DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2019-115

[redacted] YN1 (former)

FINAL DECISION

This proceeding was conducted under the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case upon receiving the completed application on May 1, 2019, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated May 15, 2020, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, a former yeoman, first class (YN1/E-6) alleged that he was erroneously and unjustly discharged from the Coast Guard on September 14, 2017. He asked the Board to correct his record to show that

1) he was granted a waiver of the reenlistment eligibility criteria in 2015;
2) he was not discharged due to erroneous reenlistment in 2017 but continued to serve on active duty; and
3) he is retired with 20 years of service as of June 19, 2020, and—if the Board's decision is issued before that date—he is on terminal leave from the date of the decision until June 19, 2020.

The applicant stated that he was erroneously and unjustly discharged for the convenience of the government due to "erroneous enlistment" in 2017 because his command in 2015 had not known that he was ineligible to reenlist and so he did not submit a waiver request. The applicant stated that after reenlisting in May 2015, he served on this enlistment for more than two years before his next command initiated an Administrative Separation Board (ASB) in 2017, "citing flimsy allegations of unsatisfactory performance." But the ASB recommended his retention on active duty, and so his command "abandoned the ADSEP process and directed [his] separation for erroneous enlistment" because he had not received a reenlistment waiver in 2015.

The applicant explained that from July 2012 to June 2015, he was assigned to a regional office of the Coast Guard Investigative Service (CGIS) as the office's "independent duty"[1] yeoman. On May 14, 2013, he was taken to mast by the commanding officer (CO) of CGIS and received non-judicial punishment (NJP) for dereliction of duty, in violation of Article 92 of the Uniform Code of Military Justice (UCMJ), and for making a false official statement, in violation of Article 107 of the UCMJ. He stated that he had "wrongly distributed protected information regarding a CGIS investigation and made a false official statement regarding the nature of the information."

The applicant stated that despite the NJP, at the end of this tour of duty at the CGIS office in June 2015, he received a Commandant's Letter of Commendation Ribbon for "outstanding performance of duty" in managing hundreds of investigative records and ensuring tracking and accountability for CGIS's regional operations. He noted that his supervisor at the time has provided an email stating that he had been unaware of the new reenlistment criteria in 2015 and would have recommended to the Enlisted Personnel Management Division (EPM) of the Personnel Service Center (PSC) that the reenlistment rules be waived for the applicant if he had known that the applicant was ineligible to reenlist and needed a waiver to do so.

The applicant stated that on May 3, 2015, while he was still assigned to the CGIS office, the chief yeoman (YNC) who was chief of the local Servicing Personnel Office (SPO) conducted a reenlistment interview with him and gave him "a list of questions and answers regarding reenlistment criteria," which had been revised in April 2014. The applicant did not describe the nature of their conversation about those criteria, but the YNC concluded that he was eligible for reenlistment and recommended him for reenlistment. She signed a CG-3307 ("Page 7") stating that she had conducted the interview and that the applicant was eligible to reenlist, and so the applicant reenlisted for six years on May 4, 2015.

The applicant stated that in June 2015, he transferred to a large cutter in an "independent duty" billet, and he received satisfactory Enlisted Evaluation Reports (EERs) with recommendations for advancement through May 31, 2016. But on July 26, 2016, the CO of the cutter placed him on performance probation for six months, through January 26, 2017, "alleging various items of 'unsatisfactory' performance over the previous 12 months." The CO gave him seven "milestones" to accomplish and told him that failure to accomplish them "would be deemed a violation of his probation." And one such milestone was receipt of a negative Page 7 documenting poor performance or conduct. The CO told him that failing performance probation would result in his being processed for discharge.

The applicant noted that on his November 30, 2016, performance evaluation, he received "average" marks but was not recommended for advancement. But then on January 16, 2017, just a few days before the expiration of his probationary period, the CO issued him a Page 7 for "disrespecting an officer." He "allegedly failed to follow the Operations Officer's request to produce

[1] COMDTINST M1000.8A, Article 1.C.16., states, "Independent duty assignments are assignments in pay grade E-6 and below in which there is only one member in any specific rating assigned to the unit, there is no immediate or local rate specific support, and that E-6 or below is solely charged with carrying out the duties and responsibilities of that rate." To be eligible, the member must have had no below-average evaluation marks, no unsatisfactory conduct marks, and no NJP or similar misconduct for the prior two years.

his official passport and, after conferring with 'the passport office' informed the Operations Officer he did not need to do so." Then again on January 25, 2017, the day before his probationary period was to end, the CO signed another Page 7 counseling the applicant for an alleged "inability to follow proper procedures for assigning personnel TDY to other units" and for "continued inaptitude to function as a YN1 in the Coast Guard." And again on the last day of his probationary period, the CO issued him a Page 7 for failing to process a member's transfer worksheet.

The applicant stated that on February 3, 2017, the CO gave him a Page 7 stating that he had failed to meet all seven "milestones" and so the CO was going to initiate separation proceedings. Therefore, the applicant exercised his right to appear before an ASB. After the hearing on May 15, 2017, the ASB found, "No basis for discharge was proven by a preponderance of the evidence presented at the hearing," and recommended that he be retained on active duty. The applicant stated that the ASB found that the three Page 7s issued during the probationary period did not document unsatisfactory performance. The ASB found that there was not enough documentation of inaptitude or a commission of a serious offense during the probationary period; that he was "an average performer with satisfactory conduct"; that he "was not suited for independent duty"; and that a "lack of training, relief, and standard procedures created miscommunication and unclear expectations."

The applicant stated that a week after the ASB made its recommendation and before that recommendation had been reviewed or acted upon, the CO of the cutter notified him that he had initiated his discharge because the applicant had not been eligible to reenlist when he reenlisted on May 3, 2015. The CO stated that this fact had been discovered after the CO had notified the applicant of his pending discharge for failing probation on February 4, 2017. Therefore, the applicant alleged, the command must have discovered his prior ineligibility to reenlist well before the ASB but waited to initiate the additional discharge proceedings until after they learned that the ASB had recommended his retention.

The applicant noted that the CO also advised him that, while he was entitled to an ASB before he could be discharged for inaptitude after failing probation, no ASB was required to be discharged for convenience of the government because of his erroneous enlistment. The CO then did not forward the ASB record of proceedings and recommendation to Headquarters and instead sought Headquarters' permission to discharge the applicant because of his allegedly erroneous enlistment. The CO advised the applicant that if Headquarters did not separate the applicant on that basis, he would forward the ASB package for review. But Headquarters did authorize the applicant's discharge on that basis, and he was discharged on September 14, 2017. His DD 214 states that he was discharged due to "completion of required active service" even though, at the time, he had 3 years, 7 months, and 16 days of service remaining on his reenlistment contract. Upon his discharge, he had completed 17 years, 2 months, and 14 days of active duty—within 10 months of having 18 years of active duty.

Applicant's Arguments

The applicant argued that the doctrine of equitable estoppel precluded his discharge for erroneous enlistment. He noted that equitable estoppel "precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes,"

citing *Comer v. Micor, Inc.,* 436 F.3d 1098, 1101 (9th Cir. 2006). And that doctrine applies to the federal government. *Watkins v. U.S. Army,* 875 F.2d 699 (9th Cir. 1989); *ATC Petroleum, Inc. v. Sanders*, 860 F.2d 1104, 1111 (D.C. Cir. 1988). Citing *Masters Pharm., Inc., v. DEA*, 861 F.3d 206, 225 (D.C. Cir. 2017), the applicant stated that the elements of government estoppel are that (1) the government made a "definite representation"; (2) the entity "relied in such a manner as to change its position for the worse"; the entity's reliance was reasonable; and "the government engaged in affirmative misconduct." He argued that these elements are found in his case because of the following:

- The YNC signed a Page 7 stating that she had conducted the reenlistment interview and determined that he was eligible to reenlist.
- The applicant relied on her finding that he was eligible "to his detriment" in that he was deprived of the opportunity to "submit a timely waiver to the Reenlistment Review Board"[2] pursuant to ALCOAST 093/14. He also alleged that detrimental reliance is shown because at the time of his discharge, he was just months shy of having 18 years of service and being able to request an early retirement pursuant to Article 1.C.11.a.(2) of the Military Separations Manual.
- The applicant's reliance on the YNC's determination was reasonable because she "was responsible for vetting his reenlistment eligibility." He argued that the fact that his command was unaware of the new reenlistment criteria at the time is evidence that he himself "had no reason *not* to rely" on the YNC's determination of his eligibility.
- The Coast Guard's "affirmative governmental misconduct" will "cause an egregiously unfair result" (citing *Grumman Ohio Corp. v. Dole,* 776 F.2d 338, 347 (D.C. Cir. 1985)) in that he was denied an opportunity to complete his enlistment and retire with 20 years of service. The applicant stated that in *Watkins v. U.S. Army,* 875 F.2d 699 (9th Cir. 1989), the court found that the Army had committed affirmative misconduct where it "did not stand aside while [plaintiff] reenlisted or accepted a promotion [but] plainly acted affirmatively in admitting, reclassifying, reenlisting, retaining, and promoting [plaintiff]." He argued that denying relief in this case "would repudiate 'elementary fairness' in favor of governmental 'entrap[ment],'" citing *Moser v. United States,* 341 U.S. 41, 47 (1955).

