

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2014-232



FINAL DECISION

This is a proceeding 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 after receiving the applicant's completed application on December 2, 2014, and assigned it to staff member [REDACTED] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated February 5, 2016, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant alleged that she was improperly discharged on February 21, 2013, for "Alcohol Rehabilitation Failure" and asked that her discharge be vacated along with her separation code and RE-4 reentry code (ineligible to reenlist), that she be reinstated on active duty with the same rate/rank as she held at the time of her discharge, and that she be awarded all back pay and allowances.

The applicant alleged she was discharged without legal authority. She claimed she had more than eight years of military service and was entitled to and requested a hearing before an Administrative Separation Board (ASB) prior to discharge, but the Coast Guard improperly denied her that right before discharging her. The applicant also alleged that the Coast Guard's refusal to convene an ASB was prejudicial because significant factual disputes were never resolved regarding the alleged incidents that resulted in her discharge and that the Coast Guard ignored factual evidence favorable to her and failed to review medical records she submitted despite her request.

The applicant alleged that the Coast Guard's stated rationale for denying her a hearing before an ASB was a 2011 memorandum signed by the Chief of the Personnel Services Division of the Coast Guard Personnel Service Center and herself after she was retained on active duty following her first ASB, which convened in 2010. The memorandum stated that any further alcohol consumption by the applicant would result in her separation without any right to a hear-

ing before an ASB. The applicant complained that the memorandum cited no legal authority for denying her right to a hearing before an ASB. Because she was denied her right to a hearing, the applicant alleged, she was unable to challenge the allegations against her.

The applicant also challenged the veracity of the factual findings of the Coast Guard's investigation of the alcohol incidents that resulted in her discharge, listed below:

- The applicant consumed alcohol contrary to orders on August 25, 2012: The applicant argued that only one witness, a senior chief petty officer (MKCS), made this allegation. She contended that the MKCS did not claim that the applicant was drunk. Instead he said that the applicant was acting like she was drinking and that he smelled alcohol in her cup. He d [REDACTED] alcohol coming from her. Furthermore, she alleged, these statements were not corroborated by other witnesses, even though others were present at the time. The applicant also argued that this witness's statement was taken one month after the alleged incident and that this delay compromised the reliability of the statement.
- The applicant consumed alcohol contrary to orders on or about September 2, 2012: With regard to allegations that the applicant consumed alcohol and was visibly intoxicated at a barbeque on or around September 2, 2012, she alleged that none of the witnesses interviewed as part of the Coast Guard's investigation stated that they saw the applicant consuming alcohol or that they smelled it coming from her. Instead they claimed she appeared to be intoxicated or impaired. The applicant argued that the most that can be inferred from these statements is that the applicant was being "touchy-feely and obnoxious." With regard to statements that the applicant was having trouble walking, the applicant alleged she was "on her feet and able to walk" and was interacting with other guests at the party. With regard to one witness's statement that the applicant was slurring her words at the barbeque, the applicant contended that the Coast Guard never asked witnesses or reviewed her medical records to determine whether any prescribed medications could account for the applicant's reported behavior. Further, she contended, the Coast Guard never consulted any physicians or pharmacists regarding about the side effects and withdrawal symptoms of any medications the applicant may have been prescribed. On these grounds, the applicant argued there was insufficient evidence to co [REDACTED] [REDACTED] alcohol. The applicant also claimed these statements were taken several weeks after the alleged incident, thus compromising their reliability.

The applicant argued that a thorough investigation would have revealed that the applicant was taking an antidepressant (unnamed), and that the drug's side effects could include dizziness, slurred speech, increased energy, sleep deprivation, euphoria, etc.—all symptoms consistent with the behaviors alleged in the investigation. The applicant argued that a hearing before an ASB would ha [REDACTED] d her the opportunity to present medical evidence on these issues and to present witnesses who have observed the applicant experience these symptoms while sober. The applicant did not submit any medical records or evidence to document this claim.

Furthermore, the applicant argued, a hearing would have afforded her an opportunity to confront witnesses and to resolve contradictions in their statements. She argued that without (1) a blood test establishing that she had consumed alcohol; (2) an admission that she had consumed

alcohol; or (3) unimpeached witness testimony from a witness who saw the applicant ingest alcohol, her commanding officer had insufficient evidence to conclude that she consumed alcohol on those dates. On this basis, the applicant asked to be reinstated to active duty.

