

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2019-130


 E-8

FINAL DECISION

This proceeding was conducted under the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case upon receiving the completed application on May 10, 2019, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated May 29, 2020, 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 is a senior chief petty officer who was involuntarily retired on September 1, 2019, with more than 21 years of service. He asked the Board to correct his record by

- (a) removing an administrative counseling form CG-3307 ("Page 7") dated February 27, 2018, which states that he had incurred a second "alcohol incident"¹ on October 27, 2017;
- (b) removing and setting aside the proceedings and results of an Administrative Separation Board (ASB) that was convened in August 2018 because of the second alcohol incident;
- (c) voiding his involuntary retirement, which resulted from a Senior Enlisted Continuation Board (SECB) not selecting him for continuation in August 2018; and

¹Article 1.A.2.d.(1) of the Coast Guard Drug and Alcohol Abuse Program Manual, COMDTINST M1000.10, 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." Article 2.B.7. requires alcohol incidents to be documented on Page 7s, and Article 2.B.8.b. states that "[e]nlisted members involved in a second alcohol incident will normally be processed for separation," in accordance with Article 1.B.15. of the Military Separations Manual. Members with more than 8 years of service are entitled to a hearing before an ASB, which will make a recommendation regarding retention to Commander, Personnel Service Center, Enlisted Personnel Management Division (PSC-EPM).

(d) promoting him to chief warrant officer (CWO).

The applicant stated that the Page 7 dated February 27, 2018, documents an alcohol incident that he allegedly incurred on October 27, 2017. On that night, he stated, he witnessed a bar fight, and when he told his command what had happened, he was assured that his conduct was not of any concern. He was selected for appointment to CWO that fall, but on February 27, 2018, he unexpectedly received the disputed Page 7 documenting a second alcohol incident. He alleged that the Page 7 inaccurately reflects the facts of what happened on October 27, 2017. He stated that he immediately appealed the Page 7 within his chain of command to no avail. And then he was processed for separation due to having incurred two alcohol incidents in his record, even though the first one had occurred 17 years earlier, when he was arrested for DUI in 2000 at age 22.

The applicant also argued that the ASB was conducted improperly because during the proceedings, the Recorder “improperly changed the scope of the [ASB’s] inquiry” to include the applicant’s conduct *after* the fight. He argued that this deprived him of fair notice of the subject of the ASB. The applicant stated that the Recorder was told by local authorities that the applicant had not started the fight and had been helpful in deescalating the situation in the aftermath. The applicant stated that the ASB “found unsupported basis for misconduct, for which I was not notified, and in direct conflict with withheld exculpatory evidence. All objections preserved.”

The applicant stated that the ASB hearing that convened in August 2018 was erroneous and unjust due to (a) a lack of fair notice, (b) an improper basis for separation, (c) an insufficient factual basis to support the findings, (d) one ASB member’s apparent bias in favor of the command, and (e) misrepresentation of the evidence. The applicant complained that his commanding officer (CO), who convened the ASB, failed to address these errors, and the Personnel Service Center (PSC) failed to take timely final action on the ASB’s report.

Instead, the applicant stated, on September 27, 2018, he was informed by memorandum that the SECB² had not selected him for continuation on active duty and so he would be involuntarily retired as of September 1, 2019. The applicant stated that the SECB’s decision was based on the disputed, erroneous Page 7, and the retirement date was four months’ shy of the date his senior chief/E-8 rank would “vest.” The applicant stated that involuntarily retiring someone before his current rank and paygrade vests violates due process. He claimed that the other military services only involuntarily retire members after their current rank vests so that they are retired in the higher paygrade.

To support his allegations, the applicant submitted his military attorney’s written rebuttal to the ASB report, which is dated August 30, 2018, as well as copies of emails between his mili-

² Under Article 4 of the Military Separations Manual, COMDTINST M1000.4, a Senior Enlisted Continuation Board (SECB) may be convened annually to review the records of enlisted members in paygrades E-7 (chief petty officer) and above with either 20 to 21 years of active duty or 25 to 26 years of active duty as of December 31st to determine who should be continued on active duty and who should be mandatorily retired. The SECB is announced at least 30 days in advance, and members are notified of their non-continuation at least 6 months before their mandatory retirement date. The SECB may be held the year that the member becomes a candidate or the following year.

tary attorney and a private attorney and the Recorder for the ASB. These documents are included in the Summary of the Record below.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on April 27, 1998. On June 11, 1998, he signed a Page 7 acknowledging that he had been counseled about the Coast Guard's drug and alcohol policies.