Therefore, the applicant concluded, the Coast Guard should have been estopped from discharging him for erroneous enlistment.

The applicant also argued that "fundamental fairness" requires that the Board grant relief in this case. He argued that "it is clear that [the CO] and the command had it out for [him]" and were intent on discharging him. (The applicant did not provide any motive or reason why they "had it out for" him.) He had received a satisfactory EER on May 31, 2016, and yet eight weeks later, the CO placed him on performance probation, alleging a whole year of unsatisfactory performance, even though the CO had not issued him any Page 7s during that year. And then he

[2] Under ALCOAST 093/14, however, only members who were *eligible* to reenlist but not recommended to reenlist by their commands had a right to a hearing before a Reenlistment Review Board. Members who were ineligible to reenlist under the new criteria were authorized to submit a waiver request for consideration by PSC.

received a satisfactory EER on November 30, 2016, but just a few days before the end of the probationary period, the CO issued him a series of Page 7s, which the ASB "found to be baseless."

The applicant further argued that even though the CO knew he had not been eligible for reenlistment before the ASB convened, the CO "strategically failed to act upon the information" and allowed the ASB to proceed. He stated that the ASB "rebuked" the CO's attempt to discharge the applicant by recommending the applicant's retention, and so the CO suspended the ASB process "and resorted to an alternative plan to initiate erroneous enlistment proceedings. At best, the command's actions reflect a disregard for Coast Guard resources and processes. At worst, they evince [the CO] and the command's decision to prioritize a vendetta against [the applicant] over a duty to provide leadership, guidance and counseling." The applicant argued that the CO's actions thus "impugn the overall fairness of [his] separation."

The applicant argued that his discharge was also unjust because the failure to seek a waiver was not his fault. The YNC had concluded that he was eligible to reenlist and recommended him for reenlistment, and no one at the command or the SPO was aware that ALCOAST 093/14 required him to have a waiver to reenlist. Moreover, had his command at the CGIS office known, they would have recommended him for a waiver.

The applicant stated that the circumstances of his discharge were particularly unjust because he was "10 months from reaching 18 years of active-duty service and only 2 years and 10 months from being eligible for a 20-year retirement." He concluded that the BCMR has "ample grounds to grant relief based on principles of equity and fairness."

In support of his allegations, the applicant submitted numerous copies of Coast Guard records, which are included in the Summary of the Record below.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on June 19, 2000. After recruit training, he was assigned to a patrol boat from September 2000 to April 2003. He served at a Group office from April 2003 to March 2004, when he was removed from a Migrant Security Assist Team for unacceptable conduct and instructed to report full time to the Group Deck Department. In August 2004, he was reassigned to the local Sector office. He earned the YN rating in February 2005.

From March 2005 to June 2008, the applicant served as a YN3 aboard a 270-foot cutter with a crew of 100. On July 14, 2006, while assigned to the cutter, the applicant was taken to mast. He had been charged with failing to obey an order, making a false official statement, and forgery, but the CO dismissed the latter two charges and awarded NJP only for failing to obey an order. The specifications state that he had used a Coast Guard workstation to create a Yahoo email account in another member's name without his knowledge or consent and had used his cutter's computer to send sexually explicit emails by that account.

In 2008, the applicant advanced to YN2 and was transferred to the Personnel Division of the Integrated Support Command at the cutter's homeport. On January 26, 2012, he reenlisted for

four years, through January 25, 2016. Upon completing this tour of duty in July 2012, he received an Achievement Medal.

In July 2012, the applicant was transferred to an "independent duty" billet at a CGIS regional office located at the same homeport. On May 14, 2013, he was punished at mast by the CO of CGIS for dereliction of duty and making a false official statement in violation of Articles 92 and 107 of the UCMJ, respectively. The specification states that on March 22 and 23, 2013, he had willfully disclosed to two members with no need to know that CGIS was conducting a criminal investigation involving two other members. In addition, during the investigation of his disclosures, on April 3, 2013, he had, "with an intent to deceive," made a false statement about one of the unauthorized disclosures. His NJP consisted of a forfeiture of $766 in pay for two months and reduction to paygrade YN3/E-4, but the reduction in rate was suspended on condition of good behavior for six months. He was not reduced in rate.

New Reenlistment Criteria

On March 7, 2014, the Commandant issued ALCOAST 093/14, which states the following:

> SUBJ: IMPLEMENTATION OF ADDITIONAL REENLISTMENT CRITERIA
> A. Enlisted Accessions, Evaluations, and Advancements, COMDTINST M1000.2 (series)
> B. Military Separations, COMDTINST M1000.4 (series)
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> 1. To ensure the Coast Guard retains a disciplined, high-performing workforce, reenlistments and/or extensions should only be offered to those members (active and reserve) who maintain high professional standards and adhere to the Coast Guards core values. Therefore, to be eligible for reenlistment or extension of (re)enlistment, a member must meet two basic criteria: receive a positive recommendation from their commanding officer and meet the eligibility criteria listed in REF A and paragraph 2 below.
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> 2. In addition to the eligibility requirements listed in Articles 1.A.5. and 1.A.7. of REF A, all active and reserve members, regardless of duty status, must meet the following eligibility requirements during their current period of enlistment (to include any extensions):
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> a. Achieve a minimum factor average of 3.5 on their enlisted performance evaluations,
> b. Have no more than one unsatisfactory conduct mark,
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> • • •
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> f. Have no documented offense for which the maximum penalty for the offense, or closely related offense under the UCMJ and Manual for Courts-Martial, includes a punitive discharge.[3]
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> • • •
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> 3. The commanding officers recommendation remains an integral part of the reenlistment process and provides commands an opportunity to clearly articulate a member's suitability for continued service. …
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> 4. Members must meet all eligibility requirements to reenlist/extend. Members who meet the eligibility criteria but are not recommended for reenlistment by their commanding officer who have less than eight years total active and/or reserve military service may submit an appeal to CG PSC-EPM-1 for active duty members or CG PSC-RPM-1 for reserve members. Members who have eight or more years of total active and/or reserve military service are entitled to a reenlistment board. Additionally, members who do not meet the eligibility criteria, but are recommended for reenlistment/extension by their commanding officer, may also submit an appeal to CG PSC-EPM-1 for active duty members or CG PSC-RPM-1 for reserve members, regardless of total years of service.

[3] Appendix 12 of the Manual for Courts-Martial United States shows that the maximum penalties for willful dereliction of duty and making a false official statement include a punitive discharge.

> 5. These updated reenlistment eligibility criteria are effective 17 March 2014. Article 1.B.4.b. of REF B requires commands to conduct a pre-discharge interview approximately six months prior to a member's expiration of enlistment (EOE) to notify a member whether they are eligible to reenlist. To accommodate this provision, members whose EOE is within six months of the 17 March 2014 effective date (17 September 2014) will not be screened against these updated reenlistment criteria. Members whose EOE is after 17 September 2014 who desire to reenlist or extend their enlistment must be screened against these updated reenlistment criteria within the timeframe of Article 1.B.4.b. of REF B. Commanding officers should coordinate with their servicing personnel office for electronic and paper records reviews prior to effecting enlistments/extensions. …
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> 6. Members not eligible for reenlistment/extension of enlistment will be discharged from the active or reserve component, as applicable, upon the expiration of their enlistment in accordance with the provisions of Article 1.B.11. of REF B with an RE-3 reenlistment code.
>
> 7, This change will be incorporated in the next update to REF A. A list of frequently asked questions is posted online at …

The online Frequently Asked Questions include the following:

> **8. If I am not eligible for reenlistment/extension, what options do I have?**
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> Members who are not eligible for reenlistment/extension but are recommended by their commanding officer for reenlistment may submit an appeal to CG PSC-EPM-1 or CG-PSC-RPM-1, as applicable.
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> **9. When considering an appeal, what factors will be considered?**
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> In determining whether a member with a history of performance or conduct issues shall be approved for reenlistment/extension, CG PSC-EPM-1 … will take into consideration the member's documented attempts to overcome deficiencies and their potential for career progression. It is possible that a member who is not eligible for reenlistment may be granted a waiver due to a Service need in that member's rating; however, CG PSC-EPM-1 … will have the authority to place a limitation on the length of that member's reenlistment/extension contract.