APPLICABLE REGULATIONS

Alcohol Abuse Regulations

Before September 2011, the Coast Guard's alcohol regulations appeared in Article 20 of the Personnel Manual (Change 42). In September 2011, the Personnel Manual was canceled and the regulations were transferred to a new Drug and Alcohol Abuse Program Manual (DAAPM). Because the [REDACTED] in effect during the applicant's documented "alcohol incidents" and her ASB, the regulations in the Personnel Manual appear below, although they did not substantively change when transferred to the DAAPM. Article 20.A.2.d. of the Personnel Manual defines an "alcohol incident" as follows:

Any 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 [UCMJ], 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.

Article 20.B.2.g. states the following regarding first alcohol incidents:

The first time a member is involved in an alcohol incident, except those described in Article 2.B.6. of this Manual, the commanding officer shall ensure this counseling is conducted; for enlisted members recorded on an Administrative Remarks, Form CG-3307, entry in the member's PDR; acknowledged by the member; and a copy sent to Commander ... This entry is in addition to that required by Article 20.B.2.e.

1. The member shall be counseled on Coast Guard policy on alcohol abuse contained in this Article.
2. ... Enlisted members will be advised an additional incident normally will result in discharge and, a statement shall be made that the member has been involved in his or her first alcohol [REDACTED] [REDACTED] a subsequent incident normally will result in separation action.

Article 20.B.2.h.2. states the following about second alcohol incidents:

Enlisted members involved in a second alcohol incident will normally be processed for separation in accordance within Article 12.B.16.

(1) Commanding officers retain the authority (1) request retention of those enlisted members who the [REDACTED] warrant such exception. ... The command recommendation for retention will be submitted as a cover letter to the required discharge package.

(2) Enlisted Members Entitled to an Administrative Discharge Board. For those enlisted members entitled to an Administrative Discharge Board (ADB), a discharge package including everything short of convening a Board, shall be forwarded to Commander (CGPC-epm). ...

Article 20.B.2.i. states the following about third alcohol incidents:

Enlisted members involved in a third alcohol incident shall be processed for separation from the Service under Article 12.B.16. Cases requiring Administrative Discharge Boards because ... the member has served eight or more years, will be processed under Articles 12.B.31. and 12.B.32.

Article 20.B.2.i. states the following about alcohol-dependent members:

Members diagnosed as alcohol-dependent must abstain from alcohol use to maintain sobriety. When commanding officers become aware that a recovering alcohol-dependent member, after successful completion of an aftercare program, is again consuming alcohol, he or she will refer the member for alcohol screening to include consultation with a medical officer. An aftercare plan will be reinstated in accordance with Health Promotion Manual, COMDTINST M6200.1 (series). This counseling, referral, aftercare program, and other pertinent information shall be recorded and acknowledged on a CG-3307 entry in the member's PDR for enlisted members or a letter for officers. The commanding officer, after reviewing the information pertinent to the case, will recommend separation, retention, or further treatment to Commander (CGPC-opm) or (CGPC-epm). A second episode (an occurrence of alcohol consumption without an associated incident) after completing any aftercare program by members who have been diagnosed as alcohol-dependent will result in separation from the Coast Guard.

Discharge Regulations

The regulations for discharge for alcohol abuse appear in Article 12.B.16. of the Personnel Manual prior September 2011 and in Article 1.B.15. of the Military Separations Manual, COMDTINST M1000.4, thereafter. Article 12.B.16. of the Personnel Manual authorized discharges for unsuitability due to alcohol abuse in accordance with Article 20.B.2. of the Personnel Manual. Article 20.B.16.d. states that a member is entitled to notification of the reason for discharge and an opportunity to submit a statement. The member is also entitled to counsel if her service warrants a general discharge. Article 20.B.16.i. states that “[a] member with more than eight years’ military service under consideration for discharge for unsuitability is entitled to an administrative discharge board. ... Article 12.B.31.” These same regulations appear in Article 1.B.15. of the Military Separations Manual in effect at the time of the applicant’s discharge in 2013.

