DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2004-192

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xxx xx xxxx, xxx/E-7

FINAL DECISION

AUTHOR: Andrews, J.

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was docketed on September 24, 2004, upon the BCMR's receipt of the applicant's completed application. The Coast Guard submitted an advisory opinion on February 15, 2005, and the applicant was granted a 42-day extension and responded on April 29, 2005. The applicant's response was forwarded to the Coast Guard for consideration on May 2, 2005. On June 21, 2005, the BCMR asked the Coast Guard to respond in writing to certain factual questions and a legal argument raised in the applicant's response to the advisory opinion. The Coast Guard submitted a supplemental advisory opinion on June 29, 2005, and the applicant responded to it on July 11, 2005.

This final decision, dated July 28, 2005, is 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 asked the Board to correct his record by removing his officer evaluation report (OER) for the period April 1, 2001, to January 31, 2002, when he was serving as a temporary lieutenant junior grade (LTJG). He also asked that his commission be reinstated and that he be promoted to lieutenant with his peer group and receive all back pay and allowances.

The applicant stated that his commission was revoked as a result of an improper imposition of non-judicial punishment (NJP) at mast after he was unjustly accused of sexual harassment. He stated that on August 22, 2001, he was informed that an e-mail

conversation he was having with a second class petty officer (BM2 Y) "was becoming uncomfortable and [she] had asked someone to let [him] know." He alleged that he immediately apologized to the BM2 "and considered the matter resolved." However, he was quickly summoned by the executive officer (XO), who told him that he would be placed on report for sexual harassment. The applicant alleged that later that day, the commanding officer (CO) told him, "It doesn't matter what you have to say, your fate has already been decided and all I have to do is find the facts to back it up." Two days later, he was reassigned from his cutter to a shore unit on temporary active duty (TAD).

The applicant alleged that on September 26, 2001, he met with the lieutenant (not an attorney) who was appointed to serve as his mast representative. He was advised that if he admitted to the charges, he would receive a lesser punishment. He alleged that the next day, he saw the CO and XO and asked if he could have an attorney be his spokesperson at mast. He alleged that the CO replied that he would not allow an attorney to set foot on the cutter. He alleged that his CO's decision not to permit him to be represented by an attorney would only have been correct if the punishment had been limited to fourteen days of restriction and an oral reprimand.

As a result of the mast on October 1, 2001, the applicant received NJP in the form of a Punitive Letter of Reprimand. He appealed the NJP on the grounds that his punishment was disproportionate, but his appeal was denied. On July 25, 2002, he was told that the Commandant had revoked his temporary commission as of October 25, 2002.

The applicant alleged that the NJP for sexual harassment was unjust because he made no sexual advances or requests for sexual favors and his comments never affected anyone's work performance. He alleged that his comments were limited to one e-mail conversation with the BM2, to whom he immediately apologized after he heard she felt uncomfortable. Therefore, he argued, his comments "could not have created an intimidating or hostile work environment." He argued that he would only have been guilty of sexual harassment if he had continued with his behavior after being told she felt uncomfortable. In addition, he argued, his comments did not establish any "quid pro quo" or pattern of sexual harassment.

The applicant stated that the BM2 never filed a complaint against him. He alleged that particular comments in the e-mail conversation were "taken out of context in order to support the charges." He alleged that he would have been let off with a warning had his command considered the entire e-mail conversation. Moreover, he pointed out, during the investigation, his command could find no AIS User Acknowledgement Form regarding computer and email use policy with his signature, even though the form was used against him during the NJP and resulted in more charges.

The applicant also alleged that he attempted to refuse mast and demand trial by court-martial but was not allowed to. He argued that he should have been allowed to refuse mast because by the time the mast occurred, he had been transferred TAD to a

shore unit and did not expect to be returned. He argued that he was unjustly denied his right to refuse NJP and request court-martial. He submitted no evidence to support his various allegations. The applicant alleged that he did not learn that his rights had been violated until almost two years later, in 2004, during conversations with others.

SUMMARY OF THE RECORD

On February 18, xxxx, after completing Officer Candidate School (OCS), the applicant—then a chief petty officer with almost ten years of military service—signed an Acceptance and Oath of Office to accept a temporary commission as an ensign. He was assigned to a cutter as a Deck Watch Officer and his duties included serving as the Education Services Officer (ESO). A "page 7" entry in his record indicates that on March 24, 2000, the Code of Conduct was explained to him and the crew of the cutter.

On his first OER, covering his service on the cutter from February 19 to September 30, 2000, the applicant received ten marks for 4, seven marks of 5, and one mark of 6 in the various performance categories[1] and a mark of 5 on the Comparison Scale.[2] He was recommended for promotion to LTJG. On his second OER, covering his service on the cutter through March 31, 2001, he received six marks of 4, ten marks of 5, and two marks of 6 in the performance categories, a mark of 5 on the Comparison Scale, and his XO's recommendation for promotion. The applicant was selected for promotion and was promoted to LTJG on August 18, 2001.

Charges Against the Applicant

On August 22, 2001, the applicant acknowledged in writing that he had been charged with these offenses: fraternization (interrelating on terms of military equality; UCMJ Article 134; four counts), attempts at fraternization (UCMJ Article 80; seven counts), failure to obey an order or regulation (by soliciting inappropriate interpersonal relationships and using the email system to do so; UCMJ Article 92; thirteen counts), dereliction of duty (by committing sexual harassment; UCMJ Article 92; two counts), and conduct unbecoming an officer (by seeking inappropriate relationships with subordinates; UCMJ Article 133; seven counts). He was advised that the evidence against him showed that he had verbally solicited an inappropriate relationship with YN3 B; had sexually harassed YN3 B and BM2 Y; and had sought inappropriate personal relationships in email messages to YN3 B and BM2 Y. He was advised that his command intended to impose NJP and that he was entitled to be accompanied at mast by a mast representative or spokesperson.

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[1] Coast Guard officers are evaluated on a scale of 1 to 7 in a variety of performance categories, with 7 being the highest mark.

[2] The Comparison Scale is not actually numbered. However, as with the performance categories, there are seven possible marks. Officers are supposed to be marked in comparison with all other officers of the same rank known to the reporting officer. A mark in the fifth place means the officer was rated to be a "distinguished performer; give tough challenging, visible leadership assignments."

The applicant was also advised in writing of various other rights, including the right to review all evidence against him, to present evidence and witnesses, and to question witnesses against him. In addition, he was advised that the maximum NJP that could be imposed was an admonition or reprimand and thirty days of restriction and that he had a right to appeal the NJP. The acknowledgement form that the applicant signed is specifically for an officer attached to a vessel and so does not include a right to consult counsel about the NJP or to refuse NJP and demand trial by court-martial. Also on August 22, 2001, the applicant was sent to work at a shore unit, the Xxxxxxxx Area, where he served as an anti-terrorism and force protection coordinator.

Following an investigation, on September 25, 2001, the investigator and the XO recommended that the charges against the applicant be disposed of at mast. The mast was held on October 1, 2001. A lieutenant served as the applicant's mast representative. The evidence gathered by the investigator included the following:

Evidence of BM2 Y

BM2 Y, a crewmember on the cutter, provided the following email messages:

Date	Time	Subject	From	To	Message
7/28/01	1454	Hello	App.	BM2 Y	"Hey Dee, It was great talking to you last night … You can be my BMOW anytime!!! …"
8/16/01	2308	Party	App.	BM2 Y	"Hey Dee, I hope to see you at the wetting down [promotion] party in XXXX. I haven't decided on a location yet, but I'll let you know when I do. Bob"
8/16/01	2349	XXXXX	App.	BM2 Y	"Dee, Let me know if you're going to a tattoo parlor in xxxxxx. I want to go with you so I can get some more work done on one of mine. Bob"
8/17/01	1608	RE: Party	App.	BM2 Y	"Which would you prefer … Sports Bar or Hotel Bar?"
8/17/01	1619	RE: Party	BM2 Y	App.	"Either would be good, there's beer at both."
8/17/01	2333	RE: Party	App.	BM2 Y	"Hey D, I just wanted to let you know that I have decided to have the wetting down party in xxxxxx. I can get a lot more alcohol for my money. But we can still party in xxxxxx if you want to."
8/17/01	1616		App.	BM2 Y	"If I tell you something, can you keep it to yourself?"
8/17/01	1923	RE:	App.	BM2 Y	"I've been wanting to ask this for a while now and don't quite know how you'll react to it so I'm kind of hesitant."
8/17/01	2142	RE:	App.	BM2 Y	"True … I'll ask you next time we're together and no one else can hear what we're saying."
8/18/01	1423	RE:	App.	BM2 Y	"D, Ever hear that song……If I said you have a beautiful body would you hold it against me?"
8/19/01	0254	RE:	App.	BM2 Y	"D, RDC dared me to say that to you … so tell him he owes me a beer now."
8/19/01	1952	…	App.	BM2 Y	"D, Just so you know what started that whole conversation … I told RDC that I thought you were attractive and he told me that I didn't have the balls to tell you. So I figured that was an easier way to say it. But I guess that I just came out and told you again. Anyway … that's what started it."