On March 10, 2014, someone forwarded ALCOAST 093/14 to the Special Agent-in-Charge (SAC) at the applicant's CGIS unit. The next day, the SAC sent an email to Headquarters stating that the applicant had received two Unsatisfactory conduct marks for the same offense in 2013 because it had been documented on both his semiannual and NJP evaluations. He asked whether that made the applicant ineligible to reenlist. He was advised that he could submit a request to the Personnel and Pay Center (PPC) to have the Unsatisfactory conduct mark on the semiannual EER changed to Satisfactory. In reply, PPC stated that if the two Unsatisfactory conduct marks were awarded for the exact same event, then the one on the semiannual EER could be corrected to Satisfactory.

On March 21, 2014, the SAC sent a memorandum to the Pay and Personnel Center, stating that in light of the new reenlistment criteria in ALCOAST 093/14, he had decided that the Unsatisfactory conduct mark on the applicant's semiannual EER dated April 20, 2013, should be changed to Satisfactory because he also had received an Unsatisfactory conduct mark as a result of his NJP on May 14, 2013. He stated that the applicant had thus received two Unsatisfactory conduct marks for the same offense. On March 24, 2014, PPC made the correction as requested.

On October 1, 2014, two weeks after the new criteria went into effect, PSC's attorney reported to the JAG's office that PSC's interpretation of paragraph 4 of ALCOAST 093/14 is as follows,[4] and the interpretation was later issued in ALCOAST 274/15:

1) Eligible & recommended = reenlist
2) Eligible & not recommended = request a waiver/appeal from epm-1 (less than 8 years' service) or reenlistment board (over 8 years' service)
3) Not eligible & recommended = request a waiver/appeal from epm-1 regardless of years in service – no reenlistment board
4) Not eligible & not recommended = no reenlistment, no waiver/appeal

On October 6, 2014, the applicant was counseled on a Page 7 for failing to adhere to purchasing policies when directed to replace the battery in a government vehicle by misusing his Unit Purchase Card and buying the battery at an unapproved vendor.

On May 1, 2015, the applicant advanced to YN1.

On May 3, 2015, the applicant had a reenlistment interview with the YNC who was the chief of the local SPO because his enlistment contract was ending on January 25, 2016, and he needed to obligate service to transfer to another unit. The YNC and the applicant signed a Page 7 stating that they had had the interview, that he met the reenlistment eligibility requirements under COMDTINST M1000.2, and that he was recommended for reenlistment. On May 4, 2015, the applicant reenlisted for six years.

On June 1, 2015, upon completing his tour of duty at the CGIS office, the applicant received a Commandant's Letter of Commendation from the Special Agent in Charge.

Performance Probation

In June 2015, the applicant reported for duty in another "independent duty" billet aboard a different 270-foot cutter, which was homeported in the same location where he had been serving since 2005.

On July 26, 2016, the CO of the cutter placed the applicant on performance probation for six months and advised him that he would be processed for discharge if he did not meet the terms of the probation. The terms and the reasons for the probation were documented on a Page 7 as follows:

> 26 JUL[Y] 2016: This is to inform you that for the past 12 months, your performance has been unsatisfactory when compared with that of your peers in your grade. Consequently, you are being placed in a six-month probationary period commencing this date. Your probation will run through 26Jan17. During this probationary period, you will be observed, counseled, and mentored to ensure you have the necessary tools available to you to successfully complete this probation. Should you fail to successfully complete this probationary period, you are subject to being processed for separation from the Coast Guard by reason of unsuitability for unsatisfactory performance.
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> The reasons you are being placed in this probationary status are:

[4] *See* BCMR Docket Nos. 2015-002, 2015-150, 2016-003, and 2016-196 (upholding PSC's interpretation).

- During the Fall 2015 … patrol, you incorrectly told 4 crewmembers that were meeting the cutter in [overseas location] returning from emergency leave, C Schools, and Boot Camp that you could only give them No Cost Orders and that they were only authorized to take Space-Available Military flights and they were responsible for their own travel. You were later counseled that as part of your duties you are required to set up all travel to/from the cutter for all crewmembers and that you shall generate a TONO when authorized by the XO to ease travel burdens on crew. You were also counseled on the fact that no crewmember will be told to take Space-Available flights for travel to/from the cutter from any location since they may be bumped off the flight due to Space-Required seats. Despite your counseling on this subject, on 09Jul[y]16 you told the [another cutter] YN1 that you would set up Space-Available travel for 2 of their crew TDY to our cutter awaiting travel.
- During the Spring 2016 inport period, you erroneously placed an E3 on the OS A-School list when in fact he requested MK A-School. After further investigation, it was noted that you were placing Non-Rates on A-School lists before they were approved by the command which is in direct violation of policy. In fact, many of the previous non-rates that you placed on A-School lists had Command Approval dates after they were placed on their respective A-School lists.
- Since you reported, you have not tracked the crew's pay closely enough and you have been directly responsible for thousands of dollars in back-pay and overpayment. Several people were authorized a $100/month Career Sea Pay kicker. You were unaware of that pay until asked, including by the Commanding Officer. As a result, several crew members missed pay, and one was back-paid by up to a year. You also were not aware that a newly reported E3 was being paid as an E1 since graduating Boot Camp in Mar[ch 20]16. You have been counseled before to make sure all newly reported personnel are being paid correctly as they check in with you. You also told an E5 that he was not authorized Flight Deck hazard pay as part of the fuel team that operated under the blades of the helicopter. Since you refused to help this E5, he was forced to seek resolution from a Yeoman off the ship to get properly paid for 4 months of hazard pay. You also delayed another E5's Service Re-Enlistment Bonus by approximately 3 months by not making sure all forms were correct before turning them into the SPO. You also failed to ensure another E5's sea pay was stopped after 30 days of being sent TLD/TDY to Base Portsmouth; as a result, he will be docked nearly $1,700. Finally, you submitted advancement paperwork for an E4 that had the wrong date for the CO's signature in Jun[e] 15. As a result, MK3 advanced over 2 weeks late and, to this date, you have been unable to figure out how to recoup his pay.
- You have also not been properly carrying out your duties as an Authorizing Official in TPAX for processing travel claims. Most recently, you received a travel claim from an E6 that did not have his flight itinerary. Even though you knew it was a requirement to have as an attachment, you forwarded it up for approval anyway and told the crewmember that it will get kicked back because it did not have an itinerary.
- You have not been following published TTP regarding your duties as a Urinalysis Coordinator. Every batch of samples that you have submitted for testing since you have been a Urinalysis Coordinator were 100% untestable because you did not follow proper procedures.
- You also jeopardized an E5's orders for … school, a critical school for Damage Control onboard the cutter. When SFLC asked you to fill out the required CG-2070 Travel Request form, you changed travel dates despite the fact that SFLC was only authorizing travel from 11-15 Jul[y]. You did not understand that SFLC is not responsible for covering hotels MI&E for additional days due to operational commitments.

The above list is not all-inclusive of your poor performance, but it is a highlight of your inability to follow proper procedures and perform adequately as an independent Yeoman onboard a major Coast Guard cutter. Other issues you continue to struggle with include tracking newly reported personnel, travel regulations and basic admin requirements and deadlines.

