

counseled on the Commandant's policy on alcohol abuse and was warned that any future involvement in an alcohol-related incident of any type would result in a discharge from the service.

(2) On April 26, 1990 another page 7 entry was entered in the applicant's record documenting his completion of a six week inpatient alcohol rehabilitation program. He was placed on an aftercare program that included the following: (1) Indefinite abstention from the use of alcohol; (2) Frequent meeting with the Command Drug and Alcohol Representative (CDAR) as well as frequent AA meetings for a period of one year; and (3) Mandatory urinalysis screening. The applicant was advised of the "provisions of COMDTINST M1000.6A [the Personnel Manual], Art[icle] 20-B-2g, concerning the consequences of subsequent alcohol use after receiving alcohol treatment." The applicant acknowledged that he had been counseled regarding the provisions of his aftercare plan and that he understood and would comply with its terms.

(3) On April 28, 1994, the applicant received another page 7 entry documenting an alcohol-related incident that occurred on April 22, 1994. The entry stated that the applicant was arrested for DUI and had a BAC of .232. The applicant was counseled on the Coast Guard's policy on alcohol abuse and was advised that any subsequent alcohol incidents would result in his separation from the Service. The applicant was also advised that this incident violated his aftercare program of April 26, 1990 and that he would be referred to a medical officer for an alcohol screening to determine whether the aftercare program would be reinstated. The page 7 entry stated that the commanding officer (CO) would then make a recommendation to the Commandant with respect to the applicant's separation from or retention in the Service and the appropriateness of further therapy.

(4) On May 16, 1994, the applicant received a drug and alcohol evaluation at a naval installation. He was evaluated as alcohol dependent. According to the evaluation report, the applicant admitted during the screening process that he consumed 12 beers in six hours during the April 1994 incident. The applicant also admitted to heavy drinking in the past. This evaluation report also stated that since December 1993 the applicant has consumed a 12-pack (of beer) on five different occasions. It also stated that this was the applicant's first documented alcohol-related incident. The evaluation report stated that the applicant may be considered a "rehabilitation failure and administratively handled [in accordance with] navy policy." The evaluation report stated that if the applicant was retained in the Coast Guard, he should attend no less than three AA meetings per week, attend stress management classes, and receive refresher alcohol treatment at Level III. The applicant's potential for further useful service was described as fair.

(5) On June 3, 1994, in a letter to the Commander, Military Personnel Command (MPC-SEP-2), the applicant's CO recommended that the applicant be

retained in the Coast Guard without the level III treatment. In concluding his letter, the CO stated the following:

[The applicant] is a solid performer who desires to work out his problems and continue working for the Coast Guard. [REDACTED] is a small northwest, coastal town without many social activities for single members and it is difficult for minority members to fit in the community. With regular [AA] meetings and support from the CDAR, this incident is not likely to occur again. Attending Level III treatment is not necessary.

(6) MPC disagreed with the recommendation of the CO. It advised the CO that the proper procedure was for the command to initiate discharge proceedings against the applicant. MPC said that this procedure could include the CO's recommendation for retention.

(7) On September 18, 1994, the applicant was charged with being drunk on duty, a violation of Article 112 of the Uniform Code of Military Justice (UCMJ), and disobedience of a lawful order, a violation of Article 92 of the UCMJ. The preliminary investigating officer's report stated that the applicant admitted to drinking, but denied that he was drunk or that he could not perform his duties. The investigating officer obtained statements from several witnesses who stated that they had the opportunity to observe the applicant on the date and time in question. It was their opinion that the applicant was under the influence of alcohol. The applicant was also relieved of his duties at that time. The preliminary investigating officer recommended to the CO that the drunk on duty charge be dropped because none of the witnesses stated that the applicant smelled of alcohol. The military record showed that the applicant was punished for being drunk on duty and disobeying an order

(8) On October 18, 1994, a court memorandum was prepared and entered in the applicant's record showing that he was taken to captain's mast on October 4, 1994, for violations of Articles 92 and 112 of the UCMJ. These offenses were described in the following manner: "[THE APPLICANT ON OR ABOUT] 0745 18SEP94 WAS DRUNK ON DUTY. WAS TO REMAIN ABOARD UNTIL SOBER AND RELEASED BY THE OOD. [ON OR ABOUT] 1300 18SEP94 DEPARTED WITHOUT BEING RELEASED BY THE OOD" (emphasis in original). As punishment the applicant received 20 days extra duty, 30 days of restriction (suspended for six months), and reduction to pay grade E-4 (suspended for six months).

