DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

[redacted]

BCMR Docket No. 2013-127

FINAL DECISION

This proceeding was conducted under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case upon receiving the completed application on June 7, 2013, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated May 9, 2014, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant asked the Board to correct his record by (a) changing a CG-3307 ("Page 7")[1] dated March 25, 2011, which documents an "alcohol incident,"[2] to reflect only an "alcohol-related situation"[3]; (b) expunging a performance evaluation; (c) setting aside the results of an Administrative Separation Board (ASB) convened on August 12, 2011; (d) voiding his discharge and removing the DD 214 dated March 1, 2012; (e) reinstating him on active duty retroactively

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

[2] Article 20.A.2.d.1. of the Coast Guard Personnel Manual defines an "alcohol incident" as "[a]ny behavior, in which alcohol is determined, by the commanding officer, to be a significant or causative factor, that results in the member's loss of ability to perform assigned duties, brings discredit upon the Uniformed Services, or is a violation of the Uniform Code of Military Justice, Federal, State, or local laws. The member need not be found guilty at court-martial, in a civilian court, or be awarded non-judicial punishment for the behavior to be considered an alcohol incident." U.S. Coast Guard, COMDTINST M1000.6A, Personnel Manual (Change 42, April 2010) (hereinafter PERSMAN). Article 20.B.2.g. requires alcohol incidents to be documented on Page 7s, and Article 20.B.2 h.2. states that "[e]nlisted members involved in a second alcohol incident will normally be processed for separation." *Id.*

[3] PERSMAN Article 20.B.2.d. defines an "alcohol-related situation" as "any situation in which alcohol was involved or present but was not considered a causative factor for a member's undesirable behavior or performance. A member does not have to consume alcohol to meet this criterion, e.g., purchasing alcohol for minors. Commands shall not use the term 'alcohol related situations' when a member's behavior clearly meets the criteria of an 'alcohol incident.'" (Emphasis in original.)

to the date of discharge; (f) assigning him to a particular billet in Baltimore; (g) effecting an advancement to E-8 he was denied; and (h) awarding him all back pay, leave, and allowances, including reimbursement for medical and dental expenses and premiums. He also asked the Board to "order such additional relief as may be warranted in order to render [him] 'whole.'"

APPLICANT'S ALLEGATIONS

Allegations About His Second Alcohol Incident

The applicant stated that on March 24, 2011, he arrived at his unit by plane, Patrol Forces Southwest Asia (PATFORSWA) in Bahrain, following 15 days of Rest and Recreation in the United States. He alleged that early in the morning on March 25, 2011, he was extremely tired because he had not slept in 41 hours, but two m[redacted]im walking down a residential road erroneously believed he was drunk, and so he was unjustly found to have incurred his second alcohol incident and processed for separation. The applicant attributed his behavior that morning to extreme fatigue and his consumption of a moderate amount of alcohol the night before after having taken Tylenol PM during his flight.

The applicant argued that his behavior on March 25, 2011—urinating in public after drinking alcohol—did not meet the criteria for an alcohol incident because, he alleged, the evidence shows that he had not drunk enough alcohol to be under the influence and that fatigue caused his behavior instead of alcohol. The applicant alleged that the Coast Guard had a duty to measure his blood alcohol content (BAC) but failed to do so, and so he is unable to prove he was not drunk. [redacted]ever, he alleged, based on the amount he drank, he thinks his BAC was just 0.005%. Because he was not drunk, he argued, and his conduct was due to fatigue, the event should have been characterized as only an alcohol-related situation, rather than an alcohol incident. He alleged that medical personnel later concluded that his conduct had been due to fatigue. If the event had been deemed an alcoh[redacted]elated situation, he would not have been processed for separation due to a second alcohol incident. Therefore, the Page 7 documenting his second alcohol incident, which was entered in his personnel data record (PDR) on April 28, 2011, should be amended to show that it was only an alcohol-related situation.

The applicant also argued that he should not have been discharged because following an investigation by a preliminary inquiry officer (PIO), the charges against him were dismissed, which denied him the chance to defend himself against them. Therefore, he argued, his constitutional right to due process was violated, and his discharge was erroneous and unjust.

Allegations About Pre-ASB Procedural Errors and Bias

The applicant alleged that, after he was advised that an ASB would be convened, the Deputy Commander sent an email to three newly arrived officers in June 2011 saying that they had been selected to serve on the ASB because they would be unbiased. However, the command never issued them a formal Convening Order, in accordance with COMDTINST M1910.2, which would have been cc'ed to the applicant, so he was unaware that they had been appointed. Later in June, the applicant learned that a redacted copy of the investigation of his conduct had been distributed for educational purposes, but everyone knew it was about him. Therefore, he

became very concerned about the possible bias of the board members if the ASB were to be held in Bahrain, and he asked that the ASB be convened in Portsmouth, Virginia. His request was originally granted by the outgoing CO, then denied after the new CO arrived, but then granted again. The applicant alleged that the new CO was very biased against him, removed him from his duties, and assigned him to menial and janitorial duties while the ASB was pending, which was humiliating.

Allegations About His Performance Evaluation

The applicant alleged that on July 12, 2011, he received a performance evaluation with extremely low marks that in no way reflected his work and achievements throughout his career. He alleged that the marks are contradicted by the many statements in support of his retention that his CO and other members submitted to the AS[redacted]he other performance evaluations he has received. He alleged that the low marks are evidence of the command's prejudice against him.

Allegations About the ASB

At the applicant's request the ASB was ultimately held in Portsmouth on August 12, 2011. He was temporarily assigned there, and different officers were appointed to serve as the ASB members. He alleged, however, that "improper command influence continued" because the ASB members received a copy of the PIO's report of the investigation of his alcohol incident less than a week before the ASB convened. The applicant argued that the ASB should not have been allowe[redacted] see the investigation because it was "closed and dismissed," he was never charged with the offense, and it is not in his PDR. He also alleged that it was improper for the ASB to be provided with a copy of any of the evidence before the hearing, pursuant to paragraph 4.A. of COMDTINST M1910.2. Moreover, his civilian attorney learned that the ASB members had received the investigation only inadvertently [redacted]only two days before the ASB convened. Despite this impropriety, he noted, the ASB unanimously recommended his retention.

Allegations About His CO's Endorsement

The applicant stated that the new CO of PATFORSWA was required to endorse the ASB package and forward it to PSC, but this officer was terribly biased against him and failed to consider the preponderance of evidence for retention in the ten statements other members had submitted on his behalf. The applicant alleged that the CO, who did not concur with the ASB's recommendation for retention, unjustly focused on the PIO's report and claimed that he had "publicly exposed his genitalia" even though, he alleged, his public urination is not described that way in the record, there were no restrooms available, and there was very little chance that he would be observed because most of the homes in the neighborhood were surrounded by high walls.

The applicant also argued that the CO had no medical training and had served insufficient time with the applicant—only 45 days—to support his statement that he had no faith in the applicant's ability to stay sober.

The applicant also alleged that his CO violated due process in his endorsement by including unsubstantiated allegations about the applicant's impact on subordinates that were not in the record considered by the ASB and that the applicant had had no chance to defend himself against. He alleged that those claims—that his poor leadership had caused two subordinates to decide to leave the Coast Guard—were also erroneous because according to a Department of Defense Manpower Data website, all of his subordinates are still in the Coast Guard except one who had long planned to get out and go to college and did so.

The applicant submitted an objection to the endorsement on this basis, pointing out that the information discussed by the CO was not mentioned in the ASB's own findings, opinions, and recommendations, and arguing that the CO attempted to re-litigate the case in his endorsement. The applicant claimed in his objection that some of the CO's statements were false and argued that the CO had not been the applicant's [redacted] provide a sufficient opinion of the applicant's performance and leadership or the likelihood of a relapse.

Allegations About the Action of the Separation Authority

Even after reviewing his objection, however, the Separation Authority at the Personnel Service Center (PSC) refused to retain the applicant in accordance with the ASB's recommendation. The applicant argued that the preponderance of the evidence, including the ten statements in support of retention submitted by other members, his performance evaluations, and record of achievements, proves that the Separation Authority's decision was arbitrary, erroneous, and unjust. Moreover, the Separation Authority provided no written explanation for its decision, as required by r[redacted]ation.

The applicant argued that under Article 12.B.31.d. of COMDTINST M1000.6, the Separation Authority at PSC could only disapprove the findings and opinions of the ASB if they were "based on incomplete evidence, contrary to the ev[redacted]e the board considered or to law or regulation, a misunderstanding or misapplication of written policy, or otherwise clearly in error." However, in his case, PSC disapproved a recommendation of the ASB merely because he disagreed with it. Moreover, PSC disapproved the recommendation of the ASB contrary to the weight of the evidence and without stating any specific reason. Because the Separation Authority failed to state his reasons for disapproving the ASB's recommendation for retention and apparently relied on information from outside the record, the applicant argued, his discharge constituted legal error and should be voided. In this regard, the applicant argued that under *Birt v. United States*, 180 Ct. Cl. 910 (1967), an administrative discharge is void if it ignores procedural rights or regulations, exceeds applicable statutory authority, or violates minimum concepts of fairness. Because the Separation Authority did not provide the reasons for disapproving the ASB's recommendation, as required, and apparently based his decision on matters that neither the ASB nor the applicant addressed, he is entitled to have his discharge voided and to be reinstated as he requested.

Applicant's Equitable Arguments

The applicant argued that he was subject to disparate treatment. He alleged that there were other members who were "involved" in the incident on March 25, 2011, and they were not

discharged. (He did not elaborate on this claim.) He cited six past BCMR cases in which members were not discharged after their second alcohol incident or whose commands had leniently failed to document alcohol incidents as such. He alleged that a Coast Guard captain who illegally transported whisky into Kuwait was not processed for separation, and submitted an email indicating that a whisky bottle was found in a captain's room when it was being cleaned after he left. The applicant also submitted news articles about Navy personnel whose conduct would meet the Coast Guard's criteria for an alcohol incident and alleged that those personnel had not been processed for separation.

The applicant alleged that his first alcohol incident in 1998 was too remote in time and so should not have influenced the outcome of the ASB. He noted that under paragraph 1.B.1.d. of COMDTINST M1000.4, the Military Separations Manual, although an ASB considers the member's entire record, NJPs that were isolated inci[redacted]e "shall have minimal influence on the determination" of whether to retain the member. The applicant alleged that his first alcohol incident was "of little or no value" to the determination of his retention because it occurred during his first year on duty when he was in training. He noted in this regard that even though he had been charged with DUI, his command did not award him NJP. The applicant argued that had his 1998 alcohol incident been properly weighed as of little or no value, he would have been retained because separation is not required after two alcohol incidents—only after three—and his prior CO had recommended his retention.

