

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2007-076

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XXXXXXXXXXXXXXXXXX

FINAL DECISION

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case on January 29, 2007, upon receipt of the completed application, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated September 20, 2007, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, who was discharged on September 8, 2004, after more than ten years of service, under other than honorable (OTH) conditions, asked the Board to

- remove from his record any documentation of “alleged illegal discrimination” by him and of his non-judicial punishment (NJP or mast) dated January 14, 2004;
- correct his DD 214 to show that his rate on separation was BM1/E-6, rather than BM2/E-5;
- upgrade the character of his discharge from OTH to honorable;
- correct the narrative reason for separation on his DD 214 from “triable by court-martial” to “hardship”;
- upgrade his reenlistment code from RE-4 (ineligible) to RE-3 (eligible with a waiver); and
- correct his DD 214 to reflect entitlement to a Meritorious Unit Commendation Award and a Global War on Terrorism Medal.

The applicant alleged that in November 2003, while he was serving on a cutter, a female subordinate in his department, SN C, falsely accused him of sexually harassing her. Regarding his conduct, the applicant stated that he was sorry and that his “biggest mistake here was letting a relationship with a member of [his] department go too far.” He stated that he “thought [he] had addressed the issue appropriately” after “realizing the relationship had turned inappropriate,” but that he would not apologize for telling SN C that he loved his wife and family. He stated that he

“had no control over what her reaction was to that decision by her making up a sexual harassment claim” and that his “relationship with SN [C] had gotten out of hand until it was too late.”

Within hours of her accusations, however, he was placed on report for two violations of the Uniform Code of Military Justice (UCMJ) and ordered to stay away from the cutter. Since he was preparing to transfer and the cutter “was wrapping up a three-month yard period,” he went on leave until he was taken to mast. A week later, a preliminary investigating officer (PIO) asked him to provide a written statement about the charges. The applicant told the PIO that he had no idea what the complaint was about, so he did not initially submit a statement.

In January 2004, the applicant alleged, he reviewed the evidence gathered by the PIO before his mast and “was appalled to discover that most of [SN C’s] accusations involved conversations that were purposely taken out of context or complete fabrications.” Moreover, of the five statements provided by other shipmates, two were based on hearsay, a third was completely irrelevant to the charges, the fourth described how SN C had accused two other senior crewmembers of harassment during her four months on board, and the fifth “provided no additional information.” The applicant also argued that the mast should be removed from his record because some of SN C’s evidence came from a Ouija board, which is a child’s game.

The applicant stated that before his mast, he complained to the XO that the PIO had not followed the instructions for investigating sexual harassment complaints provided in the Equal Opportunity Program Manual, COMDTINST M5350.4 (series). The XO told him that those regulations were optional even though they are not. The applicant argued that the mast should be removed from his record because the command failed to follow the regulations in this manual.

The applicant stated that at the start of his mast, he was prepared to ask more than one hundred questions of SN C and the crewmates who had provided statements to the PIO. However, the Group commanding officer (CO) unjustly prevented him from asking many of the questions he had prepared because they were said to be irrelevant. He immediately appealed the mast to the District Commander, but his appeal was denied.

In February 2004, the applicant alleged, Coast Guard Investigative Services (CGIS) began investigating SN C’s false accusations against him based on new information they received. He told the CGIS agents that SN C had told him that she loved him, that he had replied that he loved his wife and kids, and that within a week she accused him of sexual harassment. A few days after he spoke to the investigators, the Group XO told him that new charges might be filed against him and referred to a court-martial.

In late February 2004, the applicant alleged, his father had a heart attack, underwent quadruple bypass heart surgery, and was diagnosed with lung disease. Therefore, he took emergency leave, and when he returned he asked the officer in charge (OIC) of his cutter about getting a humanitarian transfer (HUMS). The OIC agreed to help him get the transfer, and the person who handled HUMS requests at Office of Enlisted Personnel Management (EPM) later told him that such requests are usually approved.

The applicant alleged that when he submitted his HUMS request in April 2004, the Group XO told him that SN C had done something that had caused the command to question her claims but that there was no additional evidence to support either her story or the applicant's. The applicant later learned from someone else that SN C had sent the Group CO an email alleging that poor leadership was leading to sexual harassment within the command.

In May 2004, the applicant alleged, his sister advised him that his mother's health was starting to fail. When he called EPM to discover the status of his HUMS request, he learned that it had never been forwarded by the Group. The applicant alleged that he was being punished for telling the truth to the CGIS agents even though their investigation had ended long before and he had not been charged with anything new. Therefore, on June 4, 2004, he filed a complaint against his command under Article 138 of the UCMJ. On June 15, 2004, he was informed that new charges had been preferred against him as a result of his behavior toward SN C and would be referred to a court-martial. The applicant argued that the new charges must be considered retaliation for his Article 138 complaint because of the timing and because the investigation into his alleged misconduct could not have taken so long to complete.

On June 18, 2004, the Group CO denied his request for redress and so on June 23, 2004, he submitted his formal complaint under Article 138. He alleged that his request for redress was denied not because the Group CO believed the charges against the applicant but because more than 90 days had passed since the applicant's mast. He alleged that his mast should have been thrown out because the report of the CGIS agents had recommended that SN C be charged with making false official statements.

In early July 2004, the applicant was informed that his HUMS request had been denied. In addition, the OIC told him that because his crewmates were talking about his Article 138 complaint, the applicant would be transferred from the cutter to the Group. At the Group, he was given menial tasks, such as weeding the flower bed.

In mid July 2004, the applicant alleged, he requested reinstatement of his E-6 pay grade upon the expiration of the six-month suspension of his mast sentence. Although the OIC supported his request, the Group CO denied it because of false allegations of continuing misconduct. Therefore, the applicant argued, his record should be corrected to show that he was re-advanced to and discharged as an E-6.

On August 8, 2004, the applicant alleged, his appointed counsel notified him that the Coast Guard was offering to let him separate in lieu of being tried by court-martial. The applicant initially refused but then agreed to take a few days to consider and research the option. On August 9, 2004, the Group command asked him if he was going to request separation. He told his attorney that he felt like he was being rushed to make a decision and that the command knew he would agree to separation because in his HUMS request, he had stated that if he did not get a humanitarian transfer he would likely seek a humanitarian discharge.

The applicant stated that he asked the executive officer of the cutter whether he should stand trial and was told that there was no way that he would get a fair trial because "too many senior members had been involved" and because everyone knew about his Article 138 complaint.

Therefore, and in light of his parents' poor health, he decided to request separation under honorable conditions and told his attorney that he would not accept anything lower than a general discharge under honorable conditions. He also told his attorney that one of the main reasons he was requesting separation was his parents' poor health. The applicant alleged that he never voluntarily requested an OTH discharge and that he refused to accept an OTH discharge.

The applicant also alleged that he never admitted to any misconduct, which is a prerequisite to a request for an OTH discharge. He argued that because he never admitted to any misconduct and was never found guilty of any misconduct, the District Commander must have based his recommendation on "less than factual information." He also alleged that because the District Commander recommended his separation based on "sustained" misconduct, he should have been processed for separation under Article 12.B.18. of the Personnel Manual and should have been entitled to an Administrative Separation Board.

The applicant also questioned how an OTH discharge could be appropriate, given his more than ten years of good service, when he was never found guilty of any crime or misconduct. He stated that he is only human and he makes mistakes, but he worked hard to get where he was in the Coast Guard, and it was not right for the CO to "nit-pick [him] to death with charges." He offered to take a polygraph test if the Board doubts a single word of his statement.

The applicant stated that on his last day in the Coast Guard, September 8, 2004, he asked his attorney if the attorney thought that he deserved an OTH discharge. His attorney told him that the only reason that the new charges had been filed and referred to a court-martial was that the applicant had filed an Article 138 complaint against the Group CO. The Group XO told him that his DD 214 was not yet ready and asked him to stay at the office until it was ready. The applicant, however, did not want to wait for the DD 214 to be prepared because he needed to get to his mother's house. The XO told him that the DD 214 would be mailed to him but then did not mail the DD 214 to him for three months.

On September 17, 2004, the applicant stated, his mother died. He complained that the Coast Guard's unjust denial of his HUMS request prevented him from being near her during her last months. Soon after her funeral, he was notified that on September 8, 2004, the District Commander had denied his formal request for redress under Article 138.

Regarding his requests for awards, the applicant submitted a copy of a citation dated March 21, 2005, which shows that the District Commander awarded a meritorious unit commendation to the crew of the applicant's cutter for their service from September 2002 through May 2004. He also submitted a copy of ALCOAST 274/05, which states that the Commandant awarded the Global War on Terrorism Service Medal to Coast Guard members who served at least 30 consecutive days on active duty between September 11, 2001, and January 30, 2005.

The applicant stated that after he and his father-in-law filed suit against the Coast Guard for harassment, civil rights violations, and unlawful appropriation of property, the Coast Guard settled the case by paying all damages. The applicant argued that the Coast Guard's settlement of his suit, failure to move to strike anything in the complaint, and failure to move to dismiss the case proves that the Coast Guard "agreed to accept the complaint on the grounds in which it was

filed with the understanding that I requested separation due to my mother's illness." The applicant argued that his excellent job performance aboard the cutter and his continuing public service as the "Deputy Manager/Program Manager for the Office of Emergency Management in Montgomery County, MD" should be considered evidence that refutes the allegations against him.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on December 7, 1993, as an E-1. He advanced to E-2 in 1994 and to E-3 in 1995. In 1996, he advanced to E-4 and became a BM3. In 1999, he advanced to BM2/E-5 and in 2001, he advanced to BM1/E-6. The applicant received several medals and commendations over the course of his military career, including three Good Conduct Medals. He also earned many qualifications and certifications for a variety of skills.

In the summer of 2002, the applicant began serving as the Deck Department Head and Master at Arms of a cutter. On April 10, 2003, he received the Group CO's recommendation for assignment as the OIC of an afloat or ashore multi-mission unit. From September through November 2003, the cutter underwent refurbishing at a yard in Virginia that was several hundred miles from its home port. The crew was housed in a local hotel.

On November 23, 2003, the Command Enlisted Advisor (CEA) placed the applicant on report after SN C, a female subordinate of the applicant in the Deck Department, told him that the applicant was harassing her. SN C had been assigned to the cutter for less than six months and it was her first unit following boot camp. On the Report of Offense, the CEA charged the applicant with violating Article 92 of the UCMJ "by making unwelcome sexual advances negatively affecting subordinate job performance and creating an intimidating, hostile working environment" and Article 134 by making "unwelcome sexual advances towards a subordinate contrary to the maintenance of good order and discipline aboard [the cutter]." He listed SN C and EM1 H as witnesses. The Group CO initiated an investigation into the allegations.

On November 25, 2003, the applicant was issued a military protective order that barred him from contacting SN C and from boarding the cutter without the prior permission of the captain or his delegee. The order was to remain in effect until February 1, 2004, unless sooner canceled. The applicant thereafter went on annual leave until the date of his mast.

On December 15, 2003, the XO of the cutter sent the applicant an email notifying him that by boarding the cutter that morning without providing prior notice to anyone, the applicant had violated the November 25, 2003, protective order, which required him to receive the permission of the OIC or his delegee before boarding the cutter.

Report of Investigation into Allegations of Sexual Harassment

On December 24, 2003, the PIO issued a report on his preliminary investigation into the allegations against the applicant. The report indicates that the CEA had seen on SN C's cell phone log that the applicant had made ten calls to her personal cell phone in one day without leaving a message, and after another first class petty officer, EM1 H, stated that he had twice told the applicant to leave SN C alone. The PIO also noted that two other petty officers had

approached the CEA about incidents between the applicant and SN C. He opined that SN C had been the subject of the applicant's "unwanted sexual attention" to the point where it not only affected [her] but also the morale of the entire cutter," in violation of Articles 92 and 134 of the UCMJ. The PIO based this opinion upon the applicant's numerous telephone calls to SN C; his denying her—and her alone—permission to leave the hotel one night; SN C's request to EM1 H that he get the applicant to leave her alone; the applicant's inappropriate touching of SN C's hair; SN C's distraught appearance after a car ride alone with the applicant that took much longer than it should have; and crewmembers' reports of the applicant's excessive attention to SN C. The PIO recommended that the charges be disposed of at NJP.

The PIO stated that he had interviewed the applicant, SN C, eight other members, and SN C's boyfriend, who was a second class petty officer in the Navy. The report indicates that the PIO told the applicant whom he had interviewed and asked the applicant if there was anyone else who should be interviewed, and that the applicant had denied that anyone else should be interviewed for the investigation.

