DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2020-064

[redacted]

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on January 17, 2020, and assigned the case to the Deputy Chair to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated June 4, 2021, 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, a former Seaman Gunner's Mate (SNGM/E-3) who was honorably discharged from the Coast Guard in 2016, asked the Board to correct his record by changing his narrative reason for separation, reenlistment code, and separation code on his discharge form DD-214. Specifically, he asked the Board to change his narrative reason for separation from "misconduct" to "secretarial authority," and he asked the Board to change his reenlistment code from RE-4, which means the applicant is ineligible to reenlist, to RE-1 so that he may reenlist in another branch of the military. He did not specify what he wanted his separation code of JKQ (serious offense) to be.

The applicant, through counsel, stated that in the summer of 2015, he was attending an advanced specialty school. At the time, he was twenty years old. On July 2, 2015, the applicant's class was released early for the holiday weekend. He stated that when he returned to the barracks, he had a couple of alcoholic drinks, ate, and then took a nap. He stated that eight hours after consuming alcohol, he was asked to be the designated driver for some of his classmates. On his way back to the barracks, he was sitting at a stop light and used his phone to look up directions. He stated that a police officer who was in the lane next to him pulled him over for texting and driving. The applicant argued that while he did not exhibit alcohol-related indicators, the police officer

administered a field sobriety test. The applicant also submitted to a breathalyzer exam, registered a Blood Alcohol Content (BAC)[1] of 0.116, and was arrested for driving under the influence (DUI).

The applicant stated that he immediately informed his chain of command of his arrest. On July 13, 2015, the applicant received his first alcohol incident[2] which was documented on an Administrative Remarks form ("Page 7").[3] Additionally, the applicant received nonjudicial punishment (NJP) stemming from his arrest for DUI and his drinking as a minor.

The applicant stated that on April 28, 2016, he was honorably discharged from the Coast Guard. He argued that the only explanation for his discharge was that a senior officer exerted unlawful command influence to order his discharge. To support this allegation, the applicant argued that Coast Guard regulations did not require that he be discharged. Specifically, he argued that in October 2015, there was no requirement in the Military Separations Manual to discharge members for their first alcohol incident. The applicated cited the Page 7 documenting his alcohol incident which stated, "any further incidents may result in you being processed for separation." Additionally, the applicant stated that a senior officer must have exerted unlawful command influence because his entire chain of command supported his retention.

The applicant also argued that he should have been retained in the Coast Guard through the Second Chance Program. The applicant requested consideration for the Second Chance Program on October 13, 2015. However, he stated, he was discharged without receiving any details as to the reason he was not retained under the program. The applicant argued that without a record to review, the only plausible conclusion is that the Coast Guard's decision not to retain him was arbitrary and capricious. The applicant argued that there was nothing prohibiting him from participating in the program. In fact, the applicant argued, the Military Separations Manual specifically authorized members who received their first alcohol incident to participate in the program. Further, the applicant argued that he was the ideal candidate for the Second Chance Program. The applicant stated that the purpose of the Second Chance Program is "to retain good, solid first-term performers with potential, but who have made a youthful mistake that would otherwise result in their discharge." He stated that before his alcohol incident, he did not have any negative remarks in his record and his performance was exemplary. Further, he stated that after he received his alcohol incident, he continued to excel. For example, after he received his alcohol incident, he completed more underway Naval Escort Missions than any other member of his grade.

After the applicant was discharged from the Coast Guard, he applied to the Coast Guard Discharge Review Board (DRB) and requested to change his narrative reason for separation and

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[1] The legal limit in the state in which the applicant was arrested is .08.

[2] Article 1.A.2.d. of the Military Drug and Alcohol Abuse Policy Manual, COMDTINST M1000.10, defines an alcohol incident as "any behavior, in which the CO/OIC determines by a preponderance of evidence after considering the relevant facts (i.e., police reports, eyewitness statements, and member's statement if provided) that alcohol was a significant or causative factor that resulted in the member's loss of ability to perform assigned duties, brings discredit upon the Uniformed Services, or is a violation of the UCMJ, Federal, State, or local laws. The military member need not be found guilty at court-martial, in civilian court, or be awarded non-judicial punishment for a behavior to be considered an alcohol incident."