Article 12.B.31. of the Personnel Manual and the ASB Manual provide regulations for ASBs. (Similar regulations appear in Articles 1.B.22. and 1.B.24. of the Military Separations Manual in effect in 2013.) Article 12.B.31.a. of the Personnel Manual 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.” Article 12.B.31.d states the following:

Except as appropriate articles in this manual otherwise specify, the Coast Guard Personnel Command is the discharge authority in all cases of administrative separations. ... When Commander (CGPC-c) gives 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 (CGPC-c) 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 (CGPC-c) 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
- (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 12.B.31.e. states that the Final Action Authority may take one of these 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 Article 12.B.2. guidelines.
- (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 (CGPC-c) 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 12.B.34.)
- (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. If the case is referred to a new board:
 - (a) No member of the new board shall have served on a previous board which considered the same matter; and
 - (b) The record of the earlier board's proceedings, minus the findings, opinions, recommendations, and unduly prejudicial matter may be furnished to the succeeding board.

Article 12.B.34.a. authorizes suspending the execution of an approved discharge "for a specified period if the circumstances in a case indicate a reasonable prospect for rehabilitation. During this period of suspension, the member will be afforded an opportunity to demonstrate proper behavior and efficient performance of assigned duties for an extended period under varying conditions." If the member meets the terms of the probation, the proposed discharge is not effected, but if the member fails to meet the terms of the probation, the discharge may be executed.

Article 12.B.34.b. states that the Final Action on ASB "will include instructions about the terms of the probation and specify the type of discharge to be executed if the member does not fulfill the terms of the probation."

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on April 9, 1996. On May 30, 1996, she acknowledged on a CG-3307 ("Page 7") having received a full explanation of the Coast Guard's drug and alcohol policies. While assigned to a cutter in 2003, the applicant received training on Substance Abuse, Drug and Alcohol Awareness Prevention training, and she signed a Page 7 acknowledging this training.

First Official Alcohol Incident

On February 16, 2005, the applicant was screened by a Coast Guard dispensary psychiatrist at the [REDACTED], as a result of self-referral for potential alcohol abuse following her arrest by local law enforcement for disorderly conduct and aggravated assault on a police officer earlier that morning. She was diagnosed as an alcohol abuser. The applicant was prescribed the following treatment program, to take effect immediately:

- 1) Abstain entirely from alcohol use for 60 days;
- 2) Attend two Alcoholics Anonymous (AA) Meetings in the next four weeks.
- 3) Meet with the psychiatrist again in two weeks;
- 4) Attend the B.A.S.I.C. class;
- 5) Recommend continued meetings with CAAC (Counseling and Assistance Center) counselor from Employee Assistance Program services for 12 weekly or biweekly visits.
- 6) Meet with Unit CDAR (Command Drug and Alcohol Representative) for 60 days at a time most convenient for both parties.

On March 15, 2005, the applicant's arrest was documented as her first "alcohol incident." She signed a Page 7 acknowledging her self-referral following her arrest. The Page 7 noted that "[a]ccording to the police report and by your own admission you had been consuming alcohol prior to this incident. The circumstances of the case articulated ... indicate that alcohol was a causative factor in your misconduct. Your use of alcohol in this case shows questionable judgment that will not be tolerated." Furthermore, the Page 7 stated, "You were counseled on Coast Guard policies concerning alcohol abuse, and scheduled for alcohol screening at [REDACTED] on February 23, 2005. You were directed to abstain from alcohol use pending the results of the screening. This is considered your first documented alcohol incident. Per Personnel Manual M1000.6 (series), Chapter 20, any further alcohol incidents may result in separation from the U.S. Coast Guard."

On July 5, 2005, the applicant signed a Page 7 acknowledging her successful completion of the initial phase of her alcohol treatment plan. The Page 7 also noted the applicant's enrollment in [REDACTED] County "Pre-Trial Intervention Program." The Page 7 also reinstated the applicant to Instructor Duty with the Practical Instruction Section; reminded her that "assignment to instructor duty requires the highest standards of conduct and self-discipline"; and warned her that failure to comply with her alcohol aftercare and Pre-Trial Intervention programs might result in disciplinary and administrative action in accordance with the Personnel Manual.

