

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2012-148



FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case upon receipt of the applicant's completed application on May 12, 2012, and assigned it to staff member [REDACTED] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated February 28, 2013, 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 asked the Board to upgrade the character of his August 12, 2011, discharge from general due to a "pattern of misconduct" to honorable for "completion of required service."

The applicant alleged that he served on active duty for almost ten years "with a spotless record aside from the court-martial." The applicant alleged that he was convicted but not awarded punishment, which "prov[es] the nature of [his] crimes were not severe" and that his conviction by court-martial weighed too heavily in the characterization of his service upon his discharge pursuant to the decision of an Administrative Separation Board (ASB) following the court-martial. The applicant stated that he has been working overseas in the field of anti-piracy and maritime security since his discharge but his less than honorable discharge precludes him from getting a decent job in the United States so that he can be with his wife and child.

The applicant claimed the following errors and injustices in the ASB proceedings:

- The ASB rejected all of his witnesses in defense although the Coast Guard was permitted to have two witnesses, one of whom even recommended that he receive an honorable discharge.
- One of the witnesses rejected by the ASB, SN L, is nonetheless cited as a witness in the cover letter to the ASB report. The applicant alleged that SN L was the primary victim of his actions but nonetheless recommended that the applicant be retained on active duty or, if not, receive an honorable discharge.

- The ASB refused to accept a letter from the applicant's wife based on the Coast Guard's false claim that she had already served him with divorce papers.

In support of his claims, the applicant submitted from his military record copies of his performance evaluations reflecting excellent performance, a Letter of Commendation, and two Achievement Medals. He also submitted numerous documents from the court-martial and the ASB proceedings, including letters from many fellow members requesting clemency and retention on his behalf.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on September 24, 2001. He advanced to become a [REDACTED]

Convictions at General Court-Martial

On January 28, 2011, the applicant was convicted by a general court-martial of numerous offenses under the Uniform Code of Military Justice (UCMJ). The offenses stemmed from a series of hazing incidents aboard a cutter in 2007, 2008, and 2009. The report of the results of the court-martial, dated February 10, 2011, shows that the applicant pled not guilty to all of the charges and was acquitted of many but found guilty of the following violations of the UCMJ:

- Article 93: five specifications of maltreatment by subjecting SN L and three other crewmembers to hazing rituals while they were tied up and by directing one crewmember to place his genitals on the forehead and/or face of another crewmember.
- Article 120: two specifications of indecent conduct and abusive sexual contact by intentionally exposing his scrotum in a public place and then rubbing his scrotum against the back of SN L's neck while SN L was physically incapable of declining to participate in the sexual contact.
- Article 128: three specifications of assault by tying up the hands and feet of two crewmembers and striking a third member in the stomach.

Administrative Separation Board

Although the court awarded the applicant no punishment for the above offenses, the applicant's commanding officer (CO) notified him in a memorandum dated February 7, 2011, that he was initiating the applicant's discharge for misconduct due to his commission of a serious offense, as evidenced by the court-martial convictions, "and other misconduct discovered by a Coast Guard Investigative Service [CGIS] investigation into your actions from summer 2007 through the summer of 2009" while serving aboard the cutter. The CO advised him that he might receive an honorable, general, or other than honorable discharge and that he had a right to object to the discharge, to submit a statement, to consult an attorney, and to be represented by an attorney before an ASB if he requested one.

The applicant requested an ASB and it convened on March 16, 2011. On May 5, 2011, the ASB issued a summarized record of its proceedings and a report with findings of fact, opinions, and recommendations:

