DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2020-005

[redacted]

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 December 10, 2018, and assigned the case to the staff attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision dated November 18, 2022, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST & ALLEGATIONS

The applicant, a former Boatswain's Mate, third class (BM3/E-4) who received a General – Under Honorable Conditions discharge on April 13, 2015, pursuant to an administrative discharge for misconduct, asked the Board to correct her discharge form DD-214 to show that she was medically retired. The applicant alleged that she was wrongfully separated and denied medical separation and benefits. According to the applicant, she was never convicted for Operating Under the Influence (OUI) and therefore her misconduct discharge was erroneous.

To support her application the applicant submitted the following documents:

- A Complaint, filed on January 20, 2015, wherein the applicant was charged with operating a motor vehicle on November 26, 2014, while under the influence of intoxicants or while having an alcohol level of 0.08 grams or more of alcohol per 100 milliliters of blood or 210 liters of breath. The Complaint noted that the applicant had been convicted on June 8, 2010, for a previous OUI offense, making this as her second OUI within a ten-year period.

  The applicant was charged with Criminal OUI: Class D (Count 1) and Operating Beyond License Condition or Restriction: Class E (Count 2).

- An October 1, 2015, Dismissal, wherein the applicant's charges for Criminal OUI were dismissed as a result of her pleading guilty to other charges.

- An April 21, 2017, Dismissal, wherein the applicant's charges for Operating Beyond License Condition or Restriction, as a result of the applicant pleading guilty to other charges.

- An April 21, 2017, a Prosecution by Information Document, wherein the applicant was charged with Driving to Endanger (Class D & E). The applicant was charged $1,200 for fines, surcharges, and assessments. In addition, the applicant's license was suspended for 30 days.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on October 20, 2008, training as a Boatswain's Mate.

On March 22, 2010, the applicant received a negative CG-3307 ("Page 7") for an alcohol incident when her abuse of alcohol was determined to be a "significant and/or causative factor" during the applicant's arrest for Driving Under the Influence on March 18, 2010. The applicant was counseled on Coast Guard policies regarding the use and abuse of alcohol, as well as the seriousness of the applicant's March 18, 2010, incident. The applicant signed and acknowledged this counseling on March 22, 2010.

On March 13, 2012, the applicant received a negative Page 7 after it was found that she was involved in an alcohol-related situation on March 13, 2012,[1] after she failed to return to the ship when liberty expired at 0655. Although alcohol was not considered a "significant or causative factor" in the applicant's failure to return to the ship, the previous day, when asked how much the applicant drank the night before, she had replied, "Not much. Maybe 10-12 drinks." It was determined that the applicant had stopped drinking at about 1900 hours the night before returning late from liberty, but consuming 10 to 12 drinks and believing it was "not too much" was concerning to her Command. As a result, the applicant was scheduled for a Command referred alcohol screening in order to determine the nature of the applicant's relationship with alcohol. The applicant was recommended to refrain from the use of alcohol until her screening assessment was complete.

On March 28, 2012, the applicant received a negative Page 7 for disobeying a direct order by being late and for unsatisfactory conduct in the performance of her duties as a result of the March 12, 2012, incident. The applicant's ship was set to get underway at 1000. The applicant did not return to the ship until she was retrieved by her shipmates at 0800. The applicant was then found in her rack at 0900, during the workday, when preparations were being made to get underway. Due to the applicant's state of fatigue, she was unable to stand Navigation Plot, the

[1] The term "alcohol-related situation" is no longer a part of Coast Guard policy. Documenting an "alcohol-related situation" was sometimes used by commands to avoid the repercussions of documenting an "alcohol incident." Now, an incident is either an "alcohol incident" under the Coast Guard Drug and Alcohol Manual, COMDTINST M1000.10, or it is not.

position assigned to her for navigation detail. The Command noted that the applicant's actions showed a clear disregard for the consequences of missing ship's movement and for the impact her actions on liberty would have on the rest of the crew. The applicant was warned that any further instances of dereliction or tardiness would result in further administrative action.

On November 6, 2014, an Informal Physical Evaluation Board (IPEB) met and found that the applicant was 10% disabled due to an issue with her right knee. The IPEB recommended that she be medically separated with severance pay. The IPEB did not provide a rating to the applicant for any other claimed illness. The results of the report are as follows:

> Right knee, cartilage, semilunar, removal of symptomatic.
>
> BM3 [applicant] is unfit for continued duty by reason of physical disability.
>
> The Board did not rate the following conditions as unfitting:
>
> > 1. Anxiety Disorder – According to Capt. [redacted] (retired), USN Psychiatrist on 12 Feb 2014, the member is psychiatrically fit for duty.
> >
> > 2. Factor V Leiden Mutation – the member does not meet the criteria in Coast Guard Medical Manual, COMDTINST M6000.1F Ch. 3.F.19.C. according to the narrative summary dated 11 APR 2014, "…she does not require anticoagulation when undergoing operations. BM3 [redacted] has never had any Throembolic episodes."
>
> BM3 [applicant's] medical condition prevents her from performing the duties required of a service member of her rank and primary rating.
>
> The Board recommends that she be separated with severance pay.

