

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2018-173

████████████████████
██████████ MK2 (former)

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on June 13, 2018, and assigned it to staff attorney ██████████ to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated April 19, 2019, 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, who was discharged from active duty on June 18, 2018, asked the Board to void his “wrongful discharge.” The applicant asserted that there was an “overall lack of due process in conducting his second” Administrative Separation Board (ASB) hearing. He claimed that the findings of the second hearing were based on “improper evidence.”

The applicant explained that he did not feel that he received a fair hearing before the ASB in accordance with Coast Guard policies and regulations. He claimed that he had objected to the second hearing, but it proceeded despite his objections without any provisions being cited as authority for holding a supplemental ASB hearing. He asserted that although he submitted an objection and response, he felt he was not given a fair chance to object to the second opinion of the ASB. He argued that because new evidence was presented at the second hearing, it should have been its own separate and new ASB.¹ He complained that the ASB president was not present at the second hearing, which he claimed was against Coast Guard policy. The applicant stated that he presented evidence and witness testimonies in his favor, which should have led to his retention in the Coast Guard. In support of his application, the applicant provided relevant documents, which are described below in the Summary of the Record.

¹ The applicant cited Article 8.B.9. “of reference (a).” The Enlisted Personnel Administrative Board manual, PCSINST M 1910.1, Article 8.B.9., states that “documents may not be added to the record of the proceeding, nor shall reviewers refer to reports or investigations that were not made a part of the record at the time of the hearing.”

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on August 19, 2008. Before the events at issue here, he had two negative entries in his record. First, on December 16, 2010, he received a negative CG-3307 (“Page 7”) for “immature behavior” and “willfully committed actions after being evicted from [his] previous residence.” Second, on February 14, 2011, the applicant received a negative Page 7 for an alcohol incident² because on February 12, 2011, he had been arrested and received a citation for “public drunk” (public intoxication) by the local police department in violation of the county’s laws.

On June 15, 2016, the applicant was seen by Coast Guard medical providers for a follow-up after an Emergency Room visit.³ The applicant had been “frustrated with the referral process and aggressively made an inappropriate active shooter comment. [The applicant] denie[d] owning a firearm” and denied suicidal or homicidal ideations. The notes state that the applicant had “made a verbal threat ‘If I commit a mass shooting maybe I’ll get somewhere.’ He was escorted to ER. ... He claims he did not mean it.” He then reported that he did not wish harm to himself or others and that he was frustrated with the delays in getting clinical testing completed.

On January 25, 2017, the applicant received a notice from Captain S, the convening authority of the ASB. He informed the applicant that he was initiating action to involuntarily separate the applicant “for an adjustment disorder.”⁴ The convening authority cited the Enlisted Personnel Administrative Boards Manual and the Military Separations manual as authority for this action. The diagnosis that led to this separation action was Dr. Q’s report dated November 3, 2016, which included a diagnosis for “Adjustment Disorder with Anxiety, as well as Narcissistic and Obsessive-Compulsive Personality traits.” Dr. Q stated in this report that the applicant was unsuitable for continued military service. The applicant was informed of his rights, including the right to consult with a lawyer. He was informed that the least favorable characterization of discharge he could receive was a general characterization, but the convening authority did not include a specific recommendation regarding his character of service.

On May 10, 2017, Ms. A, a Licensed Mental Health Counselor, wrote a letter on behalf of the applicant. She stated that she had worked with the applicant since March 16, 2016. He began therapy “to process the breakup of a significant relationship” because PO X’s reaction “took him by surprise.” Ms. A stated that the applicant had depression and anxiety. She stated that, in her professional opinion, the applicant’s reaction to “the breakup followed by ongoing anxiety regarding the security of his job brought on an acute stress disorder.” She stated that as his symptoms of “depression have lessened and his grief over the break up has ended, his main symptom continues

² Article 1.A.2.d. of the Coast Guard Drug and Alcohol Abuse Program, COMDTINST M1000.10 (series) defines an “alcohol incident” as “[a]ny behavior, in which alcohol is determined, by the commanding officer, to be a significant or causative factor, that results in the member’s loss of ability to perform assigned duties, brings discredit upon the Uniformed Services, or is a violation of the Uniform Code of Military Justice, Federal, State, or local laws. The member need not be found guilty at court-martial, in a civilian court, or be awarded non-judicial punishment for the behavior to be considered an alcohol incident.”

³ The applicant did not submit his medical record. A few medical documents are in his record, however, and are discussed here.

⁴ Military Separations manual, COMDTINST M1000.4, Article 1.B.15.b.(3).

to be anxiety regarding his job.” Because the symptoms have lasted longer than six months, she could no longer diagnosis him with “acute stress disorder.” Ms. A stated that the applicant was then being treated for anxiety related to the potential loss of his position with the Coast Guard.