The applicant argued that he is also entitled to relief on equitable grounds because he is a victim of injustice. He argued that his case is permeated with pervasive abuse of authority, unlawful co[redacted]d influence, bias, and disregard for due process, evidence, and law despite his numerous medals, awards, and achievements during his 14 years on active duty, including a Commendation Medal he received in June 2010 for the tour of duty he completed just before he deployed to Bahrain. Moreover, Coast Guard policy did not require his separation following a second alcohol incident. The Separation Authority[redacted]ld have opted to retain him as it has done in some past instances.

The applicant noted that before his discharge, he filed suit for a preliminary injunction in a federal district court. He submitted a transcript of the motions hearing and stated that the judge had characterized what happened to him as outrageous and dismissed his motion only because he had not exhausted his administrative remedy through the BCMR.

Allegations About the Documentation of his Discharge and Reentry Code

The applicant argued that it was both erroneous and unjust to discharge him under Article 12.B.16. of the Personnel Manual for unsuitability because he was never required to attend alcohol rehabilitation treatment, so he never failed it, and he was never told he would be discharged due to "alcohol rehabilitation failure." Therefore, he argued, the narrative reason for separation on his DD 214—alcohol rehabilitation failure—is both erroneous and unjust. Because he never received rehabilitation treatment, he alleged, he should have been assigned "miscellaneous/general reasons," as his narrative reason for separation, which corresponds to a JND separation code. With a JND code, he could have been assigned an RE-1 (eligible to reenlist), as well as an RE-3 (eligible to reenlist with a waiver) or RE-4, while only the latter two are allowed for

someone discharged due to "alcohol rehabilitation failure." He noted that his new CO assigned him an RE-4 and argued that this was due to bias. He argued that with the JND code, he should have received an RE-1 based on his many years of excellent military service and continuing abstinence.

The applicant also argued without explanation that the BCMR should review the applicant's discharge under the standards of the Discharge Review Board (DRB) at 33 C.F.R. part 51.

SUMMARY OF THE RECORD

The following information is derived from documents submitted by the applicant, in the Coast Guard's advisory opinion, and from the applicant's PDR. The applicant enlisted on February 2, 1998. On the same day, he signed a Page 7 acknowledging that he had been counseled about the Coast Guard's drug and alcohol policies.

On October 21, 1998, at age 22, the applicant incurred his first alcohol incident when he was arrested and charged by the State with "driving under the influence" (DUI). His command did not punish him but counseled him about the Coast Guard's alcohol policy and referred him for screening[4] for alcohol abuse and dependency. According to a Page 7 dated November 13, 1998, he was found to be neither abusive nor dependent based on his answers to the screening questions. Therefore, he was not ordered to attend treatment.[5] However, he was advised on a Page 7 dated November 11, 1998, which documented the alcohol incident, that any subsequent alcohol incident could result in his discharge from the Coast Guard.

A Page 7 dated December 16, 1999, states that on December 3, 1999, the applicant was referred for alcohol screening "due to possible alcohol abuse following an incident at [a training center] on 1 September 1999." The applicant had committed disorderly conduct while carrying a concealed weapon. Based on his answers to the screening questions, he was found not to be alcohol abusive or dependent, but because of his conduct, he was referred for Anger Management Training and a Personal Responsibility Values Education and Training Program. The applicant's command determined that the applicant's conduct did not constitute an alcohol incident even though he awarded the applicant non-judicial punishment (NJP) under Article 15 of the Uniform Code of Military Justice (UCMJ) on October 21, 1999. The Page 7 reminded the applicant about the Coast Guard's alcohol policy and advised him that any future alcohol incident would result in his discharge from the Coast Guard.

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[4] PERSMAN Article 20.B.2.e.1., titled "Alcohol Screening," states that "[a]ny member who has been involved in an alcohol incident or otherwise shown signs of alcohol abuse shall be screened in accordance with the procedures outlined in [the Health Promotions Manual, COMDTINST M6200.1 (series)]. The results of this alcohol screening shall be recorded and acknowledged on an Administrative Remarks, Form CG-3307, entry or letter, as appropriate, in the member's PDR with a copy to … ."

[5] Following an alcohol incident, the command must refer the member for alcohol screening by a medical officer, and if the screening results in a diagnosis of alcohol abusive or dependent, the command must refer the member for the prescribed level of treatment. U.S. Coast Guard, COMDTINST M6200.1, Coast Guard Health Promotion Manual, Chap. 2.G.3. (July 2007).

A Page 7 dated January 29, 2005, states that the applicant had been involved in an altercation with his wife at a local restaurant and that police had been called to their home. Although both the applicant and his wife had consumed alcohol, his commanding officer (CO) decided that alcohol had not been "significant or causative factor" and so found that no alcohol incident had occurred. However, the CO removed the applicant's designation as the cutter's Command Drug and Alcohol Representative (CDAR) and permanently revoked his authorization to carry weapons while assigned to the unit. The CO also reminded the applicant of the Coast Guard's alcohol policy and strongly encouraged him to seek alcohol counseling and anger management counseling through the unit's new CDAR.[6]

The applicant continued serving on active duty and advanced in the [redacted] rating. He received Page 7s documen[redacted] negative conduct and performance and several personal, team, and unit awards and commendations. A summary of his performance marks shows that he received some low marks on his performance evaluations in 1999, 2000, and 2005, when he had been formally counseled about his use of alcohol, but that his other performance evaluations were excellent.

On August 1, 2008, the applicant was advanced to chief petty officer, [redacted]/E-7. At the time, he was serving as the [redacted] He received an end-of-tour Commendation Medal for his service in this position from July 2005 through June 2010 before being transferred to the PATFORSWA in Bahrain. In addition, he was [redacted]

Second Alcohol Incident

On March 24, 2011, Coast Guard personnel assigned to PAFORSWA were reminded by email that pursuant to a Navy regulation, military personnel were authorized to travel only to and from work and to the store for food and that no other travel was authorized. Travel had been restricted since the Bahraini uprising started on February 14, 2011. The email noted that multiple public demonstrations had been planned for the next day, March 25, 2011.

A Report of Offense and Disposition, CG-4910, initiated on March 27, 2011, shows that the applicant was placed on report and charged with disorderly conduct and drunkenness in violation of Article 134 of the UCMJ. The CG-4910 states that on March 25, 2011, he was discovered by the CO of PATFORSWA and a YN3 in a Bahraini neighborhood "drunk and disorderly" and "urinating in public." It shows that the applicant was assigned a mast representative and that a Preliminary Inquiry Officer (PIO) recommended that he be punished at mast, but that the CO dismissed the criminal charges with a note explaining that the applicant "is being processed for administrative discharge."

On April 6, 2011, the applicant was again screened for alcohol abuse or dependence. Based on his answers to the screening questions, he was found to have "alcohol abuse disorder" and recommended for Level I outpatient treatment. The Page 7 documenting this screening,

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[6] Coast Guard members may self-refer for alcohol screening and treatment. *See* COMDTINST M6200.1, Chap. 2.G.1.

dated April 17, 2011, instructed the applicant to abstain from alcohol, meet with a CDAR once a week, and attend at least two support group meetings per week until his treatment began.

The applicant's command documented his second alcohol incident on a Page 7 dated April 28, 2011, following the completion of the PIO's investigation, which is summarized below. The Page 7 states that on March 25, 2011, he was seen having trouble walking and urinating on a sidewalk in a residential area of Bahrain and that the shipmates who found him reported that he was excessively intoxicated and unable to speak clearly or to tell them where he lived. The applicant did not recognize them and attempted to evade them. The Page 7 advised the applicant that he would be processed for separation because he had incurred his second alcohol incident.

Investigation

On April 17, 2011, the PIO issued a report of his investigation into the events of March 25, 2011, at the request of the Deputy Commander. The report states that, according to various witnesses, the applicant arrived at a barbeque hosted by a BM2/E-5 sometime after 8:00 p.m. on the evening of March 24, 2011. Regulations restricted travel to commuting to and from work and to the grocery store, but the applicant could get to the barbeque by jumping over the wall between their villas. The applicant, while socializing with subordinate members, consumed an unknown quantity of alcohol at the barbeque, "was seen playing the social drinking game of beer pong," and carried some type of flask in his pocket, which he drank from. The applicant left the barbeque sometime after midnight, and video surveillance tapes showed that at about 2:00 a.m., he entered a hotel bar and remained there for at least 40 minutes. The PIO found no witnesses to or evidence of the applicant's actions between 2:40 a.m. and 6:50 a.m., when, while driving to the airport, the applicant's CO and a YN3/E-4 saw him "having difficulty walking down the road" and stopped to help. As they drove closer, they both saw the applicant urinating on the street. His genitalia were exposed. The CO stopped to give the applicant a ride home, and the applicant entered the vehicle but did not seem to recognize his CO. The applicant was "dishevveled, smelling strongly of alcoholic beverages, not verbally communicating, and carrying a bottle of alcohol in his back pocket." He was unable to tell them which villa he lived in. After they figured it out, they dropped him off, but instead of going in his villa, the applicant climbed on top of a parked car and tried to jump over the wall of a different villa. The CO made phone calls to identify the applicant's housemate so that he could come help the applicant. Although the CO told the applicant to stay seated, the applicant wandered down the road requiring the CO to retrieve him. Then the applicant again tried to climb the wall of another villa. When his housemate, an OSC, arrived to open the gate to their villa, the CO told him that the applicant was drunk and needed help to get in. The applicant, however, was seen walking quickly away down the street. The OSC walked down the street and around a corner but could not find the applicant, and so another member was called to help search for him. At about 7:30 a.m., the CO and YN3 left to get to the airport. The OSC looked around for the applicant and a few minutes later saw him walking down the road toward their villa. The applicant had bloodshot eyes, smelled of alcohol, and appeared intoxicated. When the OSC asked the applicant how he was feeling, the applicant grunted. The applicant then went to his room and did not come down till about 2:00 p.m. that afternoon.

The applicant consulted a lawyer and elected not to answer the PIO's questions or to make a statement for the investigation. His Department Head told the PIO that on two occasions before the events of March 25, 2011, he had "spoken with [the applicant] about his inappropriate actions after consuming too much alcohol."

