that convened on April 9, 2021, and adjourned on April 27, 2021, including the board report, any personal statements made by the applicant in response to the board, and all documents contained in the 600+ pages submitted to the board. In the interest of justice, the Board further finds that the Coast Guard should correct the applicant's record by retiring him as a Commander (O-5) and providing him with all backpay and allowances that flow from this correction.

10. Characterization of Service. After being twice passed over for promotion to Captain, pursuant to Coast Guard policy and law, the applicant was given a mandatory retirement date of June 30, 2021. However, after notification of his second non-selection and mandatory retirement date, the applicant submitted a voluntary request for early retirement which was delayed pending the outcome of the HGH board. In CDR F's March 5, 2021, memorandum wherein he notified the applicant that an HGH board would be convened to determine the last time the applicant had served honorably, the applicant was also informed that OPM would determine the appropriate type of discharge the applicant would receive. In PSC's memorandum to this Board, PSC explained that following the HGH board, OPM convened a panel of officers to conduct a review of the applicant's military record, including the Page 7 and all documents reviewed by the HGH board, which included the 600+ pages of inflammatory, prejudicial, and unsubstantiated documents. As already outlined in Finding 8 above, these documents were erroneously and unjustly reviewed by the HGH board and their review by the panel of officers convened to determine the appropriate character of service for the applicant was equally erroneous and unjust. Given the prejudicial and unreliable nature of the documents reviewed, the Board finds that it is unlikely that this panel of officers could have arrived at a fair and equitable characterization of service for the applicant.

Furthermore, Article 1.A.2.b. of the Military Separations Manual, COMDTINST M1000.4, states:

The Service generally grants an Honorable Discharge to officers under circumstance which would warrant such a discharge for enlisted members. The following standards govern issuing honorable discharge certificates:

- (1) Acceptance of unqualified resignations as described in Article 1.A.5.a. of this Manual.
- (2) Discharge because of failure of selection for promotion.
- (3) Administrative separation for cause for reasons specified in Article 1.A.14.c.(1) of this Manual.
- (4) Other conditions generally resulting in an honorable discharge for enlisted members.

The applicant did not resign and was not separated for any of the 8 reasons outlined in Article 1.A.14.c.1. of COMDTINST M1000.4.³⁹ He was separated for twice being passed over for promotion. Furthermore, in order for an officer to receive a General discharge, Article 1.A.2.c. of

³⁹ Article 1.A.14.c.1. of the Military Separations Manual, COMDTINST M1000.4, outlines the requirements for removing an officer for substandard performance of duty.

the same manual states, “*The Service grants a General Discharge to officers administratively separated for cause* if the cause for separation or an officer’s previous record would preclude honorable discharge but is not of such a nature as to require discharge under conditions other than honorable...” Here, the applicant was not separated for cause as required by Article 1.A.2.c. of COMDTINST M1000.4. The Coast Guard had been aware of the misconduct that led to the Page 7 since July 12, 2018, and had taken no action to administratively separate the applicant for cause. Outside of the conduct admitted to by the applicant during his polygraph examination—which the applicant explained was disclosed in order to be as honest and transparent as possible under the threat of far more serious allegations and which was later determined to have been gained in violation of his Article 31(b) rights—there is no evidence that the applicant did not serve the Coast Guard honorably. The Board finds that the 600+ pages of inflammatory and unreliable evidence reviewed and relied upon by OPM in arriving at a General discharge determination should not be a basis for the determination of his characterization of service. Accordingly, because the applicant was not separated for cause, as required by Article 1.A.2.c. of COMDTINST M1000.4, and due to the erroneous and prejudicial information relied upon by OPM in reaching its decision, the Board finds that the applicant’s characterization of service should be upgraded from General—Under Honorable Conditions to Honorable.

11. Narrative Reason for Separation and Separation Code. The applicant alleged that the narrative reason for separation and separation code entered into his DD-214 were erroneous and unjust because he was not separated for unacceptable conduct but due to a voluntary retirement that was submitted in response to having been twice passed over for promotion. The record shows that on November 8, 2017, the Coast Guard issued an ALCOAST wherein it changed the verbiage used in Block 28—Narrative Reason for Separation—of the DD-214 and required that the narrative reason for separation coincide with the more specific language in the Separation Program Designator (SPD) Handbook. Here, the applicant received a separation code of “RNC,” which requires a narrative reason for separation of “Unacceptable Conduct.” The explanation provided for this separation code is “Voluntary retirement authorized by, but not required by law, when a member performs acts of unacceptable conduct (i.e., moral and/or professional dereliction) not otherwise listed.” The Board finds that this narrative reason for separation and separation code are erroneous. Title 14 U.S.C. § 2145(a)(1) states that for regular Lieutenant Commanders and Commanders:

(a) Each officer of the Regular Coast Guard serving in the grade of lieutenant commander or commander, who has failed of selection for promotion to the grade of commander or captain, respectively, for the second time shall:

(1) if he has completed at least 20 years of active service or is eligible for retirement under any law on June 30 of the promotion year in which his second failure of selection occurs, be retired on that date; ...