- According to the summarized record of the ASB, the Recorder called a CGIS agent to testify, and the agent testified that the applicant had set a poor example and caused three members to separate or be discharged. The CGIS agent called the applicant the worst chief petty officer he had ever seen and recommended that the applicant receive an other than honorable (OTH) discharge. The Recorder also called the Executive Officer (XO) of the cutter to testify. The XO denied direct knowledge of hazing but admitted to having heard loud noises coming from the berthing, which he had attributed to horseplay. The XO recommended that the applicant receive an honorable discharge. The ASB noted that the [REDACTED] (BM3 L) to testify but that the Recorder had objected to the testimony as redundant, and the Board had sustained the objection. The ASB noted that the applicant had submitted, *inter alia*, six “character statements” from officers and enlisted members, including BM3 L; seven “voluntary statements” from officers and members, including BM3 L; a transcript of his CO’s testimony; six witnesses’ statements; and a video. According to the summary, the applicant admitted that he had done wrong during the ASB but said that he had intended to increase morale and horseplay and not to offend, hurt, or cause lasting effects on anyone. After recessing for deliberations, the ASB found that the applicant should be administratively discharged for misconduct with a general discharge.
- In the report of its findings, opinions, and recommendations, the ASB noted the applicant’s convictions, the lack of any report or complaint by the crewmembers whom the applicant had hazed, and the applicant’s admission to having participated in hazing contrary to Coast Guard policy in COMDTINST 1610.1. The ASB stated that the applicant’s chain of command “tacitly condoned hazing practices” because they knew of them but failed to stop them, but also that the applicant should be held accountable for violating the anti-hazing policy.

Applicant’s Objections to the ASB

On March 18, 2011, the applicant’s counsel submitted objections to the ASB proceedings. He objected to the ASB’s determination that the applicant’s witnesses’ testimony would be duplicative with evidence from the court-martial already in the record. The attorney argued that at trial, their testimony was “limited by the rules of evidence and the unique nature of a trial regarding what they could testify about. At that setting they could not testify about whether [the applicant] should be retained in the Coast Guard, the lack of negative impact that these actions had on the ship, and their overall impressions of all the activity that [the applicant] was processed for.” In addition, one of the rejected witnesses had not testified during the court-martial but was only allowed to submit a written statement. The applicant’s counsel noted that although the ASB allowed the applicant’s witnesses to submit written statements, those statements “were not as complete as their testimony would have been.”

The applicant’s counsel also noted that although the CGIS agent had also testified fully during the court-martial, the ASB did not refuse to hear his testimony or require him to submit a

written statement instead, as it did for the applicant's witnesses. Thus, "there were separate standards for considering government versus defense witnesses." For example, while the XO was allowed to testify to the ASB about whether he had direct knowledge of the hazing, the applicant's counsel was reduced to presenting transcripts and witnesses' statements collected by the CGIS to rebut this testimony. Counsel for the applicant argued that he should have been allowed to call witnesses to rebut the XO with live testimony.

The applicant's counsel also objected to the CGIS agent's testimony about what characterization of discharge the applicant should receive since the agent did not actually witness the applicant's misconduct, and he opined that the agent's recommendation for an OTH discharge presumably had a significant impact on the ASB since the XO recommended that the applicant receive an honorable discharge, but he ultimately received a general discharge. The applicant's [REDACTED] ASB erroneously gave the applicant the choice of submitting a sworn statement and being questioned by the Recorder and the board members or submitting an unsworn statement and then choosing not to be examined by anyone or to be examined by both the ASB and the board members. The applicant's counsel argued that the applicant should have had the option of submitting an unsworn statement and choosing to be examined only by the board members and not by the Recorder.

The applicant's counsel complained that during her rebuttal closing argument, the Recorder told the Board that character testimony from two significant witnesses should not be considered because they served with the applicant during a previous enlistment, rather than his current enlistment. The attorney alleged that this instruction could have misled the Board to think that their testimony should not be weighed in their deliberations of whether to retain the applicant rather than just in their deliberations about the characterization of the applicant's discharge. The attorney also complained about the shortness of the ASB's two-hour deliberation and lunch period before reconvening to announce their decision. He alleged that the shortness of the deliberation period calls into question whether the ASB actually reviewed all of the transcripts and statements the applicant was reduced to relying on.

Finally, the applicant's counsel argued that the ASB refused to consider a letter from the applicant's wife based on a false claim by the Recorder that the wife had already served the applicant with divorce papers. The applicant's counsel stated that the applicant had not yet been served with the divorce papers on the day of the ASB.