The PIO concluded that the applicant's conduct met the elements for charges of "disorderly conduct, drunkenness" in violation of Article 134 of the UCMJ, "indecent exposure" in violation of Article 120, and "failure to obey order or regulation" in violation of Article 92. With regard to the last charge, the PIO noted that the applicant had several times disobeyed the CO's order to stay seated, had disobeyed a local military regulation by being publicly drunk, and had violated the travel restrictions by going to the hotel bar. The PIO recommended that the charges be disposed of at mast (NJP); that the applicant receive his second alcohol incident; and that the applicant go before an ASB to determ[redacted]ld be discharged. The PIO concluded his recommendations with the comment that his investigation was "closed unless otherwise ordered. If additional information is required, please contact me at …"

Alcohol Rehabilitation Treatment and Initiation of Separation Processing

On May 10, 2011, the applicant signed a form acknowledging that he had been notified of his pending separation in a memorandum, which is not in the record; that he had consulted counsel; and that he had submitted a statement objecting to the discharge. He requested an ASB. In his attached statement, dated May 8, 2011, the applicant objected to the proposed discharge in the notification memorandum. After describing his skills, achievements, and value to the Coast Guard as an [redacted], the applicant explained that the incident on March 25, 2011, had occurred on the day he returned from a rest and relaxation period in the United States. He alleged that he was suffering severe fatigue following his flight back to Bahrain and that he had not slept for 41 hours. This was—

[redacted]

> a toxic combination which under normal circumstances would never have happened. I made a poor decision to socialize with shipmates rather than rest after my travels. Those whom I was with did not suffer the same reactions nor consequences I did despite similar actions. The stresses which come from the arduous nature of our duties here, time away from home and family, and our locality in the world led to my increased drinking. This traumatic experience has brought me to the realization that I have a problem and I am determined to rehabilitate from it. Since the incident, I was referred for alcohol screening and have proactively abstained from further use. I attend all weekly meetings with the local SARP and AA groups … . Although level one is the prescribed level of treatment and this will be the first time I have been treated, I am pursuing level two treatment as a substitute on my own because I am very concerned about my health and career. … In summary, I ask for leniency and a favorable decision on my behalf to retain my career based on the length of my dedicated service, length of time (13 years) between alcohol incidents, no prior treatments, the mitigating circumstances, my pledge to abstain from alcohol and rehabilitate through treatment and support group activities.

On May 31, 2011, the applicant completed Level 2 treatment, a two-week outpatient program at a facility in Virginia Beach.

On June 7, 2011, the CO again notified the applicant in writing that he was being processed for separation for unsuitability in accordance with Article 12.B.16.b.5. of the Personnel

Manual[7] then in effect because of the applicant's two alcohol incidents.[8] Regarding the second alcohol incident, the CO wrote that on March 25, 2011, the applicant had been "found intoxicated in a residential area and then publicly urinated on the sidewalk" and repeated information in the Page 7 documenting the alcohol incident. The CO advised the applicant of his right to submit a statement; to object to the discharge; to consult counsel; and to present his case before an ASB with representation by counsel. The applicant acknowledged this notification by signature the same day.

Also on June 7, 2011, the CO submitted a memorandum requesting to retain the applicant on active duty.[9] He praised the applicant's performance of duty and noted that the applicant's DUI in 1998 had occurred during training when the applicant was far from home and that the applicant's second alcohol incident had occurred 13 years later. Regarding the incident on March 25, 2012, the CO stated that medical personnel had concluded that the applicant's fatigue had also been a significant factor in the applicant's behavior and that video and witnesses' statements had shown "no evidence of significant drinking." The CO stated that the applicant had been separated from his family for over 9 months and had "tirelessly work[ed] exhausting hours" without complaining. The CO noted the treatment and positive steps the applicant had taken since March 25th, the lack of prior alcohol treatment, his prior achievements, and the value of his skills to the Coast Guard.

On June 10, 2011, PSC advised the CO that his request to retain the applicant had been reviewed and denied and so an ASB would be convened. On June 11, 2011, the Deputy Commander sent an email informing three officers newly assigned to PATFORSWA that they would be serving on the applicant's ASB in three or four weeks and so they should not discuss the matter with the applicant so they could "be unbiased in your review and decision." Because the ASB was held in Portsmouth at the applicant's request, these officers did not serve on the ASB.

On June 13, 2011, there was a change of command at PATFORSWA, and so the applicant got a new CO.

On June 27, 2011, the applicant sent an email to a lieutenant saying he was surprised that the lieutenant had heard about his troubles and asking how the lieutenant had heard about it. He noted that he had asked for the ASB to be convened in Portsmouth "so that I can find unbiased board members who have never heard of it" and better access to his civilian attorney. In response, the lieutenant told him that the incident on March 25th was "common knowledge among the crew" and that the applicant "would not get a fair and unbiased look at your case here." Another junior officer advised the applicant in an email that a redacted copies of investigations are sometimes distributed for educational purposes and that even with names removed, "it's likely folks know who the investigation is about." On July 14, 2011, an enlisted member

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[7] PERSMAN Article 12.B.16.b.5. authorizes the discharge for unsuitability of members due to "Alcohol Abuse. See Article 20.B.2. for guidelines on alcohol abuse cases."

[8] PERSMAN Article 20.B.2.h.2. states that "[e]nlisted members involved in a second alcohol incident will normally be processed for separation."

[9] PERSMAN Article 20.B.2.h.2.a. authorizes COs to request to retain enlisted members on active duty following a third alcohol incident in exceptional circumstances.

sent an email to the applicant saying that he had overheard one of the assigned ASB members saying "everybody is guilty no matter what. He might have been joking but, given the fact that he might actually be on your [ASB], is that the kind of comment you want in the head of someone who could potentially decide your fate?"

Performance Evaluation

On June 20, 2011, the applicant received a disciplinary performance evaluation[10] covering the period October 1, 2010, through March 25, 2011. He originally received very low marks of 2[11] for the performance categories "Health and Well-Being" and "Judgment"; low marks of 3 for "Adaptability" and "Setting an Example"; numerous high marks of 5 and 6 in the other categories; an unsatisfactory conduct mark; and a mark of "not recommended for advancement." In accordance with policy, the lowest marks are supported by written comments, which note that he had "been verbally counseled on several different occasions within this marking period regarding his excessive drinking habits" and that he had a right to appeal the marks within 15 days. Based on the recommendation against advancement, his name was removed from the list of those members awaiting appointment as a warrant officer. The applicant appealed the marks on July 3, 2011, but his written appeal is not in the record.

On July 27, 2011, the new CO endorsed the applicant's appeal of his performance marks and forwarded the appeal package to the Area Command for review. He noted that the applicant had refused three requests for input for the performance evaluation despite assurances that it would not be based on hearsay and that he would receive fair marks. The applicant's prior rating chain had properly provided input for the evaluation to his incoming rating chain. When counseled about the marks, the applicant was asked to provide information to support the higher marks he wanted, but he did not do so until he submitted his appeal. The new CO responded to the applicant's appeal by raising his mark for "Health and Well-Being" from 2 to 3 and his mark for "Initiative" from 5 to 6, but he did not agree to the applicant's other requests. In denying the applicant's request for higher marks for "Developing Subordinates," "Integrity," "Respecting Others," "Judgment," and several other categories, the CO noted that the applicant's rating chain had reported that the applicant had (a) admitted to being counseled twice before during the reporting period about his excessive drinking—once after being found "passed out" outside his villa by a Bahraini citizen; (b) "failed to properly mentor and develop a subordinate who had a previous alcohol incident dated 25 July 2010"; (c) "irresponsibly drank excessive amounts of alcohol" with his subordinates; (d) "violated established NAVCENT Liberty Policy," which he had "recklessly ignored" with subordinates; and (e) publicly exposed his genitalia and urinated in front of his prior CO, and shown other professional weaknesses in his managerial and supervisory duties as an [redacted]

[10] PERSMAN Article 10.B.5.b.8. states, "[a] disciplinary enlisted employee review is required for a member who has an alcohol incident."

[11] Chief petty officers are evaluated in 25 performance categories on a scale from 1 (worst) to 7 (best). Their rating officials also assign a conduct mark (satisfactory or unsatisfactory) and a recommendation for or against advancement. Marks of 1, 2, and 7, unsatisfactory conduct marks, and recommendations against advancement must be supported by written comments. A member may appeal the numerical marks but not the advancement recommendation.

The Area Commander, a Vice Admiral, subsequently denied the applicant's appeal of his evaluation on August 15, 2011. He stated that, upon review, the assigned marks, as amended by the new CO, would remain unchanged.

Administrative Separation Board[12]

In July 2011, the applicant was temporarily transferred from Bahrain to Portsmouth, Virginia, so that the ASB could be held there. On July 28, 2011, the applicant's CO formally convened the ASB in Portsmouth as the applicant had requested to facilitate the participation of his civilian attorney and get unbiased ASB members. The CO appointed three new officers (not those named in the June 11, 2011, email) to serve on the ASB to consider whether the applicant should be retained or discharged. The CO directed them to the applicable policy manuals and instructed them to "avoid discussing the case or reviewing evidence relating to this case prior to the hearing except as required by your duties." A copy of this memorandum was provided to the applicant.

On August 12, 2011, the ASB convened in Portsmouth to hear and deliberate the applicant's case. The applicant elected not to challenge the membership of the ASB or any of the evidence submitted by the Recorder, including extracts of the report of the PIO. The applicant was represented by his attorney. The Recorder called only the applicant's prior CO as a witness to the second alcohol incident. The applicant testified on his own behalf, as did his wife, and a commander (CDR) whose written statement is summarized below. The applicant also submitted documentation of his achievements and the following statements from fellow members:

- The prior CO of PATFORSWA, who had witnessed the applicant's conduct on March 25, 2011, submitted a memorandum to the ASB recommending the applicant's retention on active duty. He highly praised the applicant's performance of duty, value to the Coast Guard, and committed and sincere response to the alcohol incident.
- A Command Drug and Alcohol Program Advisor (DAPA) recommended that the applicant be retained on active duty. He stated that the applicant's reaction to the March 25th incident had been "very proactive" and "extremely sincere about abstaining from alcohol." He noted that the applicant had completed Level 2 treatment on May 31, 2011, and was participating enthusiastically in his support group. The DAPA stated that because the applicant had never before been treated, his second alcohol incident "cannot be considered a treatment failure." Therefore, he strongly recommended that the applicant be given "the opportunity to rehabilitate through treatment prior to being subject to separation."
- A commander (CDR) who was the applicant's supervisor on a cutter from 2001 to 2003, who had served with him in Bahrain, and who had represented the applicant at mast recommended the applicant's retention on active duty. He stated that the applicant's duty in Bahrain had been arduous, difficult, and dangerous, which caused some sailors to escape

[12] PERSMAN Article 12.B.16.i. states, "A member with more than eight years' military service under consideration for discharge for unsuitability [which includes alcohol abuse] is entitled to an administrative discharge board" in accordance with Article 12.B.31.

through alcohol. He noted that the applicant's alcohol incident had occurred when he was tired following 15 days of rest and recuperation leave in the United States. The CDR stated that the applicant had taken full responsibility for his conduct at mast and had admitted his problem with alcohol and was actively seeking help and attending support meetings. He also stated that the applicant's loss of his appointment to warrant officer was a "very severe punishment."