(9) On October 28, 1994, in accordance with direction from MPC, the applicant's CO submitted a letter to MPC recommending that the applicant be honorably discharged by reason of unsuitability due to alcohol abuse. The CO informed MPC that in April 1990 the applicant completed a voluntary inpatient

treatment and aftercare program; that in April 1994, the applicant was arrested by civilian police for a DWI for which he received a \$400.00 fine, 20 hours of community service and mandatory counseling; and that in October 1994, the applicant was punished at captain's mast for disobeying an order.

The CO said that Article 20-B-2-1 of the Personnel Manual states that an alcohol-dependent member found to be consuming alcohol a second time after completion of an aftercare program shall be discharged from the Coast Guard. The CO stated that the applicant's April 1994 offense was his first episode of consumption of alcohol after completion of an aftercare program. The CO concluded this letter by giving his personal view that the applicant be retained in the Coast Guard.

(10) On October 28, 1994, the applicant was informed by letter that the CO had initiated action to discharge him from the Coast Guard for unsuitability due to alcohol abuse. On that same date, the applicant acknowledged his proposed discharge, expressed his desire to make a statement, disagreed with the recommendation to discharge him, objected to the discharge, and acknowledged that he had been provided the opportunity to consult with legal counsel.

(11) In his statement accompanying the discharge package, the applicant wrote the following:

I have served in the military for almost 16 years, counting my prior [REDACTED] service. I believe I have served well, and performed to the best of my ability. I have never been a problem maker to my superiors or my co-workers. I believe my present command can vouch for that. The alcohol use was not a problem for me until the 1988-1990 time period, for various reasons, mainly being around old friends and relatives while stationed back home in [REDACTED] during that time. At which time I sought help, and self referred my self to Alcohol rehab.

After rehab, I transferred out of [REDACTED] to [REDACTED]. I successfully completed my aftercare program, and did not consume alcohol during my tour in [REDACTED]. There were many activities after working hours and on weekends that kept me out of the drinking.

I then transferred to the CGC [REDACTED] after 6 years of shore duty. [REDACTED] being a small community, there isn't much to do. I was having a hard time adjusting to the small town life, and adjusting to the shipboard life after having been away from it for so long. The stress is what finally caused me to drink on that day I was cited for DUI.

I realize that I made a bad mistake, but I am not a bad person and also human. It was a bad judgment on my part, but I believe that I deserve a second shot at it.

(13) In December 1994, MPC recognized that the applicant was entitled to an administrative discharge board (ADB) because he had over 8 years of military service. The applicant stated that he wished to have an ADB consider his case. On February 17, 1995, Commander, Coast Guard [REDACTED] convened an ADB to hear the applicant's case and to make findings of fact and a recommendation for the applicant's discharge or retention in the Coast Guard.

Administrative Discharge Board (ADB) Proceedings

The ADB met on February 24, 1995 in the applicant's case. It voted unanimously to recommend that the applicant be retained in the Coast Guard. In the ADB report prepared by the senior member, he stated that the ADB's copy of the applicant service record was inadvertently shredded and a another copy of the service record was obtained from the [REDACTED] PERSRU. While reviewing that service record, the senior member discovered a page 7 entry dated March 7, 1987 detailing the applicant's DUI arrest while stationed in Puerto Rico.

Upon the advice of legal counsel, the ADB reconvened (the second ADB) on April 19, 1995, to consider the March 1987 page 7 entry. All members of the ADB were present at the second hearing except for the applicant's counsel, who was on a speaker phone. The March 1987 entry had not been considered at the first ADB hearing.

The reconvened (second) ADB found that the applicant had been involved in two alcohol incidents, the one in [REDACTED] and the one in April 1994. The second ADB further found that the applicant was not suitable for continued Coast Guard service and recommended that he be honorably discharged from the Coast Guard.

