

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2015-173

██████████
██████████ OS1 (former)

FINAL DECISION

This proceeding was conducted under the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case upon receiving the completed application on August 5, 2015, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

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

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant alleged that he was improperly and unjustly discharged from the Coast Guard with a general discharge on August 1, 2012, based on a faulty and biased investigation. He asked that his discharge be voided and that he be reinstated on active duty as an OS1 and receive all back pay and allowances. As alternative relief, the applicant asked that the Board upgrade the character of his discharge from general to honorable; his separation code from JKQ, which means commission of a serious offense, to LGH, which denotes an involuntary release from active duty due to a failure to meet minimum retention requirements; and his reentry code from RE-4 (ineligible) to RE-1 (eligible). In either case, the applicant asked that he be reimbursed for payments of a selective reenlistment bonus (SRB) that were recouped from him.

The applicant stated that in 2012 he was serving as the Assistant Command Security Officer and the Communications Unit Leader for the Incident Command System in the Operations Center of a Coast Guard Sector. In April 2012, while he and his supervisor, OSC X, were attending a conference, they learned of an investigation occurring at their Operations Center, and OSC X told the applicant that he, OSC X, was a subject of the investigation. Upon returning to the Operations Center, OSC X told the applicant that he too was under investigation, and he was relieved of his duties as a Communications Unit supervisor.

The applicant stated that in early May 2012, a master chief, OSCM Y, and the Base Commander informed him "of the generalities of the investigation." The applicant alleged that he was not afforded the opportunity to submit a statement or otherwise participate in the

investigation. On May 22, 2012, he met with OSCM Y and the Base Commander again and was handed a negative CG-3307 ("Page 7") signed by the Sector Commander. The Page 7 listed examples of alleged poor performance but did not mention the source of the allegations against him. They also told him that the command was initiating [REDACTED] voluntary administrative general discharge due to commission of a serious offense, pursuant to Article 1.B.17.b.3. of the Military Separations Manual, COM [REDACTED]. They told him that the alleged serious offenses were a pattern of dereliction of his duties and maltreatment and cruelty toward his subordinates, which were revealed during the investigation. The applicant stated that he was not given a copy of the investigation and the notification of his discharge did not provide "fact-based specifications to support [REDACTED] separation [REDACTED] [REDACTED]."

On May 30, 2012, the applicant stated, he wrote a rebuttal to the negative Page 7. He alleged that "he thoroughly and logically explained the various acts listed in the counseling." He claimed that of all the alleged offenses, the only one he had "truly committed was the occasional use of a swear word."

On May 31, 2012, the applicant alleged, he submitted a FOIA request for any and all reports, investigations, statements, complaints, and any other evidence supporting the proposed discharge. He hired an attorney and she contacted several of the applicant's subordinates. OS3 M, who had previously been counseled by OSC X while the three of them were at the conference for having an inappropriate [REDACTED] ship, told the attorney that she had not interacted with the applicant in more than three months. OS2 L told her that she had never seen the applicant haze anyone and called him stern but supportive. OS2 L also said that OS3 M was a "substandard performer." OS3 R denied having seen the applicant haze anyone, and OS3 W said he had never seen the applicant get "out of line" with anyone. After making these calls, the attorney received a call from OSCM Y telling her not to contact any more witnesses, and from then on, no one returned her calls. (The applicant submitted a sworn statement from his attorney regarding the telephone calls and these claims.) On July 2, 2012, the applicant was counseled on a Page 7 about providing his attorney with the phone numbers of his subordinates.

The applicant stated that he did not receive a response to his FOIA request until two days after his discharge for misconduct on August 1, 2012. Of the 120 pages of the investigation, the Coast Guard withheld 92 in their entirety as unresponsive and released 23 redacted pages and 5 unredacted pages, including the Final Action Memorandum (FAM) on the investigation.

In the FAM, the applicant stated, he was accused of failing to maintain regular work hours by taking long lunches and breaks and by leaving early; assigning watchstanders to non-primary duties, such as shredding papers, when they should have been listening to the radio or working cases; demeaning and verbally abusing subordinates with profane language and insults; making inappropriate jokes about women in the Coast Guard; using a loud and derisive tone and insulting and making threats towards subordinates in front of others; and insulting and deriding subordinates instead of providing guidance. OSC X was charged with some of the same offenses, including failing to maintain regular work hours, speaking to subordinates in an abrasive or condescending manner, making inappropriate comments about women in the Coast Guard, and failing to stop the applicant's conduct. The applicant noted that the Chief and Assistant Chief of the Operations Center, LCDR W and LT D, all denied knowledge of any such

misconduct by the applicant or the OSC. A chief warrant officer (CWO J) who was a watch supervisor and in their chain of command admitted to having observed and heard about such conduct by the applicant and the OSC but had not reported it. Another OSC, OSC Q, who was not in their chain of command, also admitted to having [REDACTED] and heard about such conduct but not having reported it.

The [REDACTED] applicant noted that the FAM states that he should receive a negative Page 7 and be recommended for discharge. It also states that he had been reassigned to the Base “pending the outcome of the investigation and discharge recommendation.” OSC X also received a Page 7 and was to be punished [REDACTED] SC Q [REDACTED] [REDACTED] [REDACTED] abusive or demeaning behavior in the workplace, and the Chief, Assistant Chief, and CWO were each issued a letter of censure based on a lack of leadership, which would be addressed on their performance evaluations, although the FAM noted that when the situation was brought to their attention, they had immediately stepped up and taken action.