- The unit chaplain stated that the applicant had a good, moral character; was always willing to assist his shipmates; and frequently worked overtime because of his intense workload. He stated that the applicant had a "strong self-discipline and determination to control his alcohol intake" and should be retained in the Coast Guard.

- A prior civilian supervisor recommended that the applicant be retained and described him as a "highly respected member of the [redacted] community" the results of whose efforts had been prodigious. He stated that the applicant's misconduct had been atypical and that "the loss of this member will be a detriment to the Coast Guard's needs."

- A Chief Warrant Officer (CWO) stated that he witnessed the applicant's arrival at a barbeque sometime after 8:00 p.m. on the night of March 24, 2011. The applicant told him he had returned from his trip just a few hours previously. The applicant was drinking Miller Lite and was not drinking excessively or being belligerent. When the barbeque ended, they went to a sports bar where again the applicant did not drink excessively. The CWO left the bar before the applicant. The CWO stated that he does not know why the applicant had trouble getting home but noted that he might have been exhausted due to the time zone changes. The CWO recommended that the applicant be retained because he had been doing an outstanding job.

- A master chief petty officer (MCPO) who was the Command Master Chief for the unit stated that the applicant was a top notch [redacted] with exceptional knowledge, an eye for detail, and a strong devotion to the Coast Guard and his shipmates. The MCPO recommended that the applicant be retained as one mistake should not end his career.

- Another master chief petty officer who was the Assistant Engineer Officer (AEO) stated that he had often had contact with the applicant, who was dedicated, conscientious, highly skilled, and did an exceptional job.

- A chief operations specialist (OSC) who was the applicant's roommate in Bahrain stated that he was at the barbeque on March 24, 2011, until about 1:00 a.m. that night, and he estimated that the applicant drank 4 to 5 beers. The OSC stated that before that barbeque, the applicant had been avoiding social events where alcohol was served since January 2011, and he had not seen the applicant drink alcohol since then. In addition, the applicant had abstained from alcohol after the night of the barbeque. The OSC stated that the applicant was an excellent roommate and officemate who would often work late and on weekends and had done an outstanding job.

- A petty officer stated that the applicant was an outstanding leader and mentor while he was stationed overseas. The applicant had relieved the petty officer as the Officer in Charge of the camp for 35 days and had fixed many problems, such as broken computers,

non-connectivity, and defunct vehicle maintenance tracking, during that period. He stated that the applicant was far too valuable to the Coast Guard to be discharged.

After reviewing all the evidence, including extracts of the PIO's report, and testimony, the ASB recommended that the applicant be retained on active duty. The ASB found that the applicant had incurred two alcohol incidents but based its recommendation on the applicant's commitment to sobriety, his "high degree of technical training in a specialized field," and his potential future usefulness to the Coast Guard. In case the applicant was not retained, the ASB recommended that he receive an honorable discharge.

ASB Endorsement and Decision

On September 29, 2011, the applicant's [redacted]e report of the ASB but did not concur, stating that he was "thoroughly convinced that the [the applicant's] overall performance, training and experience does not warrant retention." He noted that the applicant had "two other documented events" involving alcohol in his PDR as well as the two alcohol incidents. In addition, the CO claimed,

> During numerous outbriefs that departing members had with the … Command Master Chief and Deputy Commander, … personnel repeatedly and specifically mentioned their unsatisfactory experiences regarding [the applicant's] lack of leadership and the poor example he set as a Chief Petty Officer. Two individuals with [the applicant's] division reported they had decided to leave the Coast Guard becau[redacted]f [his] poor leadership. Several other enlisted members within [his] department reported … not fully enjoying their … tour because of [his] lack of leadership, professionalism, and proper behavior. … [The applicant] has not demonstrated the ability to drink responsibly, even after the numerous documented counseling sessions that have taken pl[redacted]throughout his career. … Specifically, here at PATFORSWA, [the applicant] was counseled twice previously by his department head about his excessive drinking that led to inappropriate behavior. One example details [the applicant] being found 'passed out' in the garden of his villa by a Bahraini citizen. [The applicant] then again displayed poor judgment when he decided to drink excessively with subordinates, violate curfew, publicly expose his genitalia, and urinate in front of his Commanding Officer. Despite multiple close calls with alcohol, [the applicant] still decided to excessively consume alcohol, jeopardizing his career and his personal safety. Even after all of these previous occurrences, [the applicant] still made the extremely poor decision to go out and drink excessively after taking several Tylenol PM tablets, and then made excuses for the actions that led to his second alcohol offense, but a decision was made to not bring him to mast because he was being administratively discharged. … I have no faith, whatsoever, in [the applicant's] pledge to voluntarily abstain from consuming alcohol for the remainder of his Coast Guard career. … While [he] does possess a high degree of technical training in a specialized field, he is also relied upon as a Chief Petty Officer for his leadership, judgment, and professional behavior, all of which he has repeatedly failed to demonstrate. … I cannot concur with allowing [his] technical training

and experience to outweigh his repeated leadership, judgment, and professional behavior failings.

On October 5, 2011, the applicant's attorney inquired about the status of the ASB package and requested a copy of the CO's endorsement memorandum. A Coast Guard staff attorney asked him to "point to an authority that entitles you to the endorsement." In response on October 11, 2011, the applicant's attorney noted that the applicant could get it under a FOIA/ Privacy Act request and that a courtesy copy would be appropriate. He also stated that he was concerned about the CO introducing "a whole new case and slide it in as an endorsement, with the idea being that the respondent won't get a chance to rebut it in the same way as at a hearing." On October 28, 2011, the attorney submitted a FOIA/Privacy Act request for all documentation relating to the ASB process, particularly the CO's endorsement. Following consultation, the Coast Guard attorney sent the applicant the C[redacted] the applicant withdrew his formal request.

On November 10, 2011, the applicant submitted a memorandum objecting to the CO's endorsement. He argued that "[i]n keeping with the spirit" of the ASB Manual, particularly paragraph 7.E.3., the CO's endorsement should have been based only on the information in the ASB's report, but instead the CO added new allegations and inaccurate information in his endorsement. The applicant also argued that because he had spent less than 8% of his tour with the CO who wrote the endorsement, the CO had an insufficient amount of time to observe the applicant's performance and provide an objective opinion. The applicant noted that many officers who had worked with him for a much longer period during the tour of duty had submitted statements re[redacted]mending his retention. The applicant argued that the CO should not have used information from the investigation of his misconduct in his endorsement because he was never charged, had no chance to rebut it, and he was not told that the investigation would be provided to the ASB until just a few days before the board convened. The applicant also objected to the CO's characterization of the events involving alc[redacted]but not amounting to alcohol incidents as egregious; to the CO's claim that the applicant's performance and leadership had been lacking; and to the CO's comment that the applicant should have been taken to mast but was not because he was being processed for discharge. In addition, he disputed the CO's claim that he had been counseled about his drinking twice before in Bahrain or that two subordinates had decided to leave the Coast Guard because of him and objected to it as new information that was not in the report of the ASB. The applicant admitted to having failed in his leadership when he was abusing alcohol in Bahrain but noted that he had volunteered for a level of treatment higher than what was required of him and had continued meeting the terms of his after care plan far past the required 90-day period. This objection was forwarded to the Separation Authority at PSC with the ASB package for review.

On January 23, 2012, the Separation Authority approved the report of the ASB "with the exception of the recommendation to retain [the applicant]" and directed that the applicant receive an honorable discharge. In response, the applicant filed suit for an injunction to stop his discharge, but the court denied his motion because he had not exhausted his administrative remedy through the BCMR.

On February 18, 2012, the applicant filed for an injunction to stop his discharge. At a hearing on February 23, 2012, a federal district court judge expressed great concern about the content of the CO's endorsement to the ASB report because it contained "collateral matters" about leadership and the applicant's impact on subordinates besides whether the applicant had incurred two alcohol incidents. Although the court stated that the apparent errors by the Coast Guard were "outrageous," the court did not issue the injunction because the applicant had not exhausted his administrative remedy through the BCMR.

On March 1, 2012, the applicant was honorably discharged for "alcohol rehabilitation failure" with $33,400.08 in half separation pay and an RE-4 reentry code (ineligible to reenlist). He had served 14 years, 1 month on active duty.

VIEWS OF THE [redacted]

On January 8, 2014, the Judge Advocate General (JAG) submitted an advisory opinion in which he recommended that the Board deny relief in this case. The JAG adopted the findings and analysis in a memorandum on the case prepared by PSC.

Regarding the applicant's claims that the events of March 11, 2011, did not constitute an alcohol incident; that by his own calculations he was not legally drunk; that the Coast Guard failed in its duty to measure his blood alcohol content, PSC stated that the Coast Guard had no duty to measure the applicant's blood alcohol content and that whether the applicant was drunk was irrelevant because the standard for an alcohol incident is that "some alcohol must be consumed," not [redacted]the member must be drunk. PSC also noted that the ASB found that the applicant had indeed incurred a second alcohol incident on March 11, 2011.

PSC stated that by policy the applicant's CO was required to initiate separation processing following the applicant's second alcohol [redacted]ent but was allowed to request a waiver/ retention for the applicant. The CO did so, but his request was denied in accordance with policy. PSC stated that although the applicant complained that the Deputy Commander convened an ASB by email on June 11, 2011, and did not properly notify him, the Deputy Commander did not actually convene an ASB and was merely advising the officers that they would be the ASB members because they were new to the command and would be unbiased. PSC alleged that when the new CO issued the memorandum to convene the ASB in Portsmouth on July 28, 2011, "all ministerial duties associated with convening an administrative board and notifying the applicant about that board were followed."

Regarding the applicant's complaint about his performance evaluation, PSC pointed out that it was a disciplinary evaluation covering only a 6-month period and so the marks reflected his performance and conduct during only those 6 months, which included the alcohol incident on March 25, 2011, and not his performance and achievements during the rest of his career.

Regarding the applicant's complaint about being assigned to menial duties while the ASB was pending, PSC stated that this allegation is not proven but, assuming it is true, the reassignment would be well within the authority of the CO under Coast Guard Regulations, COMDTINST M5000.3B. Likewise, PSC stated that distributing a redacted copy of the PIO's report as a

training tool is also within the authority of the CO and that, assuming the allegation is true, it did not prejudice the ASB because the members of the ASB were not from that command. Moreover, PSC noted, if the applicant thought that the ASB members were prejudiced because of the distribution of the redacted report in Bahrain or by undue command influence, he could have challenged the membership of the ASB but elected not to do so.