First ASB Report

Following a hearing on May 23 and 24, 2017, the ASB issued a decision on May 26, 2017. The ASB found that Dr. Q had diagnosed the applicant with an adjustment disorder with anxiety and narcissistic and obsessive compulsive personality traits. Dr. Q’s diagnosis was based on three sessions (March 16, 2016; March 31, 2016; and September 1, 2016) and a Walter Reed Psychological Evaluation. Dr. Q stated that even if the applicant received treatment and improved, he could not rule out the possibility that the behaviors would reoccur and the Walter Reed Psychological Evaluation likewise stated that the applicant’s “propensity to engage in similar behavior in the future may exist.” The Walter Reed Psychological Evaluation had diagnosed the applicant with adjustment disorder with anxiety, chronic. The Walter Reed Center recommended that the applicant undergo another psychological test to determine “if his approach to testing is consistent and/or if it provides insights into his behavior.” The ASB found that Ms. A, a licensed mental health counselor, had diagnosed the applicant with depression and anxiety and that she stated that his main symptoms related to his fear of separation from the Coast Guard. The ASB noted that according to Coast Guard policy, an “adjustment disorder with anxiety that is determined to be persistent and/or treatment is prolonged or non-curative is cause for discharge for unsuitability” and if a “successful outcome is not realized within six months of the initiation of therapy, the patient’s condition must be reassessed.”

The ASB found that there were two investigations into the applicant for his behavior relating to excessively contacting PO X after their relationship had ended. The ASB stated that PO X continued to “suffer emotional distress from [the applicant’s] previous inappropriate actions after their relationship ended” and the applicant did not demonstrate insight into how those behaviors adversely affected her. Another member, EM2 W, had stated that he no longer felt “safe or comfortable” working around the applicant because of comments he had made.⁵ The ASB stated that the applicant did demonstrate an ability to cease the inappropriate behaviors once he was given a military order to do so. Threat assessments by medical professionals and the Coast Guard Investigative Service had concluded that the applicant was not a threat to himself or others. The ASB found that the applicant’s work performance “remained consistently above average prior to and throughout the duration of the medical evaluations and [ASB] process.”

The ASB found that there was a basis for separation due to the fact that the applicant had been diagnosed with an adjustment disorder with anxiety, which had manifested itself in “negative behaviors that caused emotional distress for two Coast Guard members.” The ASB stated that while mental health treatment was not mandated by Dr. Q or the applicant’s condition, he should be reassessed “due to completing over six months of therapy to determine if he will have a positive prognosis.” The ASB stated that it was unclear whether the applicant, if confronted with another personal stressor (such as the ending of a relationship), “would exemplify inappropriate behavior

⁵ The record before the Board does not indicate what comments made EM2 W feel unsafe or uncomfortable. The only evidence in the record refers to the applicant’s “active shooter” statements.

as a result of his adjustment disorder with anxiety.” However, the ASB also noted that the applicant had “been able to function [e]ffectively as an MK2 throughout this process and has been determined to not be a threat to himself or others.”

The ASB made several recommendations with their decision. The ASB found that the applicant met the criteria for an unsatisfactory discharge based on apathy, defective attitude, or adjustment disorders,⁶ so he “should be separated from the Coast Guard.” The ASB recommended an honorable discharge characterization. However, the ASB also recommended that the applicant be placed on probation in lieu of immediate separation with the following conditions:

Recommend probationary period in order to obtain second mental health evaluation to be conducted by a military or VA psychiatrist that is not affiliated with this case in accordance with Opinion 3 [recommending that the applicant’s mental health be reassessed]. Member shall continue psychotherapy until the completion of the evaluation. If the reassessment is found that therapy was effective and/or curative of his adjustment disorder with anxiety, then retention is recommended. However, if re-assessment results in the same diagnosis of a chronic adjustment disorder with anxiety, then the board recommends separation.

Applicant’s Response to First ASB Report

On June 2, 2017, the applicant provided the Personnel Service Center (PSC) with a written response to the ASB’s decision. He acknowledged the ASB’s findings and recommendation and requested a second medical evaluation as soon as possible because he wished to continue serving in the Coast Guard. He highlighted the skills he had developed and asserted that he had become an “invaluable” Machinery Technician. The applicant stated that he also enclosed “information that suggested the original diagnosis of an Adjustment Disorder is no longer medically accurate.”⁷ He stated that he was confident an additional medical evaluation would add clarity as to whether he truly had a condition that warranted separation.