[3] An Administrative Remarks record entry, form CG-3307, better known as a "Page 7," is used to document a member's notification of important information, achievements, or counseling about positive or negative aspects of a member's performance in the member's military record.

reenlistment code. The applicant argued that the DRB erred in denying his request. First, the applicant argued that his request was denied without a discussion of the merits. The applicant stated that the DRB is required to make written findings and conclusions with respect to all disputed facts and issues. However, the applicant stated, he was only provided with a one-page memorandum from the President of the DRB, which stated that the applicant's request was denied. Second, the applicant argued that his request was denied without the opportunity to appear before the DRB. Then on December 5, 2018, the applicant, through counsel, appealed his decision to the DRB. In his appeal, the applicant argued that the Coast Guard failed to properly consider him for the Second Chance Program. He also argued that in his first application, he was not represented by counsel and was unable to make all statutory, regulatory, and policy arguments available to him. However, on March 7, 2019, the applicant's request was denied on the basis that his application did not constitute "new, substantial, relevant evidence, not available to the applicant at the time of the original review."

To support his application, the applicant submitted several letters of recommendation:

- The first letter was from a former supervisor, GM2 P, who stated that the applicant was a very skilled worker who had an excellent work ethic. He stated that he was very displeased that the applicant was not retained in the Coast Guard, but that his efforts would not be forgotten.
- The second letter was from another former supervisor, GM1 L, who described the applicant as a "hard-charger" who was dedicated to the Coast Guard values. He stated that the applicant always did the right thing.
- The third letter was from a fellow Coast Guard member, BMC W, who stated that the applicant had been a vital member of the Coast Guard. He stated that he always depended on the applicant because of his positive attitude, temperament, and leadership abilities. BMC W highly recommended the applicant for any position in the military.
- The fourth letter was from GM1 B who stated that the applicant was an upstanding member. He stated that that it was an honor to serve with the applicant because his work ethic and integrity never faltered.
- The fifth letter was from a Command Senior Chief who stated that he had served with the applicant for over a year and described his work ethic, demeanor, and professionalism in the highest regard. He stated that the applicant was an asset to his department and vital to the success of the mission. He stated that he believes that the applicant learned from his mistake and is ready to successfully continue service in the military.
- The final letter was from a state representative who argued that the applicant's reenlistment code was too harsh of a punishment. He stated that the applicant's experience reminded him of his own in the Navy. He also stated that he was impressed with the applicant and that, if he were still in the military, the applicant is the kind of man that he would like to have his back. He described the applicant as honorable and reliable and argued that he deserves another chance to serve in the military.

The applicant concluded by stating that he had made a youthful mistake but that he would like another opportunity to serve his country. He stated that while he received an honorable discharge, the Coast Guard counter-intuitively placed a substantial roadblock on his ability to move forward in his career by assigning his narrative reason for discharge, reenlistment code, and

separation code. He argued that these data entries should be changed so that other branches of the military can determine whether he should be barred from future service.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on April 16, 2013. Following recruit training, the applicant attended Gunner's Mate "A" School.

On July 2, 2015, the applicant was driving a vehicle when he was pulled over by a police officer. At the time, the applicant was twenty years old. According to the police report, the police officer noticed that the applicant was using his cellular phone while he was stopped at a stop light. The police officer noticed that the applicant's eyes were droopy, glassy, bloodshot, and watery. The police officer asked the applicant if he had consumed any alcoholic beverages that day, and the applicant stated that he did not drink. The police officer then asked the applicant to exit his vehicle. While exiting his vehicle, the police officer noticed that the applicant stumbled. The applicant consented to a Preliminary Breathalyzer Test. The applicant's BAC measured .095 and he was placed under arrest for DUI. About thirteen minutes later, the police officer conducted another Breathalyzer Test and the applicant's BAC measured .116.

On July 13, 2015, the applicant received a Page 7 that documented his first alcohol incident. The Page 7 stated that he received an alcohol incident when his abuse of alcohol was determined to be a significant and/or causative factor in his arrest that occurred on July 2, 2015, for DUI. The applicant was notified that any further incidents might result in his separation in accordance with Chapter 2 of the Coast Guard Drug and Alcohol Abuse Program.

On July 27, 2015, the applicant received a Page 7 which stated that he had been screened pursuant to his alcohol incident.

On July 31, 2015, the applicant completed the Navy's 20-hour Alcohol Impact Treatment Program. The Officer in Charge of the Naval Branch Health Clinic stated that the applicant appeared to have gained a greater insight into his substance use.