Regarding the allegation that the PIO's report was "closed" and so should not have been presented to the ASB, PSC stated that the investigation was "closed" because the PIO's work was completed and closing an investigation is a prerequisite to forwarding the report to the CO so that he can take action on it. PSC stated that the PIO's closing of the investigation did not mean that the CO could not use it to determine whether the applicant should be disciplined, issued an alcohol incident, or processed for separation.

Regarding the allegation that the PIO's report was "dismissed," PSC stated that the Deputy Commander dismissed only the criminal charges against the applicant, not the PIO's report, and only because the applicant was being processed for discharge. Regarding the applicant's complaint that he never had a chance to defend himself against the PIO's report because he was not taken to mast, PSC pointed out that the applicant was allowed to make a statement to the PIO and was entitled to challenge the PIO's report and to present, examine, and cross-examine witnesses during the ASB itself. Regarding the applicant's complaint that the PIO's report should not have been submitted to the ASB because it was not a part of his record and it was provided to the ASB members too early, before the hearing began, PSC again noted that the applicant did not challenge the Recorder's submission of the report during the ASB as he could have and did not challenge the membership of the ASB if he thought they might be prejudiced. PSC also noted that in the new CO's memorandum convening the ASB, the board members were directed not to consider the evidence prior to the hearing.

Regarding the new CO's endorsement, PSC stated that although Coast Guard policy did not require the CO to cc the applicant a copy of his endorsement, the command did provide him a copy of it after he submitted a formal FOIA/Privacy Act request. In addition, the command exercised its discretion to include a copy of the applicant's objection to the endorsement in the ASB package that was forwarded to PSC for review by the Separation Authority. Regarding the applicant's allegation that the CO had included information in his endorsement and based his opinion about the applicant's leadership in part on verbal discussions with members of the command that were not in the record before the ASB, PSC stated that Article 7.E. of the ADSEP Manual puts no constraints on a CO's endorsement of an ASB and so the CO's endorsement did not violate Coast Guard policy. PSC also argued that the endorsement did not violate the applicant's constitutional right to due process because the applicant was allowed to respond to the endorsement in detail in writing and his response was reviewed by the Separation Authority. In any case, PSC alleged, "the record is replete with multiple documented examples" of the applicant setting a poor example and failing to demonstrate good leadership. Therefore, PSC argued, the new CO's assertion that the applicant was a poor leader are "so amply supported by other documented evidence in the record" that his comments about unattributed statements made during departing members' outbriefs "are de minimus and are harmless error, if error at all."

Statement of the Separation Authority

Regarding the applicant's claim that the Separation Authority erroneously failed to explain why he did not approve the ASB's recommendation for retention, PSC admitted that the Separation Authority should have explained why he disapproved the ASB's recommendation for retention. PSC argued, however, that the lack of a written explanation did not materially harm the applicant, and there was ample evidence in the record to support the decision.

PSC also submitted a sworn declaration of the Separation Authority, dated January 7, 2014, and explaining his decision to discharge the applicant. He stated that he values the opinion of an ASB in providing an assessment of a member's sincerity and potential but decided that the applicant's sincerity and potential, as reported by the ASB, "did not override the [applicant's] past performance and struggles with leadershi[redacted] He noted that both of the documented alcohol incidents were very serious; that the applicant had been counseled about alcohol abuse between the two alcohol incidents; and that his review of the applicant's "entire military record led me to have great concern for his ability to be an effective leader in the future who will abide by established laws, policies, and regulations." The Separation Authority also explained at length why he considered the alcohol incident in Bahrain to be so serious and concluded that "separating [the applicant] was the right decision and in the best interests of the U.S. Coast Guard."

PSC's Conclusions

PSC [redacted]d that under Coast Guard policy, an ASB is convened to consider matters both in favor of and adverse to the member with regards to the decision to retain or separate the member from active duty. The applicant was represented by a civilian attorney, and they knew that they had the right to challenge the members of the ASB, to ask them whether they had already reviewed the PIO's report and formed an opinio[redacted]d to object to the inclusion of the PIO's report in the record, but they chose not to do so.

Regarding the CO's endorsement, PSC stated that it did *not* "cross inappropriate boundaries" and that the CO "commented on matters well within the scope of the matters raised at the applicant's hearing. PSC stated that the CO's assertions "were amply supported by multiple documents already contained in the record and matters that were raised during the applicant's hearing" and that if the CO addressed matters not addressed in detail by the ASB, the applicant was given the opportunity to review the endorsement and submit a written objection to the Separation Authority.

PSC alleged that the applicant "was given every measure of due process afforded to any Coast Guard member with eight or more years of service who is considered for administrative separation." PSC alleged that the Coast Guard followed both the spirit of the laws and Coast Guard policy related to the applicant's separation and that no relief is warranted given the applicant's alcohol incidents.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 8, 2014, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to submit a response within 30 days. The applicant requested and was granted extensions of the time to respond and submitted a response on April 21, 2014.

The applicant claimed that the Coast Guard advisory opinion made new allegations and injected new evidence that the applicant has not previously had a chance to rebut. He claimed that only evidence the Board should review is the Page 7s documenting the applicant's first and second alcohol incidents, his PDR, the ASB's report, the CO's endorsement, the Separation Authority's decision, and the court transcript. The applicant alleged that the sole basis for his discharge was his second alcohol incident and that he received no notice that anything else, such as substandard performance or leadership, wou[redacted] the ASB or the Separation Authority.

The applicant repeated many of his allegations. He stated that his ASB was a "fair and impartial hearing" and the Board members recommended retention. However, the CO's endorsement "included allegations of misconduct and substandard performance of duty which Applicant had been provided no notice and opportunity to address" because they had not been submitted to the ASB. The applicant argued that the CO was limited to addressing the findings of fact and opinions of the ASB, but instead he "injected bases for non-retention that were neither relevant to the basis for discharge for which Applicant was provided notice, presented to the ASB as evidence, nor considered by the ASB in its deliberations. He argued that the injection of new allegations in the[redacted]'s endorsement constituted a violation of due process, the governing regulation, and "basic fairness."

The applicant stated that the Separation Authority failed in his duty to explain his decision not to retain the applicant as the ASB had rec[redacted]mended. With no written explanation, the applicant argued, the decision to discharge him is unsupported in the record because the Separation Authority accepted all of the ASB's findings and opinions, the preponderance of which support retention. Therefore, the applicant argued, the Separation Authority's decision is unsupported in the record of the ASB and the Separation Authority's failure to provide a written explanation constituted an indisputable, material, prejudicial error warranting the full relief he has requested.

The applicant also argued the Separation Authority's decision to discharge the applicant must be based on the extraneous information the CO included in his endorsement because the Separation Authority approved the ASB's findings and opinions, which support retention. The Separation Authority's decision to discharge him, he argued, was thus caused by the Coast Guard's failure to follow its own regulations for the ASB, and because he was denied due process, his discharge must be considered illegal and unjust.

APPLICABLE LAW AND POLICY

Rule 303 of the Rules for Courts-Martial in the 2008 Manual for Courts-Martial United States states, "Upon receipt of information that a member of the command is accused or suspected of committing an offense or offenses triable by court-martial, the immediate commander shall make or cause to be made a preliminary inquiry into the charges or suspected offenses."

Article 1.B.3.a. of the Military Justice Manual[13] provides that when a member has been charged with violations of the UCMJ and the executive officer determines that nonjudicial punishment (NJP) under Article 15 of the UCMJ may be appropriate, the executive officer should designate a preliminary inquiry officer (PIO) to conduct a preliminary inquiry. Article 1.B.4. states that the duties of a PIO include completing a preliminary inquiry report, with a summary of events and supporting materials, as well as the PIO's own findings, opinions, and recommendations about whether the command should take disciplinary action by convening a mast or referring the charges for trial court-martial and/or take administrative actions, such as initiating administrative separation.

Title 10 U.S.C. § 1169, "Regular enlisted members: limitations on discharge," states that "[n]o regular enlisted member of an armed force may be discharged before his term of service expires, except--(1) as prescribed by the Secretary concerned; (2) by sentence of a general or special court martial; or (3) as otherwise provided by law."

Article 12.B.16.b.5. of the Personnel Manual (PERSMAN) in effect through September 28, 2011,[14] authorizes the discharge of members unsuitable for military service because of "Alcohol Abuse. See Article 20.B.2. for guidelines on alcohol abuse cases." Article 12.B.16.i. states, "A member with more than eight years' military service under consideration for discharge for unsuitability is entitled to a hearing before an administrative discharge board" in accordance with Article 12.B.31.

PERSMAN Article 20.B.2.h.2. states, "Enlisted members involved in a second alcohol incident will normally be processed for separation." Under Article 20.B.2.h.2.a., the member's CO may request to retain a member after a second alcohol incident in exceptional circumstances. Members must be discharged following a third alcohol incident. PERSMAN Art. 20.B.2.i.

PERSMAN Article 12.B.31.a. states that an ASB is "a fact-finding body appointed to render findings based on the facts obtained and recommend either retention in the Service or discharge. If recommending a discharge, the board also recommends a reason for discharge and the type of discharge certificate to be issued." Article 12.B.31.b. states that such boards will be

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[13] U.S. Coast Guard, COMDTINST M5810.1D, Military Justice Manual (August 2000). This manual was still in effect in April 2011 when the PIO completed his investigation. These rules remained the same, however, under COMDTINST M5810.1E, which was issued in May 2011.

[14] On September 29, 2011, the Coast Guard divided its voluminous Personnel Manual, COMDTINST M1000.6A (Change 42, April 2010), into several smaller manuals, including the Drug and Alcohol Abuse Program Manual, COMDTINST M1000.10, and the Military Separations Manual, COMDTINST M1000.4. The regulations in the Personnel Manual relevant to this case were not materially changed in the new manuals.

"composed and conducted in accordance with the Administrative Separation Board Manual, COMDTINST M1910.2 (series)."

Excerpts of the ASB Manual

The Administrative Separation Board Manual, COMDTINST M1910.2,[15] provides the procedures for ASBs. Chapter 1.A.1. states that an ASB "is a fact-finding body appointed to investigate a member's suitability for retention in the service, render findings based on the evidence obtained, and make specific recommendations for use by Coast Guard separation authorities. The determinations of an ASB are advisory only, not binding upon the Coast Guard." Chapter 1.B.1. states the following:

> Coast Guard discharge and retention decisions are driven by the needs of the Coast Guard overall, not by the needs of individual members or individual commands. Members do not have a right to remain on active duty in the Coast Guard, regardless of the length of their service or the hardship their separation might cause. Nevertheless, a member's military career often represents a considerable investment, both by the member and by the service. In addition, when [redacted] is discharged, the C[redacted] honorable conditions, or other than honorable – and occasionally other determinations surrounding that decision, can have a profound impact on the member's future. Sou[redacted] dictate that the decision to separate such a member be carefully considered, and that the member be provided an opportunity to be heard and to present and challenge evidence to be considered by the separation authority.