In order to successfully complete this probation and be retained in the Coast Guard, you must accomplish the following:

a. By 29 Jul[y], compile a list of all outstanding admin items including but no limited to advancements, awards, paperwork to be filed with SPO, tracker updates, etc and present to the XO and SUPPO with your pan to complete all outstanding work by 07Aug[ust]. You will also maintain a document that tracks all admin work and brief the XO every Monday on what has been added and what has been completed. Failure to do so is a direct violation of your probation.

b. You will complete all admin requirements without errors that result in delay of pay, incorrect pay, back pay or any other error in pay. Failure to do so is a direct violation of your probation.

c. You will be responsible for all routine admin onboard the cutter. No routine admin shall be completed more than 7 days from the date it was created. For instance, when a Non-Rate submits an A-School request, he will inform you that he has initiated the request and you will track that package until it is returned to you by the command for entry. This will be the standard for all admin routing onboard the cutter. If you fail to track or submit anything pas the 7-day deadline, it is a direction violation of your probation.

d. If any admin requirement that impacts a crew member's advancement is submitted late or incorrect, it is a direct violation of your probation.

e. You can no longer rely on old information from outdated sources. You must look up policy before making any kind of determination that is not routine. If you inform any crewmember of policy that is no longer in effect or if it is outdated, it is a direct violation of your probation.

f. You shall work through your Department Head to find an appropriate YNC or above to serve as a mentor. You will work with your mentor on a regular basis to grow as a Yeoman. It is your responsibility to seek assistance or notify your Department Head immediately should you need any assistance in the absence of your mentor. Failure to seek assistance in a timely manner will not be an excuse and will be considered as a violation of your probation.

g. For the remainder of your probation, if you receive any type of CG-3307 documenting any type of negative behavior or actions, it is a direct violation of your probation. If you fail to meet any USCG standards, it is a direct violation of your probation.

You are being placed in this six-month probationary period to afford you the opportunity to become a productive, contributing member of the Coast Guard. However, should you fail to make a conscientious effort to overcome your documented deficiencies in behavior and conduct, or should you violate the conditions of your probation in any way, at any time, I am authorized to recommend your separation at any time prior to the expiration of this probation.

On January 16, 2017, the CO of the cutter counseled the applicant about his performance as follows:

16Jan2017: On this date you were counseled for your recent misconduct. Your inability to follow basic orders and to follow policies outlined by the Foreign Travel, Passports and Visas Instruction, CI 5000.5G, are in violation of Article 92, UCMJ. Your blatant disrespect when speaking to an Officer regarding your passport is in violation of Article 89, UCMJ.

You were told numerous times over the last two months by the Operations Officer to produce your expired "Official Passport," which you obtained during your tour on CGC [cutter] from 2005-2008. You admittedly kept your expired "Official Passport" at your home residence. On January 4th, 2017, you were once again told to produce your "Official Passport," and you verbally acknowledged that you would bring the passport to work the following day.

> On January 5th, 2017, you informed the Operations Officer that you had spoken with the passport office, and that you did not need to turn in your passport in case it was needed for renewal. Your failure to produce your passport is in violation of Article 92, UCMJ, for failing to follow a lawful order. During the conversation, you also talked back to the Operations Officer and displayed a disrespectful attitude, in violation of Article 89, UCMJ.
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> Your blatant disregard to provide the passport after being directed to is a prime example of your inability to follow basic orders, which is expected or even the most junior members. Your actions are unbecoming of a First Class Petty Officer and fail to meet the minimum standards established by the UCMJ and the Coast Guard's core values of Honor, Respect and Devotion to Duty.
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> Due to your misconduct and commission of a serious offense, you are ineligible to re-enlist without a waiver from PSC-epm.
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> Further adverse administrative or disciplinary action may be taken if you continue to fol1ow orders or fail to treat others in accordance with the UCMJ and the Coast Guard Core Values.

On a Page 7 dated January 25, 2017, the CO of the cutter counseled the applicant as follows:

> 25 Jan 2017: On this date, you are being counseled for you inability to follow proper procedures for assigning personnel TDY to other units and your continued inaptitude to function as a YN1 in the Coast Guard.
>
> After a [cutter] Third Class Petty Officer received a Not Fit For Full Duty chit from Base [homeport] Medical, the Executive Officer (XO) was notified and instructed you and the member's supervisor to ensure he would be assigned to a cutter since he would still be able to perform his primary duties while onboard a moored cutter. During the week of 16 January 2017, the member's supervisor approached you to check on the member's TDY orders. You told the supervisor that he would be sent to a cutter, but you had not identified which one yet. Since 16 January 2017, the XO reminded you on more than one occasion that although 3 other NFFD status crewmembers were being sent TDY to Base Portsmouth, this member would be sent to a cutter instead. The XO also reminded you that any crew member sent to Base Portsmouth would need to be approved by the Base CO or Base CO of Military Personnel, and you could not send anyone TDY to Base Portsmouth without prior authorization due to Base personnel procedures.
>
> On 24 January 2017, despite previous direction from the XO, you generated TDY orders for the member and told him to check in with Base Portsmouth on 25 January 2017, again despite that the XO ordered you not to. Your actions were also against policy clearly stated in Administrative Assignment and Temporary Duty Guidance, PSCINST 1000.1A, which states that Commanding Officer or their appointee must approve TDY assignment to other units. The XO has reminded you of this policy more than once in the last several weeks.
>
> This behavior is yet another example of your inaptitude to successfully and fully execute your duties as a YN1. This behavior will be considered for any additional administrative action that may include administrative discharge.

On January 26, 2017, the applicant received the following Page 7 signed by the CO:

> 26 Jan 2017: After most recently being advised of your continued inaptitude as a Yeoman in the Coast Guard, you are being counseled again for your inability to complete routine administrative tasks in a timely manner related to the res departure of a [cutter] E-3 to MST A-School.
>
> During the week of 2 January 2017, the E-3's Division Chief coordinated with you to complete his PCS departing worksheet the week of 9 January 2017. The Division Chief also reminded you during the week or 9 January 2017, but it was not completed until 25 January 2017, 3 days after he reported to [another unit].

> The SPO at Base Portsmouth requires a 10-day lead time to process PCS orders, but you processed his PCS departing worksheet 3 days after orders were executed.
>
> This behavior is yet another example of your inability to do your job as a YN 1 successfully. This behavior will be considered for any additional administrative action that may include administrative discharge.

On February 3, 2017, the CO of the cutter signed a Page 7 informing the applicant of the following:

> 03 FEB l7: You are hereby counseled following the conclusion of your performance probation. On 26 July 2016, you were placed on a 6-month performance probation period due to your your [sic] inability to follow proper procedures and perform adequately us an independent Yeoman onboard Coast Guard Cutter [redacted].
>
> Your performance probation CG-3307 listed seven milestones that you had to achieve in order to successfully complete your probation and not be processed for separation. You were counseled and understood the fact that if you failed to meet any one or the milestones on your performance probation, you would be subject to administrative discharge.
>
> Item (a) stated that you needed to compile a list of all outstanding admin items and complete them by 06 August 2016. You were also tasked to maintain a document that tracked all admin work and to brief the Executive Officer (XO) every Monday on what had been added/completed. You successfully compiled a list of all outstanding admin items; and presented it to the XO well ahead of time on 29 July 2017. Although you created a document and utilized your email inbox flag system, you did not sufficiently maintain them to track all pending admin work. You also failed to brief the XO every Monday during the probationary period. Approximately 4 briefs were delayed later in the week and you simply failed to provide a brief to the XO on about 6 occasions.
>
> Item (b) stated that you were required [to] complete all pay related admin requirements without causing a delay in pay, incorrect pay, back bay or any other error in pay. You violated this item when you routed a memo to retroactively advance an E2 to E3 by six days. The E2 should have been advanced on 04 September 2016, but the paperwork was not routed to me until 10 September 2016. Therefore, the E2 missed out on 6 days of E3 pay since the retroactive advancement was appropriately not approved by PSC.
>
> Item (c) stated that you were required to complete all routine admin within a 7-day period. You violated this item on more than one occasion. You failed to track A-school requests as required by your initial performance probation CG-3307. An E3 started his A-School application process the week of 05 December 2017, and since you did not track the paperwork or complete it within 7 days, his application did not get approved by the command until 26 January 2017, nearly two months later. You also failed to complete a pair of PCS Departing Worksheets for two E3s departing to DC A-School. The two E3s initiated their paperwork on 20 December 2016, hut they were not routed to the XO for approval until 25 January 2017. You also received a negative CG-3307 for your failure to complete PCS departing worksheets for an E3 departing to MST A-School. The E3 arrived to A-School without orders in hand on 23 January 2016. The SPO at Base [redacted] requires a 10-day lead time on PCS orders and you failed to process that paperwork before the 13 January 2017 deadline.
>
> Item (d) stated that no admin requirements affecting a member's advancement were to be submitted late or incorrectly. You violated this item for the examples provided in items (b) and (c). Additionally, you submitted paperwork for an E2 to advance to E3 without concurrence from his Division Chief. This particular E2 had not been reviewed yet, recently lost barracks privileges due to his recent poor performance, and would not have been recommended for advancement.
>
> Item (e) stated that you were required to look up policy before making any kind of administrative decision that was not routine. You satisfied this requirement.