Written Statement by SN C to the PIO

On September 13, 2003, after EM1 H asked the applicant to escort her back to her hotel room because she had drunk a lot of alcohol that night, the applicant put his arm around her, told her he had been wanting to kiss her for a long time, and then tried to kiss her when they reached her hotel room door.

On September 15, 2003, the applicant took her with him on a trip to the ISC and told her that he "had wanted to get together with [her] for a long time" and that no one would ever know if they began a relationship. After a short silence, she reminded him of his wife and children. He continued to make advances throughout the day. He would brush by her and grab her shoulders and once, when she was lying on a couch in the office, told her that he wished he was lying with her. SN C also stated that she began complaining about the applicant's behavior to her mother and sister, who was also a member of the Coast Guard, at about this time. In addition, the applicant began calling her on her personal cell phone to ask her when she was going to dinner, to the gym, or out to drink. He got her number by handing her a "recall" list, explaining that he might need to reach everyone in an emergency, but she later learned that he had not asked the other members of the Deck Department for their personal cell phone numbers.

On September 16, 2003, while sitting behind her in the van, the applicant complimented the softness of her hair and "continued to run his fingers through my hair."

On Friday night, October 3, 2003, while at a bar with other members, the applicant asked her why she would not dance with him. When she danced with an old friend from her hometown [who became her boyfriend], he stared at them and looked mad. When the applicant approached her while they were dancing and told her he was leaving the bar, he got mad when she refused to leave with him. After he left, she asked EM1 H to ask the applicant to leave her alone.

On Saturday, October 4, 2003, the applicant called her on her cell phone “about 15 times, sometimes within less than 10 minutes of each other. His calls all showed up as missed calls” rather than voicemail messages.

On Sunday morning, October 5, 2003, the applicant knocked on her hotel room door at about 8:30 a.m., when she was still in bed. When another member opened the door next to hers, the applicant yelled, “I’m sick of her not answering her door.” Then he telephoned her room and told her to answer her door when he knocked. When she asked what he wanted, he asked her what she was planning to do that day. Later, a crewmate told her that the applicant had knocked on her door again when she was away doing laundry and got mad when she did not answer the door. After she returned to the room, he called her, asked her why she refused to answer her door or phone, and told her “there would be problems if it happened again. When I asked what he needed, he said he just wanted to know if [another crewmember] was back from leave.”

The next day, the applicant asked her “what was going on” with the friend she had met Friday night and asked her “where [she] was all weekend.” The applicant got mad and told her that her friend was not allowed to stay in her hotel room “and kept going on and on about it.” He asked her how her relationship with her friend could work since she was not staying in Virginia for long. She told the applicant that she was “starting to feel uncomfortable with him calling [her] all the time [and] getting mad at [her].”

Later that week, the applicant called her, told her he had seen her with her boyfriend near the ferry that day, and told her never to walk by him again without saying hello. EM1 H and another crewmate later told her that they had been with the applicant near the ferry and that he was very angry about it. Afterward, the applicant told her that he had sat on a bench by the ferry and waited until the last one left because he wanted to talk to her about the incident and that he did not confront her when she got off the ferry with her friend.

On October 8, 2003, her roommate, another seaman, woke her and told her that the applicant wanted her “to get off [her] ass and come drink with him” and another crewmember. She went to see her boyfriend instead, however, and another crewmember later told her that “the whole night [the applicant] kept asking where I was, ... kept asking [her roommate] why she was with [her boyfriend], [and] seemed almost angry.” The applicant called her at 10:00 p.m. that evening and left a message to return his call, which she did not do. Early the next morning, before he went home on leave, he knocked on her door and got mad when her roommate told him that she was not there. Her roommate told her that if she did not report the applicant’s behavior, her roommate would, so SN C told EM1 H that the applicant was “starting to scare” her and asked him to talk to the applicant again.

On October 9, 2003, SN C spoke to the CEA about some of the applicant’s behavior, but told him that EM1 H would talk to the applicant and that she did not want to cause any problems for her shipmates or the applicant’s family.

On October 13, 2003, when the applicant got back from leave, he pulled her aside and asked her why she had spoken to the CEA. He told her “that if [she] started anything, it would only be bad for [her].” A few days later, when completing a self-evaluation, the applicant told

her he would not give her a very high score because she had spoken to the CEA about him. He also asked her why she was with her boyfriend and what she saw in him. When she refused to talk about her personal life, he “stormed out of the office.”

On October 17, 2003, the applicant got mad at her when she refused to go to a theme park with him and some other crewmembers. When she still refused to go, he told her that he would wait to go when she was going. Later, he told her that her orders to attend Navigational School would probably be canceled and remarked to her several times that it “was funny that [she] wanted to go [to the school at] the same time [her boyfriend] was going underway.” Later, SN C told the applicant that she did not want her personal life “brought to work everyday” and that she wanted to go to Navigational School to get qualified as a quartermaster of the watch. In response, the applicant “asked when [she] was going to tell him that [her boyfriend] was going underway at the same time [and] how convenient it was. He also said someone told him about [her boyfriend] being gone at the same time [and] that he didn’t like being lied to.”

On November 20, 2003, after completing four weeks of Navigational School, SN C called the office to report that she would be returning the next day and that her boyfriend would pick her up from the airport since the Government van was in use. The applicant replied, “Never mind that, I’ll find a way to pick you up myself.” The next day, she called the applicant to tell him that she did not need a ride from the airport since her boyfriend was picking her up. He told her that since her hotel room was no longer available, she would have to stay on the cutter. She told him she would stay with her boyfriend instead, and the applicant told her that she was not allowed to stay there.

On November 23, 2003, SN C stated, the applicant took her with him in a small boat to pick up some supplies and

when we took off he straddled himself behind me and sat really close. He then put his arm between my legs while brushing them [and] started wiping the gauges which could be seen clearly before. We discussed my financial situation [and] then he told me to drive slower. He said, “You know I didn’t bring you out here just to talk about your financial situation.” I asked him what he wanted [and] he said he’d tell me but I probably wouldn’t care anyway.” After sitting in silence, I became uncomfortable so I told him he should drive. When I sat on the side, he said, “You can sit behind me.” He told me [her prior roommate] came to him and asked why he treated me differently than everyone else. And he said, “I just told [her] that it was because I was in love with you.” He then said, “Just kidding. I didn’t tell her that.” During the ride back, he asked why I was with [my boyfriend and] said he knew I was trying to get transferred to Virginia, but not to even think about seeing him until September because I would be on the [cutter] that long. He also asked how things were going to work out.

SN C stated that the next day she arranged to switch duty with someone else because she did not want to be alone again with the applicant, but the applicant found out and refused to let the other person switch duty with her.

SN C stated that the applicant “always commented on how good I looked in skirts” and once told her roommate that he had a “thing for petite blonds” (like her). She also stated that two crewmates once told her that, while playing with a Ouija board with them, the applicant had “asked the Ouija board if anything happened between him [and] I [and] it said yes.”

Written Statement of the Applicant for the PIO

The applicant provided the PIO with a statement denying that he had “offered unwelcome sexual advances” or sexually harassed anyone. He stated that he was not aware of the details of SN C’s complaint but that on October 17, 2003, while he was home on leave, EM1 H had called him and told him that SN C had not appreciated his repeated phone calls the prior weekend, which he had made because “the crew was expecting the three of us to set up a trip to Busch Gardens that weekend.” When he got back from leave, two of his subordinates mentioned to him that SN C was complaining about how he treated her and how he had called her repeatedly. They also told him that she had complained about him to the CEA and they were “extremely upset and stated they knew the things she was saying were ‘not true.’” They also told him that she had made similar claims about another petty officer and that “they could not understand why she would make up lies about us.” When he asked SN C about her complaints, she told him that she was “‘really unhappy with the CG and the ship right now’ and broke down into tears.” She denied that her unhappiness was related to anything he or someone else had done. She stated that she did not like another petty officer “constantly trying out Law Enforcement techniques on her” and that she had not like it when he called her repeatedly when she was with her boyfriend. He told her that he had not known that she was with her boyfriend, that he was calling her about the trip to Busch Gardens, and that she should have told him she did not want to participate if she had other plans. He “ended the discussion with telling her that [he would] not call her anymore unless it was absolutely necessary for work related issues, and that [he] apologized for the misunderstanding.”

The applicant further stated that he thought SN C “needed a change of pace,” so when he saw a solicitation for Navigational School and realized she “would benefit most” among the non-rates, he asked her if she wanted to attend and arranged the orders when she agreed to go. The applicant stated that while at Navigational School, SN C called him five times about work-related matters and switching her return flight, and that she would not have done so if she felt sexually harassed by him. The applicant attributed SN C’s complaints to misunderstandings and to her being “under a lot of stress during an extremely hectic yard period and the added stress of leaving someone she met and formed a strong relationship with in [Virginia].”

Other Witnesses’ Statements in the PIO’s Report

- The Command Enlisted Advisor stated that on October 18, 2003, SN C sought his advice but asked him to promise only to advise her and not to take action. She told him that she was not comfortable working for the applicant. SN C told him that the applicant arranged the Deck Department’s schedule so that he and she worked alone together frequently and, when they were alone, would make inappropriate comments to her, such as telling her that she could not see her boyfriend because he was not allowed at the hotel and she could not stay anywhere but the hotel. In addition, SN C showed the CEA her cell phone, and he saw that the applicant had called her at least ten times “on a Sunday during the day and late into the night,” though there was no reason the applicant could not have waited until Monday morning. SN C told him that the applicant wanted a personal relationship with her even though she had told him she was not interested and that he had continued his behavior even after she asked EM1 H to tell him to leave her alone. On

November 23, 2003, the CEA stated, he noticed that SN C “looked very upset and agitated” when she returned from a trip in the small boat with the applicant. Later, EM1 H told him that SN C was afraid of the applicant, so he arranged for her to switch duty with another seaman. The applicant became “very agitated” when he learned of the switch. SN C later told him that she was scared because her sister had been hospitalized after being physically beaten by a member she had accused of harassment.

- EM1 H stated that on October 3, 2003, SN C asked him to talk to the applicant “about some of his actions toward her” but she did not provide much detail. EM1 H spoke to the applicant in a “peer-to-peer manner” and “asked him what he was doing [with SN C] and he said it was nothing.” On October 18, 2003, SN C called him and told him that “she had received multiple unwanted phone calls” from the applicant, who made her feel “very uncomfortable” and asked him to speak to the applicant again. So, EM1 H asked the applicant “what good could come from anything with [SN C] that was inappropriate” and told him to stop calling her. However, the applicant stated that he was her supervisor so she would have to accept his phone calls. The applicant then said he did not want SN C to think that he was stalking her. EM1 H stated that on another occasion the applicant became extremely agitated when SN C was dancing with a man in a bar and, when questioned, said he was worried that the man would take advantage of SN C. When they ran into SN C and her friend near the ferry the next day, the applicant “became very agitated again and instantly started making phone calls.”

- GM1 S stated that one evening SN C asked him and a BM2 if she was allowed to spend the night at her boyfriend’s house and they told her she could stay where she pleased during her time off as long as she came to work on time the next morning. However, SN C said that the applicant had told her she could not stay with her boyfriend. After SN C left, BM2 K asked him if he thought “anything was going on.” GM1 S thought it was odd that the applicant did not stop another crewmember from staying over at women’s houses and even joked about how that seaman “gets the girls.” GM1 S also stated that he thought it was odd that when SN C landed at the airport after traveling all day back from Navigational School, the applicant picked her up and brought her to the office to work for a couple of hours. On November 23, 2003, GM1 S heard SN P complaining that she never got a break because the applicant always took SN C with him on trips in the small boat. When GM1 S suggested to the applicant that he take SN P instead of SN C, the applicant stated that he had to take SN C because “the Captain wants me to talk to her about something.” Since GM1 S needed to go to the same place, he said he would go with them, but the applicant told him to take another vehicle. After the applicant and SN C returned, BM2 K told him that SN C was upset, so they approached her, but she refused to talk about it. When they told her she should talk to the CEA, SN C began to cry and said she did not feel comfortable with the applicant but would not discuss the problem further and did not want to report the problem. Therefore, GM1 S and BM2 K decided to have EM1 H switch SN C’s duty that night since he was the watch coordinator, and EM1 H reported the problem to the chief. In addition, the XO later told GM1 S that the captain had not told the applicant to bring SN C with him. GM1 S stated that he did not know if the applicant was harassing SN C but that there were a lot of rumors about his behavior toward her. He also noted that the applicant had lied to him about the captain wanting SN C to take the small boat ride but that he had never known SN C to be untruthful.