On September 1, 2015, the applicant received NJP for drunken or reckless operation of a vehicle[4] and failure to obey an order or regulation.[5] The basis for the applicant's NJP was his arrest for DUI and drinking as a minor. The applicant's punishment was restriction to his base for 60 days, forfeiture of $2,268 per month for two months, and reduction to pay grade E-3.

On October 2, 2015, the applicant received a Page 7 that stated that his Commanding Officer (CO), CDR J, had terminated his remaining 30 days' restriction to his base due to his exceptional work ethic and continued resilience. CDR J noted that this action was directly related to the applicant's tremendous effort to go above and beyond in supporting his unit. CDR J also stated that the Page 7 showed his confidence in the applicant's ability to maintain a high level of performance and decision making.

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[4] Art. 111, UCMJ.
[5] Art. 92, UCMJ.

On October 13, 2015, the applicant was notified that CDR J had initiated action for his discharge by reason of commission of a serious offense. CDR J cited the applicant's arrest for DUI and his subsequent NJP as the reason. The applicant was further notified that he was eligible for retention under the Commandant's Second Chance Program. That same day, the applicant objected to his discharge and requested to be considered under the Commandant's Second Chance Program.

On December 3, 2015, the applicant submitted a retention statement to the Advancements and Separations Branch of the Enlisted Personnel Management Division (PSC EPM-1). He stated that he recognized that driving under the influence of alcohol was a poor decision that was dangerous to himself and those around him. He stated that it was not until his arrest that he understood how his actions off duty could negatively impact his shipmates. He stated that since his arrest, he had learned from his mistake and vowed to make himself better for the Coast Guard. He stated that if given a second chance, he wanted to make the Coast Guard a lifelong career and he would conduct himself with honor, respect, and devotion to duty.

On December 4, 2015, CDR J submitted a recommendation for retention on behalf of the applicant. CDR J stated that the applicant was the ideal candidate to be considered for a second chance and had his strongest recommendation for retention in the Coast Guard. To support his recommendation, CDR J stated that the applicant eagerly and professionally completed all of his assignments. He also stated that the applicant had maintained a positive attitude throughout his period of restriction and demonstrated his commitment to becoming a model Coast Guardsman. CDR J stated that he was confident that the applicant's DUI was an isolated lapse in judgment and that, if given another chance, the applicant would become an integral part of the unit and would continue to make noteworthy contributions to the Coast Guard for years to come.

On January 19, 2016, CDR J issued a memorandum to PSC EPM-1. CDR J stated that he was required to initiate discharge proceedings for the applicant due to his commission of a serious offense. Specifically, he cited the applicant's NJP for DUI. However, CDR J stated, the applicant met the eligibility requirements under the Commandant's Second Chance Program. CDR J highly recommended that the applicant be retained on active duty based on his performance and noted that he was confident that the applicant had many more years of productive service.

On March 7, 2016, the District Commander, a Rear Admiral (RADM), forwarded the discharge package to EPM-1 and recommended that the applicant be discharged. He stated that he had carefully considered the applicant's request for participation in the Second Chance Program and the endorsement from his command. However, he stated that he did not find compelling facts to warrant retention of the applicant. He stated that not only was the applicant driving under the influence of alcohol, but he had also violated a punitive order by consuming alcohol as a minor. However, in recognition of the applicant's strong performance, he recommended that he receive an honorable discharge.

On April 28, 2016, the applicant was discharged for unsuitability in accordance with Article 12.B.17. of the Coast Guard Personnel Manual. His DD-214 shows "honorable" as the character of discharge; "misconduct" as the narrative reason for separation; RE-4 (ineligible for reenlistment) as his reenlistment code; and JKQ (serious misconduct) as his separation code. The applicant signed his DD-214.

On July 1, 2016, the applicant submitted an application to the DRB in which he requested that his reenlistment code be changed from RE-4 to RE-1. He also requested to appear in-person at a hearing before the DRB. He stated that he would like his reenlistment code changed so that he could reenlist in another branch of the service. To support his application, he provided a summary of the events leading up to his discharge, a personal statement, and letters of recommendation.

On August 22, 2017, the DRB convened to review the propriety and equity of the applicant's discharge. The DRB stated that while the applicant elected to appear in-person, he did not respond to the DRB's request to appear before the board. As such, the DRB arrived at its decision after a thorough review of the record and supporting documents. The DRB determined that the applicant's discharge was proper and equitable. Specifically, the DRB determined in a unanimous 5-0 vote that the applicant's reason for separation and reenlistment code were appropriate and should not be changed. To support its decision, the DRB stated that the applicant was arrested for DUI and that he violated a punitive order by consuming alcohol as a minor.