On a Page 7 dated March 14, 2000, the applicant was advised that he had incurred his first "alcohol incident" after being arrested and convicted of driving under the influence (DUI) of intoxicants. He was screened for alcohol addiction and required to undergo an Early Intervention 20 Hour Impact course at a rehabilitation clinic.

On October 27, 2017, the applicant was visiting his son, who is also a member of the Coast Guard, when they visited a night club. Other members of their rating and his son's unit also went to the night club. Altercations between Coast Guard members, patrons, and staff were captured on the night club's surveillance video and police body camera footage. According to the police report, the police were called to the bar at about 1:00 a.m. on October 27, 2017, and saw two men fighting outside. A man on the ground was being punched in the head multiple times by his attacker. There was a large group of men around the fight. The police activated their lights and got out of their car. As they approached the group, someone pulled the attacker off the man on the ground. One of them started to run off and yell, "Go! Go! Go!" When a police officer tackled the attacker, someone else grabbed the police officer's arms as if trying to overpower him but then stopped. A staff member of the night club told the police officer that he had kicked one of them out of the bar "because he was trying to fight people in the bar and he called an African-American dancer in the bar a "N_____". The victim claimed not to know his attacker or why he was attacked. He stated that the attacker and his friends "were being 'assholes' in the bar and were kicked out. ... [He] thought the group was long gone and went outside to smoke a cigarette [when] for no reason" he was attacked and his hearing aid was destroyed. When the police officer approached the friends of the attacker, "they said they all saw it, but they weren't saying anything." One of them then claimed that the men were just wrestling but no punches were thrown, but the police officer knew that the dash cam video would show otherwise. The police officers determined that most of the men in the group were members of the Coast Guard, and other patrons and staff said that they had been very aggressive and "a problem" from the moment they entered the bar. The police officer reviewed the inside surveillance footage and saw a member "sitting at the bar next to an African-American dancer. [Someone] and a male, identified as [the applicant], clearly are trying to instigate a fight with [someone else] at the bar. At some point [someone else] became involved." That person was "yelling at the dancer and she signals [another staff member] to come over," and he points to the door and tells the person yelling to leave. The police officers concluded that the attacker and his friends (Coast Guard members) were being dishonest about what had occurred. Following the incident, the Coast Guard Investigative Service began an investigation.

The applicant advanced to senior chief petty officer (E-8) on January 1, 2018.

In an email dated February 26, 2018, the applicant's command was advised that there "is a video of E8 [the applicant] altercation with an exotic dancer and patron inside the establishment. E8 is obviously intoxicated in the video and subsequent police interview. The evidence supports an Alcohol Incident (AI), which would be his second one and lead to an admin separation with a recommendation of retirement in lieu of separation. The evidence also support [sic] violation of Article 134 Drunk and Disorderly. In addition to the AI, an NJP could also be awarded. E8 is eligible for retirement in May 2018."

The disputed Page 7, dated February 27, 2018, was signed by the applicant's CO on March 2, 2018. It includes a handwritten note stating that the applicant refused to sign it, and it reads as follows:

You received an alcohol incident on 27 October 2017 when your abuse of alcohol was determined to be a significant and/or causative factor of your misconduct that resulted in a violation of Article 134 (disorderly conduct, drunkenness). Specifically, on the date in question, you consumed alcohol and acted aggressively towards bar patrons and staff members. Your conduct was to the prejudice of good order and discipline and not in keeping with the standards expected from a Senior Chief Petty Officer in the United States Coast Guard.

You were previously counseled on Coast Guard policies concerning alcohol use and abuse as well as the serious nature of an alcohol incident. The unit Command Drug and Alcohol Representative (CDAR) will arrange an appointment with a provider who will determine the nature of your relationship with alcohol. It is highly recommended that you abstain from the use of alcohol until your screening and assessment is completed.

This is considered your second documented alcohol incident. Your first documented alcohol incident occurred on 8 March 2000. You will be processed for separation, in accordance with Chapter 2 of the Coast Guard Drug and Alcohol Abuse Program, COMDTINST M1000.10 (series).