- BM2 K, who was SN C's direct supervisor, stated that he saw the applicant become irritable and angry when SN C began "hanging out" with a man at a bar one night. The applicant "expressed displeasure" when SN C refused to leave with the applicant and told BM2 during their cab ride back to the hotel that he was "pretty pissed off actually." BM2 K stated that on the day SN C returned from Navigational School, he asked the applicant who should pick her up at the airport, and the applicant said he would do it himself, which was strange since the applicant was a BM1 and SN C was a non-rate. That night, SN C knocked on his hotel room door and asked him and GM1 S "if she had to stay in her room or would it be a problem if she stayed at her boyfriend's house." They told her that what she did in her off time was none of their business as long as she showed up to work on time. SN C told them that the applicant did not want her to stay with her boyfriend. BM2 K stated that on November 23, 2003, when he was preparing to retrieve the small boat, the applicant told him that he would get the boat and that he would be taking SN C with him because "the CO wanted him to speak with [her] about some financial situation she was having." BM2 K thought this was strange because the boat would not be a good place for financial counseling and because all of the non-rates were supposed to be working on deck maintenance projects. When BM2 K told SN C she would be going on the boat with the applicant, she asked why someone else could not go with the applicant and that she "felt as though someone was always keeping tabs on her." Later, another seaman complained to him that she had been aboard the cutter for more than a year but never got to go in the small boat, whereas the applicant and SN C "were always taking off talking together." BM2 K stated that the applicant and SN C returned in the small boat about two hours later, although their trip should have taken about a half hour, and he noticed a "drastic change in [SN C's] outward demeanor." Because he thought that something might have happened on the boat trip, he and GM1 S approached SN C and asked her what was going on, but she did not want to talk about it. Finally, she started crying and said she did not feel comfortable with the applicant, so they asked EM1 H to switch her duty that night so she would not be alone with the applicant. The applicant stated that he had "heard various rumors" and did not want to speculate about what had happened but that SN C had "been an outstanding member of the deck department whose integrity and loyalty [he had] never questioned."

- BM3 G stated that she "witnessed [the applicant] harassing [SN C] through repeated phone calls on her cell phone." SN C told her that the applicant made her feel uncomfortable so she was avoiding him whenever possible. Once the applicant asked BM3 G if she had seen SN C because "she's not answering her fucken door and I know she is in there." BM3 G also stated that she had seen the applicant "playing with [SN C's] hair and by the expression on her face I could assume she felt uncomfortable." When BM3 G later told the applicant that he was making SN C feel uncomfortable, the applicant denied treating SN C differently from any other female on the boat and denied "doing anything wrong."

- MK3 W stated that one Sunday night at about 11:00 p.m., the applicant knocked on the door of the hotel room she shared with BM3 G. He appeared agitated and asked where SN C was since he expected her back at 10:00 p.m. While he was still there, SN C returned his phone call, and he yelled at her, "Where the hell have you been?" After the applicant left, BM3 G told her that she thought the applicant was showing "jealous behavior" because of SN C's new relationship. The next morning, MK3 W heard the applicant comment that SN C had "picked up a stranger" and that he did not want her career ruined. However, BM2 K defended SN C and told

the applicant that “it was not his business to be involved in [SN C’s] private life [or to] make bad assumptions based on stereotypes.” A few days later, SN C told MK3 W that she was afraid that the applicant was stalking her because he had called her six times one Sunday on her personal phone. SN C acknowledged that she was getting “special treatment” from the deck force but felt that the applicant was showing “excessive ‘jealous’ behavior” because of her new relationship with a boyfriend. When MK3 W told her that the applicant’s behavior was inappropriate and advised her to report it to the XO or the CEA, SN C stated that she did not want to be considered a “tattletale.” MK3 W stated that she thought that SN C received special treatment from supervisors because of her accomplishments, whereas SN C’s roommate, SN P, was an “inconsistent performer.”

- SN P, who shared a hotel room with SN C, stated that on September 15, 2003, during a long ride in the van, she saw the applicant pull SN C’s hair up over the back of her seat and begin playing with it. “He ran his hands through it for what seemed like hours.” However, SN C did not seem to mind and even seemed “to enjoy it very much.” The applicant told SN P “how much he loved long blonde hair.” During drydock, SN C was frequently invited to go out to bars, clubs, and dinner with the applicant and EM1 H. Also, SN C and the applicant “went out alone on several occasions.” SN C once told her that she felt that GM1 S “was making passes at her and made her feel uncomfortable.” After SN C found a boyfriend, she “seemed very happy” except that she hated being in the Coast Guard and could not wait to get out. Less than a week later, SN C told SN P that the applicant was harassing her by calling her repeatedly and acting jealous. SN C was telling inconsistent stories about the applicant and SN P found her to be “less than truthful” on several occasions. When SN P told the applicant what SN C had said, the applicant denied that SN C had ever complained to him about his behavior. Later, SN C again got special treatment by getting to go to Navigational School. The applicant also told SN P “to be easy on SN C [because] she was just very sensitive. Throughout drydock, [SN C] was constantly accusing people of being mean to her or treating her unfair[ly].” After SN C returned from school, SN P saw her with the applicant “off to the side alone together having private conversations” and the applicant always got SN C to assist him with “just about everything [he] did,” including the boat ride on the last day of drydock when the applicant and SN C “did not return for about 2 ½ or 3 hours from a 5-minute ride around the harbor.”

- SA S stated that SN C had received special treatment by being sent to Navigational School during drydock when she did not have seniority. Upon SN C’s return from school, SN C complained to SN S that the applicant had told her she could not stay with her boyfriend and had to sleep on the ship. SA S stated that he felt very lucky to have had the applicant as his department head since the applicant was extremely knowledgeable and fair. SA S stated that the applicant treated all non-rates with “respect and dignity” and “epitomize[d] the core values” of the Coast Guard. SA S stated that he also has “the utmost respect for [SN C],” who “demands that all crew members be treated equally, ... constantly advocates equal rights for females, ... [and] has very thick skin and can handle anything that one of the males can. I feel that she would not be making allegations unless she felt that was the only way to resolve the issue ... [and] that she had exhausted all other methods.”

- A first class petty officer at another unit stated that SN C’s sister had asked him for advice on several occasions because her sister “was being harassed if not stalked by a male mem-

ber.” He advised her to tell SN C to report the harassment but was later told that the harassment had continued even after SN C reported it, so he advised her to tell her sister to get a protective order.

- SN C’s boyfriend, a second class petty officer in the Navy, stated that SN C had complained to him that the applicant had rubbed her shoulders, suggested that they have a secret relationship, called her repeatedly without leaving a message, asked very personal questions, and showed jealousy about their relationship. He stated that SN C had once called him in tears because she did not feel safe having to share a duty shift with the applicant after he had sat too close to her and put his hands between her legs when she was driving a small boat.

The PIO included in his report a copy of the bill for the Government cell phone used by the applicant during drydock. The bill shows charges for calls by the applicant to SN C’s personal cell phone twice on September 24, once on September 26, three times on September 27, once on September 29, once on October 6, and once on October 8, 2003

Non-Judicial Punishment at Mast

On January 5, 2004, the applicant was formally notified that he would be taken to mast for alleged violations of Article 92 of the UCMJ (failure to obey an order or regulation) and Article 132 (conduct prejudicial to good order and discipline) as a result of SN C’s allegations. He signed an “Acknowledgement of Rights—Acceptance of NJP” form designed for a member attached to or embarked on a vessel, which does not include the right to reject NJP and demand trial by court-martial.

On January 10, 2004, the Group XO informed the applicant by email that his mast was being postponed from January 12 to January 14 because of operational needs. The applicant responded, asking whether the mast was to be open to the crew. The XO responded that he believed that the CO had decided to leave the mast open. The applicant responded that he did not want the mast to be open because he would be defending his career. The applicant noted that Chapter 5.A.2.e. of the Equal Opportunity Program Management Manual states that “[d]ue to the volatile and potentially damaging nature of the allegations, confidentiality will be maintained to the greatest extent possible without thwarting resolution.” The XO replied that the “lawyers disagree with your interpretation of COMDTINST and the MJM” but that the Group CO might still close the mast. The XO also reminded the applicant to “[p]lease remember that we haven’t gone the route of the Equal Opportunity Prgm. This is a UCMJ proceeding, and those are the rules we must abide by. ... This will be a sober, professional proceeding.”

On January 14, 2004, the applicant was taken to mast on a charge of failing to obey the Coast Guard’s sexual harassment policy by making unwelcome sexual advances toward a subordinate, which negatively affected her job performance and created an intimidating, hostile work environment. The Group CO awarded him as punishment reduction to pay grade E-5 and extra duties for 45 days and forfeiture of pay for two months, which was suspended for six months.

On January 15, 2004, the applicant complained to the Command Master Chief in an email that at mast the day before he had learned that he could not ask half of his eighty questions about

SN C's accusations against other members. He alleged that although the OIC had testified that he did not believe the applicant intentionally committed the offenses and had asked the Group CO to be lenient, the Group CO had given him the maximum punishment.

On January 16, 2004, the Command Master Chief sent an email to the applicant and recommended that he "think hard" about his appeal. He wrote that he was "a little surprised [about] the 'max' punishment you received, but based on evidence and your not accepting responsibility for 'something' that happened either actual or perceived. I did run this by D1 Legal before responding to you and the awarded punishment is appropriate. ... [The Group XO] did tell me that all of the crew basically said the same thing: they felt there was something going on with you and [SN C] that did affect the crew."

On January 17, 2004, the applicant complained to the Command Master Chief in an email that at most several witnesses had made statements in support of SN C's claims and had not spoken about telephone calls and events that would have helped his defense and he had not been allowed to ask questions about SN C's prior complaints of harassment even though there was proof for one of them or about SN C's sister, who was also a member of the Coast Guard and who had been involved in a similar incident that had resulted in her being transferred. The applicant claimed that his aggravation during telephone conversations with SN C was taken to be harassment when it was only a symptom of his having been away from his family and having five huge projects underway.

On January 21, 2004, the applicant sent an email to the OIC and XO of his cutter stating that the OIC had failed to support or help him or his family. He further stated, "I can only assume that you feel it's ok that my family suffers as well, and Gentlemen, my family is my world. When the CG punishes my family, I get very pissed off."

The Applicant's Anonymous Emails

On January 26, 2004, SN C received an anonymous email from coastiefriend@yahoo.com, which she later forwarded to the OIC. The email, which was cc'ed to the applicant, states the following:

You two like to play games. Well here is a game you might not like. I know that you two are hiding a little information that you haven't told anyone in that investigation. [SN C], no matter how anyone looks at Harassment, it doesn't involve you sticking your tongue down anyone's throat. I wonder how it felt to sit there and watch him get busted down, and the only thing he did was fall for you. [Applicant], you are an idiot. Why are you still protecting her? Is it because you still have feelings for her? How pathetic. You two are making a joke out of the system and I won't have it. Here, this is how this is going to work. You two will tell your CO the truth by noon Friday. If not, my next e-mail will be more detailed and will address folks I know you don't want to know about your little fling.

On January 30, 2004, the OIC received an anonymous email from "coastiefriend," stating the following:

... I am told by a reliable source that the two of them [the applicant and SN C] were involved in an inappropriate relationship at some point in your yard period. I know that on several different nights when the two of them were drinking that she was in his room until 4 or 5 in the morning. I know that other than the two of them there is another member of [the cutter] who is aware of their relationship as well. He saw the two of them kissing. The way I understand what happened is one night they found out they had feelings for each other and decided not to act on them. A few days later after a nite of heavy drinking the alcohol got the best of them and they did act on their feelings. And they kept seeing each other for a while. Both of them decided to end the relationship because it was wrong and that was close to when [SN C] met her boyfriend. [She] felt [the applicant] was treating her different because of that. I know she told him on more than 1 occasion that she loved him. She was never harassed. [The applicant] is telling the truth. She claimed she was so she could leave the ship but she didn't expect him to go to mast for it. She knew he wouldn't say anything because of his family.

If [SN C's] idea of harassment is her sticking her tongue down his throat I am not clear on what harassment is. I think the fact that she abused a policy made to protect her just to make him look bad when she is just as guilty as he is stupid. And she should be held just as accountable for lying about it, if not more.

If there is any doubt about the truth in what I am saying, I ask this question. If you knew one of your buddies was going to captain's mast and you knew for a fact that he did not do what they said he did, would you stay in the mast and watch it?