On April 27, 1995, the Commander, Coast Guard [REDACTED] informed MPC that the ADB had been conducted in the applicant's case. MPC was told that the ADB was reconvened to consider additional evidence. The Commander stated the following:

Although it is unfortunate this information was not presented in the original proceedings, this did not preclude the Board from reconvening to consider all relevant facts prior to making [its] recommendation. Prior to reconvening, I received a request from the respondent's counsel to assign a new Board. Upon careful consideration I concluded that the Board members were not predisposed in their recommendation.

On May 5, 1995, the applicant's CO commented on the ADB report. He recommended that the applicant be retained in the Service even though evidence at the ADB was conclusive that the applicant had been involved in two alcohol related incidents and that he had violated his aftercare program.

The ADB proceedings (first and second hearing) were reviewed by the Chief Counsel of the Coast Guard. The Chief Counsel wrote that "[t]he initial proceeding of the Board on 24 February 1995 was in substantial compliance with the requirements of [the Coast Guard Personnel Manual and the Administrative Investigations Manual] and the recommendation for retention after that hearing is legal. The Board's subsequent proceeding on 19 April 1995 and the resultant recommendation for discharge are legally flawed." The Chief Counsel stated that Article 12-B-31.c of the Personnel Manual precluded referring the case to a new board. The Chief Counsel found that the reconvened ADB resulted in legal prejudice to the substantial rights of the applicant, particularly since the second ADB was held in the absence of the applicant's counsel, over that counsel's objection, and despite that counsel's assertion that given more time he could develop evidence to rebut the page 7 entry documenting the 1987 DUI.

The Chief Counsel advised the Commandant that he should "either disapprove the findings, opinions, and recommendation and refer the case to a new board, or disregard the second hearing with its evidence and take final action based on the proceedings of 24 February 1995 alone. If the latter course is taken, [the Commandant] should disapprove the finding of a March 1987 alcohol incident. In taking that action, however, you may consider the events of 18 September 1994 that resulted in a non-judicial punishment as constituting an alcohol incident. . . despite the board's failure to so find and despite the lack of a page seven to that effect."

On October 20, 1995, the reviewing authority for the ADB followed the Chief Counsel's advice and disapproved the second ADB hearing and the related evidence, including the finding of a 1987 alcohol incident, developed at that hearing. The Commander also disapproved the ADB's recommendation that the applicant be discharged from Coast Guard. Only the findings, opinions, and the recommendation for retention by the board after the first hearing were considered by the reviewing authority in determining his final action.,

Concerning the first ADB hearing, the reviewing authority stated the following:

The evidence presented at the first hearing supports a finding of an alcohol incident on 22 April 1994, as found by the board. There is also evidence of non-judicial punishment on 4 October 1994 for actions on 18 September 1994 which meet the definition of an alcohol incident. Despite the lack of page seven documentation of such an incident and lack of a board finding to that effect, I have determined from the

evidence that a second alcohol incident occurred on 18 September 1994. That determination and the remaining findings and opinions of the board are hereby approved. Based on the foregoing, the board's recommendation of retention is disapproved. [The applicant] shall be Honorably Discharged from the Coast Guard.

On October 23, 1995, MPC ordered the applicant discharged by reason of unsuitability.

Applicant's Statement

The applicant asserted that the Coast Guard initiated discharge separation proceedings instead of re-instituting a second aftercare program in accordance with the Personnel Manual. He stated that his CO supported his request to remain in the Coast Guard.

The applicant spoke of the unfairness of the reconvened ADB and that it was conducted over his counsel's objection. He stated that the DUI charge referred to in the March 9, 1987 page 7 entry was dropped at the court appearance. The applicant stated that since he was not convicted of that charge he thought the page 7 entry would be removed from his service record.

The applicant stated that he believed that he could continue to serve in the Coast Guard until he was retirement eligible (20 years active duty).

The applicant submitted a statement from his counsel. The counsel stated the second ADB hearing was unfair and possible illegal.

The applicant's counsel stated that the applicant had nearly 17 years in the Coast Guard and that it was not equitable for him to forfeit his retirement at this stage in his career. He stated that the applicant was respected as a skilled machinery technician and good shipmate by his command and his peers.