On September 26, 2005, the applicant signed a Page 7 acknowledging her successful completion of her three-month aftercare plan, as per Chapter 2, Health Promotion Manual, COMDTINST M6200.1. The Page 7 also warned the applicant that “future alcohol misuse or incidents may lead to separation.” The applicant also acknowledged that she had been advised of the contents of Chapter 20, Personnel Manual, COMDTINST 1000.6 (SERIES), concerning conduct expected of Coast Guard personnel.

Second Official Alcohol Incident

On August 7, 2009, the applicant received and signed a Page 7 acknowledging her recent arrest by local law enforcement authorities for driving under the influence (DUI) of alcohol on August 6, 2009. [REDACTED] “alcohol was determined to be a significant and/or causative factor” and that the applicant’s acts constituted “failure to obey and order or regulation” and “drunken disorderly conduct.” The Page 7 also notified the applicant, “You were in violation of Article 92 of the UCMJ when you disobeyed a direct order regarding alcohol consumption while operating a vehicle. You were also in violation of Article 134 of the UCMJ when you were arrested for driving under the influence of alcohol, bringing discredit upon the Coast Guard.” The applicant was further advised that this incident was her second “alcohol incident” and that she would be processed for an administrative separation.

On August 7, 2009, the applicant received and signed a second Page 7 acknowledging that due to her recent arrest by local authorities for driving under the influence of alcohol, that her access to classified information would be limited to law enforcement operations only, and that her collateral responsibilities as Assistant Command Security Officer at USCG Station Cape May had been rescinded. The Page 7 also ordered the applicant to attend alcohol screening and to follow the CDAR’s instructions “fully and entirely through to operation.” Further, the Page 7 warned the applicant, “Your failure to follow this order may result in further administrative and/or disciplinary action including potential discharge.”

On September 10, 2009, the applicant signed a Page 7 acknowledging that on August 21, 2009, she underwent alcohol screening, which determined she met the criteria for a diagnosis of Alcohol Dependent as per DSM IV and that she was recommended for outpatient [REDACTED] applicant to receive treatment beginning on September 9, 2009. Before beginning treatment, the Page 7 directed the applicant to adhere to a pre-treatment plan, consisting of—

- a) “Abstaining from consuming alcohol. Any further use of alcohol until you complete treatment and your support plan will lead to further disciplinary action.”
- b) Meeting with her CDAR once a week.
- c) Attending at least two support group meetings (e.g., Alcoholics Anonymous or other M [REDACTED] ved support group) each week.

The applicant also acknowledged that she had been advised of the contents of Chapter 20, Personnel Manual, COMDINST 1000.6 (SERIES), regarding member diagnosed as Alcohol Dependent, the expected conduct of Coast Guard personnel, and the continued care plans for those who have problems with alcohol abuse or dependency.

Administrative Separation Board (ASB)

On May 25, 2010, the applicant appeared before an ASB, which was tasked with determining whether the applicant was eligible for discharge due to a second alcohol incident and, if so, whether she should be retained on active duty pursuant to an exception to policy. The applicant asked to be retained on active duty, and the majority of the ASB recommended that the applicant be retained even though the ASB found that the applicant's two "alcohol incidents" constituted grounds for separation for unsuitability due to alcohol abuse. The ASB minority recommended that the applicant be discharged. The applicant's command concurred with the majority's recommendation to retain the applicant and forwarded the ASB's report and record to Headquarters for decision.

On February 16, 2011, CAPT K, the Chief of the Personnel Services Division of the Coast Guard Personnel Center (CG PSC), approved the ASB's findings and recommendation but noted that "the record supports a basis for separation due to unsuitability due to alcohol abuse, [which] has been established by the applicants two prior alcohol incidents." Although CAPT K approved the applicant's retention on active duty, he also set forth conditions for her retention. In addition, he concluded that were the applicant to be discharged for unsuitability, she would receive an Honorable Discharge and an RE-4 reenlistment code. CAPT K's conditions for the applicant's retention state the following:

[The applicant] must acknowledge her understanding of the following in an Administrative Remarks entry:

1. Multiple Administrative Remarks entries in March 2005 used forms of the term self-referral when documenting [the applicant's] first alcohol incident and subsequent screening. The circumstances of the screening, coming after an arrest for offenses for which alcohol was determined to be a significant and causative factor, do not qualify as a self-referral. This was properly considered an alcohol incident.