I sent both of them a warning to tell the truth, and they did not.

I am sending this anonymously. I fear what might happen if one of them found out that I knew.

The OIC replied, stating that if the sender was "not willing to verify the validity of [his] statements by revealing [him]self, [the OIC could] take no further action."

On February 3, 2004, the Group XO received an email from coastiefriend@yahoo.com, saying that a close friend had informed him that the applicant and SN C had been involved in an "inappropriate relationship and that issue had nothing to do with sexual harassment. ... [S]he was never harassed and she is just as guilty as he is."

On February 6, 2004, the OIC received another email from "coastiefriend," which was cc'ed to the applicant. The anonymous writer urged the OIC to talk to the applicant to discover the truth and stated the he would "remove [him]self from any further dealings with this issue."

On February 7, 2004, the applicant replied to both "coastiefriend" and the OIC. The applicant stated that he was curious how the anonymous writer got his information since he could only have gotten it from the applicant or SN C. The applicant warned the anonymous writer that no one would likely listen to him since no one had listened to the applicant prior to his mast. He further stated, "I appreciate your concern, but I will take it from here." To the OIC, the applicant wrote the following:

It would appear that [SN C's] little chess game has been exposed. I will assume the psychology classes she took in college proved useful for her during this ordeal. You asked for verification and you have it. ... There is a lot more to it than what is stated below. There were a lot of things that I didn't tell the PIO, or the Deputy, or XO. I only felt comfortable telling you because I trust you. Or trying to tell you. You guys were scaring me. ... Now, I guess it might make sense why I kept

asking if I could sit down and talk to you. Or why I am so convinced that she was never harassed. He or she is correct in their statement that I never lied. I am not a liar.

If you have an opportunity, I would still like to sit down and talk to you. I would appreciate it if you didn't forward or copy this to anyone. It would cost me a hell of a lot more than it already has if certain people found out.

On February 11, 2004, the applicant sent an email message to the District Legal Office asking about his avenues of recourse if the Group refused to investigate new information—the email messages from coastiefriend@yahoo.com—that he believed would prove that SN C had falsely accused him of harassment.

CGIS Investigation

On February 12, 2004, the Group CO initiated an investigation to ascertain the identity of the anonymous "coastiefriend" sending emails from coastiefriend@yahoo.com. On February 13, 2004, after being advised of and acknowledging his rights in writing, the applicant was interviewed by CGIS agents. He gave them a written statement in which he admitted that he himself had sent the anonymous emails from coastiefriend@yahoo.com. The applicant also stated that he had had an inappropriate relationship with SN C. He stated that she had initiated kisses with him on three occasions when they had been drinking and had told him that she loved him. Two days after the third kiss, she told him that they had slept together, but he had no memory of it. A few days later, the applicant stated, SN C told him that she had "found someone" else, and he told her that he was happy for her and that he would not treat her differently because of what had happened between them. He told her that he was "still her BM1 [and] still wanted to see her do well."

On February 13, 2004, the Group Operations Officer informed the Group command by email that at an interview with a CGIS agent, the applicant had admitted that he was the author of the emails received from coastiefriend@yahoo.com and stated that he sent them "to call attention to the injustice of his situation in hopes of having the matter reopened with a view toward ultimately clearing [himself] of the sexual harassment incident." The applicant had also stated that he "would rather accept punishment for an 8.H. violation [inappropriate relationship] than accept the sexual harassment allegations." The Operations Officer stated that CGIS would also interview SN C and would issue a report in three or four weeks.

The Group CO responded to the Operations Officer's email the same day, saying that the existence of an inappropriate relationship would not necessarily refute the harassment charges if the applicant harassed SN C after their relationship ended. The Group CO noted that there had been witnesses to the sexual harassment. She also noted that in addition to admitting to adultery and the inappropriate relationship, which are both violations of the UCMJ, the applicant had sent deceptive anonymous emails to the command and one threatening email to SN C. The District Legal Officer responded to the Group CO, saying that the applicant's confession did not exonerate him and that the harassment could have occurred notwithstanding the prior prohibited relationship. He noted that the potential charges against the applicant might include extortion, false statements, obstruction, violation of a general punitive order, and conduct to the prejudice of good order and discipline. He stated that it might lead to a court-martial for the applicant but

that the Group CO, as a target of the applicant's anonymous emails, was a potential witness and so could not be the convening authority for the court-martial.

On February 17, 2004, the Group Operations Officer sent an email to the District Legal Officer, saying that the OIC of the cutter had told him that he had concerns about SN C's safety given the applicant's "aggressive personality, his recent behavior and his perception that a grave injustice has been done to him." The Operations Officer noted that the applicant's anonymous emails had violated the protective order not to contact SN C. The OIC had asked that another protective order be issued and that the applicant undergo a psychiatric examination "in view of his recent behavior and some disturbing comments [the applicant] has made." The Operations Officer noted that in emails to the OIC in late January, the applicant had written the following:

- "I can only assume that you feel it's ok that my family suffers as well, and Gentlemen, my family is my world. When the CG punishes my family, I get very pissed off."
- "... it infuriates me that I keep getting the impression that everyone feels I am not being honest here."
- "See, I don't have a problem accepting punishment for something I did. I don't have a problem accepting punishment for perhaps a mistake. But I cannot and will not sit back and watch a SN with 5 months in the CG make up a bunch of lies that cost me everything."
- "Shortly before my departure for my new unit, I will send an e-mail to those onboard who I still care about. And those who felt it was appropriate to back stab should consider themselves fortunate. Being a 100% Sicilian family, my relatives do not understand the Military way. They only understand the family way. And since we are into perception here, anyone can perceive that any way they want."

The Group Operations Officer further stated that SN C would be transferred to another unit "to ensure her safety," another protective order would be issued, and the applicant would undergo a psychiatric evaluation on February 23, 2004.

On February 19, 2004, the XO of the cutter served the applicant with another protective order. In addition, his security clearance and authorization to carry firearms were revoked. The applicant surrendered four firearms from his house.

On March 4, 2004, the District Commander denied the applicant's appeal of his NJP. He stated that his review of the record showed that the Group CO had conducted "full, fair NJP proceedings on the offenses" and that the evidence supported the CO's finding that the offenses were proved. He also found that the applicant's punishment was not disproportionate.

Report of the CGIS Investigation

On March 15, 2004, CGIS issued a report on the investigation into the anonymous emails from coastiefriend@yahoo.com. The report summarized the applicant's admissions during his

interview on February 13, 2004, and noted that on February 20, 2004, the applicant had sent an email to a CGIS agent in which he offered to provide “more details” that “are somewhat more intimate” in another interview. However, after being informed on February 24, 2004, that he might be facing a court-martial, the applicant decided not to make any further statements to CGIS without an attorney.

The report notes that electronic investigation revealed that SN C had received an anonymous threatening email from coastiefriend@yahoo.com (the applicant). In her interview with the CGIS agents, SN C denied having had sex with the applicant but stated that he had kissed her once and later suggested that they could have a relationship without anyone else knowing before she reminded him that he was married. She also complained that he had repeatedly called her on her personal cell phone for no real reason. Her telephone log documented his calls.

The report also revealed that the applicant had not registered any weapons with Coast Guard Housing Office, OTIS ANGB, MA, although a fellow petty officer stated that the applicant did have weapons at his house.

Applicant's Request for Humanitarian Transfer

On March 22, 2004, the Group XO sent the applicant an email in which he expressed sympathy about his father's illness. The XO also stated that the applicant's request for a humanitarian transfer would be discussed with EPM following the resolution of the “unfortunate business of this latest CGIS investigation,” which the applicant had requested, including “new charges being considered against you as a result of the additional information you provided to the CGIS agents.”

On March 24, 2004, the applicant sent the Group XO an email asking to review the report of the investigation. He asked how his NJP appeal could have been denied if the new investigation showed that SN C had lied. He also asked if SN C was being charged with any crimes. The Group XO responded on March 29, 2004, stating that there was no evidence that SN C had lied except the applicant's own statement. The XO assured the applicant that some “corrective action [had been taken] regarding SN C,” but that it was private information.

On April 5, 2004, the OIC of the cutter entered a Page 7 in the applicant's record, which the applicant refused to sign in acknowledgement. It states that the applicant was counseled on “substandard performance over the past 2 weeks” in that he “failed to complete his extra duty as directed by NJP proceedings” by not reporting for duty on March 26, 27, 28, 29, and 31, 2004. The Page 7 also states that the applicant had failed to perform assigned tasks within a reasonable time frame and was spending too much time on the computer during the workday.

On April 19, 2004, the applicant submitted a request for a humanitarian transfer (HUMS) to a unit near his parents' home based on his father's heart surgery and lung disease and the inability of his sister and mother to care for him. He pointed out that his tour on the cutter was ending, that he did not yet have orders for another billet, and that he understood that he would need to resolve his need to be stationed near his parents' home within two years or be considered not available for worldwide assignment, which might result in a hardship discharge. He also

stated that he might seek a hardship discharge if his request for a humanitarian transfer was not granted.

On April 28, 2004, the OIC of the applicant's cutter entered a Page 7 in his record to commend him for his performance in preparing for the cutter's Ready for Operations visit and change of command ceremony. He entered another Page 7 to document counseling about the Coast Guard's policies regarding interpersonal relationships, alcohol use, and drugs abuse.

On May 17, 2004, the OIC of the applicant's cutter entered a Page 7 in his record to commend him for his work in preparing, priming, and painting the hull from May 3 to May 13, 2004, in anticipation of a June visit by a standardization team.

On May 21, 2004, the applicant emailed the Group XO asking for a copy of the command's endorsement. The XO responded in an email as follows:

I forwarded your HUMS pkg yesterday. Under the circumstances I was forced to recommend approval with the caveat that all pending UCMJ is dispensed with first (this was insisted upon by the GP CO). My earnest hope is that the pending UCMJ issues can and will be dispensed with swiftly and with much less collateral damage than last time ... as you and I discussed.

New Criminal Charges Against the Applicant

On June 14, 2004, the District Legal Officer told the Group command in an email that after reviewing all of the available information, including the two investigation reports, he recommended that the command "consider preferring charges against [the applicant] for, among others, various orders violations, false official statements, maltreatment, provoking speech, extortion, interference with an adverse administrative proceeding, and various Massachusetts gun laws, contrary to UCMJ Articles 92, 93, 107, 117, 127, and 134, respectively." He noted that he could only make the recommendation and could not order them to prefer charges, as it was up to the Group CO "to exercise your independent, professional judgment on the matter."

On June 14, 2004, the applicant was charged with four counts of violating Article 92 of the UCMJ by

- "wrongfully engaging in an unacceptable personal romantic relationship with [SN C], USCG, a subordinate in his chain of command" on "diverse occasions from September to November 2003";
- "wrongfully possessing four dangerous weapons" in his "government quarters without registering said weapons with the housing office";
- boarding the cutter on December 15, 2003, without the permission of his CO or a delegee in violation of the protective order issued on November 25, 2003, which barred him from boarding the cutter; and
- sending an email to SN C on January 26, 2004, in violation of the protective order issued on November 25, 2003, which barred him from contacting her.

The applicant was also charged with violating UCMJ

- Article 93 by “maltreat[ing] [SN C], a person subject to his orders, by wrongfully kissing her, stroking her hair, physically contacting her leg while operating a small boat, and by making repeated and unnecessary calls to her personal cellular telephone”;
- Article 107 by falsely telling the Group CO at mast on January 14, 2004, with intent to deceive, “that he was never involved in any personal, romantic relationship with [SN C], which statement was false in that he had, among other things, kissed [her]”;
- Article 117 by wrongfully using provoking words to Coast Guard officers on January 24, 2004, by saying that “those who felt it was appropriate to back stab should consider themselves fortunate. Being a 100% Sicilian family, my relatives do not understand the Military way. They only understand ‘the family way.’ And since we are into perception here, anyone can perceive that any way that they want,” or words to that effect; and
- Article 127 by communicating a threat to SN C on January 24, 2004, to try to gain favorable action on his NJP appeal by stating that if she did not tell her “CO the truth by noon Friday,” he would expose alleged secrets and misconduct concerning her “little fling” that would discredit her.