8/21/01	0010	Sometime will you explain this to me?	RDC	App.	"This is not cool sir, this is my name in print. I have full confidence in your honor to enlighten those concerned with the truth."
8/21/01	1157	RE: [same as above]	App.	RDC	"Chief, I am so sorry for getting you involved with this mess. I will straighten this out and yes I will explain it to you. Again, I hope you can forgive me."

BM2 Y stated that she had never before had a private conversation with the applicant, but when he asked her in an email on August 17, 2001, if she could keep a secret, she responded, "Of course." When he replied that he was hesitant, she told him that she did not know how to react because she did not know what he was talking about. When he said he would tell it to her when they were alone, she decided that he was hinting at something inappropriate and so stopped responding to his emails. The next day when he sent her the comment about holding her body against him, she advised her supervisor about the problem. When the applicant continued sending suggestive emails on the third day, August 19, BM2 Y again informed her supervisor. In one of the emails, the applicant stated that he had been sending the emails because an RDC had dared him to. However, when BM2 Y and her supervisor checked with the RDC, he denied it but said that the applicant had told him that he had used his name "in vain" and might have gotten him in trouble. The RDC told BM2 Y that the applicant was just trying to "cover up for the inappropriate emails." She knew that YN3 B was having a similar problem with the applicant, and so she took the matter and copies of the emails to her chief later that day, who passed them on to the XO. BM2 Y further stated that a Navy petty officer who had been on their last patrol had "also complained of inappropriate emails from [the applicant] toward the end of the patrol."

Evidence of YN3 B

YN3 B, another crewmember, stated that the applicant asked her on several occasions if she would go windsurfing with him and made it clear that it "would just be the two of us." Even though she always refused, he "would then push the question again." YN3 B stated that he asked her to go windsurfing in this way "about 4-5 times each inport the last few inports." She stated that she had heard another E-4 "talking about him asking her several times too and her saying how uncomfortable she would be." YN3 B further stated that one time when she had to see him in his stateroom, she noticed that his porthole was closed and said that, if she had a porthole, she would keep it open. In response, the applicant "looked at me seductively and said 'well we can arrange that,'" with sexual overtones that made her uncomfortable. Finally, YN3 B stated that on August 16, 2001, when the applicant told her by email that he had a hotel room reserved and invited her there, she initially misunderstood and thought he was talking about reserving a room for a party. She provided the following email messages:

Date	Time	Subject	From	To	Message
8/16/01	0002	Hello	App.	YN3 B	"Hey [first name], I was wondering if you're free next Wednesday night?"

8/16/01	1044	RE: Hello	YN3 B	App.	"Hi, you're talking about your party right? Dee and I both talked about it and we both want to go."
8/16/01	1050	RE: Hello	App.	YN3 B	"That sounds great, I think that I am taking the Wardroom out for dinner first.. What about later on afterwards?"
8/16/01	1100	RE: Hello	YN3 B	App.	"Just tell us the time and place."
8/16/01	1710	RE: Hello	App.	YN3 B	"I'd love to have both of you there … are we going to do anything later in the evening?"
8/16/01	1715	RE: Hello	YN3 B	App.	"I am going to behave, and you???"
8/16/01	1717	RE: Hello	App.	YN3 B	"that depends … I'd rather not."
8/16/01	1718	RE: Hello	YN3 B	App.	"When and Where?????"
8/16/01	1720	RE: Hello	App.	YN3 B	"Wednesday evening … I've got reservations."
8/16/01	1725	RE: Hello	YN3 B	App.	"To the Hotel Bar?"
8/16/01	1727	RE: Hello	App.	YN3 B	"I think we are talking about two different things … The party will probably be at the Sports Bar. I meant that I have reservations at the hotel for a room Wednesday night."
8/16/01	1737	RE: Hello	YN3 B	App.	"I just made a deal with [another crewmate]. I will be standing his duty. He offered me a deal I couldn't refuse."
8/16/01	1842	RE: Hello	App.	YN3 B	"Okay, question …Do you remember anything that you and I talked about the last time we were in XXXXXX XXXXXXX?"
8/16/01	1844	RE: Hello	YN3 B	App.	"Not a thing. The last thing I remember was sitting at the bar with my two fisher friends."
8/16/01	1847	RE: Hello	App.	YN3 B	"Okay I see where we're going separate ways here. As hard as this is going to be, I will try and forget it ever happened. … Anyway, you're not going to be there at the party now? I was thinking that it might be better at the Hotel Bar. What do you think? I think it is a nicer place."
8/16/01	1849	RE: Hello	YN3 B	App.	"The hotel bar is nicer. [omitted text]"
8/16/01	2015	RE: Hello	App.	YN3 B	"Well either way, [L], I want to take you out in xxxxx."
8/17/01	0913	RE: Hello	YN3 B	App.	"I have duty the first night, and then I am going to my cousins and won't be back until the day we get underway."

YN3 B also provided an email conversation in which she was asking the applicant for guidance on how to pass certain tests. When she thanked him for his help, he responded, "You're welcome [L], I've always been willing to do anything for you I can. All you have to do is just ask, and give me that look …"

Evidence of QM3 Y

QM3 Y, who was a subordinate in the applicant's department, stated that the applicant sometimes asked her what her plans were for the weekend in a way that made her feel uncomfortable. Also, he would give her looks when they crossed paths "that would give me chills because it gave me the creepiest feeling." She stated that on July 18, 2001, she was walking with an MK3 when the applicant came up and "insisted that we would join him and go to a karaoke bar." He told them that he would be upset if they refused, and he gave them looks that made them feel uncomfortable. QM3 Y

stated that the emails[3] the applicant sent her after she asked him about end of course material might have seemed harmless if they had come from someone else but made her uncomfortable in light of her prior experiences with him. She also stated that from February through July 2001, the applicant had been "flirty" with an E-3 she knew.

Evidence of PWE

PWE stated that when the XO asked him to find an AIS User Acknowledgement Form regarding computer and email use policy with the applicant's signature, he was unable to do so. "Although all SW III users must read, acknowledge and sign an AIS form, one could not be found for [the applicant]" or for several other crewmembers.

Statement by the Applicant for the Investigation

On September 19, 2001, after being advised of his Miranda/Tempia rights, including the right to consult counsel prior to questioning, the applicant signed a statement in which he "emphatically den[ied] any attempt to have an inappropriate relationship with anyone." Regarding the incident with QM3 Y and another female crewmember on July 18, 2001, he stated that he ran into the two women standing with a group of shipmates and told them that he and some others were going to a bar after dinner and that "they should stop by later if they didn't have any other plans." When QM3 Y stated that she was under 21, he told her she could get in but would not be allowed to buy alcohol. The two women agreed to stop by the bar after dinner.

Regarding QM3 Y's end of course material, the applicant alleged that the only thing he said after he had told her that she would get the material in about six weeks was to ask if there were anything else he could do for her. He stated that he asks this of everyone because he enjoys helping people succeed and had no idea that the question made her uncomfortable. He would have apologized if he had known.

Regarding YN3 B, the applicant stated that when she found out he liked to windsurf, she asked him, "When are you going to take me windsurfing?" He told her that he "went every weekend and sometimes after work, so if she wanted to go, let me know and I would bring the gear. I only have two windsurfing boards, so when I told her that it would just be us going, I assumed it was understood why." He stated that the "look" he referred to when she was asking for help in studying for tests was a "lost puppy" look she gave him every time she asked for something. He stated that when she commented on his closed porthole and he said, "Well maybe we will be able to arrange that," he meant that if she could get into Officer Candidate School, she could get a stateroom with a porthole of her own.

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[3] No copies of these emails are in the record before the Board.

Regarding his discussion of the "wetting down" party with YN3 B, the applicant stated that when he said he did not want to behave, he simply meant that he wanted to celebrate his promotion at a bar and that he told her he had a room reserved to indicate that he would not try to return to the cutter if he had too much to drink. He stated that when he told YN3 B that he wanted to take her out in Xxxxxx, he "thought it was understood that [he] meant [he] wanted her to come to the wetting down party with [him]." Later, he told her that the party was going to be on their second night in Xxxxxx and that she could bring her cousins because he "would like for her to be at the party if she could make it." When she told him she did not know her cousins' plans, he dropped the subject and did not mention it again. He stated that he "never meant that [he] wanted to go out on a date" with YN3 B.

The applicant stated that he told BM2 Y that she could be his BMOW (boatswain's mate of the watch) any time because she had done a good job. He stated that he asked to accompany her to a tattoo parlor because she had previously mentioned to him that the tattoo parlors in Xxxxxx were good and cheaper than those in the United States and because he did not know the city or which tattoo parlor was good. He stated that he had no intention of having an inappropriate relationship with her.

The applicant stated that when he told BM2 Y that he thought she was attractive, he said that the RDC had dared him to do so because the RDC "always joked around with everyone, so I thought by saying he was involved she would realize that I did not mean anything by it. I told RDC what I had said later that evening and apologized for getting him involved." The applicant stated that the next day the RDC told him that BM2 Y had reported the matter to her supervisor and did not want the applicant "to talk to her like that again." The applicant planned to apologize to BM2 Y but was called into the XO's office two hours later.