The applicant added that at his ASB, the recorder quoted the Medical Manual which states that adjustment disorders “are generally treatable and not usually grounds for separation. However, when these conditions persist or treatment is likely to be prolonged or non-curative,” then the member should be separated.⁸ The applicant asserted that the recorder did not enter into the report other relevant portions of Coast Guard policy, such as the portion of the Medical Manual which states that adjustment disorders are “transient, situational maladjustment due to acute or special stress [and do] not render an individual unfit because of physical impairment. However, if these conditions are recurrent *and interfere with military duty*, are not amenable to treatment, or require prolonged treatment, administrative separation should be recommended.”⁹ (Emphasis added). He argued that given this definition, if a member has an adjustment disorder but it does not interfere with their military duties, then he should be retained in the Coast Guard. He stated that at the hearing, he had witnesses testify that his work performance had “consistently been above average and any diagnosis of an adjustment disorder ha[d] not affected that performance.” In regards to the witness’s comment that he did not feel “safe or comfortable” working around him,

⁶ Military Separations, COMDTINST M1000.4, Article 1.B.15.b.(3).

⁷ It is not clear what documents the applicant enclosed with his submission to PSC, but behind this document in his submission to BCMR was the May 10, 2017, letter from Ms. A.

⁸ Coast Guard Medical Manual, COMDINST M6000.1E, Article 5.A.3.

⁹ *Id.* at Article 3.F.

the applicant argued that this evidence should not carry much weight because it came from a Coast Guard Investigative Services investigation which ultimately found that the applicant was not a threat to himself or others. He asked PSC to give him the opportunity to remain in the Coast Guard on probation and to allow him to receive the additional evaluation as recommended by the ASB.

Applicant's Objection to Supplemental ASB Proceedings

On September 8, 2017, the convening authority sent the ASB president instruction to “conduct a supplemental hearing in light of the new mental health evaluation” of the applicant. The convening authority stated that once the ASB had “resolved any questions it has regarding the [applicant’s] new mental health evaluation, [it] shall prepare a supplemental report of findings, opinions, and recommendations and forward them via [the convening authority] to Commander, CG PSC for final action.”

On September 12, 2017, the applicant, through his Coast Guard counsel, submitted a response to the convening authority’s notice to reopen the ASB. The applicant stated that following the ASB’s May 26, 2017, report, he had received another mental health evaluation.¹⁰ The applicant stated that he respectfully objected to the convening authority’s decision to conduct a supplemental hearing based on the new evaluation. He argued that there was no authority for the convening authority to reopen the ASB for a supplementary hearing in light of new evidence. The applicant pointed out that the convening authority did not provide any references or citations for reopening the ASB in his memorandum as authority to do so. He argued that he received the additional mental health evaluation as recommended for probation in lieu of separation; therefore, any action on the additional evaluation, such as ordering a supplemental hearing, “must be governed by the rules applicable to probation for administrative separation boards.” The applicant stated that any action taken on the terms of probation recommended by an ASB could only be taken by the Commander of the Coast Guard Personnel Service Center (PSC).¹¹ He added that part of the Commander’s responsibilities were to issue instructions about the terms of probations and to specify the type of discharge should probation not be approved, but the Commander had not issued any instructions at this point.

The applicant argued that under the rules, a staff judge advocate (SJA) or subsequent reviewer of the ASB’s report could return the report to the ASB for corrections or further proceedings for only three reasons: if the report is not in acceptable form, if the proceedings did not comply with the requirements of the Administrative Boards Manual or other Coast Guard policies, or if it was necessary to ensure that a complete record is developed.¹² The applicant argued that this provision did not permit the convening authority to order a supplemental hearing to consider new evidence. He stated that the additional mental health evaluation was recommended by the ASB as a condition of potential probation. He argued that because the Commander, PSC, had not taken any action on the recommendations of the ASB, the convening authority did not have the ability “to preemptively order a supplemental hearing based off the recommended conditions of that pro-

¹⁰ The applicant did not submit a copy of this additional mental health evaluation.

¹¹ Enlisted Personnel Administrative Boards Manual, PCSINST M1910.1, Article 1.G.d.(1) and Military Separations, COMDTINST M1000.4, Article 1.B.24.

¹² Enlisted Personnel Administrative Boards Manual, PCSINST M1910.1, Article 8.B.7.a.

bation.” The applicant argued that the Administrative Boards Manual explicitly states that “documents may not be added to the record of the proceeding, nor shall reviewers refer to reports or investigations that were not made a part of the record at the time of the hearing.”¹³ He argued that because the additional mental health evaluation was conducted after the May 24, 2017, ASB, it was considered an addition to the board’s record and was prohibited. He asserted that any reviewer, such as the convening authority, could “not refer to a report that was not made a part of the record at the time of the hearing.” The applicant argued that the inclusion of the report in the supplemental ASB violated Coast Guard policy.