In addition, the applicant was charged with eight counts of violating Article 134 of the UCMJ by

- wrongfully engaging in an “inappropriate personal relationship” with a subordinate, SN C, from September to November 2003, “contrary to the good order and discipline of the armed forces”;
- wrongfully possessing a “large capacity firearm, to wit: one SigSaur, Model P226 ... contrary to Massachusetts General Laws”;
- wrongfully possessing “four dangerous weapons,” including the SigSaur, contrary to Massachusetts General Laws;
- wrongfully endeavoring on February 3, 2004, to influence the actions of the Group XO, “an officer responsible for making a recommendation on the disposition of the accused’s appeal of nonjudicial punishment by misrepresenting the existence of an unidentified witness through the anonymous transmission of an electronic mail message using the e-mail address of coastiefriend@yahoo.com”;
- wrongfully endeavoring on February 11, 2004, to influence the actions of the Group XO with respect to the applicant’s appeal of his NJP “by misrepresenting the existence of an unidentified witness by forwarding an electronic mail message purporting to be from an anonymous person with an e-mail address of coastiefriend@yahoo.com”;
- wrongfully endeavoring on January 30, 2004, to influence the actions of the officer in charge of the cutter with respect to the applicant’s appeal of his NJP “by misrepresenting the existence of an unidentified witness through the anonymous transmission of an electronic mail message using the e-mail address of coastiefriend@yahoo.com”;
- wrongfully endeavoring on February 6, 2004, to influence the actions of the officer in charge of the cutter with respect to the applicant’s appeal of his NJP “by misrepresenting the existence of an unidentified witness through the anonymous transmission of an electronic mail message using the e-mail address of coastiefriend@yahoo.com”; and
- wrongfully endeavoring on February 7, 2004, to influence the actions of the officer in charge of the cutter with respect to the appeal of the NJP “by misrepresenting the exis-

tence of an unidentified witness by forwarding an electronic mail message purporting to be from an anonymous person with an e-mail address of coastiefriend@yahoo.com.”

On June 15, 2004, the Group XO advised the applicant of the charges against him.

Group CO's Denial of the Applicant's Request for Redress

On June 18, 2004, the Group CO informed the applicant by memorandum that his request for redress dated June 4, 2004, which is not in the record, was denied. She wrote that his request that she set aside his NJP dated January 15, 2004, was denied because he had not submitted his request within 90 days of the NJP and Article 7.A.4.a. of the Military Justice Manual (MJM) states that an Article 138 complaint “must be submitted to a superior commissioned officer within 90 days of the date of discovery of the alleged wrong.” Moreover, she pointed out that Article 7.A.4.d.(2) of the MJM states that NJP under Article 15 of the UCMJ “is a complaint ‘not cognizable under Article 138, UCMJ’” because there is another avenue for appeal, which the applicant made use of by appealing his NJP on January 19, 2004.

The Group CO also denied the applicant's request for the return of four weapons because more than 90 days had elapsed since the applicant had surrendered the weapons on February 19, 2004. She also stated that his request was denied because the weapons were evidence and would “only be returned after all investigation and any further action is completed.” In addition, she noted that it was illegal to possess the weapons without proper licenses and documentation and that he had not declared his possession of the weapons before bringing them into station housing, as required by Coast Guard housing regulations.

The Group CO stated that she could not approve his request for an immediate humanitarian transfer because she had no authority to do so as that authority rested solely with EPM. Regarding his request that she expunge all documentation “relating to illegal discrimination” from his record, she stated that she had no authority to do so. Regarding his request that she stop harassing him and his family, the Group CO stated that what he “perceive[d] to be harassment is, in reality, the normal and appropriate Coast Guard investigative and disciplinary procedures applied to [his] misconduct.”

Applicant's Complaint Under Article 138 of the UCMJ

On June 23, 2004, the applicant submitted an Article 138 complaint to the District Commander. He alleged that the new charges had been filed against him in reprisal for his request for redress. He argued that it was inconsistent for the Group CO to award him NJP for making “unwelcome sexual advances” toward SN C and then file charges against him for allegedly having a romantic relationship with SN C during the exact same period. He alleged that his advances could not have been unwelcome if he and SN C actually engaged in a romantic relationship. He argued that since the falseness of SN C's harassment allegations was only proved after his appeal of the NJP was denied, his only remaining avenue for correction of his record was an Article 138 complaint and that it should not be denied on the basis of untimeliness. He further argued that his complaint was not untimely because it requires a complaint to be filed

within 90 days of the member's discovery of the alleged wrongs against him, not within 90 days of the wrongs themselves.

Regarding the seizure of his firearms, the applicant complained that the Group CO ordered the seizure based on false pretenses and without authority, probable cause, or jurisdiction. He pointed out that his Government housing was on an Air National Guard Base, not a Coast Guard base. He alleged that she based her order on the report of a psychiatric examination but that the report of his examination had not yet been released when his firearms were seized on February 12, 2004. The applicant stated that by seizing his firearms, the Group CO had violated his constitutional rights under the Second Amendment. Regarding his lack of State licensing for the firearms, he alleged that he had not had an opportunity to register them because he brought them into the state in August 2003, left two days later for a three-month yard period in Virginia, and had been under a protective restraining order since his return to the State, and persons under such orders cannot register firearms. Moreover, his wife refuses to touch the firearms. Furthermore, the applicant stated that Coast Guard regulations state only that members "should" report any firearms they bring into base housing, not that they must report them. The applicant also stated that the Group CO's claim that his firearms were being held pursuant to an investigation into alleged offenses is ridiculous since he had not committed any crimes with them and they had nothing to do with the allegations against him.

The applicant also alleged that the Group CO violated Article 92 of the UCMJ by disregarding the Commandant's instruction for investigating harassment complaints. He stated that he did not discover the illegality of the type of investigation conducted until May 18, 2004, and so his complaint was not untimely. He argued that the regulations regarding investigations into harassment complaints are intended to protect not only the rights of the accusers but the rights of the falsely accused. The applicant stated that because the Group CO failed to follow the regulations, SN C never submitted any informal or formal claim, and no one tried to resolve her complaints with alternative dispute resolution. He alleged that if the proper regulations had been followed, he "would have clearly had the opportunity to explain the circumstances surrounding the complaint, since I have never illegally discriminated against anyone in my life, and the complaint would have been addressed and resolved without punitive action and at the lowest level. He also alleged that it was improper for the Group's civil rights officer to be appointed as the PIO because she could not give guidance on the proper handling of civil rights complaints to herself.

The applicant stated that on February 22, 2004, he asked to meet with the Group CO to discuss his complaints but she refused based on the ongoing investigation. He complained that although the investigation had ended, the Group CO had not offered to meet with him. He alleged that she had therefore violated Chapter 9.2.3 of Coast Guard Regulations, which states that "the right of any person in the Coast Guard to communicate with the Commanding Officer at a proper time and place is not to be denied or restricted."

The applicant also alleged that prior to his psychiatric evaluation on February 19, 2004, the Group CO made inappropriate and discriminatory comments about himself, his family, and his Sicilian heritage in an email to the doctor.

The applicant complained that the District had failed to forward his request for a humanitarian transfer to EPM for two months. He also argued that it was wrong for his request to be forwarded with allusions to pending frivolous charges against him. He argued that his request for a humanitarian transfer should have been promptly forwarded and approved since the Coast Guard's investigation into SN C's false accusations against him was irrelevant to his family's needs. He stated that he "requested the transfer solely on the basis [of his family's needs] and not the comparatively trivial issues that are going on here" and feels as if he is being punished twice for trying to clear his name after having been punished once based on false accusations.

The applicant concluded his complaint by asking that his NJP be set aside, his rank be restored, his firearms be returned, his HUMS request be approved and executed, that all documentation of the accusations and charges against him be removed from his record, and that all charges and threatened charges against him be dropped.

Request for Discharge in Lieu of Trial by Court-Martial

On July 21, 2004, the Group CO forwarded the charges against the applicant to the District Commander for disposition.

On August 10, 2004, the applicant submitted a request for a "discharge for the good of the Service in lieu of possible trial by court-martial under circumstances which could lead to a bad conduct or dishonorable discharge" pursuant to Article 12.B.21. of the Personnel Manual. The applicant noted that he had consulted counsel and been advised about the implications of his request. He wrote that the "basis for my request for a discharge under possibly other than honorable conditions for the good of the Service stems from my alleged misconduct contained in the court-martial charges preferred against me in enclosure (1). I elect to be administratively discharged rather than possibly tried by court-martial. I am completely satisfied with the counsel I have received." He acknowledged that he might receive an OTH discharge which would deprive him of "virtually all veterans' benefits." He also acknowledged that he was "mak[ing] this request voluntarily, free from any duress or promises of any kind."

The applicant also submitted a separate statement asking that his "administrative discharge request in lieu of possible trial by court-martial, under possibly other than honorable (OTH) conditions, ... be upgraded to a General Discharge under honorable conditions." The applicant wrote about his pride and dedication in his military service, as well as his job performance, medals, and commendations. The applicant stated that "it is punishment enough to have worn E-5 collar devices for 7 months, to have completed 45 days of extra duty," and to have lost the chance to serve as the XPO of a cutter. The applicant stated that he was requesting discharge not only to avoid trial but to lessen the emotional distress of his family and shipmates. He stated that to avoid more distress to his family or to his shipmates who would have to be called as witnesses at a court-martial, he felt like he had "little choice but to submit this request for separation for the Good of the service." The applicant further stated that it was never his "intent to allegedly violate any Article of the UCMJ. Only to provide evidence into the false accusations of Sexual Harassment for which [he] was awarded punishment in January 2004." He stated that he never illegally discriminated against anyone and that his "attempts to clear [his] good name from

those false accusations have cost [him] his career.” He asked for a general discharge for his family’s sake as an OTH discharge would harm his future employment opportunities.

On August 12, 2004, the District Commander forwarded to the Coast Guard Personnel Command the Group CO’s recommendation that the applicant receive an OTH discharge in lieu of trial by court-martial and the applicant’s statement on his own behalf. The District Commander strongly recommended that the Group CO’s recommendation be approved and stated that an OTH discharge “is warranted under these circumstances because of the degree of his sustained misconduct and its adverse impact to his former unit and Group.” He stated that he could not recommend an honorable or general discharge given the facts of the case and that he had “already given generous weight to the favorable considerations he raises in my decision to support an administrative, rather than judicial, disposition of his case.”

On August 17, 2004, CGPC ordered that the applicant receive an OTH discharge pursuant to Article 12.B.21. of the Personnel Manual “in lieu of trial by court-martial.”

On September 3, 2004, the applicant signed a statement indicating that he had “lawfully sold four firearms” to his father in law.

On September 8, 2004, the applicant received an OTH discharge under Article 12.B.21. of the Personnel Manual pursuant to his request. He also received an RE-4 reenlistment code, a KFS separation code, and “triable by court-martial” as the narrative reason for his separation.

Discharge Review Board

On May 24, 2005, the Discharge Review Board (DRB) recommended denial of the applicant’s request for an upgraded discharge. The DRB found that his discharge had been “carried out in accordance with Coast Guard policy and there were no irregularities or improper actions on the part of the Government.” The DRB stated that in light of his years of good service, the applicant was “offered the option of voluntary separation in lieu of court-martial” and chose to accept the voluntary separation. The DRB stated that the illness of the applicant’s parents at the time of his discharge “does not change the nature of the accepted voluntary separation in lieu of court-martial, which has precedence.” The DRB stated that the applicant “accepted [a] less than honorable discharge” and failed to submit compelling evidence that it should be upgraded. The Commandant approved the DRB’s recommendation on August 9, 2005.

Settlement of the Applicant’s Lawsuit

In 2006, the applicant and his father-in-law filed suit against the Coast Guard seeking the return of his father-in-law’s four firearms or their appraised value of \$3,250.00. The plaintiffs claimed that after the applicant had received the firearms from the Coast Guard on August 28, 2004, he paid \$110.00 to Federal Express Inc., to ship them to his father-in-law, pursuant to an agreement with the Coast Guard, and four hours later was informed that CGIS had removed the package from the custody of Federal Express. The Coast Guard never returned the firearms to the applicant or his father-in-law, who owned them. On June 1, 2006, the Coast Guard reached a

settlement agreement with the applicant and his father-in-law in which the Coast Guard, without admitting any wrongdoing, paid the applicant's father-in-law \$3,375.00.

VIEWS OF THE COAST GUARD

On June 25, 2007, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant partial by correcting the applicant's DD 214 with a DD 215 showing that he earned the Global War on Terrorism Medal and a Meritorious Unit Commendation Award but deny all other requested relief.