> Item (f) stated that you were required to find an appropriate YNC or above to serve as a mentor and to use that mentor to grow as a Yeoman. You were also responsible to notify your Department Head in the absence of your mentor if you encountered a problem. You requested a top performing YN1 as a mentor and it was approved by the XO. However, you violated this term on O5 January 2017 when you did not resolve an issue between you and the Operations Officer regarding your expired Official Passport. He had asked you numerous times to bring in your Official Passport and you failed to do so. Ultimately, you did bring in your passport, but only after acting in a disrespectful manner towards the Operations Officer. Rather than seek the guidance of your mentor, you initially decided on your own that you did not need to obey the order of the Operations Officer.
>
> Item (g) stated that receiving any negative CG-3307 during the probationary period would be considered a violation of the terms of your probation. On 18 January 2017, you received a negative CG-3307 for disobeying a direct order from the Operations Officer and being disrespectful in your verbal response to him, as described in item (f). On 25 January 2017, you received a negative CG-3307 after you sent an E4 TDY to Base [redacted] without prior authorization from the Base CO. Finally, on 26 January 2017, the last day of your probation period, you received a negative CG-3307 for not processing an E3's PCS departing worksheet on time as described in item (c).
>
> Due to your unsatisfactory performance, refusal to follow orders, and inability to solve administrative problems amicably and to learn from previous mistakes, you have not met the requirements of your 6-month performance [probation]. Therefore, I will initiate action to process you for administrative discharge from the Coast Guard in accordance with 1.B.l5.b.1. of the Military Separations Manual COMDTINST M l000.4.

Administrative Separation Board Proceedings

On February 4, 2017, the CO of the cutter notified the applicant in writing that he was initiating his separation for inaptitude and that the applicant had a right to a hearing before an ASB and to representation by an attorney. On February 13, 2017, the applicant exercised his right and elected to appear before an ASB.

On March 6, 2017, the CO issued an order convening the ASB.

On May 15, 2017, the ASB convened a hearing to decide whether to recommend that the applicant be retained on active duty or discharged. Its report notes the following facts:

- The applicant was placed on performance probation for six months beginning on July 26, 2016, and ending January 26, 2017.
- The applicant had received no below-standard marks on his EER dated October 26, 2016, and there is no documentation of poor performance during the probationary period until the Page 7 dated January 16, 2017, was issued.
- The order that the applicant received from the Operations Officer regarding his passport, which was the basis for the Page 7 dated January 16, 2017, differed from policy he was informed of by the Coast Guard passport office.
- Regarding the Page 7 dated January 25, 2017, concerning TDY orders, the ASB found that the applicant was not informed of the change in TDY policy "until after orders were cut nor [was he] the last approving official on the orders."

- Regarding the Page 7 dated January 26, 2017, concerning a departing member's worksheet, the ASB found that the departing member had been instructed to complete this sheet but did not do so.
- The chief of the SPO testified that she had had "similar issues with other independent duty YN[s]."
- The applicant had not had similar performance issues in non-independent duty positions.
- The applicant "received no pipeline training, did not have an on-site relief, and there is no independent duty standard operating procedure to follow."

The ASB rendered the following opinions and recommended that the applicant be retained on active duty:

- "There is not enough documentation or cause showing inaptitude during the probationary period."
- "There is not enough documentation to show cause for committing a serious offense."
- "[The applicant] is an average performer with satisfactory conduct."
- "[The applicant] is not suited to independent duty."
- "The lack of training, relief, and standard procedures creates miscommunication and unclear expectations."
- "No basis for discharge was proven by a preponderance of the evidence presented at the hearing."

Discharge for Convenience of the Government (COG)

On May 16, 2017, the day after the ASB hearing, an Area legal officer for the ASB sent the XO an email noting that the applicant had requested booking chits and asked how to file complaints against the XO and CO. The XO replied that the timing was "impeccable" because he had just learned that the applicant had failed to get travel orders for an E-3's TDY period the previous spring, which "would be grounds to charge for dereliction of duty." The E-3 had said that she asked the applicant for the travel orders several times, "but he kept turning her away and telling her he'd do it later." The attorney replied, "We'll get the ASB buttoned up, and hopefully PSC can take action on the erroneous enlistment option." The XO responded that if the applicant had requested booking chits, then the ASB had probably recommended his retention. The XO asked about whether the ASB package should be suspended or terminated while the COG discharge package was being processed. The XO wrote, "Knowing that the ASB recommendation is just that … a recommendation, I'm not too worried about it. We would still forward the ASB package with our own recommendation … based on what we've been dealing with for the last 2 years and all the additional info that I've been passing [to] you since his board started." He asked whether he needed to wait for the ASB proceedings before submitting the COG discharge package to PSC. The attorney replied that he thought that PSC's guidance had been to route both discharge packages—one with the ASB proceedings and one for the COG discharge—so that both could be considered simultaneously, but that he might be mistaken.

Also on May 16, 2017, the XO sought advice from PSC-EPM and the Staff Judge Advocate about whether the command should process both discharge packages or suspend or terminate the ASB proceedings while the COG discharge was processed. EPM advised the XO that a COG discharge would process quickly and that reviewing an ASB package would take time but that both could be processed at the same time. The Staff Judge Advocate stated that the command should submit the COG discharge package to EPM and that if EPM denied the COG discharge, the command could then forward the ASB package to PSC for final action. The XO forwarded this information to the CO.

On May 21, 2017, the XO of the cutter sent an email to EPM with an "updated version" of the paperwork for the COG discharge, stating that the ASB proceedings had not yet been received but that he had been advised that the command did not have to wait for the ASB proceedings before initiating the applicant's discharge for COG. And then, the XO stated, when they got the ASB proceedings, he was told that they could hold onto them until they heard about whether the COG discharge had been approved.

On May 22, 2017, the CO of the cutter signed a letter informing the applicant that he had initiated action to discharge him from the Coast Guard for the convenience of the government under Article 1.B.12.a.(5) of the Military Separations Manual because he had been ineligible to reenlist in May 2015 under Article 1.A.5.b.5. of COMDTINST M1000.2A and he had not received a waiver of the reenlistment criteria. The CO noted that the applicant had required a waiver to reenlist because he had received NJP in 2013 for an offense for which the maximum punishment under the UCMJ includes a punitive discharge, and the maximum punishments for both of the applicant's offenses—willful dereliction of duty and making a false official statement —included a punitive discharge. Therefore, his May 2015 reenlistment had been erroneous. The CO stated that this information had been discovered during a review of the applicant's record after his discharge for inaptitude and the ASB had been initiated in February 2017. The CO noted that because the applicant had been ineligible to reenlist in 2015, he had no right to an ASB under the Military Separations Manual. The CO noted that he was recommending an Honorable discharge and that the applicant had a right to submit a statement objecting to the discharge for consideration by the Personnel Service Center within five days.

On May 23, 2017, the XO forwarded the CO's notification letter to the applicant in an email. He explained that after the discharge for inaptitude through the ASB had been initiated, a thorough review of his record had been done to ensure it was in order, and the reviewer noticed that he had reenlisted in 2015 when he was ineligible to do so without a waiver. Therefore, he was subject to a COG discharge for erroneous enlistment. The XO advised him that the ASB discharge proceedings for inaptitude had been suspended and would be terminated if EPM discharged him for erroneous enlistment but would continue if EPM did not discharge him for erroneous enlistment. He noted that if the applicant still had the ASB package for review and comment, he should return it by the due date so that it could undergo legal review before being submitted to the CO, who was the convening authority. The CO would hold it until EPM decided whether to discharge him for erroneous enlistment. The XO noted that there was no entitlement to an ASB for a COG discharge, but he was allowed to submit a statement within five working days to be included with the COG discharge package being sent to EPM.

Also on May 23, 2017, the applicant's military attorney asked the applicant's supervisor at the CGIS unit if he would have recommended the applicant for reenlistment in 2015 despite the NJP in 2013. The response, dated May 25, 2017—which the attorney forwarded to the applicant for him to submit to PSC with his statement contesting his pending discharge for erroneous enlistment—states the following:

> With regard to the below, according to paperwork available [the applicant] had Mast on 14 May 2013. [He] re-enlisted on 4 May 2015, which included the determination and documentation (Administrative Remarks CG-3307) by YNC … CGIS SPO, dated 3 May 2015, that he was eligible for reenlistment/extension. Neither I nor then Assistant Special Agent-in-Charge [name redacted] were aware of the criteria and requirements contained in ALCOAST 093/14 as they relate to members recommend but not eligible for re-enlistment.
>
> I have discussed the matter with my SAC [name redacted], and we agree that his conduct and performance after the Mast through the date of his re-enlistment were such that had we known of the requirements contained in ALCOAST 093/14 at the time of [the applicant's] re-enlistment, we would have assisted him in submitting the appeal to CG-PSC-EPM-1 for consideration.