The applicant argued that the notification of the reasons for his discharge was deficient and violated Article 1.B.17.e.(1) of the Military Separations Manual (a) “by not providing a list of the known facts in support of the reasons for separation; (b) by failing to adequately inform him “of the particulars of the first reason for separation, dereliction of duty”; (c) by failing to identify a serious offense that he had actually committed (which he had not); and (d) by not providing him with a proper [REDACTED] period.

The applicant stated that notification of the facts supporting the reason for separation is required by the Fifth Amendment to the Constitution. It is intended to ensure he knows why he is being discharged so that he can rebut the allegations. The applicant argued that the notification that he was being discharged “based on misconduct due to commission of serious offense(s), in that [he] demonstrated pattern [sic] of dereliction of duties, and maltreatment and cruelty towards [his] subordinates as discovered during the course of an administrative investigation” was inadequate to allow him to rebut the charges because it did not inform him of any of the alleged acts of dereliction. The applicant stated that the notice was also inadequate because it failed to inform him of whether he was being accused being derelict willfully, negligently, or through culpable inefficiency. He argued that he was entitled to this specific information under the Fifth Amendment and that if his dereliction of duty was through negligence or culpable inefficiency, it did not constitute a serious offense under Article 1.B.17. because the maximum punishment under the Uniform Code of Military Justice (UCMJ) does not include a punitive discharge. The applicant argued that because the notification regarding the alleged offenses was inadequate, he could not rebut them, and he was separated for something which did not constitute a commission of a serious offense.

The applicant stated that the notification memorandum was deficient because he did not actually commit a serious offense. The applicant stated that he was “arguably *not* derelict.” The evidence against him “was that he simply was not present during normal duty hours,” and yet his work as the Assistant Command Security Officer (ASCO) often took him out of the Operations Center, where his subordinates could not see him, as did his attendance at physical therapy sessions for a knee injury, which were scheduled right after lunch, after which he was directed and authorized to go home so that he could take pain medication. The applicant stated that his

subordinates, who accused him of dereliction, were not privy to these facts and would not know why he was absent and so might draw inaccurate conclusions based on insufficient knowledge. He stated that there is no evidence that his superiors who authorized his absences accused him of dereliction and no evidence of a pattern of dereliction [REDACTED]

The applicant also [REDACTED] committed maltreatment or cruelty toward his subordinate. [REDACTED] noted the examples in the UCMJ include assault, improper punishment, and sexual harassment, such as kicking in the stomach and confinement for hours without water. Given such examples, he argued, his alleged actions cannot be considered maltreatment or cruelty. Moreover [REDACTED] effect [REDACTED] allegation [REDACTED] notification failed to include a list of the alleged conduct. The applicant also argued that the evidence shows that he was not cruel or abusive. He noted that one witness stated that he told another member to stop picking on the witness numerous times, which shows that he was protective. Two other witnesses claimed that the applicant was “given more leeway” in a “good ol’ boy system,” which means that his superiors should have received the same or more punishment. He alleged that he received harsher punishment than his superiors. The applicant noted that another witness revealed that the applicant was a pawn of his superiors, who admitted that they wanted his subordinates to hate him and that they “let him get away with certain things because he does the stuff we don’t want to do.” The applicant argued that his recommendation for advancement on his evaluation dated November 30, 2011, shows that his command “tacitly approved of his actions” and so set his [REDACTED] failure by applauding and further encouraging the now ill perceived behavior.”

The applicant argued that the notification was inadequate because it implied that he was being separated due to a pattern of shirking—the alleged dereliction of duty—but did not give him a probationary period so that he could correct his behavior.

The applicant also alleged that the administrative investigation was biased and favored his superiors because, although the most junior of all the accused, he received “the swiftest, most severe punishment.” The applicant noted that 92 of the 120 pages of the investigation were withheld as not responsive to this FOIA request, which means that 77% of the investigation had nothing to do with him, but he received the harshest punishment. He argued that a fair outcome would have been for the CWO who admitted to having observed the alleged misconduct without reporting it to also be punished and separated for dereliction, but he was not. He argued that despite their denials, the Chief and Assistant Chief of the Operations Center must have known of the alleged behavior if it occurred for nearly a year and so either lied about what they knew or were not present themselves and so were derelict and should have been punished.

The applicant concluded that the investigation was unjust and biased, that his command “had a knee-jerk reaction to an allegation of hazing,” and that his notification of discharge was substantially incomplete. He alleged that but for these errors, “it is very likely he would not have been separated.” Therefore, he asked the Board to void his discharge, reinstate him as an OS1, award him back pay and allowances, and reimburse him for the recouped bonus payments. In the alternative, he requested the discharges to his upgrades listed on page 1 of this decision. In support of his allegations, he submitted copies of parts of the investigation and other military records, which are included in the summary below.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on [REDACTED]. After attending “A” School to earn the operations specialist (OS) rating, the applicant advanced to OS3/E-4 and was assigned to a cutter. On [REDACTED], he was counseled on a Page 7 about repeated lateness. In [REDACTED] he advanced to OS2/E-5.

The applicant was not recommended for advancement on his semiannual performance evaluations dated [REDACTED], and [REDACTED]. On [REDACTED], he was counseled on a Page 7 by his CO about failing to qualify as a radio watch stander aboard his cutter due to an apparent lack of effort, failing to report for duty, and being rude and disrespectful to his supervisor. The CO stated that throughout his tour of duty on the cutter, the applicant had “demonstrated a pattern of behavior that shows improvement for a while but then deteriorates.” The CO noted that the applicant had been counseled by the Chiefs, lost his recommendation for advancement, and served as a poor example to his subordinates. In addition, the CO advised him that any further incidents of insubordination or failure to stand watches would result in disciplinary proceedings.

Upon completing his tour of duty aboard the cutter, the applicant was assigned to a Sector Operations Center. On [REDACTED] the applicant advanced to OS1/E-6.

