EVIDENCE

A Definition of Sexual Assault

We have reviewed the administrative discharge board proceedings and find the record legally insufficient to support the board's finding that the Respondent committed sexual assault through the abuse of his authority as the government failed to use a proper sexual assault standard. The action was based on AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members*, paragraph 2.29.4 (other serious or recurring misconduct that raises doubt regarding fitness for retention in the Air National Guard and Air Force, regardless of whether such misconduct has resulted in judicial or non-judicial punishment); paragraph 2.29.5 (intentional misrepresentation of facts in obtaining an appointment or in official statements or records); and paragraph 2.34.1 (failure to show acceptable qualities of leadership required of an officer of the same grade).

The government's theory of the case was that Respondent, an O-6, sexually assaulted his subordinate, MSgt H.P., over the course of several years through the "abuse of his authority." MSgt H.P. (Ret) joined the military as a chaplain's assistant in 2001 and began working for Respondent, who at that time was the wing chaplain. In July 2013, MSgt H.P., accompanied by the ANG base's victim advocate, reported to the civilian police that she was vaginally and orally sexually assaulted by Respondent, but that she did not desire the matter be pursued by civilian law enforcement. The National Guard Bureau's (NGB) Office of Complex Investigations (OCI) then conducted an investigation into the allegations.

MSgt H.P. did not testify at the administrative discharge board, however, she was interviewed by the OCI and a transcript of that interview, along with their entire report of investigation, was introduced at the discharge board.[1] In that interview, she described an instance of sexual assault wherein she stated in the fall of 2004, she was driving with Respondent in a GOV when he pulled the car over in a wooded area, they drank a beer, he asked her for oral sex and she complied. She told investigators Respondent never said, "do this and you'll keep your job," she "just felt that way." She added, "[h]e never said this to me, it was just my impression." She also described generally two instances of vaginal sex, once in her hotel room while they were TDY and another at Respondent's cabin. She was unable to provide details of these events because she had tried hard to forget them and was drinking heavily on each occasion. Beyond those instances, she generally alleged Respondent orally, vaginally and anally assaulted her numerous times, but could not remember dates or times of the alleged assaults, could not provide any specific details about them, and could not estimate the number of times she was sexually assaulted.

Though she initially relayed to the OCI that Respondent would always come to her for sex, she later described instances where she would go to Respondent's house and have sex on his porch when he called her over. She never told him "no," or objected, explaining to the OCI she just

[1] Neither Respondent nor his counsel appeared at the board. The record establishes the Respondent's absence from the proceedings was voluntary, and consequently, he waived certain rights. However, as a general proposition, waiver does not relieve the government of its obligation to adduce evidence sufficient to satisfy its burden of proof.

felt she was his "whore" and "pretty much did whatever he wanted." While she stated in interview that she felt if she didn't comply she would lose her job, she thought this was implied and that basically she "sold [her] soul." When asked by the OCI about the multiple times she had three-way sexual intercourse with Respondent and her husband, she refused to discuss the matter, instead explaining that her husband, also in the ANG, would provide those details.

Her husband was interviewed by the OCI and testified at the board. According to him, from 2006 through 2010, he and his wife engaged in threesomes with Respondent approximately 40-50 times at various locations, including their bedroom. When asked what impression he was under during their trysts, he responded, "I was given the impression and rolled right with it that it was a consensual event, and I became involved with both of them in what some would call a swinger relationship or alternate lifestyle." He stated, "[Respondent] made it clear I was welcome in their sexual encounters and I thought we could have a consensual sexual thing. At that point from my perspective it was consensual. I didn't feel threatened or intimated by his rank or position…he was a friend." When asked about specifics about their sexual activity, he stated Respondent would come to their house and they would take turns "pleasuring his wife."