The applicant further stated, "I am profoundly sorry for my actions and wish that this entire situation had never occurred. I have realized that I may have been too personal and not professional enough by calling junior personnel by their first name. … I also know that I crossed the line by what was said to [BM2 Y] and am sorry. I have also learned a valuable lesson about the way people interpret and perceive what is said and will never be anything but professional with everyone I deal with from now on." He apologized for hurting the crew and his wife and stated that he knew he had "lost any chance for continuing [his] sea career and … had to re-think [his] future."

NJP and Appeal

As a result of the mast on October 1, 2001, the applicant's CO entered a Punitive Letter of Reprimand in his record with the following text in pertinent part:

> 1. In accordance with [UCMJ, Art. 15; MJM, Para. 1.E.2.a.; and Pers. Man., Art. 8.E.2.], you are hereby reprimanded for your conduct aboard [the cutter during] the period 16 July to 16 August 2001. You behaved in a reproachable manner by your conduct

toward two female crewmembers assigned aboard this cutter. Your behavior consisted of attempts at fraternization, fraternization, failure to obey orders, dereliction of duty, and conduct unbecoming an officer.

2. You used the cutter's email system for unauthorized purposes, and initiated and pursued to the point of harassment correspondence with two female crewmembers in a wholly inappropriate and unprofessional manner. Your actions were not in keeping with Coast Guard policies dealing with fraternization and the prevention of sexual harassment. Lastly, your actions brought discredit upon the officer corps of the United States Coast Guard.
3. You are advised of your right to appeal to … Commander, Xxxxxxxx Area. ...

On October 5, 2001, the applicant submitted an appeal to the NJP. He complained that the "punishment awarded was, under the circumstances, disproportionate to the acts of misconduct that I committed. While I do not question the seriousness of the situation and a need for punishment, I respectfully ask that this being my first offense, my service record and the following statement be taken into consideration as mitigating factors." The applicant went on to state that throughout his career—first as an enlisted member, then as an "A" school instructor, and, following OCS, as the ESO of the cutter—he had worked with junior enlisted personnel. As the ESO, he stated, he had tried to make himself "more approachable" and "tried to befriend everyone that I came in contact with just as I did as an instructor. I became friendly with both male and female crewmembers so they would feel at ease speaking to me … . I was never given any guidance to suggest that I may have been crossing the line between the enlisted and officer corps." He stated that he had changed his behavior completely after he was advised of the complaints on August 20, 2001, but was transferred off the cutter too quickly to prove to his command that he had corrected himself. He stated that he now clearly understood "where the line is drawn between the enlisted and officer corps and the need for professionalism over personalism." He stated that the Punitive Letter of Reprimand would effectively end his career as an officer and asked that it be replaced with an Administrative Letter of Censure.

The applicant's CO forwarded the appeal to the Area Commander with his own recommendation that it be denied. The CO stated that he sent the applicant ashore TAD because the evidence persuaded him that the applicant had created a hostile work environment on the cutter. He stated that the applicant had admitted to all charges at the mast and should be transferred off the cutter permanently once his appeal was complete. The CO further stated that the applicant had clearly "crossed the line of inappropriate relationships" and that his claim that he was never given any guidance to indicate that he might be crossing the line was not credible. The CO pointed out that the applicant had received training on the Commandant's policies regarding interpersonal relationships, fraternization, and sexual harassment while assigned to the cutter and that he presumably also received such training as a petty officer, as an "A" school instructor, and at OCS.

The CO stated that the applicant's actions in telling one subordinate that she had a beautiful body and another that he wanted to take her out constituted not just a "mis-

step" but a "serious violation of the integrity expected of an officer" and a "flagrant disregard for the rules." The CO indicated that the applicant's actions were particularly egregious in light of the fact that both he and one of the subordinates he harassed were married. The CO stated that although statements are often taken the "wrong way … in a way not intended by the originator of the remark" and that such matters are normally resolved satisfactorily at the lowest possible level, the CO could not dismiss the applicant's remarks "as mere misunderstandings and misinterpretations." The CO stated that the applicant's inappropriate remarks were not those of "an officer innocently trying to make himself more 'approachable,'" but those of "an officer seeking out someone who might be interested in his advances. I consider his remarks not innocent but predatory. As such, an Administrative Letter of Censure doesn't measure up to the offenses committed, but a Punitive Letter of Reprimand does."

On October 26, 2001, the Area Commander denied the applicant's appeal. He stated that a military lawyer had concluded that the evidence was sufficient to conclude that the applicant had committed the charged offenses. The Area Commander stated that he had reviewed the justness of the charges even though the applicant had not appealed on that basis. He stated that his review indicated that some of the charges "could be considered multiplicious under military law and if tried at court-martial would likely be withdrawn or dismissed. Even after taking this into account, however, I find that the NJP was justly imposed." The Area Commander also stated that the Punitive Letter of Reprimand "was not excessive under the circumstances, and that any rational person could have come to the same conclusion about the type and quality of punishment as did your commanding officer."

Disputed OER

The disputed OER covers the applicant's service from April 1, 2001, to January 31, 2002. The Punitive Letter of Reprimand is cited in block 2 as an attachment to the OER. In the OER, the applicant received two marks of 1 for "Workplace Climate" and "Responsibility," two marks of 2 for "Judgment" and "Professional Presence," four marks of 4, six marks of 5, and four marks of 6 in the performance categories, and an "Unsatisfactory" mark in the lowest spot on the Comparison Scale. The low marks were supported by the following comments:

- "At CO's NJP, mbr was found to have committed the offenses of sexual harassment & violation of the CG's human relations policy."

- "Leadership potential now severely limited after finding of commission of sexual harassment & fraternization."

- "Poor judgment displayed in improper use of email, pursuit of inappropriate relationships w/ juniors."

- "Unethical behavior displayed in initiating & pursuing inappropriate relationships w/ junior enl[isted]. Derelict in obligation to not commit sexual harassment. Discredited self/USCG thru conduct unbecoming an officer – violated CG policy on use of email; used email to ask inappropriate questions, solicit inappropriate interpersonal contact w/ juniors. Improperly addressed junior enl[isted] by first names in violation of CG policy."

- "[The applicant] is not recommended for promotion to O-3. [He had] great officer potential … —all of which was cast aside by abuse of position & authority manifested in sexual harassment. This officer's leadership ability has been severely compromised and is of dubious future value to the CG."

Because the marks of 1 rendered the disputed OER officially "derogatory," the applicant was permitted to submit an addendum to it for his record, in accordance with Article 10.A.4.i. of the Personnel Manual. He submitted an addendum on March 29, 2002, in which he stated the following in pertinent part:

> It is my sincere hope that readers of this OER will also take into consideration my 13 years of honorable, unblemished service. I deeply regret the events that gave rise to the adverse aspects of this OER and I have learned—the hard way—a valuable lesson about the need to ensure that my future conduct is entirely above reproach. I appreciate the rating chain's fairness in including in this OER matter that is favorable and accurately reflects my performance of duty. … I believe that I can still be a productive member of the Officer Corps. I am working hard to prove myself worthy of the commission I hold.

The applicant also received a "concurrent OER" from the Xxxxxxxx Area command covering his work ashore from August 24, 2001, to January 31, 2002. This OER does not mention any of the events that occurred on the cutter, and the description of the applicant's work during the period indicates that it did not involve the cutter.

Revocation of Commission

On May 29, 2002, after being notified that his record was to be reviewed by a Board of Officers to determine whether his temporary commission should be revoked, the applicant submitted a letter to a revocation panel at the Coast Guard Personnel Command (CGPC). He apologized for his conduct and explained that he "became too friendly with junior personnel, which led to my corresponding with them on a personal level and eventually led to the inappropriate comments made to them."

The applicant further stated that under the Personnel Manual, an officer's commission is to be revoked when he is unable to adapt to military life or when his performance indicates that it is doubtful whether he can be formed into an effective leader. He stated that neither criterion applied to him. He stated that despite his prior conduct, he was "still an effective leader" trying to prove himself worthy of retaining his commission. He concluded that should the Board of Officers decide that he did not deserve

a second chance, he would perform his enlisted duties "with the same performance of duty and moral character that got [him] accepted to Officer Candidate School."

On June 3, 2002, the applicant's then current supervisor wrote to the Board of Officers in his endorsement that the evidence against the applicant is "indicative of a pattern of inappropriate if not predatory behavior vice a one-time lapse of judgment. It is particularly troublesome since the members involved were all junior enlisted crew aboard the [cutter] and [the applicant] is married…. As such, the behavior calls into question the moral qualifications required of a commissioned officer as described in Title 14." The supervisor concluded that although he was happy to have the applicant as a member of his staff, he agreed with the CO's assessment that the applicant's "effectiveness as an officer has been irreparably damaged and he has very limited potential for future service."

On June 24, 2002, the Board of Officers met and reviewed the applicant's record to determine whether to recommend to the Commandant that his temporary commission be vacated. The Board of Officers recommended that his commission be vacated. On July 25, 2002, the Commandant approved the recommendation.

On July 29, 2002, the applicant was informed that his commission would be vacated as of October 25, 2002. He was advised that he could apply to reenlist by September 9, 2002, and that, if his reenlistment was approved, he would be reenlisted at a pay grade no lower than the one he held prior to his appointment as a temporary officer. On October 26, 2002, the applicant was reenlisted. He is currently serving aboard a different cutter as a chief petty officer.