On July 11, 2018, the president of the DRB approved the proceedings and recommendation of the DRB. The president noted that the order and accompanying documents should be placed in the applicant's official Coast Guard record.

On December 5, 2018, the applicant, through counsel, submitted another application to the DRB in which he requested that his narrative reason for separation and reenlistment code be changed. The applicant stated that in his first application, he was not represented by counsel and he was unable to meaningfully address the errors that occurred in his case. The applicant argued that his chain of command made a material error of discretion in failing to consider all rehabilitative options prior to his discharge. Specifically, the application argued that he was not properly considered for the Commandant's Second Chance Program. Further, the applicant argued that even if his discharge was proper, relief should be granted on the basis of equity. Specifically, the applicant argued that he had turned his life around since his discharge from the Coast Guard and he had overcome his issues with alcohol.

On March 7, 2019, the president of the DRB responded to the applicant's second application for review of his discharge. The president stated that the applicant initially petitioned the DRB on July 1, 2016, and a final decision was rendered in that case on July 11, 2018. The president stated that since the applicant's initial case had already been acted upon, the DRB could only review his case for reconsideration if there were "new, substantial, relevant evidence not available to the applicant at the time of the original review." The president determined that the applicant's new application did not warrant reconsideration. Specifically, the president determined that the applicant's new argument regarding the Commandant's Second Chance Program did not constitute new evidence since the program was in effect at the time of his discharge.

VIEWS OF THE COAST GUARD

On August 13, 2020, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant alternative relief in this case and adopted

the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC argued that the applicant had failed to show that the Coast Guard committed an error or injustice. First, PSC argued that the applicant was not eligible for the Second Chance Program. However, to support this allegation, PSC cited a version of the Military Separations Manual that was not in effect at the time of the applicant's discharge. Further, PSC misquoted the manual. Second, PSC argued that the applicant's chain of command did not support his retention. Specifically, PSC stated that the District Commander did not find compelling facts to warrant the applicant's retention.

The JAG reiterated that the applicant failed to show that the Coast Guard committed an error or injustice regarding his discharge. Specifically, the JAG argued that the applicant failed to show that he was discharged due to unlawful command influence. Instead, the JAG argued that the applicant was properly discharged in accordance with Coast Guard policy. In fact, the JAG stated that ALCOAST 146/14 mandated that the applicant be separated. According to ALCOAST 146/14, "administrative discharge proceedings will be initiated for: (1) any member…on whom nonjudicial punishment is imposed for drunken or impaired operation of vehicle." The JAG stated that the applicant's CO imposed NJP when it was determined by a preponderance of the evidence that the applicant had violated Articles 111 and 92 of the UCMJ for DUI and consuming alcohol as a minor. The JAG argued that the applicant's unit had no choice but to initiate administrative discharge proceedings.

The JAG also argued that the Coast Guard did not commit an error or injustice in failing to retain the applicant through the Commandant's Second Chance Program. The JAG argued that the applicant's record shows careful consideration of his retention at every level of his chain of command. Although CDR J recommended that the applicant be retained, the District Commander did not find compelling facts to warrant positive endorsement for retention. Further, the JAG argued that the ultimate discharge authority rested with PSC EPM-1. The JAG argued that after due consideration, PSC EPM-1 decided against retaining the applicant and authorized his separation. The JAG argued that PSC EPM-1's decision was not an error because the applicant's exemplary performance record did not lessen the fact that he had been arrested for DUI and had consumed alcohol underage.

The JAG also addressed the applicant's allegations against the DRB. The JAG argued that the applicant's allegation that the DRB denied his request without a discussion of his case or the reasons for its decision lacks merit. The JAG argued that the DRB suitably complied with its statutory requirements to make written findings and conclusions with respect to all disputed facts and issues. However, the JAG acknowledged that contrary to statutory requirement, a copy of the applicant's DRB proceedings was not entered in his personnel data record (PDR). As such, the JAG recommended that the BCMR order that the applicant's DRB record be added to his PDR. While the Coast Guard committed an error, the JAG argued that it should be considered harmless error. Specifically, the JAG argued that the error had no bearing on the applicant's reconsideration request to the DRB. The JAG argued that the applicant's reconsideration request was denied because he had failed to submit "new, substantial, relevant evidence, not available to the applicant at the time of the original review."