Report of Administrative Investigation

On April 9, 2012, the applicant’s CO, who was the Sector Commander, directed a lieutenant command as a preliminary investigating officer (PIO) to investigate allegations of misconduct at the Operations Center where the applicant was a watch supervisor. On May 9, 2012, the PIO issued a report after interviewing 22 members at the center, including peers, junior, and senior personnel. Some of the investigation involved allegations of misconduct by other members, including OSC X and OSC Q, who were apparently aware of some of the applicant’s offensive behavior, but the applicant was accused of substantial misconduct. The following is a sampling of the accusations against the applicant (unless otherwise specified, the statements are attributed to petty officers (E-4 to E-6)):

- Telling a gay female member that she was considered a black cloud and a troublemaker because while away at a conference she had reported a male chief for trying to break into her hotel room after she told him she was gay. He also said that if she “knew what was good for you, [she would] come to work, sit down, shut up, do your job, that [OSC X] did not want to see her; the command did not like your personality; [OSC X] was really pissed that you were asking about being treated so harshly.”
- Yelling at a subordinate OS3 “at the top of his lungs, calling him a ‘shithead and asshole’ in front of other ... personnel or [the applicant] would have [the OS3] come across the [center] to open a safe repeatedly (11 times) so [the applicant] could shut the safe to have it reopened again,” which led the OS3 to beg to be switched to the night shift so he would not have to work under the applicant.

- Treating three particular subordinates badly in particular while OSC X and OSC Q turned “a blind eye.”
- Hazing subordinate watchstanders by throwing things at them, vindictively laughing at them, making them pick up messes he created, and calling them things like “fucking retards,” “assholes,” and “goddamn idiots” which led many of them to ask to switch schedules to avoid the applicant’s watch.
- Causing subordinates to seek counseling, to dread coming to work, and/or to consider leaving the Coast Guard.
- Causing subordinates to fear retaliation that would harm their careers.
- Being “rude/ugly” and being allowed to get away with it (the chief were often absent).
- Refusing to get qualified to stand watch so that he would not have to fill in to stand watch when others got sick as he was supposed to.
- Arriving at the center at “whatever hour of his choosing” and “appear[ing] to be on base for a max of 3 hours a day, and there is a good ol’ boy system with him.”
- Showing up for work routinely at 10:00 a.m. and working just two hours before leaving.
- Instilling “a harassing, hostile work environment by yelling/berating that occurs on continual basis,” which caused [REDACTED]s to switch watches to try to avoid him.
- Failing to provide any positive reinforcement.
- Always being “TDY (non-existent).”
- Having an “absenteeism issue,” being a “shitty supervisor,” and being at Starbucks when he should be at work (according to a CWO).
- “[N]ot being a good leader, ... he does not come to work and he does not care” (according to a chief petty officer).
- Being “good at what he does, but timeliness is an issue” (according to an officer).
- Generally not being at work to handle security issues and not being accountable to anyone.
- Taking advantage of his position not to stand watches and being at the Operations Center only from 10:00 a.m. to 2:00 p.m.
- Being “very outspoken, has no reins, never at work, a smart ass, yells at junior personnel, he gets away with a lot.”
- Calling watchstanders a “piece of shit” and having them update or shred publications or other material while actively on watch while the applicant went to get coffee.
- Throwing sunflower seeds on the floor and making a watchstander pick them up.
- Saying “inappropriate things, uses “F” word a lot, swears, unprofessional, demeaning to junior personnel, has a bad reputation for never being at work.”
- Having an “abrasive personality, is condescending, throws piles of papers to shred at watchstanders while they are on watch.”

- Calling subordinates “douchebag, fucker, idiot, etc.”
- Calling subordinates “shit bags and fuck ups” during an all-hands meeting.
- Amusing himself by having watchstanders do re [REDACTED] or remedial tasks during busy watches when they are supposed to be monitoring radios.
- Being a bully and degrading everyone.
- Motivating subordinates through intimidation.
- Issuing threats or punishment for minor problems [REDACTED] [REDACTED]
- Targeting an OS2 for “special treatment” because the OS2 was “sticking up for junior OS3s that received demeaning behavior from [the applicant].”

The officers and chiefs in charge of the Operations Center were advised of their rights and interviewed. Some denied any knowledge of abuse by the applicant, but a CWO noted that he was a “shitty supervisor” who was getting coffee at Starbucks at 9:30 a.m. when he was supposed to be at work from 7:00 a.m. to 4:00 p.m. The CWO stated that the applicant had an “absenteeism issue” and was “not diplomatic.” Another superior stated that the applicant “is not a good leader, that he does not come to work and he does not care. ... [He] was a ‘piss poor’ leader and using his knee injury to be flagrantly gone.” The applicant’s supervisor claimed that he had verbally counseled the applicant about his “foul mouth” but was unaware of the applicant’s other alleged behavior.

A medical officer told the PIO that members from the Operations Center had alleged sexual harassment, a hostile work environment, and fear of retaliation and had been treated for anxiety and depression. These members had reported the problems to senior enlisted members who had an “old guard/good old boy mentality” and did nothing in response. He stated that he knew that an E-6 and E-7 were involved.

The applicant was advised of his rights and interviewed by the PIO. He told the PIO that he—

- cursed sometimes but he did not direct it at anyone;
- denied ever yelling at anyone;
- admitted being “abrasive” and not “coddling” subordinates;
- denied going to Starbucks during the workday;
- did not pointlessly direct subordinates to repeatedly open the safe or clean up sunflower seeds he had thrown on the floor;
- had told a subordinate that she had to submit a request chit to get married as a joke;
- had not re-qualified so he was not standing any watches; and
- would often work 12 hours at a time and sometimes traveled for weeks at a time for work.