On April 26, 2018, the applicant's CO notified him by memorandum that he was initiating the applicant's separation for alcohol abuse pursuant to Article 1.B.15. of the Military Separations Manual, COMDTINST M1000.4. He noted that the applicant was entitled to counsel, to submit a statement objecting to the discharge, and to a hearing before an ASB to make a recommendation regarding his separation or retention because he had more than 8 years of service. The CO explained that he was initiating discharge proceedings because of his two alcohol incidents:

On 6 March 2000 you were convicted in ... Court ... of Driving under the Influence of Intoxicant (DUII). You received Administrative Remarks, CG-3307 to document your first alcohol incident on 14 March 2000. You were screened at ... Medical Clinic at ... on 13 March 2000. As a result of your screening you were ordered to undergo an Early Intervention 20 hour IMPACT course at the ... Clinic.

On 27 October 2017 you consumed alcohol and acted aggressively towards bar patrons and staff members at an ... night club. Your conduct was to the prejudice of good order and discipline and not in keeping with the standards expected from a Senior Chief Petty Officer. You received Administrative Remarks, CG-3307 to document your second alcohol incident on 27 February 2018 and were counseled that you will be processed for separation. You were screened on 22 March 2018.

April 27, 2018, was the applicant's 20th active duty anniversary, when he became eligible to retire.

On May 4, 2018, the applicant acknowledged notification of the discharge proceedings, noted that he had consulted counsel and decided to waive his right to submit a written statement but to exercise his right to an ASB.

On July 3, 2018, the Commandant issued ALCGENL 095/18, which announced that an SECB would convene in September 2018 to determine which of the eligible senior enlisted members would continue on active duty and which would be mandatorily retired no later than September 1, 2019. The message advised members how to check to see if they were on the list of eligible candidates and how to check and ensure that their records were correct before the SECB convened.

The applicant submitted some emails and partial emails exchanged between his military attorney and a private attorney and between his military attorney and the Recorder for the ASB in August 2018, and the Coast Guard completed the partial email exchanges:

- In an email dated August 6, 2018, with the subject line “[the applicant] FINAL Witness List,” the Recorder for the ASB sent the applicant’s military attorney the name and phone number of the police officer as the only witness he would call. He stated that he was anticipating that the officer would testify that the applicant “was one of the individuals that instigated the brawl that broke out at the club. He will also testify to the level of intoxication of your client.”
- In an email dated August 8, 2018, submitted by the applicant with the subject line “Ps ...,” a private attorney advised the applicant’s military attorney that, “Police officer says the [applicant] ordered guy he chased to stop resisting the officer[.] When guy who ran yelled at rest to flee, chief and his son stood fast[.] In spite of whatever alcohol impairment, police officer says Chief wasn’t a problem.” The private attorney noted that the strip club in question was very old and frequently visited by members of the military. He stated that the applicant could argue that he “acted appropriately and consistent with expectations for leadership.”
- In a second email dated August 8, 2018, the private attorney offered to try to get a letter on the applicant’s behalf from the city mayor.
- In a third email to the military attorney dated August 8, 2018, the private attorney stated that a retired master chief had told him that the Coast Guard “has pretty much stood by the ‘second alcohol incident’ policy with little exception. In fact I’ve heard of several cases lately where people don’t survive the first one, though each must be evaluated on its own merits.” The master chief had also stated that the applicant’s CO must be a “hot head.”
- In an email dated August 13, 2018, submitted by the Coast Guard, the applicant’s military attorney responded to the Recorder’s August 6, 2018, email with his final witness list and said she had encountered difficulty contacting the police officer. She requested a different phone number for the police officer and asked the Recorder to ask the police officer to contact her. The Recorder replied to her the next day, stating that he had “just reached out to [the police officer] with the number that you gave me. I’ll ping him on

messenger and ask that he give you a ring. What number would you prefer?” The military attorney replied, “Did I give you a number for [the police officer]? I really have no preference for how I talk to him, just need some way to do so. Would appreciate knowing how you contacted him through the touch tone system. My office is [redacted] if he wants to call me.” In a reply later that day, the Recorder stated, “After some conversations with my colleagues, I do not intend to call [the police officer] for the ADSEP board. Instead, I intend to rely upon the videos and reports that I provided to you previously to educate the board on the events that led to the alcohol incident.”