MSgt H.P.'s husband also addressed whether his wife ever felt compelled or coerced into having sex with Respondent, or whether Respondent used his rank or position to coerce her into sexual activity. He testified, "[n]othing overtly was said by him to me as far as…don't tell anybody or I'll get your job or anything because he outranked me." He explained, "there was a lot of camaraderie…a bunch of people having fun." He elaborated he saw no connection between the sex and their working relationships, stating, "[m]y take on it was what we do in our personal lives doesn't come with us to work." Further, he stated "I think she put on blinders and went back into that person that survived a rough marriage and just consented. There was certainly no overt threat, you know, sleep with me and I'll get you promoted kind of thing…no quid pro quo, no anything like that…she went back to the only mechanism she knows, which was consent, make the guy feel better. Let him know I had a good time even if she didn't." His testimony stressed that any feelings of coercion on his wife's part came long after any sexual activity with Respondent. According to him, "[i]n retrospect she felt pressured." He added, "[a]s she understands it now, it was definitely a power take. There was no explicit, 'do this or you'll lose your job.' There was nothing documented…..but she felt that way." When asked about when his wife first told him during his deployment she was sexually involved with Respondent -- which included the above-described act of oral sex on the roadside -- he stated, "[h]e did not perceive it as non-consensual." This is consistent with the testimony of OCI investigator who was unable to articulate for the board whether MSgt H.P. felt coerced to have sex with Respondent during the sex or only later.

Before and during the 2006 to 2010 timeframe, MSgt H.P. and her husband were actively involved in the swingers' lifestyle and they made Respondent aware they were swingers. While having sex with Respondent, they also had sex with numerous other couples. Of note, their "swinglifestyle.com" advertisement profile states, under "fantasies and/or real experiences," as follows: "we have enjoyed many encounters…but enjoy most of all 3--300 people all enjoying themselves with only the limits of imagination and a simple 'no thanks' as boundaries."

When asked about why they terminated sex with Respondent, MSgt H.P.'s husband asserted his wife "started dealing with demons from her prior marriage and she stopped it." At a different point, he testified, his wife suffers PTSD because, "[s]he was raped by her husband in 1985, but she couldn't press charges because the Air Force believed a husband could not rape a wife."

Consistent with the government's theory that sexual assault was committed through abuse of authority, the lead investigator from the OCI, an O-6 Judge Advocate General, testified that disparity in rank alone, even if the sexual activity was in fact consensual, met DoD's definition of sexual assault. Specifically, he testified, "she could have been consenting," however, "with him being an O-6 and her an [E-7], just that fact alone, even if it was consensual sex between them, it would still adhere to the definition [of sexual assault]."

The board found Respondent sexually assaulted MSgt H.P. between 1 January 2004 and 31 December 2010 on multiple occasions and at various locations, through the abuse of his authority.

Regulatory Authorities

The specific allegation in this case was that Respondent sexually assaulted MSgt H.P. in violation of AFI 36-6001, *Sexual Assault Prevention and Response (SAPR) Program, Incorporating Change 1*, 30 September 2009, and DoDD 6495.01, *Sexual Assault Prevention and Response (SAPR) Program*.[2]

The definition of sexual assault contained in AFI 36-6001 is prefaced with the following caution, "[t]he following definition of sexual assault has been directed by DoD and is for training and educational purposes only. This definition does not affect in any way the definition of any offense under the Uniform Code of Military Justice. Commanders are encouraged to consult with their Staff Judge Advocate for complete understanding of this definition in relation to the UCMJ." The AFI then describes ways in which sexual assault may generally be committed, but does not further define those concepts, providing:

> [s]exual assault is defined as intentional sexual contact, characterized by use of force, threats, intimidation, abuse of authority, or when the victim does not or cannot consent. Sexual assault includes rape, forcible sodomy (oral or anal sex), and other unwanted sexual contact that is aggravated, abusive, or wrongful (to include unwanted and inappropriate sexual contact), or attempts to commit these acts.

The definition of sexual assault contained in DoDD 6495.01, likewise cautions, "[f]or the purpose of this Directive and SAPR awareness and education, the term 'sexual assault' is defined as…." The definition then tracks with the definition contained in AFI 36-6001 above.

Importantly, the Department of Defense modified the definition of sexual assault in DoDI 6495.02 and DoDD 6495.01 in March 2013 and April 2013, respectively. These issuances now define sexual assault not merely in broad general categories (as above), but now tie the definition to specific UCMJ offenses. The definitions now provide:

[2] The actual documents submitted to the members are not located in the record.

> Sexual Assault. Intentional sexual contact characterized by the use of force, threats, intimidation, or abuse of authority or when the victim does not or cannot consent. As used in this Instruction, the term includes a broad category of sexual offenses consisting of the following specific UCMJ offenses: rape, sexual assault, aggravated sexual contact, abusive sexual contact, forcible sodomy (forced oral or anal sex), or attempts to commit these offenses.