The applicant's CO endorsed the findings of the ASB and recommended that the applicant receive a general discharge for commission of a serious offense pursuant to Article 12.B.18.b.3. of the Personnel Manual. The Area Commander concurred with the CO and recommended that a request for suspension of the discharge proceedings, which was submitted by the applicant's attorney, be denied.

In a legal review of the ASB's decision, dated June 15, 2011, a Coast Guard attorney stated that the ASB had refused to hear from the applicant's witnesses in person because their statements and testimony in the court-martial transcript were already in the record and their testimony before the ASB would be cumulative. The ASB had allowed the Recorder to call one witness who had not previously testified and another to respond to questions not asked during the

court-martial because that testimony would not be cumulative. The attorney concluded that the ASB's proceedings and recommendation conformed to Coast Guard policy and were supported by sufficient evidence.

On August 5, 2011, the Final Reviewing Authority "substantially approved" the record and the findings of fact, opinions, and recommendation of the ASB and approved the recommendation to award the applicant a general discharge for misconduct due to "commission of a serious offense." Following this approval, the Personnel Service Center issued orders for the applicant to receive a general discharge for misconduct due to "pattern of misconduct" by or before September 7, 2011.

On August 12, 2011, the applicant was discharged. His DD 214 shows that he received a general discharge "under honorable conditions" due to a "pattern of misconduct." The reentry code is RE-4 (ineligible to reenlist) and the separation code is GKA, denoting an involuntary discharge pursuant to the recommendation of a board resulting from a pattern of misconduct.

Following his discharge, the applicant applied to the DRB with the same arguments and information that are in his BCMR application. The DRB denied the applicant's request but corrected his DD 214 to show that he was separated due to "misconduct," rather than a "pattern of misconduct," with the separation code GKQ, which denotes an involuntary discharge pursuant to the recommendation of a board resulting from the commission of a serious offense. The applicant's DD 214 was accordingly corrected by the issuance of a DD 215 on May 25, 2012.

VIEWS OF THE COAST GUARD

On November 20, 2012, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request. Regarding the applicant's claim that his court-martial convictions weighed too heavily in the determination of his character of service, the JAG stated that given the number and nature of the applicant's offenses, his "military record, in its totality, likely protected the applicant from receiving a less favorable character of discharge than what he actually received." The JAG argued that the applicant's offenses "justify both his discharge and a characterization of discharge less than that of 'Honorable,' despite the fact that a general court-martial awarded no punishment to the applicant after finding him guilty of ten violations of the UCMJ." He noted that the applicant has not submitted any new information that the ASB and DRB did not review.¹ The JAG also noted that the applicant received due process and was represented by an attorney during the ASB proceedings. He argued that the applicant's general discharge was supported by sufficient evidence and should not be upgraded.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

¹ The JAG also claimed that when proposing the applicant's discharge due to "commission of a serious offense," the convening authority incorrectly cited Article 12.B.18.b.3. of the Personnel Manual, instead of Article 12.B.18.b.1. He called this alleged error a harmless scrivener's error. However, the JAG is not correct about the citation. Article 12.B.18.b.3. of the Personnel Manual in effect when the applicant was discharged did in fact authorize misconduct discharges for "commission of a serious offense."

On December 7, 2012, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to submit a response within thirty days. No response was received.

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.

2. The applicant alleged that he was erroneously and unjustly awarded a general discharge for misconduct. 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.² 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."³