The applicant's statement and his CO's memorandum initiating the COG discharge are not in the record before the Board.

On July 14, 2017, the applicant submitted a request for a retroactive waiver of the reenlistment criteria. In the memorandum, he stated that he was very proud of his service, had received a lot of training, and had mentored many junior enlisted members. He stated that when he received NJP in 2013, the maximum punishments for his offenses (punitive discharge) were not imposed, and he was recommended for advancement soon thereafter. He stated that he had "learned [his] lesson" from the NJP, and thereafter, he had received just one negative Page 7 while serving at the CGIS office, when inattention to detail caused him to misuse the Unit Purchase Card in 2014. And in 2015, he was advanced to E-6, recommended for reenlistment, and awarded a Letter of Commendation. The applicant stated that he had executed the reenlistment contract "in good faith" in 2015, and his command had not known that he needed a waiver to reenlist. He claimed that on July 12, 2017, his command told him that the proposed discharge for COG had been denied by EPM but that he needed to submit a waiver request. The applicant submitted copies of many documents to support his waiver request.

On July 15, 2017, the CO of the cutter forwarded the applicant's waiver request and recommended that it be denied. The CO noted the applicant's criminal offenses in 2013 and his misuse of the Unit Purchase Card in 2014. He also noted that the applicant's supervisor did not actually state that he, the SAC, or the CO of CGIS would have recommended a waiver of the reenlistment criteria for the applicant. Instead, he wrote that he and the SAC "would have assisted him in submitting the appeal" for consideration, which is neither a positive nor negative endorsement. The CO further stated that since his reenlistment and transfer to the cutter, the applicant's performance had been substandard:

> Despite specific task direction and repeated counseling from this Department Head and the Executive Officer, he continued to fail at his job as an independent duty yeoman onboard [the cutter]. In July 2016, I placed [the applicant] on performance probation for inaptitude. At the end of his performance probation, it was clear that he still could not perform his job properly, as he failed six out

> of seven requirements of his probation. Due to the severity of his failures, as outlined in the negative CG-3307s that he received, I recommended him for discharge for unsuitability due to inaptitude. His failures have had such a severe impact on the crew due to delayed pay, overpayment, underpayment, and a myriad of other administrative issues that we received an unsolicited comment on our last DEOMI Command Climate Survey from 15 March 2017, which specifically highlighted his poor performance. The Executive Officer and Chief's Mess have also received many other complaints from crew members of similar nature during Request and Complaint Masts, routine discussions regarding crew welfare, and check-out interviews with departing personnel. His EERs that I have submitted since his poor performance peaked reflect this, including not recommending him for advancement.

On August 14, 2017, Commander, PSC advised the applicant in a memorandum that "[a]fter careful consideration, your request [for a waiver] has been disapproved." In addition, PSC issued orders for the applicant to be honorably discharged on September 14, 2017. PSC directed that the applicant's DD 214 reflect a discharge under Article 1.B.11. of the Military Separations Manual for "completion of required active service."

On September 14, 2017, the applicant was discharged from the Coast Guard with 17 years, 2 months, and 26 days of active duty. His DD 214 states that he was discharged upon "completion of required active service" under the authority of Article 1.B.11. of the Military Separations Manual. His reenlistment code is RE-3, which means that he is eligible to reenlist with a waiver.

APPLICABLE LAW AND POLICY

Title 10 U.S.C. § 1169 states that "[n]o regular enlisted member of an armed force may be discharged before his term of service expires, except—(1) as prescribed by the Secretary concerned; (2) by sentence of a general or special court martial; or (3) as otherwise prescribed by law."

Article 1.B.1.d. of the Military Separations Manual, COMDTINST M1000.4, in effect in 2015 states that in deciding whether to separate or reenlist a member the Service may evaluate the member's entire military record. Article 1.B.4.a. states that "[i]n general, a member who meets the reenlistment standards … is eligible to reenlist, unless the reason for discharge precludes reenlistment … or if the commanding officer did not recommend him or her."

Article 1.B.4.b. requires members to have a "pre-discharge interview" approximately six months before the end of their enlistment to allow time for members to be processed for separation. At this interview, the member must be informed whether he is eligible to reenlist and, if not, the reason why not.

Under Article 1.B.5., "members who do not meet the eligibility criteria are not entitled to a reenlistment board even if they have eight or more years of total active and/or reserve military service." But members may submit a written appeal within 15 days of notification of their ineligibility to reenlist.

Article 1.B.11. authorizes Commander, PSC, or a District Commander or CO to discharge members whose enlistments have expired upon the expiration of their enlistments unless they have reenlisted.

Article 1.B.12. authorizes Commander, PSC to discharge enlisted members for the "convenience of the government" for numerous reasons, which include the following:

- "Erroneous enlistment, reenlistment, extension, or induction";
- "A member's inability to perform prescribed duties"; and
- "Unsatisfactory performers, provided that the notification, observation, and, if applicable, administrative discharge board requirements in Article 1.B.9. of this Manual have been complied with."

Article 1.B.15. authorizes Commander, PSC to discharge enlisted members for "unsuitability" for numerous reasons, including inaptitude and apathy. But members may not be discharged for inaptitude or apathy unless they have been afforded a six-month probationary period, although the probationary period may be cut short if the CO determines that the member is not trying to overcome his deficiencies. And a member with more than eight years of service is also entitled to an ASB.

VIEWS OF THE COAST GUARD

On November 13, 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 argued that equitable estoppel is inapplicable in this case for three reasons:

1) The YNC's statement that the applicant was eligible to reenlist on the Page 7 dated May 3, 2015, was not authorized under the reenlistment criteria in ALCOAST 093/14. And in *Goldberg v. Weinberger,* 546 F.2d 447, 481 (2d Cir. 1976), the court found that "[t]he government could scarcely function if it were bound by its employees' unauthorized representations. … Even detrimental reliance on misinformation obtained from a seemingly authorized government agent will not excuse a failure to qualify for the benefits under the relevant statutes and regulations." Therefore, the JAG asserted, the YNC's failure to discover that the applicant was ineligible to reenlist did not bind the Coast Guard and "does not negate the obligation for Applicant to have been eligible for reenlistment prior to his actual reenlistment." The JAG stated that the YNC's statement that the applicant was eligible to reenlist in 2015 was unauthorized and repudiated pursuant to *Goldberg.*
2) The applicant has not proven that his reliance on the YNC's statement was reasonable. The JAG claimed that the applicant "knew or should have known that he was ineligible to reenlist" because it was his duty to know the reenlistment criteria and because he had been punished for two offenses for which the maximum punishment included a punitive discharge. Therefore, "he cannot have detrimentally relied upon a statement made by the government that he now seeks to estop."
3) The applicant has not proven that his reliance on the YNC's statement was detrimental because he "cannot prove that he was lead to do what he would not have otherwise done. *See Mahoning Investment Co. v. United States,* … 78 Ct. Cl. 231, 246 (1933)." The JAG noted that the applicant wanted to remain in the Coast Guard and, due to the YNC's error, was permitted to remain in the Coast Guard beyond the expiration of his enlistment. The

JAG stated that the applicant's claim that he was denied the opportunity to submit a timely waiver request is insufficient because he was authorized to submit a retroactive waiver request and PSC considered it. The JAG noted that the applicant has not shown that a waiver request submitted in 2015 would have been approved and concluded that he "has failed to establish that equitable estoppel requires relief."

The JAG emphasized that while Article 1.E.4.a. of COMDTINST M1000.2A allowed the applicant to appeal his ineligibility to reenlist through his chain of command for consideration by PSC, he was never guaranteed a waiver to reenlist. And when PSC reviewed his request for a waiver in 2017—including his supervisor's statement that he and the SAC would have assisted the applicant in submitting an appeal—PSC denied his request. The JAG concluded that the applicant "has failed to establish by a preponderance of the evidence that the Coast Guard committed an error or injustice by allowing Applicant to serve nearly two years after he should have been separated."