2. Having been diagnosed as alcohol-dependent, [the applicant] must [redacted] the consumption of alcohol for the rest of her Coast Guard career, as set forth in Service policy in Chapter 20.B.2.1 of the Personnel Manual, M1000.6A (PERSMAN) and Article 2.N.1.b. of the Coast Guard Health Promotion Manual, COMDTINST M6200.1A. This clarifies potential confusion from the Administrative Remarks entry dated 28 August 2009 that only stated that [she] had to abstain until she completed her treatment and support plan.

3 [redacted] to the fact that [the applicant] has incurred two alcohol incidents, has been diagnosed as alcohol-dependent, and successfully completed treatment and an aftercare program, the provisions of PERSMAN Article 20.b.2.1, regarding the reinstatement of an aftercare plan, are rendered inapplicable to [her]. Any occurrence of alcohol consumption, even without an associated third alcohol incident, will result in [her] being processed for separation, without entitlement to another Administrative Separation Board.

On February 17, 2011, the applicant and her CO signed a Page 7 containing the three numbered paragraphs above.

Investigation & Discharge

On July 1, 2012, the applicant was transferred to another Sector. On September 12, 2012, the applicant's command initiated an investigation into allegations that she had consumed alcohol on or around August 25, 2012, and September 1, 2012. The report of the investigation, dated September 26, 2012, includes the following information:

- a) [REDACTED] cer of the Sector reported that on the evening of August 25, 2012, he was approached by the applicant at a carport while he was talking with a chief petty officer. The applicant was "carrying on" in a wild manner and kept interrupting their conversation and saying "how she almost made Chief Petty Officer." She grabbed his leg and complimented it and then began "grabbing other persons in the carport." He asked her to stop and asked her what she was drinking. She then lifted her glass up to his nose. Her glass smelled strongly of alcohol, and the applicant stated that it was vodka and water.
- b) A second class petty officer stated that at a party on September 2, 2012, she felt someone behind her kissing her neck. She first assumed it was her husband kissing her neck and stepped away when she realized it was the applicant. She stated that she did not see the applicant drink alcohol but believed she was "under the influence of something due to her mannerisms and the way she kissed my neck." She noted that she had not felt "assaulted" by the applicant.
- c) A first class petty officer reported that at the party, his wife had asked him why he had not stopped the applicant from sucking on her neck, which he had not seen although he had noticed the applicant embracing his wife from behind and assumed his wife did not object. However, his wife told him that what the applicant had done made her feel dirty and "pissed off." During this conversation, someone else mentioned that the applicant had slapped someone's butt. At approximately 10 p.m. that night [REDACTED] applicant being escorted down the street by some friends. He stated that he thought the applicant was heavily intoxicated because of the way she was walking and her prior actions. The next day, two people had asked his wife how her neck was and whether she had a hickey, and his wife was embarrassed.
- d) Another first class petty officer reported that on September 2, 2012, he and several other members were at a barbeque. At approximately 9 p.m., he witnessed the applicant stumbling to the barbeque. He stated that the applicant was very loud, appeared to be intoxicated, was slurring her words, and was having issues with her clothing. He "politely asked her to cover up her chest" since there were children around. She fixed her clothing and said she was going home. He did not see her drink anything.
- e) Other members denied having noticed the applicant drink or appear drunk.
- f) The applicant denied having drunk alcohol.

The investigation concluded that the applicant had violated Article 92 (Failure to Obey a Lawful Order or Regulation) and Article 134 (General-Disorderly conduct-drunkenness) by drinking alcohol on two separate occasions after being ordered to abstain from drinking. The investigation also added: "These actions not only bring discredit upon her, but also upon the armed forces. The conduct of [the applicant] under the influence of alcohol is intolerable." The investigator recommended that the allegations against the applicant be disposed of at a Captain's Mast in accordance with Article 15 of the Unified Code of Military Justice.

On September 28, 2012, the applicant's CO notified her of the intent to discharge her for unsuitability based upon her continuing consumption of alcohol despite being under orders not to drink alcohol. The CO noted that pursuant to the memorandum she had signed dated February 16, 2011, she [REDACTED] out entitlement to another ASB. He informed her of her right to consult counsel and to submit a statement on her behalf within five days. He noted that if she desired to consult counsel, an appointment would be made for her.