VIEWS OF THE COAST GUARD

On February 15, 2005, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request for lack of proof and merit.

The JAG stated that the applicant's command "properly followed [Coast Guard] regulations" in awarding the applicant NJP and that the collateral consequences of the NJP—including the disputed OER and the revocation of his temporary commission—"were carried out properly after affording Applicant all the due process rights to which he was entitled."

The JAG stated that under Article 15 of the UCMJ, NJP is a means for COs to deal with minor violations promptly and administratively and thus preserve discipline "without the stigma of a court martial (i.e. criminal) conviction." He argued that in reviewing any NJP, the Board should "recognize that the commanding officer is the official responsible under statute and regulation for conducting the proceedings and determining an appropriate punishment." The JAG stated that the applicant's CO had

the opportunity to see both his demeanor and that of the witnesses during the mast and that the CO's findings are "therefore entitled to substantial deference." He stated that the applicant failed to submit any evidence to overcome the presumption that his CO acted "correctly, lawfully, and in good faith." *Arens v. United States*, 969 F.2d 1034, 1037 (1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979). He further argued that "[a]bsent proof that the [CO's] determinations were clearly erroneous, or that a substantial right of Applicant was materially prejudiced by clear procedural error, the [CO's] decision should be upheld." He further argued that even if the applicant proved a procedural or administrative error, "he would still not be entitled to relief on that basis alone. Under regulations established by the President, non-compliance with any of the procedural provisions for imposing non-judicial punishment does not invalidate a punishment unless the error materially prejudiced a substantial right of the applicant."

The JAG pointed out that the applicant admitted to committing numerous offenses under the UCMJ at mast and appealed only the proportionality of his punishment. The JAG argued that because in his appeal of the NJP, the applicant "did not dispute the legality of the NJP proceeding or the basis for finding he committed the charged misconduct," the Board should deem these issues waived "absent proof of compelling circumstances that prevented the Applicant from raising such issues within the military justice system." Moreover, the JAG pointed out, the Area Commander who reviewed the applicant's appeal considered *sua sponte* whether the NJP was unjust and determined that it was not.

The JAG stated that the applicant's argument that he did not sexually harass his subordinates is misplaced because sexual harassment *per se* is not a violation of the UCMJ and was not one of the charges at his mast. Therefore, the "assertion of error … has no application to Applicant's NJP." The JAG further stated that although sexual harassment was not one of the charges at mast, the CO "reasonably characterized Applicant's conduct as sexual harassment" in the disputed OER.

The JAG stated that a member has no right to legal counsel at mast. Moreover, he pointed out, the applicant submitted no evidence to support his allegation that the CO refused to allow him to be represented by an attorney and did not mention the issue in his appeal and therefore failed to overcome the presumption of regularity on this issue. The JAG argued that even assuming *arguendo* that the CO "did improperly deny Applicant the right to a spokesperson, this would still not afford Applicant any right to relief. The right to have a spokesperson is not a material right and a command does not have to postpone a NJP proceeding to allow for the attendance of a spokesperson. *Id.* In accordance with the orders of the President, failure to comply with any of the procedural provisions for NJP proceedings isn't grounds for invalidating a punishment unless the error materially prejudiced a substantial right of the servicemember." Manual for Courts-Martial (MCM), Part V, Para. 1h. The JAG stated that the role of a spokesperson at mast is "severely limited" and stated that since the applicant admitted

to the charges "[i]t is hard to imagine how the presence of a spokesperson would have changed the outcome of the NJP."

Finally, the JAG argued that the applicant's assertion that he should have had the right to refuse NJP because he had been transferred from the cutter on TAD at the time of the mast "is simply false as a matter of law." *See, e.g., St. Clair v. Secretary of Navy*, 155 F.3d 848 (7th Cir. 1998); *Bennett v. Tarquin*, 466 F. Supp. 257 (D. Haw. 1979).

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On February 16, 2005, the BCMR sent the applicant a copy of the Coast Guard's views and invited him to respond within 30 days. He requested and was granted a 42-day extension of the time to respond. His response was received on April 29, 2005.

The applicant argued that the purported purpose of NJP to preserve good order and discipline by promptly dealing with minor infractions was not fulfilled in his case since he had been removed from the cutter for 41 days by the time his mast was held. Moreover, he argued, in *Robinson v. Dalton* 45, F. Supp. 2d 1 (D.D.C. 1998), the Board for Correction of Naval Records removed an officer's letter of reprimand when he was taken to mast without an opportunity to request court-martial even though he had been transferred TAD to a shore unit.

Regarding his failure to refute the charges at mast, the applicant alleged that his mast representative "directed" him to admit to the charges and that he "felt pressured into not defending" himself. Regarding his request for a spokesperson, the applicant alleged that it was verbal and that after denying his request, the CO scheduled the mast for the next day, so the applicant had no time to submit a formal written request.

Finally, the applicant stated that "it was readily apparent before I was ever placed on report that the [CO] had already determined the outcome of the investigation against me. After I was assigned [TAD] to a shore unit, the Command held several 'closed door' meetings with all females on board the ship to obtain statements against me. While I understand the need for Commanding Officer's NJP, there must be some sense of impartiality and undue influence [sic] on the investigation. Therefore, I feel that my right to due process was violated by failing to provide me with the opportunity to consult with my counsel and request courts-martial in lieu of NJP."

SUPPLEMENTAL ADVISORY OPINION

On June 21, 2005, the BCMR staff asked the Coast Guard to address the following factual and legal issues raised in the case: (1) what date the applicant received TAD or permanent transfer (PCS) orders to a new post; (2) whether the applicant continued to do any work for the cutter after he was removed from it; (3) whether the mast was held and the Punitive Letter of Reprimand was delivered on the cutter; and (4) whether the

applicant's circumstances met the criteria for when a military service may deny a member the right to refuse NJP and demand trial by court-martial enunciated in *United States v. Edwards*, 46 M.J. 41 (C.A.A.F. 1997)—i.e., whether the "vessel exception" applied to him. The BCMR staff noted that in *Edwards*, the court indicated that the vessel exception to the right to refuse NJP and demand court-martial should be interpreted very, very narrowly so as to apply to only those members who are (a) actually serving aboard the vessel when the mast (not the misconduct) occurs, (b) in the immediate vicinity and in the process of boarding the vessel when the mast occurs, or (c) AWOL but attached to a vessel in a foreign port.[4]

On June 29, 2005, the JAG responded to the BCMR's request. The JAG stated that no orders could be found to show that the applicant transferred TAD from the cutter. Instead, the JAG alleged, the applicant's CO received permission from his chain of command to send the applicant to work at a shore unit "because of the serious nature of the offenses and the hostile work environment created aboard the [cutter]. … At all relevant times Applicant was assigned [on a permanent basis] to the [cutter] and received career sea pay and he was credited with sea duty until permanently reassigned." In support of these allegations, the JAG submitted a copy of the applicant's orders dated February 20, 2002, which show that he was transferred on a permanent basis from the cutter to a shore unit as of March 20, 2002, and copies of the applicant's Leave and Earnings Statements, which show that he received sea pay until March 20, 2002. The JAG also submitted an affidavit from the XO of the cutter, who stated that the applicant was "expedited" off the cutter to maintain good order and discipline and because three female crewmembers "expressed a credible fear of harassment from him." He stated that the applicant returned to the cutter at least twice thereafter, under escort, either for work or to remove personal items.

The JAG stated that after being sent ashore, the applicant did not work directly for the cutter. The JAG stated, however, that the mast was held and the Punitive Letter of Reprimand was awarded to the applicant on board the cutter, as indicated in the CO's endorsement of the applicant's appeal of his NJP.

The JAG argued that the decisions in *St. Clair v. Secretary of Navy*, 155 F.3d 848 (7th Cir. 1998), and *Bennet v. Tarquin*, 466 F. Supp. 257 (D. Haw. 1979), support the Coast Guard's position that the applicant could be denied the right to refuse NJP because he had not been transferred TAD, was still permanently assigned to the cutter at the time of the mast, and was still drawing sea pay. The JAG also pointed out the CO of the cutter was "the sole interest in good order and discipline in this matter because the offense occurred aboard the vessel and involved members of the crew." The JAG also argued that the NJP would have been proper even if the applicant had been assigned TAD because Coast Guard regulations permit NJP either by the CO of the member's permanent unit or by the CO of the temporary duty station.

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[4] *United States v. Edwards*, 46 M.J. 41, 45 (C.A.A.F. 1997) (hereinafter "*Edwards*").

The JAG argued that the decision in *Edwards* is not directly applicable to this case because the court in *Edwards* was deciding whether the NJP should be admissible evidence in another proceedings, not whether the NJP itself was proper. Moreover, the JAG pointed out, in *Edwards*, the court looked to the factors analyzed in a previous case, *United States v. Yatchak*, 35 M.J. 379 (C.M.A. 1992), to determine the meaning of the phrase "attached to or embarked on a vessel." The JAG stated that those factors included where the mast was held, where the accused was assigned, the operational status of the vessel, and where the sentence was served. The JAG noted that in *Edwards*, the court cited the following as factors relevant in the determination of a member's relationship to a vessel: "whether he lived aboard, performed duties aboard, was administered [NJP] aboard, or served his punishment aboard." The JAG argued that because the applicant was permanently assigned to and physically on the cutter at the time of the misconduct and the NJP, the "vessel exception" applied to him. The JAG argued that the fact that the applicant was sent ashore during the investigation because of the hostile work environment he had created for female enlisted personnel did not mean that the vessel exception did not apply.