The JAG concluded by stating that the applicant's request to change his DD-214 so that he could reenlist in another branch of the military is unpersuasive. The JAG stated that the changes requested by the applicant are listed in the Special Additional Information section of his DD-214. The JAG stated that the Special Additional information section is for authorized agency use and are labeled as such on the form. The JAG stated that this information is used by the Coast Guard in determining the eligibility of a member with prior military service seeking to re-affiliate with the Coast Guard. The JAG stated that the applicant's request to alter one or more fields in the Special Additional Information section of his DD-214 is a request to confound the internal, administrative processes of the Coast Guard. Further, the JAG noted that the information contained on the applicant's DD-214 is not binding on other military services.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 5, 2020, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. In his response, the applicant argued that the BCMR should remand the matter to the DRB for an in-person hearing or grant his request on the merits.

The applicant argued that his case should be remanded to the DRB so that he can present his case in-person. He stated that the JAG's advisory opinion was the first time that he had learned of his apparent invitation to appear before the DRB. He stated that he never received an invitation to appear before the DRB and that the Coast Guard did not provide any evidence to show that the DRB ever sent him an invitation. The applicant stated that he did not learn about his invitation to appear before the DRB earlier because he was first provided the DRB's narrative decision in the advisory decision. He stated that he never received a copy of the DRB's narrative decision because the Coast Guard failed to include it in his PDR. He argued that had his DRB decision been properly filed in his PDR in July 2018, he would have been on notice earlier that he was invited to appear in-person for the DRB hearing.

In the alternative, the applicant asked the BCMR to grant the applicant's request on the merits. The applicant argued that the BCMR has the equitable authority to take all matters into consideration. He argued that he is a good man who made a mistake. He argued that his DD-214 should be changed so that he can reenlist in another branch of the military.

APPLICABLE LAW AND POLICY

Article 1.B.1.a. of the Military Separations Manual, COMDTINST M1000.4, discusses the Second Chance Program as follows:

> Discharge Authority
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> (1) Commander, Coast Guard Personnel Service Center is the Discharge Authority in all cases of administrative separation except in those cases specified in Articles 1.B.7, 1.B.9, 1.B.11, 1.B.14, 1.B.15, and 1.B.19. of this Manual in which the district commander, logistics/service center commands, or commanding officer, as appropriate, may be the Discharge Authority. In an effort to retain good, solid first-term performers with potential, but who have made a youthful mistake that would otherwise result in their discharge, the Commandant has established a "Second Chance Program". The Second Chance Program authorizes the first Flag Officer/SES

> in the chain-of-command of the first-term performers to waive all policy discharge authorities (except as noted below) contained in Articles 1.B.9., 1.B.12., 1.B.15., and 1.B.17. of this Manual. This authority shall not be delegated. The first Flag Officer/SES with assistance from their units shall define the internal processes for forwarding waiver requests to them. The Second Chance Program specifically excludes all policy discharges contained in Article and 1.B.12 of this Manual or Chapter 3 of reference (h), Coast Guard Drug and Alcohol Abuse Program, COMDTINST M1000.10 (series).
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> (2) Discharges for reasons other than Articles 1.B.9., 1.B.12., 1.B.15. and 12.B.17. of this Manual shall continue to be forwarded by the member's unit to Commander (CG PSC).
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> (3) In respect to the Second Chance Program:
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> > (a) A first-term performer is an enlisted member serving in his or her first four-year enlistment.
> >
> > (b) If a waiver is not granted, the first Flag Officer/SES shall endorse and forward the discharge package to Commander (CG PSC-EPM).
> >
> > (c) If a waiver is granted, the discharge package is not forwarded to Commander (CG PSC-EPM). The waiver shall be documented in an Administrative Remarks, Form CG-3307, entry in the service record and Commander (CG PSC-EPM) should be notified via message of the waiver.