The applicant noted that the ASB manual gives members a right to relief from procedural deviations only when those deviations materially prejudice his or her rights.¹⁴ He asserted that the convening authority’s decision to order a supplemental ASB hearing deviated significantly from the ASB manual procedures and therefore he would be materially prejudiced should there be a supplemental ASB hearing. He asserted that the Coast Guard should not get a second bite at the apple to argue that he should be separated with previously un-submitted evidence. He stated that during the original ASB, “documentary evidence was admitted, witness testimony was heard, and arguments from counsel [were] presented. Afterwards, the board president deemed the hearing closed and adjourned proceedings.” The ASB issued its decision on May 26, 2017, therefore “any consideration by the [ASB] and subsequent reviewers as to whether [the applicant] should be retained or separated from the service should be limited to the evidence admitted and made part of the board record as to when it was conducted.” The applicant argued that reopening the ASB with additional information unfairly and unreasonably gave the Coast Guard a second chance to advocate for ending his career after failing to achieve this outright result the first time.

The applicant provided a portion of an email chain, which begins on September 18, 2017. The email is from the ASB president and is to the members of the ASB. The subject of the email is “Notice to Reopen the ASB for [the applicant].” The email stated the supplemental hearing would take place on October 16, 2017; asked the ASB members where they wanted to meet; and asked for “the teleconference number and pass code.”

On September 19, 2017, the convening authority informed the applicant that his objection to the supplemental ASB hearing was noted and would be included with the record, but that the hearing would continue as ordered.

On September 20, 2017, the applicant replied through his attorney to the “Notice to Reopen the ASB for [the applicant]” email chain and stated that the proposed date worked for them for a hearing. He stated that he and his attorney planned on attending the hearing in-person. He stated that he had objected to the supplemental ASB so that there were “no surprises.” On September 22, 2017, the ASB president replied and stated that all material presented during the hearing would be added to the report. On October 12, 2017, the ASB president emailed the group and reminded them of the October 16, 2017, hearing. He stated that he “may be a few minutes late calling in.” The same day, the applicant’s attorney replied and asked to clarify that the ASB president would “not be physically present at the board.” He stated he was asking because he had some additional

¹³ Enlisted Personnel Administrative Boards Manual, PCSINST M1910.1, Article 8.B.9.

¹⁴ *Id.* at Article 1.K.

documents he was planning on presenting, so he would send them electronically if the ASB president would not be there physically. The ASB president responded that he would not be physically attending because he was stationed elsewhere at the time and requested all documents electronically. On October 13, 2017, the applicant's attorney responded to the email chain and stated that after further consideration, he respectfully objected to the ASB president not being present for the applicant's hearing. He attached relevant portions of the Enlisted Personnel Administrative Board Manual as support.¹⁵ He stated that it was his "position that [the ASB president's] presence in-person for this hearing is essential." He stated that he was amenable to rescheduling in order to accommodate this request. On the same date, the ASB president responded and stated that the objection was noted, but the hearing would proceed as scheduled.

Supplement ASB Report & Applicant's Response

On October 16, 2017, the ASB released its supplemental board report. The ASB found that the applicant had a "personality disorder with narcissistic, obsessive-compulsive, and histrionic personality traits" and that this diagnosis met the prerequisites for discharge from active duty. The ASB's recommendation was that the applicant met the requirements for a discharge for "personality disorders."¹⁶ The ASB again recommended that the applicant be placed on probation. The same language regarding reassessment from the first ASB report was included in this report.

On October 25, 2017, the applicant, through his Coast Guard counsel, provided an eight-page response to the ASB's supplemental hearing report to PSC. The applicant stated that he had four main complaints to address. The first was that the convening authority had no authority to order a supplemental ASB hearing. The applicant asserted that PSC should disregard the supplemental hearing and any new evidence presented during that hearing based on the arguments he made in his September 12, 2017, memorandum objecting to the reopening of the ASB. He noted that when the convening authority ordered the supplemental ASB hearing to move forward over the applicant's objection, the convening authority still did not cite any policy, regulation, or provision for support for his actions. He argued that the convening authority's ordering of a supplemental hearing was "arbitrary, capricious, unreasonable, and not authorized nor consistent with any existing Coast Guard regulation or policy."

The applicant's second complaint was that the ASB's president was not physically present during the supplemental ASB hearing. The applicant stated that he believed the ASB president's physical absence materially prejudiced his rights. He stated that the Administrative Boards Manual holds that it is "the primary duty of any Coast Guard member appointed to an administrative board to attend the board's hearing."¹⁷ The applicant argued that upon receiving confirmation that the ASB president would not be physically present, he objected through his counsel. The ASB president responded that the objection was noted but ordered the proceeding to proceed because the ASB president would be "present" telephonically. The applicant acknowledged that the ASB president was not physically present because he had been transferred to another unit, but he argued that the ASB president was nevertheless required to be physically present. The applicant asserted that the importance of being physically present "to view and listen to in-person witnesses and hear

¹⁵ *Id.* at Articles 1.G.1., 1.H., 1.H.2., 1.J., 7.D., 8.B.7., and 8.B.8.