Finally, the JAG stated that the applicant's NJP "is not relevant to either [his] OER or the revocation of his commission. [He] engaged in serious misconduct. His misconduct had three separate consequences—NJP, a derogatory OER, and revocation of his commission. The derogatory OER and decision to revoke [his] commission are a direct result of his actions, not his NJP."

APPLICANT'S RESPONSE TO THE SUPPLEMENTAL ADVISORY OPINION

On July 5, 2005, the JAG's supplemental advisory opinion was faxed to the applicant. He responded on July 11, 2005. Along with his response, he submitted a copy of TAD orders showing that on August 23, 2001, he was reassigned TAD "for approx[imately] 22 days" to a shore unit on August 24, 2001. Initially, while TAD, the applicant worked on an xxxxxxxxxxxx Instruction, but after September 11, 2001, he worked on xxxxxxxxxxxxxxxxxx. In September, the XO told him that he was to remain TAD ashore indefinitely and did not allow him on the cutter except once to remove his personal effects. On September 30, 2001, the applicant stated, he received a telephone call ordering him to appear on the cutter the next day at 10:00 a.m. for the mast. Therefore, he argued, under *Edwards*, the vessel exception did not apply to him because he had been working TAD ashore for 39 days when his mast occurred and so none of the criteria provided in the *Edwards* decision for when the vessel exception should apply were met.

The applicant stated that when he received his permanent orders in March 2002, his unit and duties did not change. Regarding sea pay, he pointed out that according to the Pay Manual, his eligibility for sea pay should have ended after he was TAD from

the cutter for 30 days. Therefore, he argued, if he continued to receive sea pay, it was an administrative oversight and irrelevant to this case.

The applicant argued that contrary to the JAG's statement, his NJP was relevant to both the derogatory OER and the revocation of his commission. He alleged that he received the derogatory OER because of the NJP and that it was because of the NJP referenced in the OER that his commission was revoked. He argued that if the NJP and derogatory OER had not happened, his commission would not have been revoked.

APPLICABLE LAW

UCMJ

Under Article 134, any officer who fraternizes "on terms of military equality" with a person the officer knows to be an enlisted member in a way that "violated the custom" of the officer's service to the "prejudice of good order and discipline" or that "was of a nature to bring discredit upon the armed forces" may be charged with fraternization. MCM, Part IV, Para. 60. Under Article 80 of the UCMJ, any member who commits an "act, done with specific intent to commit an offense under [the UCMJ], amounting to more than mere preparation and tending, even though failing, to effect its commission" may be charged with attempt. MCM, Part IV, Para. 4.

Article 133 of the UCMJ provides that "conduct unbecoming an officer and gentleman" is any "action or behavior in an official capacity which, in dishonoring or disgracing the officer's character as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer. MCM, Part IV, Para. 59.

Article 92 of the UCMJ provides that members who disobey a lawful general order or regulation or who are derelict in the performance of known duties may be charged under this article. MCM, Part IV, Para. 16.

Under Article 15 of the UCMJ, commanding officers, at their discretion, may impose NJP for minor violations of the UCMJ to maintain good order and discipline when administrative corrective measures seem inadequate and court-martial seems excessive. MCM, Part V, Para. 1.d.(1). "[E]xcept in the case of a person attached to or embarked in a vessel, punishment may not be imposed upon any member of the armed forces under [Article 15] if the member has, before the imposition of [NJP], demanded trial by court-martial in lieu of [NJP]." 10 U.S.C. § 815(a). "A person is 'attached to' or 'embarked in' a vessel if, at the time [NJP] is imposed, that person is assigned or attached to the vessel." MCM, Part V, Para. 3. If a member exercises his right to demand trial by court-martial, the NJP is terminated and it "is within the discretion of the commander whether to forward or refer charges for trial by court-martial. MCM, Part V, Para. 4.b.(1). However, "[f]ailure to comply with any of the procedural provi-

sions of Part V of this Manual shall not invalidate a punishment imposed under Article 15, unless the error materially prejudiced a substantial right of the servicemember on whom the punishment was imposed." MCM, Part V, Para. 1.h.

Military Justice Manual

Chapter 1 of the Military Justice Manual (MJM) contains the Coast Guard's regulations governing NJP, which is a non-adversarial, administrative procedure that does not result in a criminal conviction as does a court-martial. Chapter 1.B.4. provides that members must be given notice of the charges against them and informed of their rights. Chapter 1.B.5.f. provides that a "member attached to or embarked in a vessel does not have the right to demand trial by court-martial in lieu of NJP." Chapter 1.A.4.b. states that "NJP may be imposed upon TAD personnel by the commanding officer of the member's permanent unit, or by the commanding officer of the unit to which the member is temporarily assigned. A member should not be assigned TAD from a shore unit to a vessel for the primary purpose of thwarting the member's right to demand trial by court-martial in lieu of NJP."

Under Chapters 1.C.3.a. and 1.B.3.b., the XO should appoint an officer of the unit of the CO conducting the mast to serve as a "mast representative" for the accused. Under Chapter 1.C.3.a., the role of the mast representative is 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."

Chapter 1.C.1. states that because a mast is not an adversarial proceeding, a member "has no right to be represented by an attorney at mast." However, "the member may obtain the services of an attorney or any other person, at no expense to the government, to appear as his or her spokesperson." Chapter 1.C.4.b. states that a spokesperson, "at the member's election, speaks for him or her at those times during the mast when the member's responses are invited by the commanding officer. A spokesperson may be anyone, including an attorney retained by the member." Chapter 1.C.4.c. states that the CO "may not exclude the spokesperson from the mast solely because he or she is an attorney." Chapter 1.C.4.e. provides that a "spokesperson is not permitted to examine or cross-examine witnesses," except at the discretion of the CO, but "is always permitted to speak for a member when the member is otherwise entitled to speak."

Chapter 1.E. provides that the maximum punishment a captain (O-6) may impose on a subordinate officer at mast is an admonition or reprimand and 30 days of restriction. Chapter 1.E.2.a. states that a "reprimand is a more severe form of censure than an admonition" and that the admonition or reprimand of a commissioned officer "must be administered in writing."

Chapter 1.F.1. provides that a member may appeal an NJP "if he or she considers the punishment imposed 'unjust' or 'disproportionate' to the acts of misconduct for which punished … in writing within 5 calendar days of the imposition of the punishment." Chapter 1.F.1.a. defines "unjust" to include various kinds of illegality and denial of rights but does not expressly mention an erroneously denied right to demand trial by court-martial.

Regulations Concerning Personal Relationships and Sexual Harassment

Article 8.H. of the Personnel Manual concerns inappropriate relationships among Coast Guard personnel. Article 8.H.1.c. states that "[p]rofessional interpersonal relationships always acknowledge military rank and reinforce respect for authority." Article 8.H.2.c., entitled "Acceptable Personal Relationships," states that "Service custom recognizes that personal relationships, regardless of gender, are acceptable provided they do not, either in actuality or in appearance: 1. Jeopardize the members' impartiality, 2. Undermine the respect for authority inherent in a member's rank or position, 3. Result in members improperly using the relationship for personal gain or favor, or 4. Violate a punitive article of the UCMJ." Article 8.I.2.b. states that in response to sexual harassment, COs may avail themselves of 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."

Chapter 1 of the Coast Guard Equal Opportunity Program Manual (COMDTINST 5350.4), issued in March 1999, requires annual training on sexual harassment for all members. Enclosure 1 to Chapter 1 provides the Commandant's Sexual Harassment Policy Statement and 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 employee decisions, unreasonably interferes with work performance or creates an intimidating or hostile work environment. … Every Commanding Officer … must hold accountable those who commit sexual harassment and take immediate corrective action." Enclosure 18 to Chapter 5 provides examples of offenses of sexual harassment, including making offensive remarks about appearance, body, or sexual activities; body language, staring, leering, or ogling that makes one feel uncomfortable; attempts to establish a sexual relationship; and making continual requests for dates even though the respondent says "no."

Officer Evaluation Reports

Article 10.A.4.c.4. of the Personnel Manual instructs supervisors to assign marks and write comments for the first thirteen performance categories on an OER as follows (nearly identical instructions appear in Article 10.A.4.c.7. for reporting officers, who complete the rest of the OER):

> b. For each evaluation area, the Supervisor shall review the Reported-on Officer's performance and qualities observed and noted during the reporting period. Then, for each

of the performance dimensions, the Supervisor shall carefully read the standards and compare the Reported-on Officer's performance to the level of performance described by the standards. … After determining which block best describes the Reported-on Officer's performance and qualities during the marking period, the Supervisor fills in the appropriate circle on the form in ink.

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d. In the "comments" block following each evaluation area, the Supervisor shall include comments citing specific aspects of the Reported-on Officer's performance and behavior for each mark that deviates from a four. The Supervisor shall draw on his or her observations, those of any secondary supervisors, and other information accumulated during the reporting period.