Although the applicant complained that his ineligibility to reenlist was not addressed by the ASB, the JAG stated that the issue is irrelevant. The JAG noted that the ASB is a fact-finding body that only makes recommendations to PSC. In this case, the JAG stated, PSC was aware of both discharge proceedings and decided not to grant the applicant a reenlistment waiver or otherwise retain him.

The JAG noted that while the applicant argued that he was less than ten months shy of having 18 years of service, no law or policy would have prevented PSC from discharging the applicant if he had had 18 years of service. Having 18 years of service does not provide Coast Guard enlisted members with any sort of "safe harbor" for retirement as it does for members of the Army, Navy, and Air Force under 10 U.S.C. § 1176. The JAG noted that Coast Guard members with at least 18 years of service who are being processed for discharge and are entitled to an ASB may submit a conditional waiver of their right to an ASB premised on being allowed to remain on active duty until eligible to retire with 20 years of service. But the applicant had less than 18 years of service, and PSC is not required to accept a member's offer of a conditional waiver.

The JAG concluded that the applicant has not proven by a preponderance of the evidence that his discharge was erroneous or unjust. The JAG also adopted the findings and analysis provided in a memorandum prepared by Commander, PSC. Commander, PSC stated that the applicant was able to reenlist in 2015 due to an oversight, and "[u]pon discovery of this error, the proper procedures requesting a waiver to reenlist when a service member is found ineligible to reenlist were followed." Commander, PSC stated that PSC-EPM denied the waiver request, "terminated the erroneous enlistment due to expiration of enlistment or fulfillment of obligated service," and granted the applicant "separation pay (half)." His waiver request was denied based on his "documented offenses of misconduct and poor performance" and the lack of timeliness of the waiver request was not considered as a factor. Commander, PSC recommended that the Board deny relief.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

In his response to the Coast Guard's advisory opinion, dated December 16, 2019, the applicant argued that the JAG had failed to refute or distinguish the precedent cases he had cited

in his application to support his argument for equitable estoppel. He argued that the JAG's reliance on *Goldberg* is misplaced because in *Goldberg,* the U.S. Court of Appeals for the Second Circuit declined to apply equitable estoppel "on the specific ground that a Government agent upon whose representation the plaintiff detrimentally relied was not authorized to make the subject representation." *Goldberg*, 546 F.2d at 480-81. Therefore, he argued, the court "implicitly acknowledged that in other cases, such as when a Government agent was in fact acting within the scope of his authority and caused an individual to rely on misrepresentations, equitable estoppel against a Government agency is plainly permissible." The applicant claimed that in *Board of Education v. Harris,* 622 F.2d 599, 608 n7 (2d Cir. 1981), *cert. denied* 449 U.S. 1124 (1981), the Second Circuit stated that estoppel "would require a misrepresentation by an agent of the federal government made within the scope of his authority which was justifiably relied upon by the appellee to his detriment thereby making the denial of equitable relief unconscionable." The applicant argued that the JAG offered "no substantive argument as to how [the YNC's] misrepresentations were unauthorized as required by *Goldberg.* All evidence demonstrates that her representations were authorized and made as part of her official duties" as the chief of the local SPO.

The applicant argued that whether he "knew or should have known he was ineligible to reenlist" is

> a red herring argument and otherwise irrelevant to equitable-estoppel analysis. All evidence indicates he did not know he was eligible so the Advisory Opinion's suggestion that [the applicant] possessed actual knowledge is wrong. Indeed, nobody in his supervisor chain at the time of his reenlistment, nor the officer tasked with counseling him on his reenlistment eligibility were aware of ALCOAST 093/14. The question as to whether [the applicant] should have known he was ineligible for reenlistment and the legal significance thereof is irrelevant. Tellingly, the Advisory Opinion offers no legal authority for its position in this regard.

The applicant argued that it was plainly reasonable for him to rely on the YNC's determination that he was eligible to reenlist because she was responsible for reviewing his record and vetting his eligibility. And the fact that his supervisor was unaware of ALCOAST 093/14 also suggests that he had no reason not to rely on her finding that he was eligible to reenlist.

The applicant argued that his reliance on the YNC's erroneous finding that he was eligible to reenlist was detrimental because it "changed his position for the worse by being deprived of the opportunity to submit a timely waiver request and thus refraining from doing so." He noted that the JAG and PSC had "ignore[d] that he was in a substantially worse position when he was 'afforded the opportunity to apply for retroactive eligibility waiver' than he would have been at the time of his reenlistment and [the YNC's] misrepresentations." He noted that if he had submitted a waiver request in 2015, it would have been forwarded through his chain of command at CGIS, and they "would have positively endorsed his eligibility waiver and pushed for approval" based on his performance and conduct since the mast in 2013. The applicant noted that his opportunity to request reconsideration retroactively was accompanied by a negative endorsement by the CO of the cutter, who had initiated his separation for inaptitude, which the ASB had not endorsed. And the CO cited the applicant's performance aboard the cutter "as the primary basis for recommending denial" of the waiver. Therefore, the applicant argued, he would obviously have been in a substantially better position to receive a waiver if he had not relied on the YNC's erroneous finding and, instead, submitted his waiver request in 2015. Therefore, he argued, "the doctrine of equitable

estoppel is applicable here. Even if it wasn't, the facts demonstrate such manifest injustice that the Board ought to be compelled to grant relief."

The applicant stated that the JAG made several "straw man arguments that disingenuously attempt to refute arguments [he] did not make." He did not argue that the ASB's findings entitled him to retention, and he did not argue that he would have been entitled to a "safe harbor" if he had 18 years of service. Instead, he argued, "The fact that he was months away from being allowed to request voluntary retirement merely underscores the unfairness of separation."

The applicant stated that his case is predominantly about fairness and justice, and the Board has "an abiding moral sanction to determine, insofar as possible, the true nature of an alleged injustice and to take steps to grant thorough and fitting relief." *Yee v. United States,* 512 F.2d 1383, 1387-88 (Ct. Cl. 1975) (citation omitted). The applicant argued that tellingly, neither the JAG nor PSC addressed his arguments bearing on fundamental fairness, but these arguments "are as important as any technical or legal argument because they speak to the fundamental statutory purpose of this Board and they provide compelling reason for granting relief."

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions based on 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 applicant was timely filed within three years of the applicant's discharge.[5]

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.[6]

3. The applicant alleged that his discharge was erroneous and unjust and that he should be reinstated on active duty and awarded back pay and allowances because he was miscounseled about his eligibility to reenlist in 2015 and relied on that miscounseling to his detriment. 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 his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.[7] 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."[8]

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[5] 10 U.S.C. § 1552(b).

[6] *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).

[7] 33 C.F.R. § 52.24(b).

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

4. **Ineligible to Reenlist**: Under ALCOAST 093/14, the applicant was ineligible to reenlist in 2015. Paragraph 2.f. of the ALCOAST made ineligible to reenlist any member who, during his current enlistment, had committed any documented offense under the UCMJ for which the maximum punishment under the Manual for Courts-Martial United States includes a punitive discharge. The applicant had been punished at mast and received NJP in 2013 for two such offenses: dereliction of duty (willfully disclosing a CGIS investigation to two members with no need to know about it), in violation of Article 92 of the UCMJ, and making a false official statement (lying about one of the two unauthorized disclosures), in violation of Article 107. Appendix 12 of the Manual for Courts-Martial United States shows that for either of these offenses, the maximum punishment includes a punitive discharge. Nevertheless, on May 3, 2015, both he and the YNC signed a Page 7 erroneously stating that he was eligible to reenlist.