¹⁶ *Id.* at Article 1.B.15.b.(2).

¹⁷ *Id.* at Article 4.D.1.

counsel's argument cannot be overstated." He stated that he had the right to have the ASB president physically present during "this vitally important decision."

The applicant's third complaint was that even if the additional evidence was accepted at the supplemental ASB hearing, it "should have resulted in the [ASB's] modified recommendation to retain [the applicant]." He noted that in its first, May 26, 2017, report, the ASB had stated that if a reassessment was done and found that therapy had been effective, then retention would be recommended. The applicant stated that the additional evaluation he received provided a diagnosis of "mixed personality disorder" and no mention or diagnosis of "adjustment disorder with anxiety." He stated that according to the Military Separations and Coast Guard Medical Manuals, a personality disorder and an adjustment disorder are two medically and clinically different disorders. He argued that the ASB wrongly recommended him for immediate separation because the additional evaluation did not find that the applicant still suffered from an adjustment disorder. The applicant stated that he had also provided evidence that his anxiety did not interfere with his military duties, was not related to his performance of his duties, and was "undoubtedly amendable to treatment." He argued that "for these reasons, the [ASB] should have recommended retention pursuant to its own previous recommendation." The applicant asserted that if PSC chose to separate the applicant based on the supplemental hearing but ignored the findings that applied to him from the original hearing, then the "service would be 'cherry-picking' – essentially subjectively picking and choosing what provisions apply to [him]."

The applicant's final argument was that that the ASB's new recommendation to separate him based on a "mixed personality disorder" could not result in his separation at that time. He stated that the Enlisted Personnel Administrative Boards Manual states that the convening authority for administrative separation proceedings must properly notify a member of the specific basis for the separation proceeding.¹⁸ The applicant stated that on January 25, 2017, he was notified by the convening authority that separation processing was being initiated due to a diagnosis of an adjustment disorder with anxiety. The applicant argued that when the ASB was reopened, whether this was an authorized action or not, it was a continuation of the original ASB which convened to determine whether the applicant had an adjustment disorder with anxiety. The applicant argued that this was the only condition that could have been properly considered by the ASB at either of the hearings based on the notifications to the applicant. He stated that the supplemental ASB recommended him for separation based on a personality disorder and not an adjustment disorder with anxiety. He stated that he did not dispute that a personality disorder was a legitimate basis for separation; rather, he argued that this condition was not the basis of his ASB and was not within their scope of inquiry. The applicant noted that had the convening authority wished to change the ASB's scope of inquiry, he could have done so pursuant to the manual.¹⁹ The applicant argued that if the Coast Guard wished to discharge him on the basis of a personality disorder, he must be afforded a whole new ASB with a new convening order and new board members.²⁰

¹⁸ *Id.* at Article 2.C.2.b.

¹⁹ *Id.* at Article 1.F.3.

²⁰ The applicant alleged that if the Coast Guard were to order a new ASB, there would have been potential "double jeopardy" issues, which could be why the convening authority chose to reopen the ASB as opposed to calling a new one. *See* Military Separations, COMDTINST M1000.4, Article 1.B.22.c.

On January 11, 2018, the convening authority positively endorsed the ASB's supplemental findings and recommendations. The convening authority specifically endorsed separating the applicant for unsuitability due to adjustment disorders. He stated that over a period of eighteen months, the applicant was "evaluated by three separate mental health providers and was once diagnosed with Adjustment Disorder with Anxiety with a specifier or chronic; once with Adjustment Disorder, as well as narcissistic and obsessive-compulsive personality traits; and, once with Personality Disorder with narcissistic, obsessive-compulsive, and histrionic personality traits." The convening authority stated that the applicant met the requirements for separation because his adjustment disorder was chronic. He noted that the applicant "clearly" wished to continue serving in the Coast Guard but that it was in the best interest of the Coast Guard to separate the applicant.

On May 14, 2018, the Final Reviewing Authority (FRA) acted on the ASB's recommendation after reviewing the ASB's findings and recommendations. The FRA noted that on May 23, 2017, the ASB recommended separating the applicant for unsuitability due to adjustment disorders but on October 16, 2017, the ASB recommended separating him for unsuitability due to personality disorders. The FRA stated that only one basis for separation could be approved and "after careful review of the evidence developed ... which includes diagnoses of Adjustment Disorders by at least three medical providers," the FRA determined that the applicant should be separated for unsuitability due to adjustment disorders with an honorable characterization of service.