Article 10.A.4.f.1. prohibits a rating chain from mentioning that an "officer's conduct is the subject of a judicial, administrative, or investigative proceeding, including criminal and non-judicial punishment proceedings under the Uniform Code of Military Justice, … except as provided in Article 10.A.3.c. … These restrictions do not preclude comments on the conduct that is the subject of the proceeding. They only prohibit reference to the proceeding itself."

Article 10.A.4.c.8.a. instructs the Reporting Officer to complete the Comparison Scale on an OER by filling in the circle that most accurately reflects his or her ranking of the Reported-on Officer in comparison to all other officers of the same grade whom the Reporting Officer has known.

Article 10.A.4.h. states that any OER which contains a numerical mark of 1 in any performance category or an "unsatisfactory" mark on the Comparison Scale is deemed "derogatory." When derogatory OERs are prepared, the reported-on officers must have an opportunity to prepare an addendum to the OER "to explain the failure or provide their views of the performance in question." The rating chain members must endorse the addendum by signature and may address the addendum in a written attachment.

Regulations Regarding Vacation of Temporary Commission

Article 12.A.12.b.1. of the Personnel Manual provides that a CO or a superior in the chain of command or the Personnel Command may recommend or initiate vacation of any temporary officer's appointment "based on adverse information about the officer." Article 12.A.11.a. states that "[s]ome officers either are unable to adapt to service life or their performance indicates it is doubtful whether the time and effort required will form them into effective officers." Article 12.A.11.b. provides that a CO or a superior in the chain of command may recommend revoking the commission of an officer "based on knowledge of adverse information about the officer." When this happens, "the officer concerned [must have] an opportunity to review the recommendation and … comment as desired by letter endorsement." Then a panel of senior officers reviews the officer's record and makes a recommendation to the Commandant, who may approve, disapprove, or modify the recommendation.

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 submission, 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 argued that because he had been assigned TAD to a shore unit for several weeks when he was taken to mast/NJP and the Coast Guard had no intention of allowing him to return to his billet on the cutter, he was erroneously denied the right provided under 10 U.S.C. § 815(a) (hereinafter "Article 15") to refuse mast and demand trial by court-martial in lieu thereof. The form the applicant signed regarding his rights at mast was a form created specifically for an officer attached to a vessel and did not include a right to consult counsel about NJP or a right to refuse NJP and demand court-martial. The JAG has indicated that the applicant was not given the option of refusing NJP. Therefore, the Board finds that the applicant has proved that he was not given the right to demand trial by court-martial in lieu of NJP. Whether he was actually entitled to and erroneously denied that right remains to be answered.

3. The JAG argued that the Board should consider the issue of whether the Coast Guard erred in denying the applicant the right to demand trial by court-martial in lieu of NJP to be waived because the applicant did not appeal his NJP based on this issue. However, the form the applicant signed in acknowledging his rights at mast shows that he was not entitled to consult an attorney about his mast rights. Therefore, it is not clear how he could have known he should appeal the NJP on this basis, even if he knew that other members under other circumstances had been given this right. Furthermore, Congress provided that members should have at least three years to seek relief from an error or injustice via the BCMR,[5] and section 205 of the Soldiers' and Sailors' Civil Relief Act of 1940 "tolls the BCMR's limitations period during a servicemember's period of active duty."[6] Although the Board's rules do require applicants to exhaust available administrative and legal remedies prior to applying to the Board,[7] the Coast Guard has limited the right to appeal NJP to within five days of imposition.[8] Therefore, the remedy is no longer available to the applicant, and deeming him to have waived the issue would in effect negate Congress's determination of how long an active duty member should have to seek relief from this Board. Moreover, under the circumstances of this case, the Board is not persuaded that, without counsel, the applicant can be considered to have intentionally conceded the right to refuse NJP when submitting

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[5] 10 U.S.C. § 1552(b).
[6] *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994).
[7] 33 C.F.R. § 52.13.
[8] Military Justice Manual, Chap. 1.F.1.

his appeal. Therefore, the Board finds that the applicant did not waive this issue in failing to mention it in his appeal.

4. The JAG argued that denying the applicant the right to refuse NJP was not an error because of the "vessel exception" in Article 15, which denies members "attached to or embarked in a vessel" the right to demand trial by court-martial in lieu of NJP. The JAG argued that the vessel exception applied to the applicant because (a) the misconduct was committed aboard the cutter and the CO of the cutter was "the sole interest in good order and discipline in this matter because the offense occurred aboard the vessel and involved members of the crew"; (b) at the time of the mast, the applicant was still "assigned or attached to" the cutter, pursuant to Part V, Paragraph 3, of the Manual for Courts-Martial, since the Coast Guard had not issued transfer orders to make official that which it had done in fact (reassigning the applicant to work at a shore unit); and (c) the applicant was brought back on board the cutter to attend the mast. These arguments are addressed below:

a. An important purpose of NJP under Article 15 is to enable the CO of a vessel to maintain "good order and discipline."[9] Therefore, the logic of allowing the CO of a vessel to exert his "interest"—as the JAG called it—and conduct NJP for offenses committed aboard the vessel is clear. However, the same interest and logic would apply to every CO in every military unit whether on a vessel or not, and yet in Article 15 Congress and the President have given the vast majority of military members the right to refuse their CO's NJP and demand trial by court-martial. In enacting the vessel exception, Congress intended "all military members [to have] a right to demand trial in lieu of nonjudicial punishment except 'in some cases where a ship is at sea.'"[10] In deciding whether the vessel exception should apply, the law looks not to the member's assignment and location at the time of the misconduct, but to his assignment and location at the time of the NJP.[11] Although the applicant was ordered aboard the cutter under escort for his mast on October 1, 2001, he had been assigned TAD for more than five weeks to a shore unit under a different command, which also had authority to offer him NJP.[12] Therefore, whether he had a right to demand trial by court-martial in lieu of NJP hinged not on where the offenses took place nor on who was his CO when he committed the offenses but on whether he was still "attached to or embarked in" (according to UCMJ Article 15) or "assigned or attached to" (according to the Part V, Para. 3, of the Manual for Courts-Martial) the cutter by October 1, 2001, at which time he had not worked on the cutter for five weeks. The CO's interest in punishing the applicant aboard the cutter without convening a court-martial may not trump the appli-

[9] Manual for Courts-Martial, Part V, Para.1.d.(1).
[10] *Edwards*, at 44 (citing 108 CONG. REC. 17,560 (1962)).
[11] MCM, Part V, Para. 3; *see also Robinson v. Dalton*, 45 F. Supp. 2d 1, 2-3 (D.D.C. 1998); *St. Clair v. Sec'y of the Navy*, 155 F.3d 848, 853 (7th Cir. 1998); *United States v. Edwards*, 43 M.J. 619, 621 (N-M.C.C.C.A. 1995), *rev'd on other grounds, Edwards v. United States,* 46 M.J. 41, 44 (C.A.A.F. 1998).
[12] Military Justice Manual, Chap. 1.A.4.b.

cant's right to demand trial by court-martial unless he was still "assigned or attached to" or "embarked in" the cutter within the meaning of the law on October 1, 2001.

b. The JAG argued that the applicant was still "assigned or attached to" the cutter on October 1, 2000, because the Coast Guard had not yet issued orders to transfer him to another unit, even though he had worked at the shore unit for several weeks and the Coast Guard had no intention of allowing him to return to his billet on the cutter. The applicant has produced a copy of the TAD orders by which he was assigned off the cutter on August 24, 2001. According to the record, the TAD orders were originally issued for "approximately" 22 days, but the XO told the applicant they were extended indefinitely, and no other orders were issued until February 20, 2002. The JAG's argument about orders would allow the Coast Guard to apply the "vessel exception" to any member who had recently worked on a cutter simply by delaying issuing the orders that would make official a *de facto* transfer to a shore unit and by continuing to pay the member sea pay, contrary to regulation,[13] as it did in the applicant's case. Moreover, in *United States v. Yatchak*, 35 M.J. 379 (C.M.A. 1992), the court found that the respondent was not "attached to or embarked in a vessel" even though he was a crewmember of the ship.[14] Also, in *St. Clair v. Secretary of the Navy*, 155 F.3d 848 (7th Cir. 1998), the court concluded that the appellant was "attached to" the vessel, even though he was confined to barracks ashore, because "the Navy did not reassign him until January 24, 1992, when it placed him on temporary duty."[15] Therefore, since the applicant had been reassigned TAD for several weeks at the time of his mast, the fact that he was officially still a crewmember of the cutter because the Coast Guard did not issue permanent transfer orders until several months after his removal from the cutter does not prove *per se* that he was still attached to the cutter for the purpose of Article 15 by October 1, 2001.

c. In *Edwards v. United States*, 46 M.J. 41 (C.A.A.F. 1998), the appellant had been denied the right to refuse NJP because he was assigned to a ship, even though the ship was undergoing repairs throughout his tour of duty. The Court of Appeals for the Armed Forces stated that in extending the right to refuse NJP (which had previously applied only to members of the Army and Air Force) to the members of the Navy and Coast Guard, "both Congress and the President intended the 'vessel exception' to be limited to situations such as where service members were [a] aboard a vessel, [b] in the immediate vicinity and in the process of boarding, or [c] attached to vessels and absent

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[13] Coast Guard Pay Manual (COMDTINST M7220.29A), Fig. 4-4, Rule 4, states that when a member on sea duty is assigned ashore TAD, sea pay "accrues for 30 days past the date of the member's departure." Note 4 to Fig. 4-4 states that "sea pay and time terminates at 2400 the 30th actual day the member is TD/TAD away from the career sea pay eligible vessel or ashore at a mobile unit."