Administrative Separation Board

On August 10, 2018, the CO signed an “Amended Convening Order Number Two – Involuntary Separation” for the ASB. The convening order directs the ASB to make findings of fact based on the preponderance of the evidence; to render opinions based on those findings of fact and the evidence presented; and to make a recommendation regarding retention or separation.

On August 21, 2018, the ASB convened, heard witness testimony, and reviewed many records, including surveillance video from inside the night club and police body camera footage outside the night club. In a report dated August 23, 2018, the ASB found that there were grounds for separating the applicant and recommended that he be honorably retired due to his second alcohol incident. The ASB found that a verbal altercation between multiple parties had ensued inside the night club on October 27, 2017. The applicant had drunk alcohol, which impaired his judgment, and been “a contributing factor to the verbal altercation.” Specifically, his “interaction with bar patrons ... contributed to hostilities and in general did not deescalate the situation.” The applicant and his son then left and were half a block away from the night club when they heard a fight break out between two Coast Guard members outside of the night club. His son ran back to where the fight was occurring, and the applicant followed him. The police arrived at the same time as the applicant, who remained on the scene for the police investigation. The ASB stated that the applicant’s “actions in the presence of Law Enforcement was not in keeping with the professional attitude expected of a USCG Senior Chief.” The ASB also noted that the applicant had had “ample opportunity throughout the night to remove himself from the incident” but did not, and his “consumption of alcohol leading up to this incident was a major contributing factor to his actions.” The ASB explained as follows:

[The applicant’s] actions on this night demonstrated altered judgment due to his consumption of alcohol (opinion 1). As seen in police body cam footage, when the police officer reviewed bar footage inside of [the night club] with the bar owner, [the applicant] was pointed out as one of the instigators to verbal altercations inside the bar that eventually led to the physical altercation outside of [the night club] ... Additionally, as seen in the police body camera footage, after the fight had occurred and the police were conducting their interviews of those involved, [the applicant’s] character and general tone was not professional in front of police officers and other bar patrons (exhibit 9). [He] had ample opportunity to remove himself from this situation, but remained connected to this incident throughout its entirety (opinion 6).

On August 24, 2018, according to an email submitted by the applicant, his military attorney advised the private attorney that the ASB had recommended separation. In reply, the private

attorney noted that local officials had been reluctant to weigh in on the case. He stated that in the course of his dialogs with local officials, he had learned that the arresting officer

agrees that the Senior Chief did nothing wrong. The police officer who first responded found that the Senior Chief in fact was helpful in facilitating by his command presence and orders to a subordinate that resistance stopped and custody was peacefully accomplished without injury to the officer or the younger USCG member. I also validated the complicity of and responsibility of the Senior Chief's son in many events and police contacts over years, which may or may not have influenced the events on which the admin separation referral was based. Another consideration related to poor judgment evidenced by a senior SNCO frequenting this strip bar and predictable trouble spot with his son. This alone appeared to be a potential consideration which could validate the Command referral decision.

On August 30, 2018, the applicant's military attorney submitted an 18-page rebuttal to the ASB's report. Her primary arguments were the following:

- The Recorder and the ASB had impermissibly expanded the scope of the inquiry because, while his CO's notification had stated that his conduct towards patrons and staff "at" the night club would be at issue, the ASB considered and relied on his conduct toward patrons outside the night club, even though "by any common understanding" the word "at" means only inside the night club.
- The Recorder had been overzealous and abandoned his role as an impartial investigator by arguing that there were no grounds for an exception to the rule that the applicant should be processed for discharge because of the second alcohol incident; by presenting only adverse information about the applicant except to note that he deserved to be retired based on his exemplary record; and by (presuming the Recorder knew) not informing the applicant's attorney that the police officers might testify favorably on his behalf and thus stopping her from "compelling" them to testify.
- The ASB's findings did not support discharge because the ASB did not find that the applicant "acted aggressively toward bar patrons and staff members at an [location] night club," that he was drunk and disorderly, or that the Page 7 was accurate. The ASB ignored his superior officers' testimony that the applicant's conduct in the night club—as seen on surveillance video—had been consistent with his usual "quirky" behavior. The findings and opinions were vague and not evidence of any aggression, instigation, or unreasonableness on the applicant's part.

The ASB's proceedings with the applicant's attorney's rebuttal were forwarded to the applicant's CO for review, comment, and forwarding to the Final Reviewing Authority.

Senior Enlisted Continuation Board

When the applicant's record was reviewed by the SECB in September 2019, the disputed Page 7 documenting his second alcohol incident was in his record.