The narrative reason provided on the applicant’s DD-214 indicates that the applicant was allowed to retire even though the retirement was not required by law. However, pursuant to 14 U.S.C. § 2145(a)(1), because the applicant had twice been passed over for promotion—the first being when his name was removed from the ADPL and the second being a regular non-selection—the applicant’s retirement was required by law. Although the applicant had submitted a request to retire early, he was actually retired after his mandatory retirement date, and the Board is not persuaded that he should be burdened with “Unacceptable Conduct” as a narrative reason for

separation based primarily on inflammatory and unreliable allegations and the false findings of the HGH board just because he had requested an early retirement. Accordingly, the Board finds that the more appropriate code and narrative reason for separation for the applicant is “SGB,” which means “Mandatory retirement required by law when a commissioned or warrant officer was not selected for permanent promotion,” and corresponds with the narrative reason of separation of “Non-Selection, Permanent Promotion.” For the reasons outlined above, the Board finds that the Coast Guard committed an error and injustice when it issued the applicant a narrative reason of separation of “Unacceptable Conduct” and a separation code of “RNC.” Accordingly, the Coast Guard should correct the applicant’s separation code from “RNC” to “SGB” and his narrative reason for separation from “Unacceptable Conduct” to “Non-Selection, Permanent Promotion.”

12. Additional Necessary Relief. In reviewing the applicant’s complete record, the Board noted additional relief that is warranted. Specifically, the Board noticed that block 4a of the applicant’s DD-214 currently shows the applicant’s “Grade, Rate, or Rank” as LT and block 4b lists the applicant’s “Pay Grade” as O-3. Pursuant to the relief recommended in this decision, the Coast Guard should correct block 4a of the applicant’s DD-214 to reflect a “Grade, Rate, or Rank” of CDR and block 4b to reflect a “Pay Grade” of O-5.

13. For the reasons outlined above, the Board finds that the applicant has not proven, by a preponderance of the evidence, that the Coast Guard erred in issuing him a Page 7 based off admissions he made during a polygraph examination; nor has he proven that the Coast Guard’s reliance of the Page 7 as a basis for removing him the Captain Promotion List was erroneous or unjust. However, the Board finds that the applicant has proven, by a preponderance of the evidence that the Coast Guard erred in its handling of his HGH Special Board.⁴⁰ The applicant has also proven, by a preponderance of the evidence, that the characterization of service and narrative reason for separation he was provided upon his retirement are erroneous and unjust. Accordingly, the Coast Guard should expunge from the applicant’s records any and all documents pertaining to the HGH board that convened on April 9, 2021, and adjourned on April 27, 2021, including the board report, any personal statements made by the applicant to the board, and all documents contained in the 600+ pages submitted to the board. Furthermore, in the interest of justice, the Coast Guard should correct the applicant’s record by retiring him as a Commander (O-5) and providing him with all backpay and allowances that flow from this correction. The Coast Guard should also correct the applicant’s record by changing his characterization of service from General to Honorable, his narrative reason for separation from “Unacceptable Conduct” to “Non-Selection, Permanent Promotion,” and his separation code from “RNC” to “SGB.”

(ORDER AND SIGNATURES APPEAR ON NEXT PAGE)

⁴⁰ *Hary*, 618 F.2d at 708.

ORDER

The application of CDR [REDACTED] [REDACTED] [REDACTED] USCG (Retired), for the correction of his military record is granted in part as follows:

The Coast Guard shall remove from his military records all documents pertaining to the HGH board that convened on April 9, 2021, and adjourned on April 27, 2021, including the board report, any personal statements submitted by the applicant in response to the HGH board, and the 600+ pages of inflammatory allegations and evidence from the investigations and court-martial submitted to the HGH board. The CG-3307 (Page 7) dated October 25, 2019, shall remain in his record.

The Coast Guard shall correct his military records to show that he was Honorably retired in the grade of Commander (O-5) due to non-selection for promotion and shall pay him all backpay and allowances due as a result of this correction.

The Coast Guard shall issue him a new DD-214 reflecting an Honorable characterization of service, a retired grade of Commander (O-5) reflected in block 4a and 4b, an "SGB" separation code, and "Non-Selection, Permanent Promotion" as his narrative reason for separation.

May 31, 2024

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