[14] *United States v. Yatchak*, 35 M.J. 379, 380-81 (C.M.A. 1992). Although the issue in *Yatchak* was whether the respondent was "attached to or embarked in a vessel" for purposes of whether he could be confined on bread and water, this phrase in Article 15(b)(2)(A) has the same meaning as in Article 15(a). *Edwards v. United States,* 46 M.J. 41, 43 (C.A.A.F. 1998).

[15] *St. Clair v. Sec'y of the Navy*, 155 F.3d 848, 853 (7th Cir. 1998).

without authority in foreign ports."[16] Likewise, in *Yatchak*, the court stated that "Congress devised the term, 'attached to or embarked in a vessel,' to cover those actually at sea as well as those in port when their ship is about to depart."[17] None of these circumstances applied to the applicant during the five weeks prior to his mast on October 1, 2001. Although the applicant was ordered to and did return to the cutter for his mast on October 1, 2001, a member who is permanently assigned to a shore unit cannot be ordered to a cutter just to impose NJP and deny him the right to demand trial by court-martial in lieu of mast.[18] Therefore, although the applicant did not receive permanent transfer orders for several months, the Board is not persuaded that the vessel exception applied to him simply because the CO ordered him back to the cutter for the mast.

5. The JAG argued that the decision in *Edwards*[19] does not directly apply in this case because the court was not determining the correctness of the NJP itself but was deciding whether evidence of the NJP was properly used as evidence against the appellant during the sentencing phase of his trial by court-martial for a later crime. However, the court in *Edwards* acknowledged that its jurisdiction "does not extend to direct review of [NJP] proceedings,"[20] but still focused the entire decision *not* on the admissibility of evidence but on whether the vessel exception was properly applied to the appellant given the meaning of the phrase "attached to or embarked in a vessel" as it was intended by Congress and the President. Furthermore, in *Robinson v. Dalton*, 45 F. Supp. 2d 1 (D.D.C. 1998), the court found that the delegate of the Secretary of the Navy had been arbitrary and capricious in failing to consider the limits to the vessel exception provided in *Edwards.*[21] The delegate in *Robinson* had refused to reconsider an application to the Board for Correction of Naval Records (BCNR) to remove a punitive letter of reprimand received at NJP by the captain of a ship who had been denied the right to refuse NJP and demand trial by court-martial even though by the time NJP was imposed, he had been transferred TAD ashore.[22] After the court remanded the case to the BCNR "for a more fully reasoned explanation" in light of the decision in *Edwards*,[23] the Navy agreed "to remove the punitive letter of reprimand and all references to that letter and the nonjudicial punishment proceeding from Plaintiff's military personnel

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[16] *Edwards*, at 45.
[17] *Yatchak*, at 381 (citing Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Armed Services Comm., 81st Cong., 1st Sess. 945-46 (1949), *reprinted in* Index and Legislative History, Uniform Code of Military Justice (1949)).
[18] Military Justice Manual, Chap. 1.A.4.b.
[19] In *Edwards*, the vessel exception had been applied to the appellant at NJP for an unauthorized absence and for carrying a concealed weapon even though his ship, the *U.S.S. Constellation*, was undergoing renovation during his tour. *Edwards*, at 42. The court found that the NJP was incorrectly admitted as evidence during the sentencing phase of a court-martial for a later crime because the vessel exception should not have applied to the appellant since the ship was not operational at the time of the NJP. *Id*. at 45-46.
[20] *Edwards*, at 43.
[21] *Robinson v. Dalton*, 45 F. Supp. 2d 1, 4 (D.D.C. 1998).
[22] *Id.* at 2-3.
[23] *Id.* at 4.

record" and to pay the plaintiff's attorney's fees "for the sole purpose of settling this case and for no other reason."[24]

6. The JAG argued that the applicant was attached to the cutter because in *St. Clair* the court found that the Navy properly applied the vessel exception because the appellant was still "attached to" the vessel at the time of his NJP, even though he had been restricted to barracks ashore after his arrest.[25] However, in *St. Clair*, the court based its finding that the appellant was attached to the vessel on the fact that the Navy did not reassign him TAD until several months after the NJP.[26] In the instant case, the Coast Guard assigned the applicant to a shore unit TAD more than five weeks before the NJP. Therefore, the Board is not persuaded by the decision in *St. Clair* that the vessel exception was properly applied to the applicant. Furthermore, the Board notes that the decision in *St. Clair* was issued before the Court of Appeals for the Armed Forces narrowly defined the circumstances under which the vessel exception should be applied in its decision in *Edwards*.

7. The JAG argued that the Board should find that the applicant was attached to or assigned to the cutter because of the decision in *Bennett v. Tarquin*, 466 F. Supp. 257 (D. Haw. 1979), wherein the court found that the Navy properly applied the vessel exception to crewmembers of a two-crew nuclear submarine who were training ashore in Hawaii while the other crew was at sea in the submarine near Guam.[27] In *Bennett*, the court based the decision on (a) the fact that the plaintiffs' assignment orders indicated that they were still crewmembers on sea duty and sea pay; (b) as part of the "off-crew," they were training for further submarine duty; (c) they were subject to recall to and expected to return to duty on the submarine; (d) "[a]t no time does the administration of discipline over the off-crew fall upon a person other than the Commanding Officer"; and (e) the interpretation of the legislative history of Article 15 in *Jones v. Frudden*, 4 MIL. L. REP. 2606 (N.D. Cal. 1976).[28] However, by the time of his NJP, the applicant had been assigned TAD to a shore unit, was performing no work for the cutter, was not expected ever to return to duty on the cutter, and was subject to the discipline of the shore unit command.[29] Moreover, the interpretation of the legislative history of Article 15 in *Jones v. Frudden* was relied on in the lower court's decision in *United States*

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[24] *Robinson v. Danzig*, Civ. Act. No. 98-0467 (JR), Settlement Agreement and Mutual Release (D.D.C. February 26, 1999).
[25] *St. Clair*, at 14.
[26] *Id.* at 15.
[27] *Bennett v. Tarquin*, 466 F. Supp. 257, 259 (D. Haw. 1979).
[28] In *United States v. Edwards*, 43 M.J. 619, 622 (N-M.C.C.C.A. 1995), *rev'd*, *Edwards v. United States,* 46 M.J. 41, 44 (C.A.A.F. 1998), the lower court stated that "[t]he District Court [in *Jones v. Frudden*, 4 MIL. L. REP. 2606 (N.D. Cal. 1976)] considered congressional hearings and floor proceedings and found them not to be definitive, noting that the measure had not been controversial, and concluded that the broad language used did not suggest that the exception applied only to ships at sea, or that the 'unique responsibilities of the ship's captain' are not present even when the ship is in port."
[29] Military Justice Manual, Chap. 1.A.4.b.

v. Edwards, 43 M.J. 619, 622 (N-M.C.C.C.A. 1995),[30] and rejected when that decision was overturned by the Court of Appeals for the Armed Forces in 1998 based on a very different interpretation of the legislative history.[31] Furthermore, as with *St. Clair*, the Board notes that the decision in *Bennett* was issued before the Court of Appeals for the Armed Forces narrowly defined the circumstances under which the vessel exception should be applied in its decision in *Edwards*. Therefore, the Board is not persuaded by the decision in *Bennett* that the vessel exception was properly applied to the applicant.

8. In *Yatchak*, the Court of Military Appeals found that "Congress devised the term, 'attached to or embarked in a vessel,' [in Article 15] to cover those actually at sea as well as those in port when their ship is about to depart."[32] In *St. Clair*, the Court of Appeals for the Seventh Circuit concluded that the appellant was "attached to" the vessel because "the Navy did not reassign him until January 24, 1992, when it placed him on temporary duty."[33] In *Edwards*, the Court of Appeals for the Armed Forces stated that "both Congress and the President intended the 'vessel exception' to be limited to situations such as where service members were [a] aboard a vessel, [b] in the immediate vicinity and in the process of boarding, or [c] attached to vessels and absent without authority in foreign ports."[34] In addition, the court in *Edwards* held that the appellant's relationship to the ship at the time of his NJP depended upon such factors as "whether he lived aboard, performed duties aboard, was administered [NJP] aboard, or served his punishment aboard."[35] The record is clear that at the time of his mast, the applicant had neither lived nor performed duties aboard the cutter for more than five weeks, he had been assigned TAD to a shore unit, and there was no expectation that he would ever return to his billet on the cutter. He was ordered back to the cutter just to attend the mast under escort. The cutter's CO could issue this order because, in the absence of permanent transfer orders, the cutter was still the applicant's permanent duty station. However, in *Yatchak*, *Edwards*, and *Robinson*, the fact that the plaintiffs/appellants were permanently assigned to vessels when NJP was imposed was not dispositive of the issue of whether they were "attached to" the vessels for the purpose of the vessel exception. And in *St. Clair*, the court indicated that TAD orders would have been sufficient to sever the attachment.[36] Therefore, the Board finds that that by October 1, 2001, the applicant was no longer assigned to, attached to, nor embarked on the cutter for the purposes of Article 15, in accordance with the meaning given those terms in *Yatchak*, *St. Clair*, and *Edwards*, and he was erroneously denied the right to consult with counsel concerning NJP and to demand trial by court-martial in lieu of NJP.