In Respondent's case, the record does not reflect which DoD definitions were provided to the members (with or without reference to UCMJ offenses). Regardless, the record is clear in this case that the members were not instructed in terms of UCMJ definitions and elements. In fact, the members were not instructed as to the elements or definitions of any sex crime whatsoever.

It's instructive in this respect that AFI 36-3206, *Administrative Discharge Procedures for Commissioned officers, Incorporating through Change 7*, 2 July 2013, paragraph 3.3, defines sexual assault as follows:

> Sexual assault for purposes of this Instruction includes a broad category of sexual offenses consisting of the following specific UCMJ offenses: rape, sexual assault, aggravated sexual contact, abusive sexual contact, forcible sodomy (forced oral or anal sex), or attempts to commit these offenses.[3]

The record is unclear as to Respondent's status when the alleged sexual assaults occurred. It is true that he likely was not in federal military status under Title 10, subject to the UCMJ; but was rather subject to the state's criminal laws or state military code at the time of the alleged offenses. However, a full exposition of state justice systems applicable to National Guard personnel is beyond the scope of this opinion and unnecessary to resolve the issue presented in Respondent's case for here, the government did not instruct on any specific offense or elements thereof whatsoever (UCMJ or otherwise). What is required, however, is that a discharge premised on "sexual assault" be based on an actual offense contained in a criminal code.

Conceivably, DoDD 6495.01, *Sexual Assault Prevention and Response (SAPR) Program*, uses "sexual assault" in a manner that encompasses sexually assaultive offenses broader than the specific UCMJ offenses articulated. For example, the Directive is made applicable to service members "who are on active duty but were victims of sexual assault prior to enlistment or commissioning." Paragraph 2.a.(5). Additionally, paragraph 4.i. provides, "[e]nlistment or commissioning of personnel in the Military Services shall be prohibited and no waivers are allowed when the person has a qualifying conviction (see Glossary) for a crime of sexual assault." "Qualifying Conviction" is then defined in Part II as follows:

> A State or Federal conviction, or a finding of guilty in a juvenile adjudication, for a felony crime of sexual assault and any general or special court-martial

[3] Attachment 1, Glossary of References and Supporting Information, adds to the definition, "[d]ue to amendments to the UCMJ, the names and character of offenses may vary based on when they were committed and the applicable version of the UCMJ at that time. See DoDI 6495.02." This definition also appears in AFI 36-3208, *Administrative Separation of Airmen*, Incorporating through Change 7, 2 July 2013, paragraph 5.55.

> conviction for a UCMJ offense, which otherwise meets the elements of a crime of sexual assault, even though not classified as a felony or misdemeanor within the UCMJ. In addition, any offense that requires registration as a sex offender is a qualifying conviction.

Similarly, DoDI 6495.02, *Sexual Assault Prevention and Response (SAPR) Program Procedures*, paragraph 2.b. states that the Instruction applies to:

> National Guard (NG) and Reserve Component members who are sexually assaulted when performing active service ... and inactive duty training. If reporting a sexual assault that occurred prior to or while not performing active service or inactive training, NG and Reserve Component members will be eligible to receive limited SAPR support services from a SARC and a SAPR VA and are eligible to file a Restricted or Unrestricted Report.

However, any rationale for an expansive reading of "sexual assault," with respect to eligibility for victim services does not likewise apply when the DoD Issuances are used *as a basis* for a member's discharge. A victim-centric focus for services should be broad and even over-inclusive. Those same principles don't apply with equal force to the question of what the government needs to prove as a basis for sexually assaultive conduct in the first instance. Moreover, terms like "qualifying conviction" still envision that some sexually assaultive crime be committed.

Though not squarely before us in this case, we use this opportunity to direct the field, when an administrative discharge action for active duty Air Force personnel is premised on commission of a sexual assault, that the members are to be instructed in terms of "specific UCMJ offenses," the elements of which the government must prove by a preponderance of the evidence.

In the instant case, the government elected to rely upon the definition of sexual assault as it appears in a Department of Defense Issuance and an active duty Air Force Instruction. In that event, the government was required to tie Respondent's alleged assaultive conduct to an offense recognized by those authorities.