The applicant apparently did not submit a response within five days. However, on October 11, 2012, she acknowledged this notification, named civilian counsel she had hired, and requested a particular officer as military counsel. In addition, she submitted a statement and requested an ASB.

In her statement, dated October 5, 2012, the applicant requested an ASB and argued that she was contesting the allegations against her and that holding the hearing would "ensure that the package presented to the final action authority is reliable enough to support the action." In addition, she argued that under Article 1.B.15. of the Military Separations Manual, there are no exceptions to the entitlement to an ASB. The applicant noted that under Article 1.B.22.e., the final separation authority could retain a member on probation following an ASB but argued that she had not been retained on probation in 2011 and that her retention on active duty had been approved. She argued that even if her abstention from alcohol were considered a probationary condition, "it had no duration and the option described in (4) of 1.B.22.e. and 1.B.24 involves a finite period." Therefore, the applicant argued, there was no regulatory authority for discharging her without another ASB.

[REDACTED] October 15, 2012, the applicant's civilian attorney submitted a supplemental response. He stated that the Coast Guard had not cited any legal authority that allowed it to deny the applicant an ASB. He argued that the Final Action Authority's terms for her retention on active duty "cannot trump her right to a board." He also argued that the applicant's consumption of alcohol had not yet been proven, that no witnesses saw her drink and no test results proved she had drunk alcohol, and that she should have an opportunity to challenge the allegations. He argued that her consumption of alcohol could only be proven by an admission, a blood or alcohol test, or u [REDACTED] d testimony from someone who saw her drink alcohol. He stated that she had been prescribed an antidepressant whose side effects and withdrawal symptoms included slurred speech, dizziness, sleep deprivation, increased energy, euphoria, etc., and that convening an ASB would allow her to present her medical evidence and witnesses stating that she has experienced such symptoms while completely sober.

The applicant's CO forwarded the applicant's statement and the letter from her civilian attorney to PSC with his recommendation for her discharge. He argued that the applicant was not entitled to another ASB.

On February 21, 2013, the applicant was honorably discharged from the Coast Guard pursuant to COMDTINST M1000.4, Article 1.B.15. Her DD 214 shows "Alcohol Rehabilitation Failure" as her narrative reason for separation; separation code JPD, denoting an involuntary discharge for alcohol rehabilitative failure; and an RE-4 reentry code (not eligible to reenlist).

VIEWS OF THE COAST GUARD

On 4 [REDACTED] dvocate General (JAG) of the Coast Guard submitted an advisory opinion and recommended denying relief. The JAG adopted the findings and analysis provided in a memorandum prepared by the Coast Guard Personnel Service Center (PSC).

PSC stated that in 2011 the Final Action Authority for the ASB approved the ASB and retained the applicant on active duty provided that any further alcohol consumption, even without a third "alcohol incident," would result in her discharge without another ASB. In addition, the applicant "acknowledged these conditions by signature" on the Page 7. Following her retention and transfer to another unit, her new CO determined that she had drunk alcohol "in violation of her retention agreement" and so she was separated without an ASB. Therefore, PSC recommended that the Board deny relief.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On April 15, 2015, the Board forwarded a copy of the views of the Coast Guard to the applicant and invited a written response within thirty days. The applicant requested and was granted extensions of the time to respond in accordance with 33 C.F.R. §§ 52.26 and 52.42(d) and submitted her response on September 16, 2015.

The applicant argued that after she was found to have drunk alcohol in 2012, her command failed to abide by regulations because she was not referred for alcohol screening [REDACTED] [REDACTED] ed rehabilitation treatment, and her aftercare plan was not reinstated, and she was discharged without another diagnosis as alcohol-dependent. (She alleged that under regulations, she could only be discharged after a second alcohol incident after being diagnosed as alcohol-dependent.)

The applicant alleged that after she was notified of her right to consult counsel and consulted civilian counsel, she requested military counsel, but the command did not make the appointment [REDACTED] as stated on the notification.

The applicant also argued that the Coast Guard had failed to cite an authority that allowed the Coast Guard to deprive her of an ASB. The refusal to convene another ASB for her deprived her of the chance to dispute her CO's finding that she had drunk alcohol.