The PIO made many findings of misconduct by various members and concluded that there had been “a complete leadership breakdown.” The PIO recommended that the applicant’s superiors receive poor performance evaluations, other adverse documentation, denial of

advancement and promotion, and retraining. The record also shows that at least one supervisor was punished at mast and is no longer a member of the Coast Guard. Regarding the applicant, he concluded that the applicant had hazed subordinates and that his behavior had been cruel, abusive, humiliating, oppressive, and demeaning. He [REDACTED] that the applicant had been derelict in his duties, been insubordinate, used provoking speech, and so had violated Articles 91, 92, 93, 117, and 134 of the [REDACTED] [REDACTED] recommended that the applicant be relieved of his duties and discharged [REDACTED] from the Coast Guard for commission of a serious offense. He noted in this regard that the maximum punishment for violating Article 92 or 93 of the UCMJ included a punitive discharge. He also recommended preparation of a Page 7 detailing the applicant's offenses and a performance [REDACTED] with a [REDACTED] conduct [REDACTED] [REDACTED] ncrement.

Discharge Notification and Counseling

On May 22, 2012, the applicant's CO notified him in writing that he was initiating the applicant's discharge "based on misconduct due to commission of serious offense(s), in that you demonstrated pattern of dereliction of your duties, and maltreatment and cruelty towards your subordinates as discovered during the course of an administrative investigation of [the Sector's Operations Center]. I am recommending that you be separated from the Coast Guard with no higher than a General Discharge." The CO advised him that he had a right to consult an attorney, to object to the discharge, and to submit a statement. The CO also noted that the applicant was not eligible [REDACTED] [REDACTED] for the Second Chance Program.

Also on May 22, 2012, the CO counseled the applicant regarding the specifics of his misconduct on a Page 7, which the applicant refused to sign. The CO addressed the applicant's "pattern of abdication of responsibility, gross disrespect and cruelty towards your subordinates in the following ways:"

- You failed to maintain regular work hours, taking long lunches and breaks, and departing early, causing your shipmates to have to take on extra duties and work, and failing to fill in to keep the section running when a watch stander was ill or unable to stand watch.
- You assigned watch standers tasking outside of their primary duty of listening to the radios, or running cases, such as shredding papers, causing the subordinate watch standers to be unable to effectively perform their primary duties.
- You demeaned and verbally abused your subordinates by using profane language and insults towards them, calling them names including "assholes," "douche bags," "fucking retards," "shitheads" and "goddamn idiots."
- You used a loud and derisive tone of voice, threats, and other unprofessional language when addressing subordinates, and insulted and derided them in front of others.
- You made inappropriate jokes about women in the Coast Guard.
- You failed to demonstrate appropriate leadership, often insulting or deriding members instead of providing guidance. For example, on one occasion when a new CG member submitted first-ever marks input, you failed to give the member feedback and guidance on the task. Instead, you gave the marks back and told the member "this is a pile of shit, do them again."
- On at least one occasion, you threw papers and other items at your subordinates.
- On several occasions, you ordered subordinates to pick up items from the deck such as papers, scraps, packing peanuts, sunflower seeds and other items, some of which you deliberately threw.
- On at least one occasion, you called a subordinate a "trouble maker" and a "black cloud," and stated that the subordinate was not liked by the command as a result of the subordinate reporting crimes and misconduct carried out against the subordinate.

-On several occasions, you hazed your subordinates by directing them to open a locked safe, then slamming the safe closed and ordering them to come back and open it again, repeating this unnecessary pattern up to 11 times while laughing at and insulting them.

-On two occasions, you ordered a subordinate to fill out a chit in order to get married.

Your cruelty, mistreatment, and disrespectful behavior has caused serious damage to mission readiness, work performance and well-being of your shipmates. Your behavior calls into serious question your ability to perform as a petty officer and a leader in the Coast Guard. Such instances of maltreatment, hazing, and otherwise disrespectful behaviors as outlined above are clearly in violation of law, Coast Guard policy, and general principles of good leadership and respect for others, and will not be tolerated.

It is noted that as a result of your conduct, some personnel have had to seek out medical, EAP services (or both), due to their fear of facing such harassment at work. Some qualified, high-performing members are now contemplating getting out of the Coast Guard due to the mistreatment you subjected them to.

In order to correct your behavior, you must immediately stop all cruel, degrading, and disrespectful behavior. This includes, but is not limited to, not using profanity at work, calling your subordinates and shipmates only by their given names or ranks/rates, directing your subordinates to do only those tasks necessary to the effective completion of the mission, and addressing concerns or making corrections of your subordinates only in private and only in the presence of and after prior discussion with [a CWO], who will ensure you use only appropriate and respectful leadership techniques. To further familiarize yourself with the Coast Guard's expectations for respect, you must review references (a) through (f). If you have any questions about what constitutes appropriate conduct or leadership techniques, you should discuss these with [the CWO].

Additionally, you must maintain a 0700-1530 day-work schedule with reasonable breaks (unless standing watch).

You are currently subject to administrative and/or disciplinary consequences as a result of your conduct. In addition, be advised that any further cruelty, maltreatment, disrespect, or hazing behaviors towards any person will result in punitive action under the Uniform Code of Military Justice, which could include prosecution for violation of UCMJ Article 91, insubordinate conduct towards petty officer(s), UCMJ Article 92, dereliction of duty, UCMJ Article 93, cruelty and maltreatment, UCMJ Article 117, provoking speeches or gestures, UCMJ Article 134, general article-conduct prejudicial to good order and discipline, and/or any other article applicable to the misconduct observed.