Views of the Coast Guard

The Coast Guard recommended that the applicant's request for relief be denied. The Service stated that the errors that the applicant alleged were harmless, because the discharge authority did not consider the 1987 alcohol incident in ordering the applicant's discharge. The Coast Guard also argued that the applicant has not shown, absent the error, he would likely have been retained in the Coast Guard.

The Coast Guard stated that its policy provides that any member involved in two alcohol incidents will normally be processed for separation from the Coast Guard for unsuitability. Article 20-B-2-g. of the Personnel Manual. In addition,

members violating an aftercare plan will normally be processed for separation. Article 20-B-2(k) of the Personnel Manual. Finally, members involved in a third alcohol incident shall, without exception, be processed for separation. Article 20-B-2-h of the Personnel Manual. The Service stated that the applicant's military record showed that he was involved in at least three alcohol incidents and at least two violations of his aftercare plan.

The Coast Guard argued that no one has a right to remain in the Armed Forces unless a specific statute or regulation grants that right. Dodson v. U.S., 988 F.2d 1199, 1203-1204 (Fed. Cir. 1993). So, to prevail in this case, the applicant must establish that his discharge was carried out in violation of a substantial right. Skinner v. U.S., 594 F.2d 824, 828 (Ct. Cl. 1979). In accordance with the Personnel Manual, the applicant was afforded a hearing prior to his discharge.

The Coast Guard argued that its regulations are structured to provide the discharge authority with considerable fact-finding and discretionary decision-making powers in determining whether the member should be discharged, and the type of discharge to be awarded. Government officials are accorded a presumption that they carry out their duties correctly, lawfully, and in good faith. Arens v. U.S., 969 F.2d 1034, 1037 (1992); Sanders v. U.S., 594 F.2d 804, 813 (Ct. Cl. 1979). Thus, argued the Service, the BCMR should only grant relief if the applicant's discharge resulted from a clear violation of a substantial right, or if the decision amounted to a clear abuse of discretion.

Article 12-B-31.d(1) of the Personnel Manual permits the Commandant to take final action other than that recommended by the ADB, so long as his action is supported by the evidence of record and the reasons for that action is stated in the final action. The Commandant has delegated his authority to act on separations to the Commander, MPC.

The Coast Guard stated that the Chief Counsel properly advised the Commander, MPC, that the second ADB hearing was legally flawed, and that the Commander could either refer it to a new board or take final action based solely on the first ADB hearing. The Commander was further advised that if he elected to take action, the finding of a March 9, 1987 alcohol incident should be disapproved. The Commander was further advised that he could consider the September 18, 1994 event (drunk on duty incident) as an additional alcohol incident.

The Coast Guard asserted that the Commander's action disapproving the second hearing involving the 1987 incident, but finding that the events of September 18, 1994 to be a second alcohol incident was consistent with the Chief Counsel's advice. The Service concluded that the Commander acted properly and there was no procedural error in the applicant's discharge proceedings.

The Coast Guard also did not find an abuse of discretion by the Commander in discharging the applicant. The Service noted that the applicant did not contest the April 22, 1994 DUI, the violation of his aftercare program, or the first ADB hearing. The Coast Guard stated that evidence of the September 18, 1994 incident was admitted into evidence at the first ADB hearing. This evidence showed the following:

At about 0645 on the morning of the 18 September 1994, Applicant assumed the watch onboard USCGC [REDACTED] as duty oiler. Applicant's behavior was uncharacteristically loud and "oppressive," and he was wearing sunglasses below decks. After talking to applicant, and closely observing his behavior, the OOD and Applicant's supervisor, both E-7's, concluded that he was intoxicated. . . . The two other witnesses interviewed also concluded the he was hungover or intoxicated. . . . Applicant was therefore relieved of his duty as watchstander and ordered to remain on board until he "sobered up" and was authorized to depart by the OOD. He departed the ship without this authorization and his absence was only discovered at 1300 when a search was conducted and his car was missing from the parking lot. In the ensuing investigation, Applicant verbally admitted to having 5 drinks at two bars between 2200 and 2300 on 17 September 1994, (an admission that he again violated his after care program). He did not mention even this drinking in his written statement, merely stating his conclusion that "he was not drunk" and that he was under a great deal of pressure because of his DUI. . . .