On September 26, 2018, Commander, PSC-EPM advised the applicant in a memorandum that he had been selected for non-continuation by the SECB. Therefore, he would be retired on September 1, 2019, unless he requested an earlier retirement date.

On October 2, 2018, the Personnel Service Center issued orders for the applicant to be mandatorily retired no later than September 1, 2019, because he had been selected for non-continuation by the SECB.

On June 20, 2019, the Final Reviewing Authority for the ASB approved the ASB's findings, opinions, and recommendations, including retirement. The Final Reviewing Authority noted, however, that the applicant had not requested retirement but was pending mandatory retirement. Therefore, he stated, he would "allow the Enlisted Personnel Management division of the Personnel Service Center (CG PSC-epm) to complete [the applicant's] processing in accordance with Coast Guard policy."

The applicant retired on September 1, 2019, while this case was pending.

VIEWES OF THE COAST GUARD

On December 4, 2019, a judge advocate (JAG) submitted an advisory opinion in which she recommended that the Board deny relief in this case.

The JAG noted that the applicant claimed that his command had initially said that his conduct on the night of October 27, 2017, was not of any concern. The JAG stated that there is no evidence of the alleged promise and that, even if such a promise were made, it is not binding and is repudiated by the Coast Guard, citing *Goldberg v. Weinberger*, 546 F.2d 477 (2d Cir. 1976).

The JAG noted that the applicant complained that the Page 7 documenting the second alcohol incident was not issued until four months after the incident, following the investigation. The JAG stated that under COMDTINST 1000.14, a Page 7 may be issued up to two years after an incident occurs.

The JAG noted that the applicant claimed that the disputed Page 7 is factually incorrect, but he presented no evidence to refute the comment in the Page 7 that he "consumed alcohol and acted aggressively towards bar patrons and staff members." The JAG stated that the fact that the applicant was cooperative with the police at some point does not refute the text of the Page 7. In addition, the JAG noted, the applicant did not show that he actually appealed the Page 7 through his chain of command when he had the opportunity to do so.

Regarding the ASB, the JAG rejected the applicant's claim that the word "at" means only inside and not outside the night club. The JAG stated that the applicant was properly notified that the basis of the proceeding was his conduct on the evening of October 27, 2017, at a particular night club in a particular town, and this description is sufficient notification for the purposes of due process. The JAG argued that a reasonable ASB respondent would know that his conduct outside as well as inside the night club would be under scrutiny, and it is implausible to believe that he and his counsel were unaware of that fact, especially since his counsel asked for contact information for the police officer who only observed the applicant's conduct outside the club.

The JAG also argued that the ASB had ample video evidence supporting their finding that he had consumed an excessive amount of alcohol, which impaired his judgment and caused him to be a contributing factor in the hostilities at the bar that night and to act in ways that were not in keeping with his rank and brought discredit to the uniformed services.

The JAG noted that the applicant claimed that a member of the ASB was biased but provided no evidence; failed to show bias on the part of the Recorder; and failed to show that a Reporter recused herself based on her knowledge of the facts of the case.

The JAG stated that while the Recorder had a responsibility to “investigate all reasonable sources of evidence about the respondent’s conduct, and impartially present[] that evidence to the board,” there is no evidence that he failed to do so; the applicant’s own counsel knew to contact the police officer; and it was also his counsel’s responsibility to present exculpatory evidence.

The JAG noted that the final action on the ASB’s recommendation was delayed but pointed out that Article 1.I.3. of PSCINST M1910.1 states, “Failure to process a board proceeding within the recommended time goals does not affect the validity of the final action taken by CG PSC.”

In response to the applicant’s claim that retiring him on September 1, 2019, before his senior chief rank “vested” violated his due process, the JAG noted that pursuant to Article 1.E.1.a. of PSCINST M1910.1, “Coast Guard members do not have a right to remain in the Coast Guard, or retain their current rate, regardless of their length of service or the personal hardships the administrative action might cause.” The JAG stated that members may be involuntarily separated at any time in accordance with policy.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On December 10, 2019, the Chair sent a copy of the views of the Coast Guard to the applicant’s attorney and invited a written response within 30 days. No response was received.