3. The applicant alleged that he did not receive due process because the ASB refused to allow his witnesses to testify. The record shows that the ASB relied on the testimony that the applicant's witnesses provided during his court-martial and allowed them to submit additional statements to augment their testimony if necessary. According to the attorney who reviewed the case for Commander, Personnel Service Center, the ASB refused to hear their testimony in person because they believed it would be duplicative of their testimony at trial, which was already in the record. However, the ASB "is never required to hear the testimony of a witness that is unreasonably cumulative with other evidence before the Board."⁴ At court-martial, a member presents testimony during the sentencing phase about his overall performance, impact, character, and present and future value to the Coast Guard because retention and the character of discharge, if not retained, are necessarily at issue during the sentencing phase of a general court-martial. Therefore, the Board is not persuaded that the testimony of the witnesses who appeared on behalf of the applicant at his court-martial would not have been unreasonably cumulative with their testimony already included in the record had they testified in person at the ASB. Thus, and in light of the fact that they were allowed to augment their prior testimony in writing, if necessary, the Board finds that the applicant has failed to prove that the ASB's refusal to hear his witnesses' duplicative testimony in person was erroneous or unjust.

4. The Board notes that the applicant's counsel argued that the testimony of the Coast Guard's witnesses was not screened with the same standard because the CGIS agent was allowed to testify before the ASB even though he had already testified at the applicant's court-martial. However, the CO's notification of discharge dated February 7, 2011, states that he was initiating the applicant's discharge for misconduct based not only on the charges of which the

² 33 C.F.R. § 52.24(b).

³ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁴ ASB Manual, COMDTINST M1910.2, Chap. 4.C.1.

applicant was convicted at court-martial, but also on other evidence of misconduct revealed during the CGIS investigation. Therefore, the record shows that the CGIS agent had matters to testify about other than the matters at issue during the court-martial, and such testimony would not have been duplicative.

5. The applicant complained that one of his alleged victims, SN L, is erroneously listed in the ASB report as a witness who testified orally even though he was not allowed to do so. Whether SN L testified orally during the ASB is not apparent in the record. However, the summarized record of the ASB notes two statements submitted by SN L. The applicant has not proved by a preponderance of the evidence that important information from SN L was erroneously or unjustly excluded from the record before the ASB.

6. The applicant complained that the ASB refused to accept a letter from the applicant's wife based on the Coast Guard Recorder's false claim that his wife had already served him with divorce papers. The date that the applicant's wife initiated the service of the divorce papers and the date that the applicant actually received the divorce papers are not in the record. However, the ASB "is never required to hear the testimony of a witness that is unreasonably cumulative with other evidence before the Board, or that is irrelevant, even if the witness is in attendance and prepared to testify."⁵ The applicant's wife would have had little, if any, personal knowledge of the quality of the applicant's performance and future value as a member. The applicant has not proved by a preponderance of the evidence that the ASB erred in its judgment of the value of the applicant's wife's statement.

7. The applicant complained that the ASB refused to allow him the option of making an unsworn statement and then to be questioned only by the ASB members. However, Chapter 1.E.3.f. of the ASB Manual states that a Respondent who chooses to testify as a witness "shall be subject to full interrogation by the Recorder and Board members on all matters bearing on the Respondent's suitability for retention and other issues before the Board." Chapter 6.F. states that even if he chooses not to testify, "a Respondent may make an unsworn statement to the Board after all witnesses have testified and before the closing arguments. The Respondent may not be cross-examined upon this unsworn statement." In light of these regulations, the Board finds that the applicant was not entitled to make an unsworn statement and then to answer only questions posed by the ASB members and not by the Recorder.

8. Regardless of what the applicant's chain of command knew, hazing is strictly prohibited in the Coast Guard⁶ although the record shows that the chain of command may have known of it and done nothing, or at least not enough, to stop it. In light of the applicant's conviction on ten charges under the UCMJ, the Board is not persuaded that the Coast Guard committed error or injustice in deciding to discharge him administratively due to his misconduct even though no punishment was awarded by the general court-martial. Nor is the Board persuaded that his general discharge was erroneous or unduly severe.

9. Accordingly, the applicant's request should be denied.

⁵ ASB Manual, COMDTINST M1910.2, Chap. 4.C.1.

⁶ Shipboard Regulations Manual, M5000.7A, para. 2-22-1. ("The Coast Guard will not tolerate the practice of hazing. Hazing constitutes military misconduct and preventing it is an All Hands responsibility.")

ORDER

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