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 over this matter under 10 U.S.C. § 1552. The application was timely filed within three years of the applicant's discharge.¹

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.²

3. The applicant alleged that her separation for Alcohol Rehabilitation Failure was erroneous and unjust because the evidence that she consumed alcohol on or around August 25, 2012, and September 1, 2012, was inconclusive and disputed and because she was wrongly denied another ASB. In considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed documents in an applicant's military record are correct and fair, and the applicant bears the burden of proving by a preponderance of the evidence that the documents are erroneous or unjust.³ Absent specific evidence to the contrary, the Board presumes that Coast Guard officers and other Government officials have carried out their duties "correctly, lawfully, and in good faith."⁴

4. The applicant alleged that the Coast Guard could not legally separate her without affording her a second ASB. The record shows that the applicant received an ASB in 2010 because of her two "alcohol incidents," which resulted in her being processed for separation pursuant to Article 20.B.2.h.2. of the Personnel Manual then in effect. The applicant had undergone alcohol rehabilitation treatment, and so the ASB recommended her retention. In his decision as the Final Action Authority on the ASB, dated February 16, 2011, CAPT K approved the ASB's decision and agreed to retain her on active duty but only on condition that she never drink alcohol "for the rest of her Coast Guard career" and that any consumption of alcohol would result in her separation without another ASB. On February 17, 2011, the applicant signed a Page 7 acknowledging these conditions for her retention on active duty. She could have refused the conditions and been separated from active duty, but by her signature, she voluntarily accepted these conditions.

5. The applicant complained that there was no legal authority for CAPT K's action because under Article 12.B.31.e. of the Personnel Manual then in effect, to make her retention conditional, CAPT K was supposed to "approve the discharge" but suspend it and place the applicant on probation and then vacate the suspension and discharge her without another ASB if she failed probation, instead of approving the ASB decision but retaining her conditionally and

¹ 10 U.S.C. § 1552(b).

² See *Steen v. United States*, No. 436-74, 1977 U.S. Ct. Cl. LEXIS 585, at *21 (Dec. 7, 1977) (holding that "whether to grant such a hearing is a decision entirely within the discretion of the Board").

³ 33 C.F.R. § 52.24(b).

⁴ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

discharging her without another ASB if she failed to meet the conditions. The Board finds, however, that the applicant is complaining about a distinction without a difference. The Page 7 dated February 17, 2011, which the applicant was required to sign to remain on active duty, shows that she was clearly on notice that her retention on active duty was conditional upon her abstention from alcohol for the remainder of her Coast Guard career and that if she drank alcohol she would be discharged without an ASB, as it states, “the member is to be retained in the United States Coast Guard under strict adherence to the following administrative remarks: ... Any occurrence of alcohol consumption, even without an associated third alcohol incident, will result in [her] being processed for separation without entitlement to another Administrative Separation Board.”

6. The applicant argued that the conditions for retention on the Page 7 cannot be considered [REDACTED] did not name a “specified period” as required by Article 12.B.34.a., but in fact he did. As his decision and the Page 7 state, he required her to “abstain from the consumption of alcohol for the rest of her Coast Guard career,” which is a specific period of time. In addition, as required by Article 12.B.34.b., CAPT K specified the type of discharge (Honorable with an RE-4) that the applicant would receive if she failed to meet the conditions for retention. Therefore, the Board finds that the applicant has not proven by a preponderance of the evidence that CAPT K acted without legal authority in 2011 when he made the applicant’s retention on active duty conditional upon her abstaining from alcohol for the rest of her Coast Guard career and made her subject to discharge without another ASB if she consumed alcohol. Articles 12.B.31. and 12.B.34. of the Personnel Manual authorized CAPT K’s decision to make the applicant’s retention in the Service conditional as described in the Page 7, and her signature on the Page 7 shows that she understood and voluntarily agreed to those conditions—including separation without an ASB if she drank alcohol—in order to remain in the Service.