5. **No Equitable Estoppel**: The applicant argued that in 2017, the Coast Guard should have been equitably estopped from discharging him pursuant to ALCOAST 093/14 because of the YNC's error in counseling him on May 3, 2015. The Board disagrees and finds that the applicant has not shown that the Coast Guard should be estopped from enforcing its reenlistment criteria against him for the following reasons:

a. Elements of Government Estoppel: In *Peters v. United States,* 28 Fed. Cl. 162 (1993), the U.S. Court of Federal Claims found that the Air Force was not estopped from discharging a sergeant with 18 years of active duty due to obesity even though he had been obese throughout his service and had been retained on active duty despite repeatedly failing the weight standards. The court stated that in addition to the four elements of estoppel in common law, a fifth element, serious "affirmative misconduct," must exist for the government to be estopped:

> The common-law doctrine of equitable estoppel is founded on the notion that a litigant should not be permitted to assert a claim or defense that is predicated on his own wrongdoing. The elements that must be established to succeed on an equitable estoppel claim are as follows: (1) the party to be estopped must know the facts, (2) the party to be estopped must intend that his conduct be acted on or must act so that the party asserting the estoppel has a right to believe it is so intended, (3) the party asserting the estoppel must be ignorant of the facts and (4) the party asserting the estoppel must rely on the other party's conduct to his injury. *Emeco Indus., Inc. v. United States*, 202 Ct. Cl. 1006, 1015, 485 F.2d 652, 657 (1973). …
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> … In addition to the traditional elements listed above, a litigant asserting estoppel against the government must establish some type of affirmative misconduct by the government. *See Office of Personnel Management v. Richmond*, 496 U.S. 414, 421, 110 S. Ct. 2465, 2470, 110 L. Ed. 2d 387 (1990) ("Our own opinions have continued to mention the possibility, in the course of rejecting estoppel arguments, that some type of 'affirmative misconduct' might give rise to estoppel against the Government."); *Schweiker v. Hansen*, 450 U.S. 785, 788–90, 101 S. Ct. 1468, 1470–72, 67 L. Ed. 2d 685 (1981) (suggesting that misconduct would be required to estop the government); *Henry v. United States*, 870 F.2d 634, 637 (Fed. Cir. 1989) (noting that affirmative misconduct is required to estop the government).
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> … The Supreme Court's cases suggest that the "affirmative misconduct" must be quite serious.[9]

b. Applicant's Knowledge of Reenlistment Criteria: Whether the applicant knew in 2015 that he was ineligible to reenlist because of his 2013 offenses is unclear. Nowhere in his application or in the official records before the Board did he expressly claim that at the start

[9] *Peters v. United States*, 28 Fed. Cl. 162, 168-69 (1993).

of his interview with the YNC on May 3, 2015, he was unaware (1) that at least one of his offenses carried a maximum punishment of a punitive discharge or (2) that he was ineligible to reenlist because of the criteria in ALCOAST 093/14. Regarding his personal knowledge about his ineligibility, he stated only that on May 4, 2015—after their reenlistment interview—he had relied on her advice and reenlisted "in good faith." As a member of the yeoman rating, however, the applicant, like the YNC, would have known there were new reenlistment criteria in ALCOAST 093/14 and could easily have determined the maximum punishments for his offenses. And the fact that in 2015 some members of the applicant's chain of command who were not yeomen were unaware of the criteria in ALCOAST 093/14 is not probative of the applicant's own knowledge.

c. No Detrimental Reliance: The applicant alleged that he relied on the YNC's erroneous counsel to his detriment because he lost the opportunity to submit a waiver request in 2015, when his command would have recommended him for a waiver of the reenlistment criteria. It is true that the YNC erroneously counseled him about his eligibility to reenlist, and if she had refused to reenlist the applicant, he would presumably have exercised the opportunity to request a waiver in 2015. The applicant's supervisor stated in his May 25, 2017, reply to the applicant's attorney that he and the SAC would have helped the applicant submit such a request, which at least implies that they would have recommended a waiver for him. But the decision about whether to recommend approval of the applicant's waiver request would have been made by the CO. And even assuming that his CO would have recommended approval of his waiver request in 2015, the Board finds that it is unlikely that PSC would have approved his request in 2015. As noted in the FAQ for ALCOAST 093/14, in deciding whether to grant a waiver, the needs of the Service—not of the member—prevail, and the yeoman rating has not been designated a "critical rating" in years, if ever. The applicant had committed two separate, serious offenses, each of which made him ineligible to reenlist. Moreover, his 2013 offenses were not so unlike the underhanded and dishonest conduct for which he had received NJP in 2006. And after his 2013 NJP, he both misused his Unit Purchase Card and bought a battery from an unapproved vendor in 2014. In light of his rate and record, the Board cannot conclude that the applicant's apparent reliance on the YNC's erroneous counsel caused him an "injury" by preventing him from receiving a waiver of the reenlistment criteria in 2015. The preponderance of the evidence shows that a 2015 waiver request by the applicant would have been denied by PSC. Therefore, the preponderance of the evidence also shows that the required element of *detrimental* reliance for equitable estoppel is not present in this case.

d. Affirmative Misconduct: The applicant noted that in *Board of Education of City School District of New York v. Harris,* 622 F.2d 599 (2d Cir. 1981), *cert. denied* 449 U.S. 1124 (1981), the U.S. Court of Appeals for the Second Circuit stated in a footnote that "[a]n estoppel in this circumstance would require a misrepresentation by an agent of the federal government made within the scope of his authority which was justifiably relied upon by the appellee to his detriment thereby making the denial of equitable relief unconscionable."[10] And the record shows that the YNC was authorized to conduct the reenlistment interview during which she erroneously informed the applicant that he was eligible to reenlist. But the Second Circuit declined to decide that case on the estoppel issue, noting that the law on whether the government can be

[10] *Board of Ed. of City School Dist. of New York v. Harris*, 622 F.2d 599, 608 n7 (2d Cir. 1981), *cert. denied* 449 U.S. 1124 (1981).

estopped was "unsettled."[11] In *Peters v. United States,* 28 Fed. Cl. 162 (1993), the U.S. Court of Federal Claims found that serious "affirmative misconduct" must exist for the government to be estopped.[12] In *Peters,* even though multiple Air Force personnel had repeatedly failed to enforce the Air Force's weight standards for 18 years, the court found that their negligence did not constitute the kind of serious affirmative misconduct required to estop the government. On the other hand, as the applicant noted, in *Watkins v. United States Army,* 875 F.2d 699 (9th Cir. 1988), the U.S. Court of Appeals for the Ninth Circuit found that the Army was estopped from discharging a member based on his homosexuality because, even though he had admitted that he was homosexual upon his induction and a few other times, throughout his 14 years of service Army personnel had repeatedly reenlisted him, had declined to discharge him each time the issue was raised, and had granted him a Secret security clearance even though being homosexual was a bar to holding a security clearance at the time.

In the applicant's case, he was erroneously counseled about a significant issue—his reenlistment eligibility—on one occasion by the YNC, and when the Coast Guard discovered his ineligibility, he was discharged. But the Board need not determine whether the YNC's error constitutes serious affirmative misconduct because the Board has already found that the applicant's reliance on the YNC's miscounseling was not detrimental since he would not have been granted a waiver of the reenlistment criteria by PSC if he had requested one in 2015. Without detrimental reliance, there is no equitable estoppel,[13] and so the issue of whether there was serious affirmative misconduct by the government in this case is moot.

6. **Fundamental Fairness**: The applicant argued that "fundamental fairness" requires the Board to grant his request for relief because his CO "had it out for [him]" and was intent on discharging him. The applicant did not allege or prove that the CO or XO were biased against him on an impermissible basis, such as race, religion, or gender, and the record shows that his performance probation and the discharge proceedings for inaptitude were based on poor performance, not unlawful discrimination. Although the ASB found that there was not enough documentation of inaptitude in the applicant's record to warrant his discharge, the ASB's findings focus on minor issues with the Page 7s issued in January 2017; ignore some significant performance deficiencies mentioned therein; and fail to mention any of the numerous, serious performance deficiencies documented on the Page 7 dated July 26, 2016. The fact that the ASB found insufficient evidence of inaptitude does not persuade this Board that his discharge on different grounds—his ineligibility to reenlist because of his criminal offenses—was fundamentally unfair. Nor does the CO's decision to allow the ASB hearing to be held even after the applicant's ineligibility to reenlist was discovered impugn the fairness of the applicant's discharge.

7. **Conclusion**: The new reenlistment criteria issued in ALCOAST 093/14 caused many members with many years of service to be ineligible to reenlist. But enlisted members may be discharged "as prescribed by the Secretary concerned"[14] and ALCOAST 093/14 made the applicant ineligible to reenlist or extend his enlistment in 2015. Although an administrative error

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[11] *Id.* at 608.

[12] *Peters*, 28 Fed. Cl. at 169.

[13] *Id.* at 168; *Watkins,* 875 F.2d at 709.

[14] 10 U.S.C. § 1169.

by a YNC allowed the applicant to remain in the Coast Guard for about 20 extra months,[15] the Board finds that he has not proven by a preponderance of the evidence that his discharge pursuant to ALCOAST 093/14 constituted an error or injustice. Accordingly, the applicant's requests for relief should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

[15] Had the YNC not erred, the applicant would have been discharged on January 25, 2016, instead of September 14, 2017.

ORDER

The application of former YN1 [redacted], USCG, for correction of his military record is denied.

May 15, 2020

[redacted]