Chapter 1.C. states the following regarding an ASB's scope of inquiry:

1. An ASB documents the facts relating to the Respondent's conduct, competency, background, character and attitudes, so that the separation authority may properly determine whether the member should be retained or separated, the reason for separation, and the proper characterization of the member's service that should be reflected in any separation documents. In its deliberations regarding separation, the Board's foremost consideration is whether separation or retention is in the best interest of the Coast Guard. Available statements from superiors and peers, and available records bearing upon Respondent's suitability for retention, are among the types of evidence to be considered by the Board.

2. The Board shall inquire into, assemble evidence, and provide findings of fact, opinions, and recommendations regarding all matters relevant to the decisions before the separation authority; including:

   a. Whether the Respondent should be retained or separated from the Coast Guard;

[15] U.S. Coast Guard, COMDTINST M1910.2, Administrative Separation Board Manual (August 1999) (hereinafter ASB Manual).

b. The extent to which the evidence supports separation for specific reasons listed in Personnel Manual, COMDTINST M1000.6A, Chapter 12;
c. The proper characterization of the Respondent's service (i.e., Honorable, General under Honorable Conditions, or Other than Honorable) using the standards provided in Personnel Manual, COMDTINST M1000.6A, Article 12.
d. Any other issues specified in the convening order.

Under Chapters 1.E. and 5 of the ASB Manual, the member has many rights, including the right—

- to be informed of "the factual basis for separation processing,"
- to be present during the hearing and represented by counsel,
- to challenge the membership of the ASB [redacted],
- to present evidence and to "examine and to object to the consideration of physical and documentary evidence and written statements," and
- to testify, to present witnesses, to "object to the testimony of witnesses and to cross-examine witnesses."

ASB Manual Chapter 1.E.5. states, "Any of these rights may be voluntarily waived, and any error will generally be forfeited by failure to make timely objection or otherwise assert the right in a timely manner to the Senior Member prior to or during the hearing, and to the Convening Authority at other times."

ASB [redacted]ual Chapter 1.F.1. states, "The proceedings of the Board should be conducted substantially in accordance with the rules and principles prescribed in this Manual. Deviations from these requirements do not create any right to relief on the part of the Respondent, unless they substantially prejudice the rights listed above so as to adversely affect the decisions of the separation authority. Failure to follow the require[redacted]ts of this Manual may, however, result in return of the case to the Board for further proceedings and result in additional costs to the Coast Guard."

ASB Manual Chapter 3.C.4. states that it is the duty of the Recorder to investigate all sources of information and to assemble and present relevant evidence to the Board regarding the issues before it. Chapter 3.D.2. states that "[t]he Recorder shall not present arguments or evidence to the Board members regarding the separation issues before it except during the hearing or as otherwise authorized by this instruction. Any evidence provided to the Board shall also be made available to the Respondent." Chapter 6.A. notes that the Military Rules of Evidence do not apply.

ASB Manual Chapter 4.A. states, "The Senior Member shall also coordinate mutual disclosure by the Respondent and Recorder of information to be presented at the hearing, so as to avoid unnecessary surprise and delay once the hearing has commenced. Board members should not review or consider evidence regarding the matters before the Board prior to the hearing, except as strictly necessary in the performance of their assigned duties."

ASB Manual Chapter 5.E. states that the Respondent or the Recorder "may object to any matter or decision of the Board at any time during the hearing, based on procedural error, infringement on the rights of the Respondent, or another appropriate basis." Chapter 5.F.2. states, "If the Respondent is not satisfied with the Board's resolution of the matter, the Respondent shall submit a brief written statement of the objection for inclusion in the Record (see enclosure (9)), the action taken by the Board on the objection, and the harm or prejudice to the Respondent caused by the error. Failure to make a timely objection or to preserve a record of an alleged error in this manner generally constitutes forfeiture of the error in subsequent review."

ASB Manual Chapter 7.B. states that the ASB's report shall consist of a preliminary statement, a list of witnesses testifying, and the Board findings of fact, opin[redacted] dations. Chapter 7.C. states that the [redacted]nble the record of the proceeding, including the report and all exhibits.

ASB Manual Chapter 7.E. states that the Senior Member of the Board forwards the entire record of proceedings to the Convening Authority (normally the CO), who may return the investigation to the ASB for further proceedings and "shall review the report and provide a command endorsement," which "shall include, at a minimum, a statement of concurrence [redacted]disagreement with the findings, opinions, [redacted]l and a complete copy to the Separation Authority.

Military Separations Manua[redacted]

Article 1.B.22.d. of the new Military Separations Manual,[16] one of the successors to the Personnel Manual which went into effect on September 29, 2011, states the following regarding the Separation Authority—

> Except as appropriate articles in this manual otherwise specify, the Coast Guard Personnel Service Center is the discharge authority in all cases of administrative separations. Send the original and one copy of the administrative discharge board report to Commander (CG PSC-PSD-mr) through the chain of command for endorsement. When Commander (CG PSC) receives the record of administrative discharge proceedings, he or she will review the board record and approve or disapprove the board's findings of fact, opinions, and recommendations in whole or in part. Commander (CG PSC) may disapprove findings and opinions if they were made based on incomplete evidence, contrary to the evidence the board considered or to law or regulation, a misunderstanding or misapplication of written policy, or otherwise clearly in error. If Commander (CG PSC) disapproves the findings of fact, opinions, or recommendations; he or she may:
>
> (1) Amend, expand, or modify findings of fact and opinions or take final action other than that recommended without returning the record, if evidence of record supports that action and the final action states the specific reasons; or

[16] U.S. Coast Guard, COMDTINST M1000.4, Military Separations Manual (September 2011) (hereinafter Military Separations Manual).

> (2) Return the record to the board for further consideration with a statement of the specific reasons to disapprove the findings of fact, opinions, or recommendations.

Article 1.B.22.e. of the Military Separations Manual, titled "Options of Discharge Authority," Commander, PSC may take any one of these final actions:

> (1) Approve the board's findings of fact, opinions, and recommendations and direct their execution.
> (2) Approve the board's recommendation for discharge, but change its type either to one more favorable than recommended if the circumstances warrant it or to one less favorable than recommended based on a determination the type of discharge recommended does not fall within the guidelines of Article 1.B.2. of this Manual.
> (3) Approve the board's recommendation for discharge but change the basis for discharge when the record indicates such action would be appropriate, except Commander (CG PSC) will not designate misconduct if the board has recommended discharge for unsuitability.
> (4) Approve a discharge, but suspend its execution for a specified probationary period. (See Article 1.B.24. of this Manual.)
> (5) Disapprove the recommendation for discharge and retain the member in the Service.
> (6) Disapprove the recommendation for retention and direct discharge under honorable conditions with an honorable or general discharge certificate as warranted.
> (7) Disapprove the findings, opinions, and recommendations and refer the case to a new board based on a finding of legal prejudice to the substantial rights of the respondent.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely filed within three years of the applicant's discharge.[17]

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.[18]

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[17] 10 U.S.C. § 1552(b).

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

3. The applicant alleged that his discharge was erroneous and unjust for several reasons, the most significant of which is the allegation that he was denied due process during the review of his ASB proceedings. When considering allegations of error and injustice, the Board begins its analysis in every case by presuming that the disputed information in the applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.[19] Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."[20]

4. The applicant made numerous arguments and allegations that the Board finds to be meritless and/or not dispositive of the case and will therefore address them only briefly:

a. Standard and Scope of Review: The applicant argued that this Board should confine its review to the proceedings of the ASB, as if the BCMR were an appellate board of the ASB, and apply the standards provided for the Discharge Review Board at 33 C.F.R. part 51. The BCMR, however, is not an appellate board of the ASB and considers all cases *de novo*[21] and in accordance with 10 U.S.C § 1552 and the Board's own regulations at 33 C.F.R. part 52. As required in those laws, the Board considers all submissions of the applicant, the applicant's military records, and the Coast Guard's submissions, and decides, based upon the preponderance of the evidence, whether it is "necessary to correct an error or remove an injustice"[22] in the applicant's record, which may include voiding a discharge and reinstating a member on active duty with back pay and allowances as the applicant requested.[23]

b. Second Alcohol Incident: The Board finds that the applicant's conduct on March 25, 2011, clearly met the definition of an alcohol incident in Article 20.A.2.d.1. of the Personnel Manual (PERSMAN) then in effect. Although the applicant alleged that his conduct that morning was due more to fatigue than to alcohol, the Board finds this allegation to be not credible given the applicant's participation in a drinking game at a barbeque, drinking from a flask he kept in his pocket, presence in a bar in the wee hours, and energetic behavior and odor of alcohol the next morning as described in the PIO's report. The applicant was also quite vague about how many hours he had been in Bahrain when he attended the barbeque on March 24, 2011, and said nothing about how he had spent those hours or why he did not rest before, during, or after the barbeque instead of playing drinking games and going to a bar contrary to the travel regulations in effect. Although he alleged that he was not drunk when his CO found him, legal

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[19] 33 C.F.R. § 52.24(b).

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

[21] *Sawyer v. United States,* 930 F.2d 1577, 1581 (Fed. Cir. 1991) (finding that "the Claims Court unduly restricted the authority of the BCNR when it reasoned that after review boards have acted, the BCNR may only act in an appellate capacity").

[22] 10 U.S.C. § 1552(a).

[23] *Roth v. United States,* 378 F.3d 1371, 1381 (Fed. Cir. 2004) (finding that the Secretary, acting through the Board, "is obligated not only to properly determine the nature of any error or injustice, but also to take 'such corrective action as will appropriately and fully erase such error or compensate such injustice,'" quoting *Caddington v. United States,* 147 Ct. Cl. 629, 632 (1959)).

intoxication is not a requirement for an alcohol incident, and the Coast Guard had no duty to measure his blood alcohol content. Therefore, the Board finds that the applicant has not proven by a preponderance of the evidence that his CO erred or abused his discretion in finding that the applicant's consumption of alcohol was a significant or causative factor in the applicant's misconduct on the morning of March 25, 2011, which clearly violated the law and brought discredit on the Uniformed Services. The applicant has not proven by a preponderance of the evidence that his second alcohol incident should have been documented as only an alcohol-related situation.

c. Pre-ASB Due Process: The applicant complained that his command distributed a redacted copy of the PIO's report for educational purposes to the members at PATFORSWA and that everyone at PATFORSWA knew it was about him; that on June 11, 2011, his command notified three officers newly assigned to PATFORSWA that they would be serving as the applicant's ASB so that they could provide an unbiased review but did not notify the applicant; and that the Recorder provided a copy of the PIO's report to the ASB members sometime before the hearing and so they must have read it before the hearing even though they had been instructed not to. The applicant argued that these alleged actions biased the ASB members and denied him due process.