Regarding the applicant's NJP, the JAG argued that the evidence of record shows that the Group CO's decision "was reasonable and based on ample evidence" and that the applicant has not proved that he was denied the opportunity to respond to the evidence presented at the hearing, such as the statements about the Ouija board game. The JAG stated that there is no evidence that the mast was not conducted in accordance with applicable procedures. The JAG also stated that the command's denial of the applicant's request under Article 138 that the NJP be removed was proper because "pursuant to MJM [Military Justice Manual] Chapter 7.A.4.d.(2), an Art. 138 complaint for redress of punishment awarded at NJP is not permitted."

Regarding the applicant's complaint that his command failed to file charges of perjury and false official statements against SN C, the JAG pointed out that CGIS made no such recommendation and that SN C's statements during the February 2004 investigation were consistent with those she made during the December 2003 investigation.

Regarding the applicant's allegation that his command erroneously failed to follow procedures under the Equal Opportunity Program Manual (EOPM) that might have resolved SN C's complaint in a private manner without resorting to NJP, the JAG stated that in light of the evidence, the command found that the applicant's actions violated the UCMJ and took punitive action against him, and that NJP proceedings are open to the public under the MJM. The JAG noted that Chapter 5.A.2.e. of the EOPM states that "[a]ppropriate corrective action ... may range from verbal counseling and mediation when the behavior was of an unintentional nature, to punitive actions for intentional or egregious behavior."

Regarding the applicant's rank at the time of his discharge, the JAG stated that the applicant was reduced to E-5 at mast and had not re-advanced to E-6 prior to his discharge. The JAG stated that the applicant's sentence made "no provision for advancement to E-6 after six months." He noted that the applicant's reduction in rate and extra duties were effected after the mast and that only the forfeitures were suspended for six months.

Regarding the applicant's allegation that his OTH discharge was improper because he requested an honorable discharge, the JAG stated that the applicant did request an honorable discharge, but he also requested a discharge in lieu of court-martial and his request shows that he understood he could receive an OTH discharge as a result of the request. The JAG stated that no upgrade of the discharge is warranted in this case because of the applicant's actions with respect to SN C and their effect on the command; because he was found to have four unauthorized weapons in his housing unit; because he twice violated a protective order; because he made threaten-

ing statements and extorted another member; and because he sent anonymous emails to his command. The JAG further stated that even if his parents' health factored into the applicant's decision to accept a separation in lieu of possible trial by court-martial, the OTH discharge is supported by the record.

Regarding the applicant's request for the Global War on Terrorism Medal and a Meritorious Unit Commendation Award, the JAG stated that his entitlement to these awards is supported by the record and a DD 215 should be issued to reflect his entitlement to them.

The JAG concluded that pursuant to 33 C.F.R. § 52.64, "this case presents issues of significant policy regarding character of service and narrative reasons for discharge for a member requesting discharge in lieu of court-martial."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On July 2, 2007, the Chair sent the applicant a copy of views of the Coast Guard and invited him to respond. On August 15, 2007, the applicant responded.

The applicant stated that the fact that the JAG insists that "the information coming from a Ouija board" was relevant evidence "is quite disturbing and inappropriate" and that considering answers from a Ouija board to be reliable evidence is ridiculous.

The applicant stated that the primary purpose of his Article 138 complaint was not the removal of his NJP but "to stop the continuing harassment" of his family by the Group CO.

The applicant alleged that the JAG's advisory opinion accused him of perjury and false statements but that he "never made a false statement of any kind" and that there is no evidence that he did so. He stated that most of the evidence against him at mast was statements by crewmembers who heard and believed SN C's comments and concerns and were "possibly reacting to the stresses from a hard and long yard period." He alleged that some of these crewmembers have told him that they regretted their statements or questioned the logic of his NJP. He further argued that it is inconsistent for the JAG to argue that the EOPM does not apply but then cite provisions of the EOPM to justify the command's course of action.

The applicant alleged that at mast, the Group CO orally promised to reinstate him to E-6 after six months but then refused to do so, even though the OIC recommended it, after he filed his Article 138 complaint.

Regarding his request for separation in lieu of discharge, the applicant noted that the Coast Guard did not cite any authority for awarding him the OTH discharge and acknowledged that he had requested an honorable discharge. He stated that if he had known that an OTH discharge was the probable outcome of his request, he would have used those words. The applicant also alleged that he "never one time met with counsel [even] after [he made] repeated requests for a meeting" prior to his separation.

Regarding the anonymous emails, the applicant wrote that “some of those emails may have been written during a period I probably could have qualified as clinically depressed.” He noted that he was prescribed the medication Clonazepam¹ from March 2004 through August 2004, and submitted emails concerning that prescription. In addition, he stated that he never denied having an inappropriate relationship with SN C because he was never asked about it—not even at mast.

Regarding his firearms, the applicant alleged that he did not have a chance to register them because he was deployed to another state, Virginia, for drydock duty the day after he brought them into the State, and that when he tried to comply with the law he could not because the command had issued a protective order against him.

The applicant also alleged that he did not violate the protective order when he went to the cutter on December 15, 2003. He alleged that the captain of the cutter had authorized his presence but forgot to inform the XO. He alleged that after the XO was informed of the misunderstanding, he received emailed apologies from both the CO and the XO of the cutter. He did not submit copies of these emails.

The applicant denied that his email to the OIC regarding his family being Sicilian and only knowing the “family way” was threatening. He stated that he was simply trying to explain to them that his family did not understand what was happening. He stated that he is still good friends with both the CO and the XO of the cutter. Regarding his email to the SN C, the applicant stated that it was not his intent to extort SN C although he sees how the email could be interpreted as extortion. He stated that he was simply “giving her an opportunity to tell the truth.”

The applicant alleged that he never accepted the OTH discharge and “was given some incorrect information by my assigned counsel indicating that my request for separation under honorable conditions had been endorsed by [the District Commander].” He alleged that he did not know that he had received an OTH discharge until three months after his discharge.

The applicant argued that his OTH discharge is absurd in light of the three Good Conduct Medals and many qualifications and certifications he accrued during his enlistment. He also argued that the OTH and narrative reason for discharge should be upgraded because the JAG acknowledged in the advisory opinion that his parents’ illness might have contributed to his request for discharge in lieu of court-martial.

In support of his allegations, the applicant submitted an email from SA P (previously SN P) dated February 18, 2004, in which she highly praised the applicant’s leadership and stated that he had been unjustly convicted although his “only mistake ... was to trust someone.” The applicant also submitted an email dated Thursday, August 12, 2004, in which he asked his assigned counsel if he had “some time Monday or Tuesday.” The counsel replied that he would not be in the office the following week and advised him not to “make waves” until his separation in lieu of trial was approved. The applicant then asked to see him the next day, Friday, and the counsel replied, “Yes, please call me. Moments ago, I got word that the admiral has endorsed your

¹ Clonazepam is commonly prescribed for seizure disorders, panic disorders, and anxiety. In addition, it is sometimes prescribed for depression.

request and now we just have to wait for final approval from the USCG paper pushers. Congratulations. Talk to you in the morning. 0815 is best.” In addition, the applicant submitted evidence of his accomplishments at his current civilian job.

APPLICABLE REGULATIONS

COMDTINST 5350.21D, the Commandant’s Sexual Harassment Policy Statement, states that sexual harassment “includes unwelcome sexual advances; requests for sexual favors; and other verbal or physical conduct of a sexual nature that is made a condition of employment, affects employment decisions, unreasonably interferes with work performance and creates an intimidating or hostile work environment. It will not be tolerated.”

Discrimination and Relationship Regulations in the Personnel Manual

Article 8.H.3.b.2. of the Personnel Manual in effect in 2003 states that a romantic relationship between a supervisor and a subordinate is an “unacceptable relationship.” Article 8.H.5.a. states that while all members must avoid inappropriate relationships with other members, “[p]rimary responsibility rests with the senior member.”

Article 8.I.1.a.1. states that sexual harassment is a form of illegal discrimination. Article 8.I.1.b.2. states that administrative and/or disciplinary action will be taken only when the discriminatory conduct is intentional. Article 8.I.1.e. states the following:

When area commanders, district commanders, commanding officers, ... become aware of allegations of illegal discriminatory conduct of personnel under their command, they shall investigate the basis for those allegations. Upon determining that illegal discrimination probably occurred; i.e., more probable than not, they shall initiate administrative or disciplinary action or formal disciplinary action as appropriate. In determining whether informal action or formal disciplinary action is appropriate, they must evaluate the severity of the alleged conduct with the reliability and veracity of the evidence presented.

Article 8.I.2.b. states the following:

Commanding officers and officers in charge have a responsibility to look into all allegations of sexual harassment and to take prompt and effective action. They must be aware of all courses of action available to them to deal with sexual harassment allegations. They generally fall into three categories - discrimination complaint processes, administrative processes and UCMJ provisions. These actions are not mutually exclusive and two or all three of them may be pursued simultaneously. The actions taken by a command in a particular case will depend upon the severity of the conduct, the state of the evidence, the limits of the commander's authority, and other such factors. Specific questions regarding prosecuting offenders should be addressed to the command's servicing legal office.



2. Sexual Discrimination. Military Civil Rights Manual, COMDTINST M5350.11 (series) provides detailed information on processing complaints of discrimination based upon gender. The primary purpose of the process is to ensure the complainant obtains an appropriate remedy or redress for any wrong he or she may have suffered.

3. Prompt appropriate administrative action should be taken simultaneously with discrimination complaint processes, with respect to sexual harassment offenders, when a command has sufficient information to reasonably believe an incident has occurred. It is not necessary to await the com-

pletion of the procedures set forth in the above paragraph. Commands have a wide variety of actions available which include but are not limited to informal or formal counseling, evaluation in performance reports, and formal performance reviews, which could lead to separation.

4. Specific acts of sexual harassment may amount to criminal offenses punishable under various provisions of the UCMJ. A review of the UCMJ and the Manual for Courts-Martial reveals numerous provisions well suited for prosecution of sexual harassment amounting to criminal conduct.

Equal Opportunity Manual (COMDTINST M5350.4)

The EOPM provides policy and guidance for establishing a diverse workforce and environment “free of discrimination and harassment.” EOPM, Chap. 1.C. Chapter 5.E.4.a.1. of the EOPM in effect in 2003 defines “sexual harassment” as follows:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when submission to or rejection of this conduct explicitly or implicitly affects an individual’s employment, unreasonably interferes with an individual’s work performance or creates an intimidating, hostile or offensive work environment. Sexual harassment can occur in a variety of circumstances ... e. The harasser’s conduct must be unwelcome.

Examples of sexual harassment provided in Enclosure 18 to Chapter 5 include treating someone differently because of his or her gender; making unwanted attempts to establish a romantic relationship despite efforts to discourage it; making repeated requests for dates, drinks, dinners, etc., despite the respondent’s refusals; touching in a way that makes a person feel uncomfortable; making unwanted attempts to stroke, fondle, or kiss another person; and implying potential retaliation—by means of, for example, a performance evaluation—for not responding positively to sexual advances.

Chapter 5.A. provides “Guidance for Handling Allegations of Discrimination.” Under Chapter 5.A.2.a., “Commanders and supervisors are responsible for and must be committed to preventing discrimination and sexual harassment in their commands ... Appropriate corrective action ... may range from verbal counseling and mediation when the behavior was of an unintentional nature, to punitive actions for intentional or egregious behavior.”

Chapter 5.A.3.b. states that “systems are in place to resolve complaints of discrimination at the lowest possible level.” Chapter 5.B.7.a. states that “COs/OINCs, CROs, and MCR/Fs shall seek to achieve informal resolution of discrimination complaints at the earliest possible stage.”

Chapter 5.A.3.c. states that “[c]ommanders and supervisors must investigate and, to the extent that authority to do so is vested in them by law or regulation, take such action as they consider appropriate on all alleged violations of this instruction. The nature of the investigation will depend upon the particular facts and circumstances and may consist of an informal inquiry where that action is sufficient to resolve factual issues. ... Confidentiality will be maintained to the greatest extent possible.” Chapter 5.A.2.e. states that because of “the volatile and potentially damaging nature of the allegations, confidentiality will be maintained to the greatest extent possible without thwarting resolution.”

Chapter 5.A.4.b. states that the prohibitions against discrimination and sexual harassment “are punitive, general and regulatory orders and apply to all military ... personnel individually without further implementation. A violation of these provisions by military personnel is punishable in accordance with the UCMJ.”

Chapter 5.B.15. outlines the Coast Guard’s “Informal Complaint Program” for members who bring issues of discrimination to the attention of the command, also known as “aggrieved persons.” It states that an aggrieved person should notify her CO or OIC of her grievance through the chain of command within 45 days of the alleged incident of discrimination or harassment. If the complaint is not resolved to her satisfaction, the CO or OIC shall arrange for the aggrieved person to meet with a civil rights counselor, who shall make an informal inquiry—not amounting to an investigation—and attempt to resolve the matter informally before advising the aggrieved person of her right to file a formal discrimination complaint. The aggrieved person may elect to use alternative dispute resolution and be referred to a mediator.