The applicant was separated on June 18, 2018, with an honorable characterization of discharge. His separation code was JFY and the narrative reason for separation was "Adjustment Disorder." He received an RE-3 reentry code, denoting that he is eligible to reenlist in the military with a waiver.

VIEWS OF THE COAST GUARD

On January 28, 2019, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which she recommended that the Board deny relief in this case. The JAG stated that members before an ASB have no right to receive probation in lieu of an administrative discharge.²¹ The manual that control ASBs further states that the "final action on all boards controlled by this Manual is taken by Commander, Coast Guard Personnel Service Center. A[n ASB's] report, including its findings of fact, opinions, and recommendations, is advisory only ... it is not binding on CG PSC."²² The JAG argued that the supplemental hearing was proper because the first hearing did not constitute a final agency action. The JAG stated that the applicant was not subjected to multiple ASBs, rather, "his separation was considered by a single [ASB] over the course of two hearings." There is no prohibition against an ASB considering one case over the course of multiple hearings, according to the JAG.²³

²¹ Enlisted Personnel Administrative Boards Manual, PSCINST M1910.1, Article 1.G.1.d.(3).

²² *Id.* at Article 1.J.

²³ The JAG also argued that the supplemental ASB did not constitute double jeopardy. But the applicant did not argue that the supplemental hearing subjected him to double jeopardy; he merely alleged that if the Coast Guard had convened an entirely new ASB it would have subjected him to double jeopardy, which is a principle of criminal law and inapplicable in administrative proceedings.

The JAG argued that, even assuming *arguendo* that the convening authority did not have the authority to hold a supplemental hearing, this is harmless error “because final authority to separate a member does not rest with the [ASB], rather CG PSC.” The ASB’s report is “advisory only” and is reviewed but is not binding on PSC.²⁴ The JAG argued that any errors that the ASB made are irrelevant because PSC only considers the recommendations but independently evaluates the basis and appropriateness of the separation. The JAG asserted that this is shown through the fact that the FRA approved the characterization of discharge and that the basis for separation was unsuitability, but found that the applicant should be separated for an adjustment disorder instead of a personality disorder.

Regarding the ASB president’s physical absence from the supplemental hearing, the JAG argued that there is nothing in the Enlisted Personnel Administrative Boards Manual that prohibits *remote* attendance. The manual requires a “member appointed to an administrative board to attend the board’s hearing.”²⁵ The JAG pointed out that the manual also allows witnesses to appear remotely.²⁶ The JAG asserted that the applicant failed to present evidence that the ASB president “did not participate, failed to understand the evidence being presented, or otherwise attribute[d] any error or defect to his remote attendance.”

Regarding the applicant’s argument that the supplemental ASB recommended separation for a personality disorder instead of an adjustment disorder so he should have been retained on active duty, the JAG asserted that this argument failed. The JAG argued that it was precisely because the applicant was found to have a “mixed personality disorder and may still have an adjustment disorder” that the ASB requested another mental health evaluation. Both an adjustment disorder and a personality disorder are deemed by the Medical Manual to be psychiatric disorders that can be the basis to administratively separate a member as unsuitable for military service. The JAG asserted that the applicant received all due process at the ASB hearings and throughout the entire process with military counsel appointed to him.

In her advisory opinion, the JAG adopted the findings and analysis provided in a memorandum prepared by PSC. PSC argued that the applicant has not shown an error or injustice in his ASB process. PSC stated that the applicant could have been separated based on the initial ASB hearing but he was given the opportunity to present additional evidence at a supplemental hearing, including an additional mental health evaluation. PSC asserted that the applicant was “discharged appropriately and all due process rights were given to the applicant” and recommended that the Board deny relief.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On February 5, 2019, the Chair sent the applicant a copy of the Coast Guard’s views and invited him to respond within 30 days. No response was received.

²⁴ Enlisted Personnel Administrative Boards Manual, PSCINST M1910.1, Article 1.J.

²⁵ *Id.* at Article 4.D.1.

²⁶ *See id.* at Article 3.B.1.a. and 6.D.7.

APPLICABLE REGULATIONS

The Enlisted Personnel Administrative Board manual, PCSINST M 1910.1, sets general guidelines and procedures for ASBs. According to Article 1.A.1., ASBs are fact-finding bodies that convene to gather evidence and make recommendations whether administrative action should be taken to separate a Coast Guard enlisted member.

Article 1.F.3. of the manual states that if during the ASB, it is determined that the inquiry should be expanded or restricted, or that the convening order should be modified, the ASB “shall recommend the changes to the convening authority.” The “convening authority may take such action on [an ASB’s] recommendation for changes as he or she deems appropriate.”