7. The applicant argued that her alleged violation of the condition that she abstain from alcohol was never adequately established. The Board disagrees. A senior chief petty officer reported to the investigation that on August 25, 2012, the applicant—a first class petty officer—was “carrying on” in a wild manner and kept interrupting his conversation with a chief petty officer, saying “how she almost made Chief Petty Officer,” and that she grabbed and complimented his leg. Then, most significantly, when he “asked her what she was drinking,” she raised her glass to his nose and told him that it contained vodka and water, and [REDACTED] [REDACTED] l odor.” Thus, while the applicant refused to admit that she had drunk alcohol to the investigator, the Board finds that her CO had strong evidence that she had drunk alcohol and that she had admitted to drinking alcohol to a senior chief petty officer. In this regards, the Board notes that the applicant has not claimed or shown that the senior chief had any reason to lie about her admission and conduct on August 25, 2012. Nor does the fact that the senior chief’s statement was taken one month after the incident persuade the Board that it is unreliable.

8 [REDACTED] n the applicant’s admission to the senior chief on August 25, 2012, which was supported by the smell of alcohol in her glass and by her inappropriate behavior towards the senior chief, the Board finds that her CO had sufficient evidence to conclude that the applicant had violated the conditions for her retention on active duty by drinking alcohol. Therefore, although the applicant was allegedly taking an antidepressant whose potential side effects included dizziness, slurred speech, increased energy, sleep deprivation, and euphoria, the Board finds that she has not proven by a preponderance of the evidence that her CO committed an error or

injustice by concluding that she had violated the condition for her retention that she abstain from drinking alcohol for the rest of her Coast Guard career and by processing her for discharge without convening a second ASB in accordance with the terms of the Page 7 she signed on February 17, 2011. The Board notes that the CO also had the witness statements of three petty officers that at a barbecue on September 2, 2012, the applicant acted heavily intoxicated by arriving in dishabille with her chest not properly covered by her clothes; by stumbling, speaking very loudly, and slurring her words; by embracing a married, second class petty officer from behind and kissing and sucking on her neck; and by being “escorted” away from the barbecue by friends.

9. The applicant alleged that the September 2012 investigation into the allegations of her alcohol consumption was inadequate and that other, unnamed people should have been questioned. The record shows that the investigator gathered statements from various members, some of whom provided supporting evidence that the applicant had consumed alcohol and some of whom did not. The Board finds that the applicant has not proven by a preponderance of the evidence that the investigation was inadequate or materially flawed.

10. The applicant made numerous allegations with respect to which regulations under the DAAPM her command should have followed after she violated the conditions for her retention, instead of separating her. For example, the applicant argued that her command should have required her to undergo additional alcohol screening, required her to have additional rehabilitation treatment, reinstated her aftercare plan, and discharged her only if she was again diagnosed as alcohol-dependent and/or after she failed alcohol rehabilitation again. None of these allegations is dispositive of the case⁵ because after the applicant’s two alcohol incidents, completion of alcohol rehabilitation, ASB, and violation of the conditions for her retention, the Coast Guard was authorized to discharge her expeditiously without another ASB in accordance with the provisions of the Page 7 shed signed on February 17, 2011, the DAAPM, and Articles 1.B.15. and 1.B.24. of the Military Separations Manual then in effect.

11. The Board notes that the applicant also complained about not receiving an appointment to consult military counsel as indicated on the notification form she signed on October 11, 2012. Assuming this allegation is true, the Board notes that at the time the applicant requested that she be allowed to consult a particular officer as military counsel, she was already being represented by civilian counsel, she had already submitted her statement regarding the proposed discharge, and the time for submitting statements had expired. Moreover, because she was not entitled to a second ASB, her rights were limited to those prescribed in Article 1.B.15.d. of the Military Separations Manual. Under that article, a member being discharged for unsuitability is entitled to counsel only if the member is going to receive a General discharge. In the applicant’s case, the Coast Guard was executing the Honorable discharge directed in CAPT K’s decision dated February 16, 2011, in the event that she violated the conditions for her retention. In light of this regulation and these circumstances, the Board finds that the applicant has not proven by a preponderance of the evidence that she was denied due process or denied a right to consult counsel regarding her pending discharge.

⁵ 33 C.F.R. § 52.24(b); *see Frizelle v. Slater*, 111 F.3d 172, 177 (D.C. Cir. 1997) (noting that the Board need not address arguments that “could [not] affect the Board's ultimate disposition”).

ORDER

The application of former [REDACTED], USCG, for correction of her military record is denied.

February 5, 2016