Non-Judicial Punishment under Article 15 of the UCMJ

Article 1.B.1.a. of the Military Justice Manual (MJM) states that a “command may receive an allegation of misconduct from any source. Another member of the command may inform a superior that he or she witnessed an act of misconduct ... Any report of misconduct may serve as the basis for initiating a preliminary inquiry.”

Article 1.B.1.c. states that “[a]ny member of the armed forces who is aware of an offense may submit a CG-4910. The person submitting the CG-4910 [Report of Offense and Disposition] may rely upon information received from other sources and does not have to have personally witnessed the alleged act of misconduct.” Article 1.B.1.b. states that “[o]nce the member has been placed on report, the procedure to be followed may vary with the size and type of unit and the desires of the commanding officer.”

Article 1.B.3. states that before a mast, a command may appoint a preliminary inquiry officer (PIO) to investigate the alleged offense and a mast representative to assist and represent the accused member. Article 1.B.5.i. states that the accused member “must be allowed to examine documents and other evidence that the NJP authority will examine and consider in determining whether to impose NJP.”

Article 1.C.1. states that a “mast is not an adversarial proceeding. It is different from courts-martial; a member has no right to be represented by an attorney at mast. ... It is possible, however, that the member may obtain the services of an attorney or any other person, at no expense to the government, to appear as his or her spokesperson.” Article 1.C.4.e. states that a spokesperson “is not permitted to examine or cross-examine witnesses (see paragraph 4.c.(1)(B), Part V, MCM). The commanding officer may, as a matter of discretion, permit a spokesperson to examine or cross-examine witnesses. A spokesperson is always permitted to speak for a member when the member is otherwise entitled to speak. The purpose of precluding a spokesperson from examining witnesses is to avoid having the mast hearing become an adversarial proceeding.”

Article 1.C.3.c. states that a mast representative “serves primarily to assist the member in preparing for and presenting his or her side of the matter and to speak for the member, if the member desires. It is Coast Guard policy that the mast representative may question witnesses, submit questions to be asked of witnesses, present evidence, and make statements inviting the commanding officer's attention to those matters he or she feels are important or essential to an appropriate disposition of the matter. In addition, the mast representative may make a plea for leniency, and to that end, may solicit and submit statements regarding the reputation of the member at the unit as well as other matters in extenuation or mitigation.”

Article 1.D.1.e. states that a mast “is normally open to the public unless the commanding officer determines that it should be closed due to operational necessity, to prevent disclosure of classified information, or other good cause.”

Article 1.D.1.f. states that the “burden of proof required in order to award NJP is a preponderance of the evidence. This standard means that before NJP may be awarded, the commanding officer must determine it is ‘more likely than not’ that the member committed an offense(s) defined by the UCMJ.”

Article 1.D.1.g. provides the following rules of evidence applicable at mast:

A member retains the right against self-incrimination at a mast, and may not be forced to make a statement or answer questions. ... Privileges arising from communications with a spouse, an attorney, a member of the clergy, or a psychotherapist apply at mast, with certain exceptions Other rules of evidence applicable to courts-martial do not apply at mast. The commanding officer may consider hearsay, or a statement made outside the mast proceeding, such as police reports and oral or written statements made to an investigator, whether or not the person who made the statement appears in person at the mast. When deciding whether a hearsay statement is credible and the weight it should be given, the commanding officer should carefully evaluate the circumstances under which the statement was made. Judicial exclusionary rules involving rights warnings and search and seizure do not apply at a mast, and the commanding officer may consider evidence that would be inadmissible at court-martial. The commanding officer should apply a rule of fundamental fairness: under all of the circumstances, is it fair to the member to consider this evidence? The commanding officer should consult his or her servicing legal office with any questions about whether or not to consider specific evidence.

Article 1.D.8.d. states that

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

Article 138 of the UCMJ

Article 138 of the UCMJ (10 U.S.C. § 938) states the following:

Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made.

Article 14.B.5. of the Personnel Manual states the following:

Congress established UCMJ Article 138 as a means for a military member to seek redress of alleged "wrongs" committed by the member's commanding officer. A "wrong" can include an allegedly improper personnel record entry. ... The MJM [Military Justice Manual] describes the procedures for seeking redress from one's commanding officer under Article 138, UCMJ, and if redress is denied, for filing a "complaint" with the officer exercising general court-martial jurisdiction over the member's commanding officer.

Article 7.A.4. of the MJM states that “[u]pon due application, a complaint alleging a wrong for which redress has been sought in writing, but refused by the commanding officer, is cognizable under Article 138, UCMJ.” Article 7.A.4.d(2) states that NJP is not a cognizable complaint under Article 138. Article 7.A.4.a. states that an Article 138 complaint

must be submitted to a superior officer within 90 days of the date of discovery of the alleged wrong, and the complainant must have requested in writing redress from his or her commanding officer and have been refused. ... The OEGCMJ [officer exercising general court-martial jurisdiction] may waive the 90-day time limit and the requirement for written request for redress and denial thereof for good cause and action on the complaint by the OEGCMJ constitutes such waiver. The period during which the commanding officer considers the request for redress will not be included in computing the 90-day period.

Article 7.A.4.b. states that the complainant’s CO “shall reply to the request for redress without undue delay and, if redress is denied, shall inform the member that a complaint may be forwarded to the OEGCMJ.”

Separation for the Good of the Service under Article 12.B.21.

Article 12.B.21.a. of the Personnel Manual states that

[a]n enlisted member may request a discharge under other than honorable [OTH] conditions for the good of the Service in two circumstances: in lieu of UCMJ action if punishment for alleged misconduct could result in a punitive discharge or at any time after court-martial charges have been preferred against him or her. ... Send requests for discharge under other than honorable conditions for the good of the Service through the officer exercising general court-martial jurisdiction for his or her personal review and comment.

Article 12.B.21.b. states that a “member who indicates a desire to submit a request for a discharge under other than honorable conditions for the good of the Service will be assigned a lawyer counsel.”

Article 12.B.21.e. states that the “reason for discharge shall be for the good of the Service, and commanding officers shall not recommend the member for reenlistment. If Commander, (CGPC-epm-1) believes the member warrants a more favorable discharge type than

under other than honorable conditions based on the facts of the case, Commander, (CGPC-epm-1) may direct issuing an honorable or general discharge.”

Article 12.B.32.a.1. states the following:

The Service will not discharge any member under other than honorable conditions without first affording him or her the right to present the case to an administrative discharge board with the advice and assistance of counsel and unless approved board findings and an approved recommendation for discharge under other than honorable conditions support such discharge. However, if appropriate, the Service may issue such discharge without board action if the member is beyond military control for prolonged unauthorized absence, requests discharge for the good of the Service, or waives the right to board action in writing.

The Separation Program Designator (SPD) Handbook states that when a member is voluntarily discharged “for conduct triable by court martial for which the member may voluntarily separate in lieu of going to trial,” the member receives an RE-4 reenlistment code (ineligible); a KFS separation code; and “triable by court martial” as the narrative reason for separation.”

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely.

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.

3. Absent specific evidence to the contrary, the Board presumes that Coast Guard officers, including the applicant’s chain of command, have acted “correctly, lawfully, and in good faith” in performing their duties.² The applicant bears the burden of overcoming this presumption and proving by a preponderance of the evidence that the Coast Guard committed error or injustice³ by awarding him NJP for sexual harassment, by reducing his rate to E-5, and then by separating him in lieu of trial by court-martial with an OTH discharge, an RE-4 reenlistment code, and “triable by court-martial” as his narrative reason for separation.

4. The applicant alleged that on January 14, 2004, he was wrongfully awarded NJP for sexual harassment even though he never sexually harassed SN C. Apart from the applicant’s own claim that he never sexually harassed SN C, the only evidence in the record that somewhat supports his denial is SN P’s stated perception that SN C enjoyed some of the inappropriate

² *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979); 33 C.F.R. § 52.24(b).

³ For purposes of the BCMRs under 10 U.S.C. § 1552, “injustice” is “treatment by military authorities that shocks the sense of justice.” *Sawyer v. United States*, 18 Cl. Ct. 860, 868 (1989), *rev’d on other grounds*, 930 F.2d 1577 (citing *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976)).

attention she received from the applicant and then told inconsistent stories, which SN P did not relate. On the other hand, several witnesses provided evidence that strongly supported SN C's claim of being harassed by the applicant. Most of the witnesses described instances in which the applicant paid inappropriate attention to SN C by, for example, stroking her hair; frequently inviting her, a non-rate, to socialize with him and EM1 H; frequently and agitatedly inquiring into her whereabouts during off-duty time; repeatedly telephoning her for non-business reasons during off-duty time; arranging the work schedule so that he and SN C would work alone together frequently; and objecting to her spending time with her boyfriend. EM1 H reported that SN C asked him twice in October 2003 to get the applicant to stop his inappropriate behavior and that the applicant became agitated on a few occasions when he saw SN C with her boyfriend. The CEA reported that he saw SN C's cell phone log, which showed that the applicant had called her many times one weekend in October 2003 without leaving any message. The lack of messages indicates that his calls lacked a legitimate business purpose. GM1 S and BM2 K reported that the applicant fabricated a false reason for requiring SN C to go alone on the small boat with him on November 23, 2003. Moreover, much of this behavior occurred after EM1 H first confronted the applicant on October 3, 2003, about his unwelcome, inappropriate behavior toward SN C. Therefore, and in light of the definition and examples of sexual harassment provided in Chapter 5.E.4.a.1. and Enclosure 18 of the EOPM, as well as the burden of proof applicable at mast under Article 1.D.1.f. of the MJM, the Board finds that the applicant has not proved that the Group CO erred in finding that he had sexually harassed SN C, a subordinate in his own department.⁴ Sexual harassment is a violation of a general order and contrary to good order and discipline and hence a violation of Articles 92 and 132 of the Uniform Code of Military Justice.⁵

5. The applicant alleged that his behavior toward SN C was not sexual harassment because she welcomed his attention, kissed him, and was involved in an inappropriate relationship with him. Welcome sexual advances are not sexual harassment,⁶ though they often violate other regulations about inappropriate and unacceptable relationships. The record indicates that in September and early October 2003, SN C did accept invitations to socialize with the applicant, EM1 H, and sometimes other petty officers. However, as of October 3, 2003, when EM1 H first confronted the applicant about his inappropriate behavior toward SN C, the applicant was on notice that it was unwelcome. The only evidence in the record indicating that SN C might have welcomed the applicant's inappropriate behavior was provided by SN P (later SA P), whose statement is strongly refuted by the statements of other crewmembers, who noted SN C's discomfort with and complaints about the applicant's excessive and inappropriate attention during off-duty hours. The Board finds that the applicant has failed to prove by a preponderance of the evidence that SN C welcomed his inappropriate attention. However, even if SN C did at one point engage in an inappropriate relationship with the applicant, such circumstance would not rebut the evidence that the applicant later sexually harassed her in October and November 2003.

⁴ The Board notes that the applicant complained that evidence about a child's game played on a Ouija board was presented at mast. However, evidence that the applicant asked a question about unacceptable behavior between SN C and himself in the presence of other crewmembers was certainly relevant to the nature of his behavior toward her and to her and the crew's perception of his behavior even if the question was asked pursuant to a child's game.

⁵ Chapter 5.A.4.b., Equal Opportunity Program Manual (EOPM) (COMDTINST M5350.4).

⁶ EOPM, Chapter 5.E.4.a.1.e.

6. The applicant stated that he never intended to harass SN C and so should not have been awarded NJP. Article 8.I.1.b.2. of the Personnel Manual states that administrative and/or disciplinary action will be taken only when the discriminatory conduct is intentional. Although the applicant may not have realized that his conduct constituted sexual harassment, the record indicates that his conduct was intentional. Telephoning SN C repeatedly during off-duty hours and arranging the departmental work schedule to ensure that she would frequently work alone with him cannot be considered unintentional conduct even if the applicant did not realize, despite EM1 H's warning, that his behavior was inappropriate.