Article 1.B.17.b. of the Military Separations Manual, COMDTINST M1000.4, discusses reasons to discharge members for misconduct as follows:

> (3) Commission of a Serious Offense. Commission of a serious offense does not require adjudication by non-judicial or judicial proceedings. An acquittal or finding of not guilty at a judicial proceeding or not holding non-judicial punishment proceeding does not prohibit proceedings under this provision. However, the offense must be established by a preponderance of the evidence. Police reports, CGIS reports of investigation, etc. may be used to make the determination that a member committed a serious offense.
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> > (a) Members may be separated based on commission of a serious military or civilian offense when:
> >
> > > (1) The specific circumstances of the offense warrant separation; and
> > >
> > > (2) The maximum penalty for the offense or closely related offense under the UCMJ and Manual for Courts-Martial includes a punitive discharge. The escalator clause of Rule for Courts-Martial 103(d) shall not be used in making this determination.

ALCOAST 146/14 announced changes to the Coast Guard substance abuse policy that became effective on May 1, 2014, and included policy changes regarding DUIs in relevant part:

> d. Highlight stigma associated with driving under the influence (DUI). The Coast Guard must take a firmer stand on the impacts of DUI on a member's career and spell out the implications of a DUI. Administrative discharge proceedings will be initiated for:
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> > (1) Any member who is convicted by domestic or civil authorities, convicted by court-martial, or on whom nonjudicial punishment is imposed for drunken or impaired operation of a vehicle, aircraft, or vessel.

Rule 104 of the Manual for Courts-Martial discusses unlawful command influence as follows:

> (a) *General prohibitions.*
>
> > (1) *Convening authorities and commanders.* No convening authority or commander may censure, reprimand, or admonish a court-martial or other military tribunal or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court-martial or tribunal, or with respect to any other exercise of the functions of the court-martial or tribunal or such persons in the conduct of the proceedings.
> >
> > (2) *All persons subject to the code.* No person subject to the code may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case or the action of any convening, approving, or reviewing authority with respect to such authority's judicial acts.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552.

2. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice.[6] Although the applicant in this case filed the application more than three years after he knew of the alleged error on his discharge form, DD-214, he filed it within three years of the decision of the Discharge Review Board, which has a fifteen-year statute of limitations. Therefore, the application is considered timely.[7]

3. The applicant alleged that his narrative reason for separation, reenlistment code, and separation code on his DD-214 are erroneous and unjust. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in the military record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.[8] 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."[9]

4. The applicant argued that he was administratively separated from the Coast Guard due to unlawful command influence. He argued that since Coast Guard policy did not require his separation and his CO supported his retention, there could be no other explanation for his separation other than unlawful command influence. According to the Manual for Courts-Martial, unlaw-

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[6] 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.
[7] *Ortiz v. Secretary of Defense*, 41 F.3d 738, 743 (D.C. Cir. 1994).
[8] 33 C.F.R. § 52.24(b).
[9] *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

ful command influence prohibits a convening authority or commander from censuring, reprimanding, or admonishing a court-martial or other military tribunal with respect to the findings or sentence adjudged. In this case, the applicant was not taken to court-martial or another military tribunal. Instead, the applicant received NJP, which is his command's disciplinary measure. As such, unlawful command influence is inapplicable in this case. Further, the applicant's allegation that Coast Guard policy did not require his separation is incorrect. The applicant argued that his separation was not required because he only received his first alcohol incident. However, in addition to receiving an alcohol incident, the applicant received NJP for driving under the influence of alcohol and consuming alcohol as a minor. As noted by the JAG, ALCOAST 146/14 requires the Coast Guard to administratively discharge members on whom "nonjudicial punishment is imposed for drunken or impaired operation of a vehicle, aircraft, or vessel." Finally, the applicant's allegation that he was separated due to some nefarious action by a senior officer is unfounded. The fact that the District Commander did not agree with the applicant's CO and determined that there was insufficient evidence to retain the applicant is not evidence of wrongdoing. Therefore, the applicant has not shown by a preponderance of the evidence that he was separated from the Coast Guard due to unlawful command influence.