The record shows that the ASB was convened in Portsmouth, rather than Bahrain, at the applicant's request and that the applicant did not challenge or object to the membership of the ASB, which he presumably would have if he thought that the ASB members might have been prejudiced by any of the alleged errors and improprieties. The officers who served on the ASB were not those that had received the email on June 11, 2011, and were not part of the command in Bahrain. The applicant also did not challenge the submission of the PIO's report into evidence, which he could have if he felt its use was improper. Because the applicant chose not to challenge or object to the membership of the ASB or any of the evidence submitted by the Recorder, the Board finds that he has not proven by a preponderance of the evidence that anything that occurred prior to or during the hearing on August 12, 2011, prejudiced the proceedings or denied him due process under the ASB Manual.

d. PIO's Report as Evidence: The applicant argued that the PIO's report should not have been submitted as evidence for the ASB because it had been "closed and dismissed." This argument is erroneous and misleading. The PIO's report shows that the PIO "closed" his investigation only in the sense that he had finished it and would not continue investigating the matter unless the command asked him to. This comment, included as the last of the PIO's seven recommendations, did not negate the PIO's other recommendations or prevent the CO from using the report for disciplinary or administrative purposes. In addition, the PIO's report was never "dismissed." The Report of Offense and Disposition shows that the CO dismissed only the criminal charges against the applicant and only because he was being processed for separation. The dismissal of the criminal charges did not in any way invalidate the PIO's report, a separate proceeding which could properly be used for administrative and well as disciplinary purposes.[24] Moreover, the applicant did not challenge or object to the submission of the report into evidence during the ASB hearing, which he was entitled to do. Therefore, the Board

[24] U.S. Coast Guard, COMDTINST M5810.1D, Military Justice Manual, Art. 1.B.4 h. (2000).

finds that he has not proven by a preponderance of the evidence that the PIO's report was improperly submitted as evidence by the Recorder for the ASB to consider.

e. CO's Alleged Bias: The applicant alleged that his new CO, who convened the ASB and prepared the endorsement for the ASB report, was biased against him. The record does not contain any allegation or evidence of any impermissible basis for bias on the part of the new CO. The new CO raised some of the applicant's performance marks on appeal and convened the ASB in Portsmouth at the applicant's request. The CO's actions, to the extent they were discretionary, presumably resulted properly from his opinion of the applicant's performance and conduct.[25] The applicant has not proven by a preponderance of the evidence that his discharge resulted from any improper bias against him on the part of his new CO.

f. Performance Evaluation and Removal from Advancement List: The applicant asked the Board to remove the disciplinary performance evaluation from his record and retroactively advance him to pay grade E-8. The applicant received low marks for "Health and Well-Being," "Judgment," "Adaptability," and "Setting an Example," and some other marks were not as high as those on his previous evaluation; an unsatisfactory conduct mark; and a recommendation against advancement. He alleged that the excellent marks on most of his other evaluations, his many awards, and the statements from several officers attesting to his skills and supporting his retention prove that the disputed marks are erroneous and unjust. The evaluation, however, covers only the applicant's performance from October 1, 2010, through March 25, 2011, not the applicant's entire career, and it was required by PERSMAN Article 10.B.5.b.8. because he incurred his second alcohol incident. In light of the applicant's conduct during the reporting period, the Board finds that the disputed marks are amply supported in the record, and he has not proven by a preponderance of the evidence that the evaluation or his resulting removal from the advancement list are erroneous or unjust.

g. Disparate Treatment: The applicant alleged that he was subject to disparate treatment because others "involved" in his alcohol incident on March 25, 2011, were not separated and because other members of the Coast Guard and other military services have been retained after two incidents and shown repeated leniency in that their commands failed to document alcohol incidents despite conduct that met the definition of an alcohol incident. These claims are somewhat misleading: The PIO's report shows that no other member was intoxicated, violating travel regulations, revealing his genitalia, and/or urinating in public with the applicant on March 25, 2011; the BCMR has handled many more cases in which members have been discharged following two alcohol incidents than the six cases the applicant cited in which members were treated leniently by their COs;[26] and the applicant himself was treated leniently in both 1999 and 2005. A Page 7 in his record dated December 16, 1999, states that the applicant committed disorderly conduct while wearing a concealed weapon after drinking alcohol, and a Page 7 dated January 29, 2005, states that police were called to the applicant's house after he drank alcohol and argued with his wife. Either of these incidents could reasonably have been docu-

[25] 33 C.F.R. § 52.24(b); *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

[26] Searching the BCMR's online reading room for the term "alcohol rehabilitation failure"—the narrative reason for separation most commonly assigned in alcohol abuse cases—results in a list of 30 final decisions, and searching for the term "alcohol incident" results in a list of more than 140 final decisions.

mented as alcohol incidents, in accordance with the definition in PERSMAN Article 20.A.2.d.1., and resulted in discharge proceedings, but his COs showed leniency by not documenting them as alcohol incidents. Similarly, the applicant's supervisor in Bahrain reported to the PIO that he had counseled the applicant about his use of alcohol twice before the incident occurred on March 25, 2011, but that counseling was not documented on Page 7s even though in one instance a Bahraini citizen found the applicant "passed out" in his garden after drinking alcohol. Such conduct is inconsistent with the requirements of a chief petty officer—a rank entrusted with and expected to lead, supervise, set an example for, and mentor other enlisted members. The Board finds, therefore, that the applicant has not proven by a preponderance of the evidence that his discharge was an unjust result of disparate treatment.

h. Remoteness of 1st Alcohol Incident: The applicant alleged that the decision to discharge him was unjust because more than 12 years passed between his first alcohol incident on October 21, 1998, and his second on March 25, 2011, and he received many excellent performance evaluations and awards in the interim. The fact that more than 12 years passed between the two documented alcohol incidents does not persuade the Board that the decision to discharge him was unjust because, as noted in paragraph g., above, the applicant had been counseled about his alcohol use between the two alcohol incidents and encouraged to seek treatment. In fact, he had been trained as a Command Drug and Alcohol Representative and so knew the rules and knew very well that he risked discharge by being intemperate.

5. The most significant of the applicant's allegations is that he was denied due process when his CO included in his endorsement to the ASB report comments about his leadership and comments about what subordinate members transferring from the command had said about him. The applicant argued that he was denied due process because he received no notice that poor leadership was one of the grounds for his discharge and had no opportunity to rebut or cross-examine the CO about these claims.[27]

6. Under 10 U.S.C. § 1169, an enlisted member may be discharged "as prescribed by the Secretary concerned." The prescribed procedures for an ASB in 2011 and 2012 were those published in the ASB Manual, the Personnel Manual, and the Military Separations Manual that replaced part of the Personnel Manual on October 1, 2011. As the applicant argued, the Coast Guard was required to follow its own rules.[28] Those rules include, however, Chapter 6.A. of the ASB Manual, which states that the Military Rules of Evidence do not apply to the proceedings, and Chapter 1.F.1. of the ASB Manual, which states that "[t]he proceedings of the Board should be conducted substantially in accordance with the rules and principles prescribed in this Manual. Deviations from these requirements do not create any right to relief on the part of the Respond-

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[27] The applicant also alleged that either the CO or the members were untruthful about leaving because none of the members have left except for one who went to school. The claim is unproven but even assuming it is true that no member has left except one who went to school, it would not be dispositive because (a) members cannot leave the Service at will because they sign multi-year enlistment contracts and (b) the members could have changed their minds about leaving after being assigned to another unit.

[28] *Fort Stewart Schools v. Federal Labor Relations Auth*., 495 U.S. 641, 654 (1990) ("It is a familiar rule of administrative law that an agency must abide by it own regulation."); *see Drumheller v. Dep't of Army*, 49 F.3d 1566, 1573 (Fed. Cir. 1995) (C.J. Newman, dissenting) ("It is black letter law that an agency must comply with its employee regulations.").

ent, unless they substantially prejudice the rights listed above [in Chapter 1.E.] so as to adversely affect the decisions of the separation authority." Therefore, the Board must determine whether any deviation from the prescribed rules occurred that substantially prejudiced the rights of the applicant so as to adversely affect the decisions of the Separation Authority.

7. Under Chapter 1.E.1. of the ASB Manual, the applicant was entitled to notification of "the factual basis for separation processing." The applicant alleged that he was notified that he was being processed for discharge based on his two alcohol incidents, and this claim is supported in the record. The notification documents show that the applicant's two COs did process him for discharge based on his two alcohol incidents. The factual basis for his separation processing, however, does not limit the inquiry of the ASB and the reviewing officials in deciding whether to retain him. Under the ASB Manual, the ASB is a fact-finding body appointed to investigate not only the misconduct that triggered the ASB but the "member's suitability for retention in the service."[29] The scope of an ASB's inquiry is very broad, as it must "document[] the facts relating to the Respondent's conduct, competency, background, character and attitudes" and consider "whether separation or retention is in the best interest of the Coast Guard"[30] because "Coast Guard discharge and retention decisions are driven by the needs of the Coast Guard overall, not by the needs of individual members or individual commands."[31] The applicant and his attorney clearly understood the broad scope of the ASB's inquiry because they presented a large amount of evidence about the applicant's skills and performance unrelated to the applicant's alcohol abuse. Therefore, the Board finds that the applicant received accurate notification of the "factual basis for separation processing" as required by Chapter 1.E.1. of the ASB Manual and clearly understood the very broad scope of the inquiry into his conduct and performance, including his leadership, that would inform the final decision to retain or discharge him. In this regard, the Coast Guard did not deviate from the rules, and the applicant was not denied due process.

8. The applicant alleged that when endorsing the ASB report before forwarding the record of proceedings to PSC for final action, his CO was limited to reviewing only the findings of fact, opinions, and recommendations in the ASB's report. Therefore, he argued, by mentioning matters in his endorsement that were included in the record of proceedings but not in the ASB report, the CO violated his due process rights. The Board strongly disagrees. Chapter 7.E. of the ASB Manual clearly describes the minimum that the CO must do when endorsing an ASB report, not the maximum. The CO must review the ASB report and his endorsement must "include, at a minimum, a statement of concurrence or disagreement with the findings, opinions, and recommendations of the Board." Nothing in the rule prohibits the CO's endorsement from discussing evidence in the record of proceedings that the ASB did not mention in its report. Therefore, the Board finds that the CO did not deviate from the rules when discussing matters in the record of proceeding, such as information from the PIO's report and the various Page 7s in the applicant's record, that the ASB members did not mention in their findings of fact, opinions, or recommendations.