Constructive Force Authorities

Abuse of authority is a constructive force theory of sexual assault recognized by military case law. During the timeframe of the sexual assaults alleged by the government in this case (2004 through 2010), Congress overhauled the statutory provisions addressing sexual assault in the Uniform Code of Military Justice (UCMJ). Until October 2007, Article 120, UCMJ, defined "rape" as an act of sexual intercourse done by force and without consent. Effective 1 October 2007, the amended Article 120, UCMJ consolidated various sexual assault provisions into Article 120, UCMJ, *Rape, Sexual Assault, and Other Sexual Offenses*.[4] While "without consent" was no longer an element of any of the new Article 120, UCMJ, offenses, "force" was defined using terms that nonetheless invoke the concept of "consent." Specifically, the statute provided

[4] Article 120, UCMJ, was again amended in June 2012.

that “force” means action to compel submission of another or to overcome or prevent another’s resistance.

Before the October 2007 changes to the UCMJ, case law recognized that force could be accomplished in one of two manners: actual force or constructive force. Actual force is physical force used to overcome a victim's lack of consent. *United States v. Palmer*, 33 M.J. 7, 9 (C.M.A.1991). However, the concept of constructive force was developed through military case law to cover scenarios where the force utilized by the perpetrator against the victim was not direct physical force. *United States v. Leak*, 61 M.J. 234, 246 (C.A.A.F. 2005). A perpetrator could be found to have used such “constructive force” against a victim through statements, threats or through the use or abuse of military authority that created a reasonable belief that the victim would suffer physical injury or that resistance would be futile, under the totality of the surrounding circumstances. *United States v. Simpson*, 58 M.J. 368, 379 (C.A.A.F.2003); *Leak* at 247.

The concept of constructive force, developed by case law prior to the revision of Article 120, was defined out of the 2007 Article 120’s definition of “force,” but appeared elsewhere in other statutory definitions. “Threatening or placing that other person in fear” of harm less than death or grievous bodily harm included classic examples of the “old” Article 120’s doctrine of constructive force. By statutory definition, “threatening” for purposes of establishing an aggravated sexual assault or an abusive sexual contact included threats to accuse a person of a crime; expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt, or ridicule; or through the use or abuse of military position, rank, or authority, to affect or threaten to affect, either positively or negatively, the military career of some person.

In determining whether force and lack of consent occurred, the totality of the circumstances must be considered. *See United States v. Webster,* 40 M.J. 384, 386 (C.M.A. 1994). While the perpetrator’s rank is a factor, rank disparity alone is not sufficient to constitute constructive force, other factors are relevant. *United States v. Simpson*, 58 M.J. 368, 377 (C.A.A.F. 2003). Additionally, the prosecution cannot convict a person of rape simply on the basis that the victim subjectively believed resistance would be futile. A subjective fear of accused’s power over her life is insufficient to support the conclusion that resistance would have been futile. The government must show the express or implied use of constructive force that, under other circumstances, which would lead a reasonable person to reach the same conclusion. *United States v. Bradley*, 28 M.J. 197 (C.M.A. 1989); *United States v. Bell*, 2008 WL 8104046 (Army Ct.Crim.App., 2008). Although force and lack of consent are generally separate elements, case law recognizes that there may be circumstances in which the two elements are so closely intertwined that both elements may be proved by the same evidence. *See United States v. Palmer,* 33 M.J. 7, 9-10 (C.M.A.1991)(“[C]onsent induced by fear, fright, or coercion is equivalent to physical force”).

Examining the totality of the circumstances, military courts have recognized one of those circumstances can be the presence of a coercive environment in a training situation which may prompt a trainee's passive acquiescence due to the unique situation of dominance and control presented by the perpetrator's superior rank and position. For example, *United States v. Simpson*,

58 M.J. 368, 377 (C.A.A.F. 2003), involved an Army drill instructor that engaged in a pervasive array of sexual misconduct with trainees. In concluding he used constructive force to accomplish the sex acts, the Court of Appeals for the Armed Forces (CAAF) observed the accused was in a unique power relationship with the trainees; he was physically imposing; he had a reputation in the unit for being tough and mean; he had actual and apparent authority over each of the victims in matters other than sexual contact; the location and timing of the assaults, including his use of his official office and other areas within the barracks in which the trainees were required to live; he refused to accept verbal and physical indications that his victims were not willing participants; the relatively diminutive size and youth of his victims, and their lack of military experience; and finally, the accused's abuse of authority in ordering the victims to isolated locations where the charged offenses occurred.