APPLICABLE LAW AND POLICY

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 4.A.1. of the Military Separations Manual, COMDTINST M1000.4, cites 10 U.S.C. § 1169 as the legal authority for involuntary retirements pursuant to SECBs. Article 4.A. states that the SECB “must carefully consider, without prejudice or partiality, the record of every eligible candidate and not select for continuation those active duty enlisted members whose service is no longer in the best interest of the Coast Guard. Those members not continued must be retired in accordance with this Manual.” Article 4.A.2. states that “senior enlisted” includes members in paygrades E-7 through E-9.

Article 4.A.3.d. states that members selected for involuntary retirement are not entitled to a reenlistment board or an ASB, and the SECB “is separate and distinct from individual involuntary retirement board (IIRB) described in Article 1.C.10.c. of this Manual. The SECB is a proactive review of SECB candidates across the Coast Guard while the IIRB is convened on a case by case basis.”

Article 4.B.2. states that Commander PSC-EPM announces the names of the SECB candidates at least 30 days before the SECB convenes, so that the candidates may review their records for accuracy, and notifies non-continued members at least 6 months before their involuntary retirement date.

Article 4.C.2. identifies the following criteria for candidates:

a. An enlisted member in the paygrade of E-7 or higher whose active military service time meets the following criteria on 31 December of each year.

1. 20 to 21 years active military service
2. 25 to 26 years active military service

b. Regardless of the exact date a member meets this criteria [sic] during a calendar year, 31 December will be the cut-off that determines whether a member is an SECB candidate, and is the date the member must become an SECB candidate.

c. The SECB may be held at any time during the calendar year during which an enlisted member becomes an SECB candidate or during the following year. However, if the SECB is held in the following year, the SECB must be held early enough to allow Commander (CG PSC) to comply with the notification requirement in Article 4.B.2.b.(5) of this Manual. An SECB candidate must only be considered by one SECB at each active military service milestone listed in Article 4.C.2.

Article 4.D.1. states, “SECB policy is based solely on the amount of active military service and is not impacted by advancements, TIR [time in rate], or reductions in pay grade.”

Article 4.G.1. lists the reasons candidates may be selected for non-continuation. They include receipt of an unsatisfactory conduct mark, which is required for members who incur an alcohol incident, and failing to meet service norms concerning alcohol abuse during the five-year period before the SECB convenes.

Article 4.G.3. states that the SECB must have at least five members in paygrade E-9 or higher and at least 50% of the members must be in paygrade E-9. Article 4.G.4. states that the SECB produces a list of candidates recommended for continuation and a list of candidates recommended for non-continuation. And they must certify that “in the opinion of at least three members if the board has five, or two-thirds of the members if the board has six or more members, the candidates who are recommended for non-continuation.” Article 4.B.1. states that Commander, PSC has final authority to approve the results of the SECB.

Article 4.H.1.a. states that states, “All non-continued members will retire no later than 1 September of the year following the year they became an SECB candidate.”

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 retirement.³

2. The applicant alleged that the Page 7 documenting a second "alcohol incident" in his record and his involuntary retirement on September 1, 2019, were erroneous and unjust. 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.⁴ 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."⁵

3. The applicant alleged that the Page 7 dated February 27, 2018, which documents his second alcohol incident, was erroneous and unjust, but he has not submitted evidence sufficient to overcome the presumption of regularity accorded the Page 7, much less to prove that it is erroneous. The record shows that based on the night club's surveillance video and police camera footage, the applicant's CO concluded that he had drunk alcohol and been drunk and disorderly at the night club on October 27, 2017, in violation of Article 134 of the UCMJ, and that he had acted aggressively toward bar patrons and staff. The police report shows that the police concluded that the witnesses to the fight outside the night club had been Coast Guardsmen and that they had not been honest with the police. And the ASB report shows that the applicant had contributed to the hostilities that night. Therefore, the preponderance of the evidence shows that the CO properly concluded that the applicant's conduct had met the definition of an "alcohol incident"⁶ and documented it on a Page 7 as required.⁷ And so he has not shown that the disputed Page 7 is erroneous or unjust or that his military record was erroneous when it was reviewed by the ASB or the SECB.

4. The applicant and the JAG made numerous arguments about the ASB proceedings in August 2018. But the applicant was discharged pursuant to the SECB, rather than the ASB. And there is no evidence that the proceedings of the ASB, which were not final until June 2019,

³ 10 U.S.C. § 1552(b).

⁴ 33 C.F.R. § 52.24(b).