7. The applicant alleged that after SN C accused him of sexual harassment, his command acted erroneously and unjustly by failing to follow the procedures for handling discrimination complaints under the EOPM. When SN C complained about the applicant's harassment to EM1 H, a senior member of her unit, in October 2003, under the EOPM, she became a potential "aggrieved person." The record shows that EM1 H twice attempted to resolve the issue at the lowest possible level by discussing the applicant's behavior with him. On November 23, 2003, upon learning that his discussions with the applicant had not resolved the problem, EM1 H reported the matter to the Command Enlisted Advisor. The CEA discussed the allegations with SN C, who told him that she would not file a complaint because her sister—also a member of the Coast Guard—had been severely assaulted after filing one. Given SN C's refusal to file a sexual harassment complaint under the Equal Opportunity Program, the command cannot be faulted for not following the procedures for handling such complaints under the EOPM. If SN C had wanted to file a complaint, under Chapter 5.B.15. of the EOPM, the command would have been required to continue following the procedures for handling such complaints in that manual.

8. With no EO complainant but significant evidence of misconduct—sexual harassment of a subordinate—the CEA placed the applicant on report based on his own observations, SN C's accusations, and an oral statement by EM1 H. The Report of Offense shows that the CEA himself filed the charges against the applicant on November 23, 2003, and listed SN C and EM1 H as witnesses. Given the applicant's position as SN C's department head and a first class petty officer, the Board does not believe that the CEA's decision to place the applicant on report in accordance with Article 1.B.1. of the MJM was an error or unjust⁷ overreaction. Under Articles 8.I.1.e. and 8.I.2.b. of the Personnel Manual, COs have significant discretion in deciding how to handle a member accused of sexual harassment. The applicant has not proved that the Group CO abused her discretion in taking him to mast even though masts are open to the public.

9. The applicant alleged that he was unable to defend himself at mast because he was not allowed to ask certain questions that the District Legal Office found to be irrelevant to the charges against him. He alleged that he was not allowed to ask questions about SN C's two prior complaints about harassment, even though there was evidence of one of them, or about her sister's sexual harassment complaint and subsequent transfer to another unit. Articles 1.D.1.g. and 1.D.8.d. of the MJM permit a CO to require a member to submit a list of proposed questions in advance, to seek the advice of a legal office about whether such questions should be allowed at mast, and to control the questioning of witnesses to "ensure that any questioning helps to discover the truth of the allegations against the member, avoids wasting time, and protects a witness

⁷ See footnote 3, above.

from harassment or unnecessary embarrassment.” Under Articles 1.C.1. and 1.D.8.d. of the MJM, a mast is supposed to be a non-adversarial proceeding, and the CO is allowed to control the cross-examination of witnesses to prevent a mast from becoming an adversarial proceeding. Assuming that the applicant’s allegation about the types of questions that the Group CO disallowed is true, the Board finds that the Group CO did not offend the regulation or prevent the applicant from defending himself by disallowing the questions. Evidence about whether SN C had previously complained of sexual harassment by other members would not be probative of whether the applicant sexually harassed SN C since it is perfectly possible that SN C could have been sexually harassed by more than one member. Nor would evidence that SN C’s sister had been transferred after filing a sexual harassment complaint make SN C a less credible witness.

10. The applicant argued that his mast should be removed because evidence gathered by the CGIS investigators after the mast showed that SN C had made false statements during the mast. However, the only “new evidence” that CGIS agents gathered that contradicted SN C’s claims was the applicant’s own statement and fraudulent emails alleging that SN C had lied. As the applicant destroyed his own credibility by sending the fraudulent emails, the Board finds that his claim about his inappropriate relationship with SN C is insufficient to prove that the District Commander erred in denying his appeal of his NJP or that the documentation of the NJP should be removed from his record.

11. The Board concludes that the applicant has failed to prove by a preponderance of the evidence that documentation of the mast and NJP should be removed from his record. He has not proved that he was denied due process or that the Group CO did not reasonably conclude, based upon the preponderance of the evidence, that he had violated Articles 92 and 132 of the UCMJ by sexually harassing a female subordinate.

12. The applicant asked the Board to correct his record to show that he was separated as a BM1/E-6. He alleged that at mast, the Group CO promised to restore his pay grade to E-6 after six months. The applicant submitted no evidence to support this allegation, and the mast record does not support it. Moreover, even assuming the Group CO made such a promise, it would have been conditional upon six months of good behavior, which the applicant did not provide. The applicant has not proved by a preponderance of the evidence that his record should be corrected to show that he was re-advanced to E-6 after his reduction in rate.

13. The applicant asked the Board to upgrade his discharge from OTH to honorable. He alleged that the additional criminal charges that led to his OTH discharge were filed in retaliation because he was planning to file a formal complaint against the Group CO under Article 138 of the UCMJ and had already sought redress from her. The applicant alleged that the timing of the charges proves that they were retaliatory. The applicant submitted his request for redress from the Group CO on June 4, 2004. On June 14, 2004, when the District Legal Officer recommended that the command consider preferring many new charges against the applicant, the command quickly prepared a charge sheet with the recommended specifications and informed the applicant of the charges. However, the record also shows that the command never intended to let the applicant’s recent misconduct go unpunished: The Group XO referred to unresolved UCMJ charges against the applicant in an email to him dated March 22, 2004, and noted that the matter was in the hands of the District Legal Office, where “the lawyers ... [were] decid[ing]

how to handle the new info” from the CGIS report that was issued on March 15, 2004. And in an email dated May 21, 2004, the Group XO reminded the applicant that new UCMJ charges were “pending.” Therefore, the applicant has not proved that the charges brought against him by his command on June 14, 2004, were filed in retaliation for his June 4, 2004, request for redress under Article 138 of the UCMJ.

14. The applicant argued that his OTH discharge should be upgraded because the new charges against him were unfair since his emails were not intended to extort, threaten, or mislead anyone. He alleged that he never admitted to having committed the alleged misconduct. However, on February 13, 2004, the applicant told the CGIS that he had sent the emails in question and had engaged in an unacceptable relationship. He has also admitted that he brought firearms into his military housing without registering them with the housing officer or with the State, and he must have known at the time that he would not be present in the State for many weeks. Therefore, there is substantial evidence that he admitted to all of the misconduct underlying the charges that were filed against him on June 14, 2004. The Board finds that those charges are amply supported in the record. In an anonymous email dated January 26, 2004, the applicant told SN C that he would tell her command that she had been involved in an inappropriate relationship with him unless she told them so that week. In an email dated February 7, 2004, the applicant told the OIC that the anonymous email was “verification” of the applicant’s own claim that SN C had lied about their relationship. Thus, he fraudulently pretended that the anonymous emails from coastiefriend@yahoo.com were not his own, while also claiming, “I am not a liar.” In addition, the applicant sent an email to the OIC with a veiled threat about his family being “100% Sicilian” and understanding only the “family way. And ... anyone can perceive that any way they want.”

15. The applicant argued that his discharge should be upgraded because the new charges against him were unfair since, when he sent the anonymous emails, he “probably could have qualified as clinically depressed” and was later prescribed Clonazepam. The Board finds the applicant’s evidence to be grossly inadequate to show that he should not have been held responsible for the content of his emails. There is no evidence in the record that in January and February 2004 he suffered from a “severe mental disease or defect” that rendered him “unable to appreciate the nature and quality or the wrongfulness of the acts,” which is required for a member to be deemed not mentally responsible for his crimes under Article 50a of the UCMJ and Rule 916(k) of the Rules for Courts-Martial.

16. The applicant argued that his discharge should be upgraded because his parents were very ill in 2004 and he would not have requested the discharge if they had not been ill. His father had a heart attack, underwent surgery, and was diagnosed with a lung disease in the winter of 2004 and his mother was ill and died in September 2004. The applicant may well have allowed his parents’ poor health to weigh into his decision to avoid trial by requesting separation. His personal reasons for requesting separation in lieu of going to trial, however, do not make the Coast Guard’s approval of his request for an OTH discharge erroneous or unjust.

17. The applicant argued that his OTH discharge should be upgraded because he requested an honorable discharge and did not know he had received an OTH discharge until three months after his separation. Under Article 12.B.21. of the Personnel Manual, a member facing

trial by court-martial may request an OTH discharge in lieu of trial. Article 12.B.21.e. states that Commander, CGPC may direct an honorable or general discharge, instead of an OTH discharge, if he believes that the “member warrants a more favorable discharge.” The record shows that on August 10, 2004, the applicant submitted a “request for a discharge under possibly other than honorable conditions” in lieu of trial by court-martial. He sought separation in lieu of trial in accordance with Article 12.B.21. and clearly knew that an OTH discharge was a likely outcome of his request. The record also shows that the applicant submitted an additional statement asking that his discharge “under possibly other than honorable (OTH) conditions ... be upgraded to a General Discharge under honorable conditions,” pursuant to Commander, CGPC’s authority under Article 12.B.21.e. The applicant’s request that his discharge be upgraded to a general discharge does not negate the fact that he knowingly submitted a request for an OTH discharge in lieu of trial, which was granted. His request dated August 10, 2004, shows that his attorney had advised him about the implications of such a request. Moreover, the applicant admitted in his application that on his last day on active duty, he asked his attorney if the attorney thought that he deserved an OTH discharge, which shows that the applicant knew that his request for an OTH discharge had been granted and that his request that it be upgraded to a general discharge had been denied.

18. The applicant argued that his OTH discharge should be upgraded because he never met with an attorney regarding his discharge despite repeated requests. Article 12.B.21.b. of the Personnel Manual states that a “member who indicates a desire to submit a request for a discharge under other than honorable conditions for the good of the Service will be assigned a lawyer counsel.” The applicant’s request for discharge dated August 10, 2004, includes an acknowledgement of his consultation with an attorney. Moreover, the applicant admitted to having communicated with an attorney several times regarding his request for separation in lieu of trial, and the record includes emails sent between the applicant and his attorney. While it is possible that the applicant never met with the attorney in person, the preponderance of the evidence shows that he was assigned an attorney in accordance with Article 12.B.21.b. and was provided counsel by the attorney. The applicant has not proved that he was denied counsel or due process with respect to his OTH discharge.

19. The applicant argued that because he was discharged for misconduct, he should have been processed for an administrative discharge under Article 12.B.18. of the Personnel Manual and he should have received a hearing before an Administrative Discharge Board. Article 12.B.18. provides procedures for involuntary discharges for misconduct. The applicant, however, expressly and voluntarily requested a discharge for the good of the Service under Article 12.B.21. Under Article 12.B.32.a.1., members who request a discharge for the good of the Service are not entitled to a hearing before an Administrative Discharge Board.

20. The applicant argued that his OTH discharge should be upgraded because he served with honor for more than ten years, during which he earned three Good Conduct Medals, each recognizing three consecutive years of good behavior, and because of his post-discharge public service. In light of the substantial evidence in the record of numerous violations of the UCMJ and Coast Guard regulations by the applicant, the Board finds that the OTH discharge was neither erroneous nor unjust despite the applicant’s otherwise honorable service. Moreover, the delegate of the Secretary has held that “the Board should not upgrade discharges solely on

the basis of post-service conduct.”⁸ The Board concludes that the applicant has failed to prove by a preponderance of the evidence that his OTH discharge should be upgraded.

21. The applicant asked the Board to upgrade his narrative reason for separation from “triable by court-martial” to “hardship” and his reenlistment code from RE-4 to RE-3. Because the applicant has not proved that his OTH discharge in lieu of trial by court-martial was erroneous or unjust, there is no basis in the record for changing his narrative reason for separation or reenlistment code as they accurately reflect the true reason for his discharge in accordance with Article 12.B.21. of the Personnel Manual and the SPD Handbook.

22. The applicant asked the Board to correct his record to reflect entitlement to a Meritorious Unit Commendation Award and a Global War on Terrorism Medal. The citation for the commendation shows that the District Commander awarded the unit commendation to the crew of the applicant’s cutter for their service from September 2002 through May 2004. The applicant was assigned to the cutter throughout this period. In addition, ALCOAST 274/05 shows that the Commandant awarded the Global War on Terrorism Service Medal to Coast Guard members who served at least 30 consecutive days on active duty between September 11, 2001, and January 30, 2005, which the applicant did. Therefore, the Board agrees with the JAG that the applicant’s DD 214 should be corrected to reflect his entitlement to these awards.

23. The applicant made numerous allegations with respect to the actions and attitudes of various members of his unit and chain of command. Those allegations not specifically addressed above are considered to be without merit and/or not dispositive of the case.

24. Accordingly, the applicant’s DD 214 should be corrected to reflect entitlement to the Meritorious Unit Commendation Award and the Global War on Terrorism Medal, but all other requested relief should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

⁸ Memorandum of the General Counsel of the Department of Transportation to the Board for Correction of Military Records, July 8, 1976.