Similarly, in *United States v. Brown*, 2009 WL 1173104 (N.M.Ct.Crim.App., 2009), the accused was a 38–year–old Air Traffic Controller Second Class and the victim was a 20–year–old E–3 assigned to her first duty station. In concluding the accused used sufficient force to accomplish the offense of rape, the Army Court of Criminal Appeals observed the following factors: the appellant was an experienced, 38–year–old E–5; the victim was a 20–year–old E–3; the appellant exercised actual and apparent authority over the victim during their two-person watch; the location and timing of the rape, including that the incident occurred in an isolated space approximately 10 stories above the ground, at approximately 0630 hours near the end of mid-watch; the appellant's repeated sexual advances throughout the watch and particularly his repeated refusal to accept verbal and physical indications that the victim was not a willing participant; the appellant's throwing of a chair and loud expression of frustration just before his final sexual advances culminating in the rape; and that the appellant was physically larger than the victim.

However, in *United States v. Bright*, 66 M.J. 359 (C.A.A.F. 2008), the accused was a drill sergeant convicted of raping a female trainee on three separate occasions. On appeal, the CAAF concluded there was insufficient evidence, based on totality of circumstances, regarding lack of consent. First, the CAAF observed that the record was devoid of any evidence that the victim manifested a lack of consent or took any measures to resist sexual intercourse. In fact, she made arrangements to meet him at a hotel knowing that sex would occur and she made her own way to the hotel to meet him. On two occasions, she arrived at the hotel first and waited for him. Additionally, even though she resisted sodomy on one occasion, there was no evidence that she resisted "normal sexual intercourse" in any way, verbal or physical. The CAAF next concluded there was no evidence to support the inference that resistance would have been futile or that resistance would have been overcome by threats of death or grievous bodily harm. The accused never threatened her physically—the only threat was to take away her pass status. Finally, the court distinguished the victim's perceived futility of resistance from the facts in *United States v. Simpson*, 58 M.J. 368 (C.A.A.F. 2003) and *United States v. Clark*, 35 M.J. 432 (C.M.A. 1992) (where the accused cornered the victim in a "small shed with brick walls and a metal door and . . . positioned himself between the door and the victim").

Ultimately, when addressing whether the futility of resisting sexual intercourse with the accused established lack of consent, the CAAF in *Bright* held the government could not overcome the

fact that the alleged victim was physically separated from the accused at the time she agreed to meet him for sex.

In a case prosecuted under the "new" Article 120, UCMJ, *United States v. Walker*, 2014 WL 2512827, A.F.Ct.Crim.App., 2014, the Air Force Court of Criminal Appeals (AFCCA) upheld the convictions of a Military Training Instructor (MTI) for sexually assaulting trainees by placing them in "in fear of an impact on their military careers through the use and abuse of his military rank, position, and authority." *MCM*, Part IV, ¶¶ 45.a.(t)(7)(B)(ii)(III) and 45.b.(3)(a). In that case, the AFCCA observed the trainees were participating in a stressful and demanding training program where by design MTIs have a great deal of control and authority over the daily lives of the trainees and where trainees are expected to follow the orders and direction of the MTIs. The accused specifically used his position to require the women to report alone to locations under his control (including his office and other dormitories) and, contrary to regulations, went behind closed doors with them. He made inappropriate sexually-oriented comments to them and then moved on to hugging, kissing and/or groping them, also contrary to regulation. He next escalated to digital penetration and/or sexual intercourse, after again directing them to report to an isolated location. Throughout this, he ignored verbal and physical indications from the women that they were not willing to participate in this conduct. The AFCCA held he clearly used and misused his rank, MTI position, and authority to arrange for the young women to be alone in this vulnerable position with him. Considering the totality of the circumstances, AFCCA found the accused, through the use and misuse of his military authority, acted in a manner of sufficient consequence to cause the five women to reasonably fear their military careers would be negatively impacted if they did not comply with his sexual advances, and that this fear caused them to engage in the sexual acts.

Analysis

Applying the above authority, the statements of MSgt H.P. and her husband make it evident that Respondent did not actually or constructively force MSgt H.P. into having sex multiple times over the course of several years. MSgt H.P. told OCI investigators that Respondent never stated, "do this and you'll keep your job," she simply "just felt that way." The above cases make clear that a subjective belief or fear caused by "*power over her life"* is insufficient to constitute constructive force. There was no evidence introduced that Respondent actually did anything to induce such a belief. Rank/position alone is insufficient to constitute constructive force.