Applicant's Acknowledgement and Statement

On May 30, 2012, the applicant signed an acknowledgement of the CO's notification, acknowledged having consulted an attorney, objected to the discharge, and attached a three-page statement in which he responded to the specific allegations against him on the Page 7 dated May 22, 2012. In his statement, the applicant wrote that his supervisor and chain of command had never questioned his work ethic or hours. He denied missing work and claimed that he often worked outside of the Operations Center where his subordinates would not see him. He noted that went to physical therapy sessions before and after his knee surgery and would go after lunch and then go home as authorized to take pain medication. He alleged that he routinely worked during his off hours. He alleged that he did not fill in for sick personnel because his supervisor did not require it and because as the Communications Unit Supervisor, he was not a qualified watch stander and so was prohibited from filling in. Instead, he worked with OSC X to make

sure a qualified watch stander could fill in and would “compensate in the schedule at a later date.” He stated that shredding classified and FOUO papers was a primary duty of the watch standers as a lot of it was generated at the Command Center and it was his responsibility to ensure that the paper was shredded. The applicant admitted using inappropriate language but denied ever calling anyone an idiot, instead claiming that he was say it “as a general statement while at my desk, but not [REDACTED].” He also denied ever making jokes about women in the Coast Guard. The applicant alleged that he appropriately advised subordinates about completing input for evaluations; that he never threw papers at anyone; and that it was proper for him to direct subordinates to clean up because the center did not have a cleaning service.

[REDACTED] [REDACTED] [REDACTED]

Regarding his telling someone she was a “trouble maker” and “black cloud,” the applicant alleged that the member was a friend, not a subordinate, and that she could not stand watch due to a shoulder injury but would sometimes show up or call to apologize for having to stay home on sick leave. When she attended an all-hands meeting, her chief told her to go home, she began crying, and the applicant pulled her aside to make sure she was okay. After the all-hands, the command tasked him “call[ing] her to further reason with her” and so he called her and gave her what he considered “thoughtful advice.” He told her that “the best way to make her situation blow over was to come into work, keep her head down and do her job, and everything would work out.” He denied calling her a trouble maker or black cloud and noted that he had told the investigator that he did not.

[REDACTED]

Regarding the safe, the applicant stated that his subordinates had to open the safe at least twice per day, but they “had some inexplicable issues with conducting the Watch to Watch correctly.” Therefore, they “conducted safe and watch to watch training during this time. I never laughed at or insulted any personnel in the course of this training.”

The applicant stated that he once informed a subordinate that he had to fill out a request chit to get married because he actually thought it was required because his roommate at his prior command had been required to submit a chit when he got married. When he learned one was not required, he alleged, he “promptly returned and apologized to my subordinate.”

The applicant concluded that he loved his job, took it seriously, and “never intended for any of these allegations in the course of [his] duties.” He stated that a lot of people responded positively to his directions and expectations but understood that he “should have adopted a different leadership style for some of my personnel, treating people how they wanted to be treated, not how I want to be treated. The acts of cruelty, mistreatment, and disrespect that is referred to in [the Page 7] is just not me. I always tried to take an active role in my subordinates’ professional and personal lives and I generally have always cared about their well-being.”

Performance Evaluation

On his performance evaluation dated May 31, 2012, the applicant received many low marks in the various performance categories, an unsatisfactory conduct mark, and a recommendation against advancement. The comments his rating chain prepared state that he had—

demonstrated a pattern of abdication and gross disrespect and cruelty towards subordinates. The member routinely failed to maintain regular work hours and did not meet several deadlines. [He] often used language that was abusive to subordinates. ... He often called members d[REDACTED]ames and made them complete tasks just because they were subordinate to him. It is documented that he hazed several m[REDACTED]perations Center. On multiple occasions, [he] [REDACTED] jokes about women that were rude and disrespectful ... [He] used his position as a supervisor to intimidate members. ...

Final Action Memo [REDACTED] [REDACTED] [REDACTED]

On June 5, 2012, the applicant's CO took final action on the report of the administrative investigation. He found that several petty officers had reported that the applicant failed to maintain regular work hours, assigned watchstanders to duties other than listening to the radio or running cases, used demeaning and abusive language and insults towards subordinates, made inappropriate jokes about women in the Coast Guard, used a derisive and threatening tone and insulting and deriding subordinates in front of others, and insulting and deriding subordinates instead of providing guidance. The CO stated that the applicant would receive a Page 7, that his eligibility for a security clearance would be reviewed, and that he would be recommended for an administrative discharge. His supervisor was to be punished at mast, counseled on a Page 7, and reassigned, and his elig[REDACTED] security clearance would be reviewed. The officers would be issued letters of censure and negative evaluations.

On July 1, 2012, the applicant was counseled on a Page 7 about revealing personal identifiable information (PII) by obtaining the personal cell phone numbers of all the members assigned to the Operations Center, having them emailed to his private email address without their permission, and providing them to his attorney, who then called members while they were on duty or on liberty between watches. He was directed to retake Privacy Act training and advised that any further release of PII would result in disciplinary action.

On July 11, 2012, the Sector Commander recommended that he receive a general discharge for misconduct due to the commission of a serious offense. He stated that the applicant had demonstrated a pattern of dereliction of his duties, maltreatment and cruelty towards his subordinates. The CO also reported the applicant's intentional release of PII. The CO forwarded with this memorandum the applicant's acknowledgment of the notification and statement, a summary of his evaluations, and the Page 7s dated May 22 and July 2, 2012.

On July 19, 2012, the District Commander forwarded the discharge recommendation and recommended approval.