Article 1.G.1.d.(1) of the manual states that the ASB “may recommend that CG PSC suspend the execution of an approved discharge and place the respondent on probation for a specified period of time when there may be a reasonable prospect for rehabilitation.” Article 1.G.1.d.(3) states that “Coast Guard members have no right to receive probation in lieu of administrative discharge or denial of reenlistment, but may request probation.”

Article 1.J. of the manual states that “final action on all boards controlled by this Manual is taken by Commander, Coast Guard Personnel Service Center.” The ASB’s report, including its findings and recommendations, are “advisory only.” The report “will be thoroughly and carefully reviewed and considered, but it is not binding on CG PSC. CG PSC is responsible for enforcing policy that is in the best interests of the entire Coast Guard and for ensuring the consistent application of military personnel policy across the Coast Guard.”

Article 2.C.2. states that the convening authority shall include in the notice to the member the basis for the proceedings, including the “Coast Guard policy that authorizes separating, denying reenlistment to, or reducing the respondent, and the conduct or performance of duty that proves that the elements of that policy have been met.”

Article 4.D.1. of the manual requires a “member appointed to an administrative board to attend the board’s hearing.”

Article 7.D. of the manual states that even if an ASB report has been forwarded to PSC for final action, the ASB “remains in effect until the board proceedings are terminated by proper authority or until the Coast Guard takes final action on a respondent’s case.” If a record is returned to the ASB “for correction or further proceedings, the board is authorized to consider additional matters included in the record, reconsider, and modify the board report and the summarized record of the board hearing.”

Article 8.B.7. of the manual states that a Staff Judge Advocate or a subsequent reviewer of the ASB report “may return the record of the proceeding and board report to the board for correction or further proceedings if he or she determines that the record and report are not in acceptable form, that the proceedings did not comply with the requirements of this Manual or any other Coast Guard policy, or that it is necessary to ensure that a complete record is developed.”

Article 8.B.9. of the manual states that after the ASB hearing and during the review process, “documents may not be added to the record of the proceeding, nor shall reviewers refer to reports or investigations that were not made a part of the record at the time of the hearing.”

The Coast Guard Medical Manual, COMDTINST M6000.1, Article 3.F.16.d. states the following regarding personality disorders: This condition “may render an individual administratively unfit rather than unfit because of a physical impairment. Interference with performance of effective duty will be dealt with through appropriate administrative channels.”

Article 3.F.16.e. of the Medical Manual states the following regarding adjustment disorders: “Transient, situational maladjustment due to acute or special stress does not render an individual unfit because of physical impairment. However, if these conditions are recurrent and interfere with military duty, are not amendable to treatment, or require prolonged treatment, administrative separation should be recommended.”

Article 5.A.2. of the Medical Manual states that lists personality disorders that are disqualifying for appointment, enlistment and induction or if identified on active duty and the list includes obsessive compulsive, histrionic, and narcissistic personality disorders.

Article 5.A.3. of the Medical Manual states that adjustment disorders are “generally treatable and not usually grounds for separation. However, when these conditions persist or treatment is likely to be prolonged or non-curative ... process in accordance with Military Separations, COMDTINST M1000.4.”

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 submission 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 his discharge following his ASB with a supplemental hearing was erroneous and unjust. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant’s military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.²⁷ 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.”²⁸

3. The applicant argued that the convening authority had no authority to order a supplemental hearing. However, the Enlisted Personnel Administrative Board manual, Article 7.D. states that an ASB “remains in effect until the board proceedings are terminated by proper authority

²⁷ 33 C.F.R. § 52.24(b).

²⁸ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

or until the Coast Guard takes final action on a respondent's case" and provides that a case may be returned to the ASB for further proceedings. And Article 8.B.7. authorizes a reviewer to return a case to the ASB "to ensure that a complete record is developed." Therefore, the applicant's ASB remained open and was not final until the FRA made a decision on the ASB's recommendations on May 14, 2018. The ASB hearings were on May 26, 2017, and October 16, 2017, respectively. The applicant complained that the convening authority did not cite any authority in his September 8, 2017, notification of the supplemental ASB. But the convening authority referenced his original January 25, 2017, ASB notification memorandum, which cited his authority to convene an ASB. The applicant has not proven by a preponderance of the evidence that the convening authority lacked the authority to direct a supplemental hearing before the ASB.