⁵ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁶ Article 1.A.2.d.(1) of the Coast Guard Drug and Alcohol Abuse Program Manual, COMDTINST M1000.10, 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."

⁷ COMDTINST M1000.10, Article 2.B.7.

had any effect on the proceedings on the SECB in September 2018. Therefore, with respect to his involuntary retirement, the preponderance of the evidence shows that the arguments about the ASB proceedings are without merit.

5. The applicant did ask to have the proceedings of the ASB expunged, but the Board finds no grounds for doing so. The applicant's command was required to initiate separation proceedings because he had incurred a second alcohol incident,⁸ and the applicant exercised his right to a hearing before the ASB. The command's notification to the applicant dated April 26, 2018, shows that he received proper notice of the basis for the ASB: his aggressive conduct *at* (inside and outside) the night club. The applicant has not supported his allegations that a member of the ASB was biased against him or that the Recorder misrepresented the evidence. The emails he submitted do not show or imply that the police officer returned the phone calls of either the Recorder or the applicant's counsel, and the police officer was not required to return their calls or to testify on anyone's behalf at the ASB. In addition, the applicant has not shown that the surveillance video, police camera footage, and other evidence gathered by the Recorder provided insufficient information to support the ASB's findings and opinions and to substantiate a proper basis for separation. The applicant has not proven by a preponderance of the evidence that the ASB's proceedings were erroneous or unjust.

6. An enlisted member in paygrade E-7 or higher is subject to selection for continuation or non-continuation (involuntary retirement) by an SECB during the year he reaches his 20th or 21st active duty anniversary or the following year.⁹ The applicant was an E-8, and he reached his 20th active duty anniversary in April 2018. Therefore, he was properly listed as a candidate for selection by the SECB convened in September 2018.

7. The applicant has not shown any impropriety in the composition or conduct of the SECB. Because he had incurred an "alcohol incident," he must also have received a disciplinary performance evaluation¹⁰ with an unsatisfactory conduct mark.¹¹ An SECB *may* select a member for involuntary retirement if within the past five years they have received an unsatisfactory conduct mark or failed to meet service norms concerning alcohol abuse.¹² Because the applicant had recently incurred an "alcohol incident," he has not shown that the SECB committed an error or injustice in selecting him for involuntary retirement.

8. The applicant complained that the mandatory date of retirement for non-continued SECB candidates—September 1, 2019¹³—deprived him of due process because he was within four months of having his E-8 rank "vest." He cited no law or caselaw supporting this claim, and the Board knows of none. His separation orders show that he retired as a senior chief (E-8), and

⁸ COMDTINST M1000.10, Article 2.B.8.b.

⁹ COMDTINST M1000.4, Article 4.C.2.

¹⁰ COMDTINST M1000.2B, Article 4.C.2.c.(b) (requiring an unscheduled, disciplinary performance evaluation upon receipt of an "alcohol incident").

¹¹ COMDTINST M1000.2B, Article 4.D.4.b.(6) (requiring an unsatisfactory conduct mark on any enlisted performance evaluation documenting an alcohol incident).

¹² COMDTINST M1000.4, Article 4.G.1.

¹³ *Id.* at Article 4.H.1.a. (requiring non-continued members to be retired no later than September 1st of the year after they become an SECB candidate).

under 10 U.S.C. § 1407(c), his retired pay must be based on his “high-3 average.”¹⁴ The applicant has not proven by a preponderance of the evidence that his date of retirement is erroneous or unjust.

9. The applicant also asked the Board to appoint him to CWO and claimed that he was on a list of members selected for appointment to CWO. The applicant did not prove this claim but even assuming *arguendo* that his name was on a list for potential appointment to CWO, he was never appointed as a CWO and there are no grounds for appointing him.

10. The applicant has not proven by a preponderance of the evidence that the Page 7 documenting his second alcohol incident, the ASB proceedings, or his involuntary retirement as an E-8 on September 1, 2019, pursuant to the SECB are erroneous or unjust. Therefore, his requests for relief should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

¹⁴ 10 U.S.C. § 1407(c) (defining the high-3 average as “(A) the total amount of monthly basic pay to which the member was entitled for the 36 months (whether or not consecutive) out of all the months of active service of the member for which the monthly basic pay to which the member was entitled was the highest, divided by (B) 36”).

ORDER

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

May 29, 2020