On July 26, 2012, after requesting and reviewing a copy of the administrative investigation, PSC issued orders for the applicant to receive a general discharge for misconduct due to his commission of a serious military or civilian offense with separation code JKQ and reentry code RE-4. The applicant received the general discharge on August 1, 2012.

VIEWS OF THE COAST GUARD

On January 20, 2016, the Judge Advocate General of the Coast Guard (JAG) submitted an advisory opinion in which he recommended that the Board deny relief.

The JAG stated that the application is untimely because the applicant was discharged on August 1, 2012, and his appeal was filed on August 5, 2015. Therefore, the JAG argued, the applicant's claims "should not be considered by the Board beyond a cursory review."

Regarding the applicant's argument that his notification was insufficient because it did not provide a list of specific examples in which he failed to adequately inform him of the particulars of his dereliction of duty, as required by Article 1.B.17.e. of the Military Separations Manual, the JAG argued that the CO's notification memorandum and the long list of specific examples of conduct for his discharge on the Page 7 met the requirements for notification.

Regarding the applicant's claim that he had not committed a serious offense, the JAG argued that the applicant was separated for both maltreatment of his subordinates and dereliction of duties. The JAG stated that a member may be administratively discharged for commission of a serious offense when a preponderance of the evidence establishes that the member committed an offense for which the maximum penalty under the UCMJ includes a punitive discharge and the specific circumstances of the offense. The JAG noted that a conviction at court-martial is not required. The JAG stated that the applicant's CO determined based on the information in the report of the investigation that the preponderance of the evidence showed that the applicant had been derelict in his duties and maltreated his subordinates. The JAG stated that the evidence in the investigation showed that the applicant knew he was supposed to "maintain core work hours" and failed to do so. Although the PIO did not state whether the applicant's dereliction of duties was willful or negligent, and only willful dereliction includes a possible punitive discharge as punishment, the JAG argued that the fact that the PIO recommended that the applicant be discharged for commission of a serious offense and cited both Article 92 (dereliction of duty) and Article 93 (cruelty and maltreatment) indicates that the PIO considered the applicant's dereliction to be willful.

In any case, the JAG noted, violating Article 93 of the UCMJ also carries a maximum punishment with a punitive discharge and it "is not necessary to prove physical or mental harm or suffering on the part of the victim ... it is only necessary to show, as measured from an objective viewpoint in light of the totality of circumstances, that the accused's actions reasonably could have caused physical or mental harm or suffering." The JAG noted that the applicant's profane language and insults towards his subordinates and the hostile work environment he created caused his subordinates to seek medical counseling and assistance. Therefore, he argued, the preponderance of the evidence show that the applicant was cruel towards his subordinates by demeaning and verbally abusing them, and the CO did not commit an error or injustice in finding that the applicant had violated Article 93 of the UCMJ.

Regarding the applicant's argument that he was entitled to probation because he was being discharged for "shirking," the JAG stated that under Article 1.B.17.c. of the Military Separations Manual, probationary periods are only initiated for members demonstrating a failure

to adequately support dependents or to pay debts or for shirking. No probationary period is required for members being discharged for commission of a serious offense, and the applicant was not entitled to one, “especially in light of the egregious nature of the conduct.” Accordingly, the JAG concluded, relief should be denied. [REDACTED]

APPLICANT’S [REDACTED] IE VIEWS OF THE COAST GUARD

On January 21, 2016, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within thirty days. The applicant requested and was granted an extension and submitted [REDACTED] on March [REDACTED].

The applicant argued that his application was timely filed because he filed it on July 31, 2015, within three years of his discharge. The applicant submitted a copy of the packaging label, which shows that he shipped it to the Board’s address by FedEx Priority Overnight service on July 31, 2015, so that it would arrive on August 1, 2015, exactly three years from his date of discharge.

The applicant argued that the Coast Guard was required to abide by its regulations in the Military Separations Manual because the purpose of the regulations was to protect personal liberties and interests. The applicant argued that because the Coast Guard did not provide him a probationary period and [REDACTED] list of the allegations on the Page 7 dated May 22, 2012, was not included in the notification of discharge memorandum dated May 22, 2012, and is not referenced in that memorandum, the Coast Guard clearly violated its regulations. The applicant argued that the Page 7 dated May 22, 2012, did not provide adequate notice because it was improper since it did not afford him a probationary period and because the Page 7 was not referenced by the memorandum.

The applicant argued that he did not commit a serious offense because his treatment of his subordinates did not rise to the level of maltreatment or cruelty and so he did not violate Article 93 of the UCMJ and because the PIO never stated whether his alleged pattern of dereliction of duties was willful or negligent, and only willful dereliction can carry a punitive discharge. The applicant argued that the facts do not show that the alleged dereliction was willful.

The applicant also argued that because he showed a *pattern* of dereliction, which the manual calls “shirking,” he had to be afforded a probationary period to be able to correct his deficient behavior. Because he was not afforded a probationary period, his notification of discharge was deficient and in violation of the Military Separations Manual.

The applicant noted that the advisory opinion did not address his arguments of injustice and so argued that the Coast Guard has conceded injustice in that the administrative investigation was biased because he was the most junior of the accused and received the harshest punishment, because his superiors failed to teach him how to be a compassionate leader, because he was a just a pawn as his superiors used him to carry out discipline and wanted his subordinates to hate him, and because his superiors had tacitly approved of his behavior by recommending him for advancement and giving him good marks prior to May 2012.

APPLICABLE REGULATIONS

Article 1.B.17. of the Military Separations Manual in effect in 2012, COMDTINST M1000.4, states the following in pertinent part:

1.B.17.a. Policy

Except as specifically provided here, only Commander (CG PSC) may direct a discharge for misconduct and the type of discharge (under other than honorable, general, or honorable) as warranted by the particular circumstances of a given case. (See Article 1.B.2. of this Manual.) ...