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[29] ASB Manual, Chap. 1.A.1.

[30] *Id.* at Chap. 1.C.

[31] *Id.* at Chap. 1.B.1.

9. The applicant alleged that the CO's discussion in his endorsement of derogatory information about the applicant's leadership received during outbriefs with enlisted members when they were transferring to other units—which was not information presented during the ASB—deprived him of his right to review the evidence and cross-examine witnesses. As noted above, under Chapter 1.F.1. of the ASB Manual, "[d]eviations from these requirements do not create any right to relief on the part of the Respondent, unless they substantially prejudice the rights listed above [in Chapter 1.E.] so as to adversely affect the decisions of the separation authority." The list of rights in Chapter 1.E. includes the right to examine and to object to written statements and the right to object to testimony and to cross-examine witnesses who testify at the ASB.

10. The applicant alleged that his CO deviated from the regulations in advising the Separation Authority about the outbriefs in his endorsement. While a judge in court may not base her decision on evidence not in the record, the Military Rules of Evidence do not apply to ASB proceedings, and the CO is not the decision-maker and is supposed to express his own views about the applicant's suitability for retention in his endorsement after at least reviewing the ASB report. Because the CO's endorsement is always added after an ASB hearing, a Respondent is not normally allowed to respond to what the CO says in his endorsement even though the applicant has a right to examine and object to the written statements presented to the ASB and to cross-examine witnesses during the ASB. The CO's endorsement is, in essence, a written statement that the rules do not permit a Respondent to contest. Chapter 7.E. places no limits on the matters the CO may address, and the Separation Authority may disapprove an ASB's findings and opinions "if they were made based on incomplete evidence."[32] Obviously, the Separation Authority cannot know whether the ASB's findings and opinions were based on incomplete evidence unless the Separation Authority is made aware of and considers evidence that was not presented to the ASB. Therefore, the Board finds that the CO's endorsement did not deviate from the rules prescribed by the Secretary because the rules do not limit the matters the CO may address and expressly allow the Separation Authority—the final reviewing authority—to consider evidence the applicant has not had an opportunity to rebut or contest.

11. The applicant argued that the CO's endorsement violated his constitutional rights. Enlisted members do not have a property interest in their military employment that is protected under the Constitution because they may be discharged "as prescribed by the Secretary."[33] An enlisted member has a constitutionally protected liberty interest in his employment, however, if the type of discharge is stigmatizing,[34] which is true in this case. This liberty interest prevents the Coast Guard from discharging the applicant without due process, but such due process is "fulfilled by notice of the government act and an opportunity to respond before or after the act."[35] Notice of a proposed adverse action is adequate when it "apprises the employee of the

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[32] Military Separations Manual, Article 1.B.22.d.

[33] *Flowers v. United States,* 80 Fed. Cl. 201, 223 (2008) (citing *Canonica v. United States,* 41 Fed. Cl. 516, 524 (1998)).

[34] *Canonica,* 41 Fed. Cl. at 524.

[35] *Id.; see Board of Regents v. Roth*, 408 U.S. 564, 573 (1972); *Lee v. United States,* 32 Fed. Cl. 530, 546 n. 17 (1995).

nature of the charges 'in sufficient detail to allow the employee to make an informed reply.'"[36] The Board has already found in finding 7, above, that the applicant received proper notice of the reasons for his discharge processing—the two alcohol incidents—and of the broad scope of the matters that would be considered in deciding whether to retain him. With regard to the opportunity to be heard, the Supreme Court has described it as "an opportunity to refute the charge" or "to clear his name."[37] The applicant was provided opportunities to refute the charges against him in April 2011, when the PIO requested an interview or written statement; on May 10, 2011, when the applicant submitted a statement objecting to the proposed discharge; on August 12, 2011, during the ASB when he submitted substantial oral and written testimony about the quality of his performance; and on November 10, 2011, when he submitted a statement objecting to the content of the endorsement. The Board concludes that the applicant received the notification and opportunity to be heard he was entitled to under the Constitution before he was discharged.

12. The Separation Authority at PSC approved the ASB's findings and opinions but not the recommendation for retention. The Separation Authority was entitled to take final action "other than that recommended" by the ASB as long as "evidence of record support[ed] that action."[38] The Board finds that proceedings of the ASB contained ample evidence—including the PIO's report, the two alcohol incidents, and the other negative Page 7s in his record—to support the Separation Authority's decision to discharge the applicant. The Separation Authority failed, however, to state his "specific reasons" for discharging the applicant in his memorandum dated January 23, 2012, as required by the rules.[39] If this error—the lack of an explanation with "specific reasons" for the discharge in the Separation Authority's memorandum—could be considered to have caused the applicant's discharge, than it would be a material, prejudicial error requiring correction.[40] But the lack of an explanation by the Separation Authority cannot be considered causally connected to the decision to discharge the applicant since the Separation Authority was the final reviewing authority within the Department. Therefore, the lack of an explanation by the Separation Authority must be considered harmless error at least with respect to the Separation Authority's decision to discharge him.[41]

13. In a memorandum dated January 7, 2014, the Separation Authority has belatedly provided the applicant with the required specific reasons behind his decision not to follow the ASB's recommendation for retention. The Board accords no evidentiary weight to this memo-

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[36] *King v. Alston*, 75 F.3d 657, 661 (Fed. Cir. 1996) (quoting *Brook v. Corrado,* 999 F.2d 523, 526 (Fed. Cir. 1993), and *Brewer v. United States Postal Serv.,* 227 Ct. Cl. 276, 647 F.2d 1093, 1097 (1981), *cert. denied,* 454 U.S. 1144 (1982)).

[37] *Codd v. Velger*, 429 U.S. 624, 627 (1977).

[38] Military Separations Manual, Article 1.B.22.d.(1).

[39] *Id.*

[40] *Engels v. United States*, 678 F.2d 173, 175 (Ct. Cl. 1982) (finding that an error in an officer's military record is harmless unless the error is "causally linked with" the record the officer wants corrected); *Hary v. United States*, 618 F.2d 704, 707-09 (Ct. Cl. 1980) (finding that the plaintiff had to show that the proven error "substantially affected the decision to separate him" because "harmless error … will not warrant judicial relief.").

[41] *Engels*, 678 F.2d at 175; *Hary*, 618 F.2d at 707-09.

randum because it was signed almost two years after the Separation Authority's original decision to discharge the applicant.

14. The applicant alleged that his DD 214 erroneously and unjustly shows that his reason for discharge was "alcohol rehabilitation failure" even though he did not undergo rehabilitation treatment before his second alcohol incident and allegedly remained sober after his treatment in May 2011. The record shows that the applicant could have received rehabilitation treatment but did not because he did not self-refer and, when ordered to undergo screening, he was not diagnosed as alcohol abusive or dependent based on his answers to the screening questions. Nevertheless, the Board agrees with the applicant that because he did not undergo any sort of rehabilitation treatment, aside from several warnings not to abuse alcohol, before his second alcohol incident, the narrative reason for separation and corresponding separation code shown on his DD 214 are inaccurate. [redacted]

15. DD 214s are completed in accordance with COMDTINST M1900.4D and the Separation Program Designator (SPD) Handbook. The number of permissible separation codes and narrative reasons for separation authorized by the Department of Defense in the SPD Handbook is limited, and so there is not an authorized narrative reason for separation or separation code that perfectly matches the circumstances of every discharge. However, it is extremely important for DD 214s to be fair and reasonably accurate and not to unduly tarnish servicemembers' records without just cause because government and civilian employers often demand to see former servicemembers' DD 214s before hiring them. Although the record shows that the applicant abused alcohol on several occasions while on active duty, because he did not actually receive alcoh[redacted]ehabilitation treatment before his second alcohol incident, the Board finds that his DD 214 should be corrected to show that he was discharged for "miscellaneous/general reasons" with the JND separation code, as he requested. In this regard, the Board notes that there is no SPD code signifying a discharge due to alcohol abuse matching the circumstances of the applicant's discharge. Therefore, a discharge due [redacted]iscellaneous/general reasons" under Article 1.B.12. of the Military Separations Manual is the most accurate one available.

16. The applicant received an RE-4 reentry code on his DD 214, making him ineligible to reenlist. The RE-4 is the only reentry code authorized for those assigned "alcohol rehabilitation failure" as their narrative reason for separation. Pursuant to the SPD Handbook and ALCOAST 125/10, a member separated with the JND separation code for "miscellaneous/general reasons" may receive an RE-1, RE-3, or RE-4 reentry code on his DD 214, and the RE-3 is the default code. Although the applicant argued that his record of achievements warrants an RE-1 code, the Board finds that because of his record of alcohol abuse, he should not receive an RE-1 code. While a member discharged due to "alcohol rehabilitation failure" normally receives an RE-4 code, the applicant was not discharged as a result of receiving and failing rehabilitation treatment. Therefore, the Board finds that he should receive the default RE-3 code. An RE-3 code means that the veteran is eligible to reenlist except for the disqualifying problem that caused his discharge. With an RE-3 code, a veteran may reenlist if he persuades a recruiting authority to grant him a waiver because the disqualifying problem that caused his discharge no longer exists. The Board finds that this restriction is appropriate in light of the applicant's alcohol abuse.

17. The applicant made numerous allegations with respect to the actions and attitudes of members of his command, his COs, the ASB, and the Separation Authority. Those allegations not specifically addressed above are considered to be unsupported by substantial evidence and/or not dispositive of the case.[42]

18. Accordingly, the Board finds that the applicant's military record should be corrected to show that he was discharged pursuant to Article 1.B.12. of the Military Separations Manual, COMDTINST M1000.4, with separation code JND, narrative reason for separation "miscellaneous/general reasons," and the reentry code RE-3. These corrections should be made by issuing him a new DD 214 instead of issuing a DD 215 correction form. No other relief is warranted, however, because although the record before the ASB and this [redacted] applicant was a technically excellent [redacted] who received many excellent performance evaluations and awards, he not proven by a preponderance of the evidence that his discharge resulting from his second alcohol incident was erroneous or unjust.

(ORDER AND SIGNATURES ON NEXT PAGE)

[redacted]

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

ORDER

The application of former [redacted] USCG, for correction of his military record is granted in part as follows:

The Coast Guard shall correct his military record to show that he was discharged under COMDTINST M1000.4 Article 1.B.12. with the JND separation code, an RE-3 reentry code, and "miscellaneous/general reasons" as his narrative reason for separation. The Coast Guard shall issue him a new DD 214 reflecting these corrections.

No other relief is granted.

May 9, 2014

[redacted]