5. The applicant argued that the Coast Guard erred by not allowing him to participate in the Second Chance Program. According to Article 1.B.1.a. of the Military Separations Manual, the Second Chance Program was created to retain solid first-term performers who made a youthful mistake that would otherwise result in their discharge. While the manual prohibits certain members from participating, there is nothing in the manual that prohibited the applicant's participation in the program. However, just because a member is eligible to participate in the program does not guarantee their retention. The Military Separations Manual specifies that a member's retention is dependent on their first Flag Officer/SES in the chain-of-command waiving all policy discharge authority. In this case, the applicant's first Flag Officer, the RADM who was the applicant's District Commander, did not grant a waiver for the applicant. While the applicant's record shows that he was a solid first-term performer, the record also shows that the RADM's determination that the applicant was not a good candidate for the program was supported by serious misconduct. According to the applicant's narrative of events, he drove his classmates to a bar after having had just a couple of drinks eight hours earlier and was their designated driver on his way back to the barracks when he was arrested for DUI. But the breathalyzer results show that the applicant put himself and other vehicles on the road at risk, and if he was the designated driver, he put the Coast Guard members who were in the vehicle at risk as well. Moreover, according to the police report, the applicant lied to the police officer when he stated that he did not drink. Finally, the applicant's BAC results are also inconsistent with his narrative of the events in his application to the Board. Therefore, the applicant has not proven by a preponderance of the evidence that the Coast Guard committed an error in failing to retain him through the Second Chance Program.

6. The applicant asked the Board to change his narrative reason for separation, reenlistment code, and separation code. But the records show that the applicant was properly discharged in accordance with Coast Guard regulations. On October 13, 2015, the applicant was notified that his CO had initiated action for his discharge due to the commission of a serious offense. According to the Military Separations Manual, a member can be discharged for the commission of a serious offense if the offense was established by a preponderance of the evidence, the specific circumstances of the offense warrant separation, and the maximum penalty for the offense

under the UCMJ includes a punitive discharge. In this case, the applicant received NJP for failure to obey an order or regulation and drunken or reckless operation of a vehicle, both of which carry a maximum penalty including a punitive discharge. According to the SPD Handbook, since the applicant was discharged due to the commission of a serious offense, the proper narrative reason for separation was "misconduct," the proper enlistment code was E-4, and the proper separation code was JQK. Therefore, the applicant has not proven by a preponderance of the evidence that the Coast Guard committed an error in issuing his DD-214.

7. The applicant's remaining allegations pertain to decisions made by the DRB. Specifically, the applicant argued that his DRB case was improperly denied without a discussion of the merits, that he was improperly denied an in-person hearing, and that his request for reconsideration was improperly denied. However, the BCMR is a separate and independent entity from the DRB, with its own administrative record, and it is not a DRB appeals board. While the BCMR may reach a different conclusion and grant relief in cases where the DRB has denied relief, the BCMR does not have authority to tell the DRB how to conduct its business, to overturn a DRB decision in the way that an appellate court overturns the decision of a lower court, or to remand a case back to the DRB. The BCMR could remove a decision of the DRB from an applicant's military record if it found that the presence of that decision in the record constituted an error or injustice, but the applicant in this case has not done so. Any concerns or requests related to his DRB case should be addressed directly to the DRB.

The applicant is correct in that the BCMR has equitable authority to take all matters into account when considering an applicant's request. However, the applicant's assertion that the BCMR should grant his request because his DRB case was not properly adjudicated is without merit. First, although the applicant claimed that he was denied the hearing he was entitled to under 10 U.S.C. § 1553, the DRB decision states that he did not respond to an invitation to attend a hearing. Second, contrary to the applicant's assertion, the DRB issued a decision which included written findings and conclusions with respect to the disputed facts and issues. Finally, the applicant has not shown that the DRB's denial of the applicant's reconsideration request was an error. According to 33 C.F.R. § 51.9(h), a request for reconsideration must contain "new, substantial, relevant evidence not available to the applicant at the time of the original review." Contrary to the applicant's assertion, new arguments are not equivalent to new evidence. Even if the BCMR determined that the DRB had committed errors, procedural errors at the DRB would not warrant granting the applicant's requests for relief in this case because he has not proven he is entitled to that relief by a preponderance of the evidence. The BCMR has assessed the applicant's substantive arguments regarding his reenlistment code, separation code, and narrative reason for discharge herein and determined that the facts do not warrant granting his request.

8. Accordingly, the applicant's request to change his narrative reason for separation, reenlistment code, and separation code on his DD-214 should be denied.

9. The JAG acknowledged that a copy of the applicant's DRB proceedings is not included in his PDR. According to 33 C.F.R. § 51.11(b), the "record of the discharge review" must be incorporated into the service record of the applicant. Therefore, the Coast Guard should incorporate the record of the discharge review into the applicant's PDR.

ORDER

The application of former [redacted] for correction of his military record is denied, but the Coast Guard shall correct his record to include the record of the discharge review in accordance with 33 C.F.R. § 51.11(b).

June 4, 2021

[redacted]

[redacted]

[redacted]