1.B.17.b. Reasons to Discharge for Misconduct

Commander (CG PSC) may direct discharging a member for misconduct in any of these cases:

- (1) Civilian or Foreign Conviction. Conviction by foreign or domestic civil authorities ...
- (2) Pattern of Misconduct. Members may be separated when they have:
 - (a) Two or more non-judicial punishments, courts-martial, or civilian convictions or a combination thereof within a 2-year period,
 - (b) Three or more unauthorized absences, each is at least three or more days, within a 2-year period,
 - (c) Six or more unauthorized absences and the total amount is at least six days, within a 2-year period,
 - (d) A pattern of failure to contribute adequate support to dependents (See Article 2.E. of reference (e), Discipline and Conduct, COMDTINST M1600.2 (series).),
 - (e) A pattern of failure to pay just debts, or
 - (f) A pattern of shirking.
- (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.
 - (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.
- (4) Drugs. ...
- (5) Fraudulent enlistment. ...

1.B.17.c. Probation

Commanding officers must afford a member a reasonable probationary period to overcome deficiencies before initiating administrative discharge action in cases of a pattern of failure to contribute adequate support to dependents (See Article 2.E. of reference (e), Discipline and Conduct, COMDTINST M1600.2 (series).), a pattern of failure to pay just debts, or shirking. If a command contemplates discharging a member for reasons contained in this paragraph, the command shall initiate a formal probation or treatment period of at least six months....

1.B.17.d Discharging Members with More than Eight Years' Service for Misconduct ...

1.B.17.e. Discharging Members with Fewer than Eight Years' Service for Misconduct

Commanding officers shall process members with fewer than eight years of total active and inactive military service recommended for honorable or general discharge for misconduct as follows:

- (1) Inform the member in writing of the reason(s) for being considered for discharge (specifically state one or more of the reasons listed in Article 1.B.17.b. of this Manual supported by known facts).
- (2) Afford the member an opportunity to make a written statement. If the member does not desire to do so, the commanding officer sets forth that fact in writing over the member's signature. If the member refuses to sign a statement his or her commanding officer will so state in writing.
- (3) Afford the member an opportunity to consult with a lawyer as defined by Article 27(b)(1), UCMJ, if contemplating a general discharge. If the member requests counsel and one is not available, the commanding officer must delay discharge proceedings until such time as counsel is available.
- (4) Send the case containing a recommendation and these documents to Commander (CG PSC-EPM-1) for action: ...

Article 92 of the UCMJ prohibits being derelict in the performance of duties and the elements are “(a) that the accused had certain duties; (b) that the accused knew or reasonably should have known of the duties; and (c) that the accused was (willfully) (through neglect or culpable inefficiency) derelict in the performance of those duties.” Only if the accused is willfully derelict in the performance of duties does the maximum punishment include a punitive discharge.

Article 93 of the UCMJ prohibits “cruelty toward, or oppression or maltreatment of, any person subject to his orders” and the elements require the accused to be cruel toward, oppress, or maltreat a person subject to the accused’s orders. The explanation in the Manual for Courts-Martial states that cruelty, oppression, or maltreatment does not have to be physical and must be measured by an objective standard. The maximum punishment includes a punitive discharge.

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 regulations:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The preponderance of the evidence shows that the application was timely filed as it was submitted to a delivery service for priority overnight delivery on July 31, 2015.¹
2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.²

¹ 10 U.S.C. § 1552(b) (requiring applications to be submitted within three years of the discovery of the alleged error or injustice).

² *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

3. The applicant alleged that his general discharge for misconduct due to “commission of a serious offense” was erroneous and unjust. In 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 her record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.³ 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.”⁴

4. The applicant alleged that his discharge was unjust because he did not commit a serious offense as defined in Article 1.B.17.b.3.(a) of the Military Separations Manual. The Board disagrees. A great preponderance of the evidence in the record shows that he was willfully derelict in his duties, in violation of Article 92 of the UCMJ, and that he was cruel to, maltreated, and oppressed his subordinates, in violation of Article 93. Although the PIO did not make an express finding of willfulness (versus neglect) with regards to the applicant’s dereliction, the investigation showed that the applicant was constantly absent without justification; that he would arrive at 10:00 a.m. and leave at 2:00 p.m., having taken a lunch break or coffee break in between; and that he went to Starbucks while he should have been working at the Operations Center. The applicant’s claim that he sometimes had duties elsewhere and that on the days he had physical therapy, he would not return after lunch, does not explain the extent of his absences reflected in the statements of both subordinates and a superior. Nor, given the extent and repetition of his absences, can they possibly be considered merely neglectful rather than willful.

5. Although the applicant argued that his conduct did not constitute cruelty, oppression, or maltreatment of his subordinates by an objective standard, and so did not violate Article 93, the Board disagrees. The PIO’s report and the witness statements reflect numerous instances of pointless, demeaning abuse, which caused his subordinates to be anxious and fearful, to seek counseling, to switch to the night shift to avoid him, and to consider leaving the Coast Guard. The Board is persuaded by the volume and nature of the allegations against the applicant in the PIO’s report that he was cruel to, oppressed, and maltreated his subordinates, in violation of Article 93 of the UCMJ. Therefore, the Board finds that the applicant has not proven by a preponderance of the evidence that his CO committed error or injustice in finding that he had committed serious offenses warranting separation, as defined in Article 1.B.17.b.3.(a) of the Military Separations Manual, by violating Articles 92 (willfully) and 93 of the UCMJ.