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[30] *United States v. Edwards*, 43 M.J. 619, 622 (N-M.C.C.C.A. 1995), *rev'd, Edwards v. United States,* 46 M.J. 41, 44 (C.A.A.F. 1998). *See* footnote 28, above.

[31] *Edwards v. United States*, 46 M.J. 41, 44-45 (C.A.A.F. 1998).

[32] *Yatchak*, at 381 (citing Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Armed Services Comm., 81st Cong., 1st Sess. 945-46 (1949), *reprinted in* Index and Legislative History, Uniform Code of Military Justice (1949)).

[33] *St. Clair*, at 853.

[34] *Edwards*, at 45.

[35] *Edwards*, at 46.

[36] *St. Clair*, at 853.

9. The applicant argued that, because he sought and was erroneously denied the right to demand trial by court-martial in lieu of NJP, the record of the NJP and the Punitive Letter of Reprimand should be removed from his record. The JAG argued that a "failure to comply with any of the procedural provisions for NJP proceedings isn't grounds for invalidating a punishment unless the error materially prejudiced a substantial right of the servicemember."[37] Although the applicant ultimately pled guilty to the charges at mast, the Board finds that his right to refuse NJP and demand trial by court-martial was a substantial right that was materially prejudiced by the Coast Guard. Accordingly, the record of the NJP, the Punitive Letter of Reprimand that he received as punishment at NJP, and any other mention of the NJP or Punitive Letter of Reprimand should be removed from his record.

10. The applicant alleged that the NJP was unjust because his CO refused to allow him to use an attorney as his spokesperson at mast and because he was coerced into pleading guilty at mast. He submitted no evidence to support these allegations. Moreover, in light of finding 9 above, the Board need not address these issues. For the same reason, his allegation that he should not have been charged with and found guilty of misusing the email system at mast since the command could find no user form regarding Coast Guard email policy with his signature on it need not be addressed.

11. The applicant alleged that the disputed OER improperly describes his offenses as "sexual harassment" and should be removed from his record because the poor marks and comments are based on the unjust NJP. However, he has not proved that the investigation into his misconduct was erroneous. His rating chain was entitled to base marks and comments in the OER on the information discovered in the investigation whether or not the NJP occurred.[38] Article 8.I.2.b. of the Personnel Manual states that commands may respond to allegations of sexual harassment with "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 applicant's command responded to the emails an enlisted female crewmember complained about to her supervisor with administrative processes (TAD transfer, investigation, derogatory OER) and with NJP under Article 15 of the UCMJ.

12. Enclosure 18 to Chapter 5 of the Equal Opportunity Employment Manual states that "sexual harassment" may include making offensive remarks about appearance, body, or sexual activities; body language, staring, leering, or ogling that makes one feel uncomfortable; attempts to establish a sexual relationship; and making continual requests for dates even though the respondent says "no." The evidence gathered in the investigation includes descriptions not only of these sorts of behavior but of a pattern of such behavior by the applicant, which the rating chain reasonably relied on to

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[37] Manual for Courts-Martial, Part V, Para. 1.h.

[38] Coast Guard Personnel Manual (COMDTINST M1000.6A), Arts. 10.A.4.c.4.d., 10.A.4.c.7.d., 10.A.4.f.1.

use the term "sexual harassment" in the OER. Although the applicant now attempts to retract his guilty pleas and argue that he was not seeking a sexual relationship or creating an intimidating or hostile work environment, the preponderance of the evidence in the record shows that he was fishing for a sexual, inappropriate relationship with subordinate enlisted members of his command. In particular, the Board notes his email conversation with YN3 B in which he invited her to a party, told her that he'd rather not "behave" that night, told her that he had a hotel room reserved, and then—even though he realized that she had quickly maneuvered to ensure she would be on duty the night of the party so as to avoid his party—pressed the issue by saying that he still wanted to "take [her] out." His email conversation with BM2 Y is equally incriminating in that, after trying unsuccessfully to get her to promise to keep something he wanted to tell her secret, he sent her the sexual come-on line "If I said you have a beautiful body would you hold it against me." In a military environment, such a fishing expedition by an officer in one's chain of command for a sexual relationship is fraught with danger for the enlisted members' careers as well as for that of the officer. Unlike in most civilian environments, any subordinate who responded positively to the applicant's behavior or who even failed to report his behavior was potentially subject to punishment. In light of the email conversations and other evidence in the record of sexually loaded comments and body language by the applicant that clearly left some female subordinates uncomfortable and wary, the Board finds that his rating chain did not commit error or injustice in describing his conduct in the disputed OER as "sexual harassment" or for that matter as fraternization, improper use of email, pursuit of inappropriate relationships, unethical behavior, and conduct unbecoming an officer.

13. The disputed OER refers to the NJP and Punitive Letter of Reprimand in three places. The Punitive Letter of Reprimand is cited as an attachment in block 2. In light of finding 9, the reference to the letter should be removed from block 2. In block 5, the low mark of 1 for the performance category "Workplace Climate" is supported by the comment, "At CO's NJP, mbr was found to have committed the offenses of sexual harassment & violation of the CG's human relations policy." In block 7, the applicant's reporting officer wrote, "Leadership potential now severely limited after finding of commission of sexual harassment & fraternization." As there is ample evidence in the report of the investigation to support the rating chain's comments about sexual harassment and fraternization, the Board finds that only the language concerning the NJP, findings, and offenses must be removed. Therefore, from block 5, the words "At CO's NJP, mbr was found to have" and "the offenses of" (which implies criminal charges) should be removed. These deletions would leave the comment supporting the mark of 1 for "Workplace Climate" as "… committed … sexual harassment & violation of the CG's human relations policy." From block 7, only the words "finding of" need be removed. The applicant has not proved that any other part of the OER is erroneous or unjust. Nor is there reason to remove the entire OER as the applicant requested. In BCMR Docket No. 151-87, the Board held that "an OER will not be ordered expunged unless the Board finds that the entire report is infected with the errors or injustices alleged; unless the Board finds that every significant comment in the report is incorrect

or unjust; or unless the Board finds it impossible or impractical to sever the incorrect/unjust material from the appropriate material." In the instant case, the Board finds that it is both possible and practical to remove the language that refers to the NJP and the Punitive Letter of Reprimand from the written comments.

14. The applicant asked the Board to reinstate his commission and promote him to lieutenant with backpay and allowances. Even if the applicant had never gone to NJP and there were no NJP or Punitive Letter of Reprimand in his record, however, the Board of Officers and those who reviewed and approved that board's recommendation would still have seen the derogatory OER with the details of his misconduct and condemnatory language from his chain of command. Therefore, the Board is not persuaded that in the absence of the NJP and Punitive Letter of Reprimand he would have been allowed to retain his temporary commission. In his letter dated May 29, 2002, the applicant argued that under the Article 12.A.11.a. of the Personnel Manual, an officer's commission should be revoked only when he is unable to adapt to military life or when his performance indicates that it is doubtful whether he can be formed into an effective leader and that neither criterion applied to him given his own assessment of his performance and leadership. However, the derogatory OER contains the same information as that in the Punitive Letter of Reprimand and ample evidence on which the Board of Officers and those who reviewed and approved the board's recommendation could base their determination that his commission should be revoked under the criteria in Article 12.A.11.a. The applicant has not proved by a preponderance of the evidence that the Coast Guard committed any error or injustice in revoking his commission.

15. Accordingly, the applicant's request should be granted in part by removing the documentation of the NJP and the Punitive Letter of Reprimand from his record; by removing the reference to the Punitive Letter of Reprimand from block 2 of the derogatory OER; by removing the words "At CO's NJP, mbr was found to have" and "the offenses of" from block 5; and by removing the words "finding of" from block 7 of the OER. All other relief should be denied.

ORDER

The application of xxxxxxxxxxxxxxxxxxx, xxx xx xxxx, USCG, for correction of his military record is granted in part as follows:

The documentation of his NJP on October 1, 2001, and the Punitive Letter of Reprimand shall be removed from his record.

The derogatory OER covering his service from April 1, 2001, to January 31, 2002, shall be corrected by

a) deleting the phrase "Punitive Letter of Reprimand (NJP awarded on 2001/10/01)" from block 2;
b) deleting the words "At CO's NJP, mbr was found to have" and "the offenses of" from block 5; and
c) deleting the words "finding of" from block 7.

These corrections shall be made to the extant derogatory OER by hand and shall be made in all paper and electronic copies retained for his Personal Data Record.

No copy of this decision shall be placed in his Personal Data Record.

No other relief is granted.

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David Morgan Frost

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Patrick B. Kernan

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Audrey Roh