In all the years she was having sex with Respondent, she never articulated to her own husband she was in any way pressured or coerced. According to MSgt H.P's husband, all of their three-way sexual encounters were consensual, characterized by an atmosphere of "camaraderie," people "having fun," and "pleasuring his wife." There was never a threat or a "quid pro quo" regarding [MSgt H.P's] job," of which he was aware, and their personal lives did not "follow them to work." In fact, her coping mechanism was "to consent" and "make the guy feel better."

Of course, because she engaged in a swinging lifestyle does not mean MSgt H.P. could not also have been sexually assaulted. However, it is relevant to the extent they invited Respondent into their lifestyle, in which they engaged frequently and consensually had sex with other partners. Additionally, according to their own swingers' website profile, their boundaries are respected

with a simple "no thanks." It is curious that MSgt H.P. never uttered such words to Respondent, though this philosophy towards sex is based on their "real experience" according to their website profile.

None of the facts present in the above cases concluding constructive force was utilized by the creation of a uniquely coercive environment, are present here; only MSgt H.P.'s subjective, never-articulated, concern over her job. Unlike the cases involving a coercive work or training environment, here there is no wide disparity in age or military experience as between a non-commissioned officer and a new trainee/Airman; there is no evidence Respondent physically intimidated her; and at no time did she express either physically or verbally that she was not a willing participant. Like the facts in *Bright*, where the alleged victim met the accused in a motel and had sex, the government here cannot overcome the fact that MSgt H.P., according to her own testimony, travelled to Respondent's house repeatedly to specifically have sex on his porch, and likewise invited him over to her home to have sex up to 50 times.

Importantly, the record demonstrates she did not feel assaulted until after the fact. According to her husband, he has "[t]wo versions of his wife's story" and that "[i]n retrospect she felt pressured." Assuming her husband is correct, and there are two versions of their sexual encounters, one consensual during the actual sex, and one after the fact, MSgt H.P.'s feelings about the sex retrospectively do not transform otherwise consensual sexual encounters into assaultive. This is not to say, assuming it is true, that Respondent did not commit other potential offenses, such as fraternization, but the evidence does not support a finding of sexual assault.

The lead OCI investigator's testimony is particularly troublesome in that it is wholly at odds with the above authority governing constructive force, yet it was received by the board uncorrected by the legal advisor. Moreover, though the government's theory was that the sexual activity was induced through Respondent's abuse of authority (i.e. constructive force), at no time during the proceedings were they accurately instructed on the legal concept of constructive force. Under any theory of constructive force (pre or post October 2007 UCMJ amendments), there must be some showing of express/implied use of constructive force by Respondent that created a reasonable fear that MSgt H.P. would suffer some type of injury or harm or that resistance would be futile.

Further, the members rendered inconsistent findings in this case. While they found the Respondent abused his authority to sexually assault MSgt H.P. (allegation 1), they also found he did not abuse his authority in engaging in sexual activity with her (allegation 6). The logical explanation for this is the erroneous information provided the board that Respondent's rank alone constitutes sexual assault under the DoD's definition even if MSgt H.P. was otherwise outwardly consenting. Moreover, the members determined Respondent did not sexually harass MSgt H.P. (allegation 2), which would have required a finding that sex with him was a condition of her employment or that his conduct created a hostile work environment. It is not legally possible for the members to have ruled out the very factors that would essentially constitute constructive force through abuse of authority, and yet find he sexually assaulted MSgt H.P. through the abuse of his authority.

The gravamen of the government's case was that Respondent sexually assaulted MSgt H.P. Aside from the board's finding of sexual assault, the board also found that Respondent engaged in unprofessional relationships with MSgt H.P. and her husband; that he abused alcohol while on duty and/or while driving a GOV (stemming from the facts of the first alleged oral assault); and made false statements to investigators (Respondent's denial of the allegations). Given the government's emphasis on the sexual assault, it cannot be said with confidence that the members would have discharged Respondent with a UOTHC in the absence of that finding.

Conclusion. The evidence is legally insufficient to support a substantive finding that Respondent committed a sexual assault through the abuse of his authority. Therefore, we do not concur with the recommendation Respondent be discharged.

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