6. The applicant alleged that he was actually discharged for “shirking” and so was entitled to a probationary period pursuant to Article 1.B.17.c. of the Military Separations Manual. However, neither the PIO nor the applicant’s CO used the word “shirking.” Instead, they stated that he should be discharged for “commission of a serious offense” under Article 1.B.17.b.(3), which included violations of both Articles 92 and 93. Article 1.B.17.c. requires probationary periods for “a pattern of shirking,” “a pattern of failure to pay just debts,” and “a pattern of failure to contribute adequate support to dependents”—all of which are stated reasons for discharge due to a “pattern of misconduct” under Article 1.B.17.b.(2), not under Article

³ 33 C.F.R. § 52.24(b).

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

1.B.17.b.(3). The records show that the applicant was clearly discharged due to his “commission of a serious offense” for violating both Articles 92 and 93 of the UCMJ and so he was not entitled to a probationary period under the paragraphs of Article 1.B.17. of the Military Separations Manual. Therefore, the lack of a probationary period [REDACTED] r his notification of discharge deficient.

7. [REDACTED] e applicant argued that his CO’s notification memorandum was insufficient because it did not include a list of the facts supporting the reason for separation and because it failed to adequately inform him of the particulars of his dereliction of duty, as required by Article 1.B.17.e. of the [REDACTED] ns Man [REDACTED] leged th [REDACTED] y given a copy of the investigation, and it is not clear from the record whether he was shown a copy and allowed to read it or parts of it. Article 1.B.17.e.(1) of the Military Separations Manual requires the CO to “[i]nform the member in writing of the reason(s) for being considered for discharge (specifically state one or more of the reasons listed in Article 1.B.17.b. of this Manual supported by known facts.” This article does not require the reasons and supporting facts to be provided in any particular written format or even in one sole format. The fact that Article 1.B.17.e.(4)(d)[1] mentions forwarding a “copy of the letter notifying the member of the reason(s)” for the discharge to the Personnel Service Center does not mean that the only type of “writing” that may or must be used to notify the member pursuant to Article 1.B.17.e.(1) is a letter or that using a memorandum, instead of a letter, or a memorandum plus a Page 7 as was done in this case, renders the separation p [REDACTED] d.

8. The record shows that both the memorandum and the Page 7 were signed by the CO on the same day, May 22, 2012, and presented to the applicant. The former informed the applicant that the CO was initiating his discharge “based on misconduct due to commission of serious offense(s), in that you demonstrated pattern of dereliction of your duties, and maltreatment and cruelty towards your subordinates as discovered during the course of an administrative investigation of [the Sector’s Operations Center].” The latter informed the applicant of a list of facts from the PIO’s report supporting the offenses of both dereliction and maltreatment and cruelty. Although he alleged that the Page 7 was not sufficiently specific about his alleged dereliction, the Page 7 states that he “failed to maintain regular work hours, taking long lunches and breaks, and departing early, ... failing to fill in to keep the section running when a watch stander was ill or unable to stand watch.” The Board finds that this language was sufficiently specific to enable him to rebut the claims against him. In addition, the Board finds that together, the memorandum and Page 7 signed by the CO on May 22, 2012, fulfilled both the requirements and the purpose of Article 1.B.17.e.(1) by informing the applicant in writing of the reasons for his proposed discharge and by providing ample, detailed supporting facts. Therefore, and because the applicant was afforded an opportunity to consult counsel, to object to the discharge, and to submit a statement, the Board finds that the applicant received all due process under both Article 1.B.17. and the Constitution.

9. The applicant alleged that his discharge was unjust because no one else received a swift general discharge even though he was the most junior of the accused. The law provides different means and steps for punishing and separating different types of members, however. The applicant could be and was administratively discharged for misconduct with the due process provided in Article 1.B.17.e. because he was an enlisted member with less than eight years of

service. His supervisor, OSC X, presumably had more than eight years of service and so would be entitled to an Administrative Separation Board and could not be swiftly separated. The Board notes that he was punished at mast (which the applicant was not) and that he is no longer a member of the Coast Guard. Some of the commissioned and warrant officers above OSC X apparently witnessed or were told about one or more instances of abuse by the applicant and OSC X, but their offenses were generally passive, and the rules provide different ways of ending the careers of poorly performing officers, especially commissioned officers, who have been appointed by the President. Based on the evidence of record and especially the extent and nature of the applicant's misconduct, the Board cannot conclude that his administrative general discharge for misconduct was unjust just because other members who committed other kinds of misconduct did not receive administrative general discharges.

10. The applicant alleged that he was not allowed to make a statement or participate in the investigation, but the record shows that he was interviewed and did make statements. The applicant also complained that he was counseled and that his colleagues stopped returning his attorney's calls after he released the crew's PII without their permission, but the Board finds that the Coast Guard committed no error or injustice in counseling the applicant about his Privacy Act violations on a Page 7. The applicant alleged that he was just a pawn and was not afforded proper leadership, but the Board finds that his dereliction and abuse were not justified by the poor leadership at the Operations Center. The applicant made numerous other allegations with respect to the actions and attitudes of various officers involved in the Operations Center, the investigation, and his discharge proceedings. Those allegations not specifically addressed above are considered to be unsupported by substantial evidence sufficient to overcome the presumption of regularity and/or are not dispositive of the case.⁵

11. The applicant has not proven by a preponderance of the evidence that his general discharge for misconduct due to his commission of serious offenses was erroneous or unjust. Therefore, the Board finds no grounds for voiding his discharge and reinstating him on active duty; for upgrading his character of discharge, separation code, narrative reason for separation, or reentry code; for reimbursing him for the recouped bonus payments; or for paying him any pay or allowances. His request should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

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

ORDER

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

August 5, 2016