The Coast Guard argued that the September 18, 1994 incident met the definition of an alcohol incident as defined in the Personnel Manual. An alcohol incident is defined as "any behavior, in which the use or abuse of alcohol is determined 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 nonjudicial punishment for the behavior to be considered an alcohol incident."

The Coast Guard stated the Commander, MPC, properly concluded that the applicant had a second alcohol incident (the September 1994 incident). The applicant has not shown extraordinary circumstances meriting his retention, and even if he had, the MPC Commander's decision would be entitled to great deference by the BCMR. The Service stated that the Commander, MPC, as the discharge authority was not required to return the record to the ADB because the evidence in the record was sufficient for him to make a determination.

The Coast Guard argued that should the BCMR find that the applicant was prejudiced by an error in his discharge proceeding, the remedy should be limited to a corrected proceeding, with any other remedies awarded retroactively if the applicant is retained.

The Coast Guard concluded its comments by stating the following:

Applicant's discharge is fully supported by the record, The ADB's failure to accord applicant his counsel rights at its second session was remedied by the Commander, MPC. Weight and deference should be afforded to the judgment of the discharge authority.

APPLICABLE REGULATIONS

Article 12-B-31d. of the Personnel Manual states in pertinent part: "[T]he Commandant will . . . take action to approve or disapprove the board's findings of fact, opinions, and recommendation , in whole or in part. The Commandant may disapprove findings of fact, and opinions, if they were made based upon incomplete evidence, were contrary to the evidence considered by the board, were contrary to law or regulation, were a misunderstanding or misapplication of written policy, or are otherwise clearly in error. If the Commandant disapproves the findings of fact, opinions, or recommendations; the Commandant may: (1) . . . take final action other than recommended without returning the record, so long as that action is supported by evidence of record and the specific reasons are set out in the final action."

Article 12-B-31e. states that "[t]he Commandant may then take one of the following final actions: . . . (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 upon a finding of legal prejudice to the substantial rights of the respondent. . . ."

Article 20-A-2c. of the Personnel Manual states: "Alcohol Incident. Any behavior, in which the use or abuse of alcohol is determined 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. . . ."

Article 20-B-2b. states: "Alcohol Incident. . . [I]n order for a member to have a designated alcohol incident, the actual use of alcohol by the member must occur..."

Article 20-B-2f. states: "First Alcohol Incident. . . (2) . . . Enlisted members will be advised that an additional incident will normally result in discharge. . . ."

Article 20-B-2g. states; "Second Alcohol Incident. . . . Enlisted members involved in a second alcohol incident will normally be processed for separation. . . ."

Article 20-B-2k. states: "Unsuccessful Treatment. Members refusing to undergo the treatment deemed necessary by the commanding officer, failing to complete this treatment, or violating an alcohol rehabilitation aftercare plan will normally be processed for separation. . . ."

Article 20-B-2l. states: "Members diagnosed as alcohol dependent must abstain from alcohol use in order to maintain sobriety. . . . A second episode of alcohol consumption after completion of an aftercare program by members who have been diagnosed as alcohol dependent will result in separation from the Coast Guard."

Article 20-B-3d. states that "the commanding officer shall advise members in writing of the following prior to treatment: . . . (2) Successfully completing a treatment program after one alcohol incident will allow the member to continue a career in the Coast Guard. Members . . . violating an alcohol rehabilitation aftercare plan normally will be separated from the Coast Guard."