4. The applicant argued that even if the supplemental hearing was properly convened, Coast Guard policy still prohibited the addition of new evidence to the record. He cited Article 8.B.9. of the Enlisted Personnel Administrative Board manual. Article 8 provides the rules for "Review and Final Action" on an ASB report—not for the ASB itself—and states that "documents may not be added to the record of the proceeding, nor shall reviewers refer to reports or investigations that were not made a part of the record at the time of the hearing." This rule prevents reviewing authorities from making their decisions based on evidence that was never considered by the ASB. The applicant argued that this provision meant that "documents may not be added" after the initial hearing. However, as discussed in finding number 3, the ASB "remains in effect until the board proceedings are terminated by proper authority or until the Coast Guard takes final action on a respondent's case" and, if a record is returned to the ASB "for correction or further proceedings, the board is authorized to consider additional matters included in the record, reconsider, and modify the board report and the summarized record of the board hearing."²⁹ Therefore, the supplemental hearing was an extension of the first hearing and the additional mental health evaluation is a document and additional matter that was added "at the time of the hearing." The Board is not persuaded that the Coast Guard erred in permitting the documentation of an additional mental health evaluation, which had been recommended by the ASB, to be considered by the ASB.

5. The applicant argued that the ASB president not being physically present at the supplemental hearing deprived him of due process. The applicant pointed to Article 4.D.1. of the Enlisted Personnel Administrative Board manual, which requires that ASB members "attend the board's hearing." However, the word "attend" is not defined in this section or elsewhere in the manual. The ASB president was physically present at the initial hearing and he attended telephonically at the supplemental hearing because he had permanently changed stations and was no longer in the geographical area. The record shows that the ASB president received the applicable documents electronically before the supplemental hearing, and the applicant has not shown that he presented additional evidence at the supplemental hearing that the ASB president was unable to properly evaluate because of his telephonic attendance. Therefore, the Board finds that the ASB president satisfied the requirement to "attend" the ASB hearing as required by Coast Guard policy and that the applicant was not deprived of due process in this regard.

6. The applicant argued that he was not properly notified of the basis for his discharge because before the first hearing, he was notified that he was being processed for discharge due to

²⁹ Enlisted Personnel Administrative Board manual, PCSINST M 1910.1, Article 7.D.

a diagnosed adjustment disorder and, at the supplemental hearing, the ASB considered a diagnosis of personality disorder. The applicant was entitled to notification of the basis for the separation proceedings.³⁰ The record shows, however, that he was notified before the second hearing that the ASB would be considering the documentation of the additional mental health evaluation, which had been conducted upon the recommendation of the ASB. Although the applicant did not submit a copy of this additional mental health evaluation, the record shows that he admitted to having undergone the additional evaluation and to having received a copy of the evaluation with the diagnosis of personality disorder before the supplemental hearing of the ASB. The preponderance of the evidence shows, therefore, that the applicant was notified before the supplemental hearing that the ASB would be reviewing the additional mental health evaluation, which included the diagnosis of personality disorder, and would be reconsidering its findings and recommendation regarding separation on the basis of its contents. Moreover, the record shows that the applicant was actually discharged on the basis of his chronic adjustment disorder, as he was originally notified, instead of the personality disorder. The Board finds that the applicant has not proven by a preponderance of the evidence that the Coast Guard failed to notify him of the basis for the discharge proceedings.

7. The applicant argued that even if the supplemental ASB was properly convened and properly considered the additional mental health evaluation, it erred by not recommending his retention in the Coast Guard. The Board disagrees. After the initial hearing, the ASB found that the applicant had been diagnosed with a chronic adjustment disorder with anxiety and narcissistic and obsessive compulsive traits and recommended his discharge based on that diagnosis. After the supplemental hearing, the ASB found that the applicant had also been diagnosed with and could be discharged based on a personality disorder with narcissistic, obsessive compulsive, and histrionic traits. The applicant reasoned that because the supplemental ASB did not find that he still suffered from an adjustment disorder, he should have been recommended for retention because the condition originally under consideration was no longer present. The ASB is not a medical board, however, and cannot diagnose members or change their diagnoses. The applicant had been diagnosed by medical officers with both a chronic adjustment disorder and a personality disorder, and Dr. Q had expressly noted that the adjustment disorder and resulting behavior could recur. The ASB's report could not alter these diagnoses. The ASB was authorized only to make findings and recommendations regarding his retention or separation on the bases of these diagnoses and his past conduct and performance. Both adjustment disorders and personality disorders are grounds for administrative separation due to unsuitability.³¹ Therefore, the ASB acted within its authority in recommending that the applicant be separated for unsuitability due to first the chronic adjustment disorder and then the personality disorder. And the FRA acted within his authority in directing the applicant's administrative discharge due to his chronic adjustment disorder.

8. The applicant has not proven by a preponderance of the evidence that his separation proceedings were erroneous or unjust. Accordingly, his request that his discharge be voided so that he would remain on active duty should be denied.

³⁰ Enlisted Personnel Administrative Boards Manual, PSCINST M1910.1, Article 2.C.2.b.

³¹ The Coast Guard Medical Manual, COMDTINST M6000.1, Article 5.A.2.d., e., & h.

ORDER

The application of former MK2 [REDACTED] USCG, for correction of his military record is denied.

April 19, 2019