FINDINGS AND CONCLUSIONS

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

1. The BCMR has jurisdiction of the case pursuant to section 1552 of title 10, United States Code. The application was timely.
2. The applicant has challenged the ADB proceedings as being legally flawed because of the Coast Guard's error in reopening the February 24, 1995 proceedings, which recommended the applicant's retention in the service, to consider a new piece of evidence, the March 1987 page 7 entry. Contrary to the first ADB hearing, the second ADB found that the applicant had been involved in two alcohol incidents and recommended his discharge from the Service.
3. The Commander, MPC, by delegation, is the discharge authority and as such takes final action on all ADB proceedings. The Personnel Manual authorizes the discharge authority to disapprove findings, opinions, and recommendations of an ADB if they were made in error. The Coast Guard admitted that the second hearing was held in violation of the personnel Manual. Therefore, the Commander, MPC, properly exercising his authority, disapproved the second ADB hearing including its use of the March 1987 page 7 entry and the related findings, opinions and recommendations. Article 12-B-31d. of the Personnel Manual. It was not necessary for the discharge authority to return the record to the ADB for

rehearing because final action could be taken on the first ADB hearing, which was determined by the Chief Counsel to be in substantial compliance with the Personnel Manual.

4. Acting solely on the evidence presented at the first ADB hearing, the discharge authority also disapproved that board's recommendation that the applicant be retained and ordered the applicant to be honorably discharged. Despite the first ADB recommendation for retention, the discharge authority found that the evidence submitted in the first ADB supported a finding that the applicant had been involved in two alcohol related incidents (the April 22, 1994 incident and the September 18, 1994 incident). There was evidence in the ADB record (i.e., witnesses statements) that on September 18, 1994, the applicant was intoxicated and had to be relieved of his duties. The applicant's claim that he was not drunk on September 18, 1994 and that he could perform his duties was insufficient to overcome the witnesses statements and the court memorandum documenting his October 4, 1994 captain's mast for being drunk on duty and for disobeying an order. Documents related to the September 18, 1994 incident were offered into evidence at the first ADB hearing. The applicant's discharge based upon two alcohol related incidents was permissible pursuant to Article 20-B-2g. of the Personnel Manual.

5. In taking action, the discharge authority certainly violated no law or regulation in disapproving the first ADB's recommendation that the applicant be retained. The Personnel Manual states that the discharge authority may take final action other than that recommended by the ADB, without returning the record to the ADB for further action and if the service member has not suffered legal prejudice, so long as the action taken is explained and supported by the record.

6. The discharge authority explained his reasons for disapproving the recommendation of the first ADB and the evidence of record fully supported the discharge authority's finding that the applicant was involved in a second alcohol incident on September 18, 1994. The applicant has not shown that he suffered legal prejudice with regard to the first ADB hearing. The taint that was attached to the first proceeding by the illegal convening of a second ADB was effectively removed when the discharge authority disapproved the second ADB proceeding. At the first ADB, the applicant had counsel, the opportunity to present and cross-examined witnesses, to offer evidence, and to make any statement he desired to make. Since the evidence of the September 18, 1994 incident was admitted at this first hearing, it was not unfair for the discharge authority to consider it when he took action on the record.

7. Pursuant to Article 12-B-31e(6) of the Personnel Manual, in disapproving the recommendation for retention, the discharge authority properly ordered the applicant discharged with no less than an honorable discharge.

8. The evidence of record shows that the applicant was alcohol-dependent and in 1990 received treatment as an inpatient for that dependency. Upon release from the alcohol rehabilitation center, the applicant signed a page 7 entry acknowledging his aftercare program and the consequences contained in Article 20-B-2g. should he resume the use of alcohol.

9. The applicant argued that after the April 1994 incident the Coast Guard should have reinstated the aftercare program rather than initiating discharge proceedings. This argument is without merit. Article 20 of the Personnel Manual does not require that a member receive a second alcohol rehabilitation treatment. In fact, Article 20-B-2k. of the Personnel Manual states that a member who violates his alcohol rehabilitation aftercare plan will normally be processed for separation. It is discretionary with the Commandant whether further therapy will be approved for an alcohol dependent member, such as the applicant, who has resumed drinking. Article 20-B-2l. of the Personnel Manual.

10. It is also within the discretion of the reviewing authority to approve or disapprove the CO's recommendation that the applicant be retained in the Coast Guard. The discharge authority did not commit an error or injustice by not retaining the applicant under the "exceptional circumstances" exception of Chapter 20 of the Personnel Manual.

11. The applicant has failed to prove an error or injustice regarding his discharge from the Coast Guard. Accordingly, the application should be denied.

ORDER

The application of
correction of his military record is denied.

USCG, for