On November 26, 2014, the applicant was arrested for driving under the influence. The arresting agency completed a field sobriety test before administering a chemical breath test, which revealed the applicant had a 0.19% blood alcohol content, more than twice the .08% legal limit.

On December 15, 2014, the applicant received a negative Page 7 as a result of her November 26, 2014, arrest for driving under the influence. This was the applicant's second documented drug incident. Her Officer-in-Charge determined that alcohol was a significant and/or causative factor in her arrest for driving under the influence of alcohol. The applicant was reminded that this was her second documented drug incident, the first one having taken place on March 18, 2010, and as a result, she would be processed for separation in accordance with Article 2 of the Coast Guard Drug and Alcohol Abuse Program, COMDTINST M1000.10.

On January 9, 2015, the Preliminary Investigating Officer (PIO) released a Memorandum, "Investigation into Alleged Misconduct at Station [redacted]," wherein he released his findings regarding his preliminary inquiry into the applicant's misconduct. The PIO noted that the applicant was advised of her Miranda/Article 31 rights before each interview.[2] The opinions and recommendation of the PIO are as follows:

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[2] The facts of the applicant's misconduct were provided in the subsequent police reports and will therefore not be summarized here. Only the opinions and recommendations of the PIO are summarized here.

1. It is my opinion· that BM3 [applicant] violated Article 92 (Failure to Obey Order or Regulation) of the Uniform Code of Military Justice by not notifying the command of her arrest. During all three interviews, I asked BM3 why she did not notify the command and she stated that she did not think about it. During our third interview BM3 [applicant] seemed nervous and also stated that she knew she would be in trouble. The lack of notification to the command and not giving command information to the state trooper shows that BM3 [applicant] was trying to hide the arrest for DUI hoping that she would be medically discharged from the military before anyone found out about the offense. (Finding (11)).

2. It is also my opinion that BM3 [applicant] is in violation of Article 111 (Drunken or Reckless Driving) of the Uniform Code of Military Justice. BM3 [redacted] was tested with a breathalyzer at 2036 at the [redacted] Police Department. The results of that test proved that BM3 [applicant] had a BAC of. 19%. BM3 [applicant] had been in police supervision or custody for 2.5 hours. The average person would metabolize roughly one drink per hour or .016% BAC. For BM3 [redacted] to have .19% BAC at the time of the breathalyzer she would have been around a .22% BAC at the time of the accident. Using the BAC chart (Exhibit 12), and BM3 [applicant's] weight of 1601bs taken from her last weigh-in results in Direct Access, it takes between 8-11 standard drinks depending on the time to reach a BAC level of .22%. It is not possible that BM3 [applicant] could reach a BAC of .22% in the 45 minutes from the collision until law enforcement arrived on scene. Furthermore, BM3 [applicant] stated that she consumed 2-4 inches of a 1 liter bottle (approximately 6 standard shots) in 45 minutes. Drinking six standard shots in 45 minutes would have given BM3 [applicant] a BAC of.15% at the time she was approached by law enforcement. This shows that BM3 [applicant] must have consumed alcohol before the accident in [redacted]. BM3 [applicant] stopped in [redacted] at a liquor store to purchase soda. It is very unlikely that someone would stop at a liquor store just for sodas and then stop again at a second liquor store to purchase alcohol for her trip. All of these actions lead me to believe that BM3 [applicant] was consuming alcohol during her trip. (Finding (1, 4, 7, 8, 9, 12, 14)).

3. It is my opinion that BM3 [applicant] violated Article 107 (False Official Statements) of the Uniform Code of Military Justice by submitting her signed written statement and three separate interviews during the course of this investigation that conflicted with the [redacted] State Police Arrest Report. Furthermore, the totality of the information provided by BM3 [applicant] cannot accurately describe the arrest for driving under the influence or the 2.5 times the legal limit of alcohol in her system at the time of arrest. During my third interview I informed BM3 [applicant] that I had received and read the [redacted] State Police Report and gave her the opportunity to change her statement. BM3 [applicant] again stated that her written statement was correct even though it contradicted with the [redacted] State Police Report. (Exhibit (5, 7, 8, 9, 15)).

4. During the course of this investigation I interviewed BM3 [applicant] three times. I believe based on her nervous demeanor during interviews and the differences between her statements and the police report that BM3 [applicant] is trying to hide the truth and hoping that no one would discover her arrest before she was medically discharged. I am also very alarmed that BM3 [applicant] would say that she felt like a 2 on a 1 to 10 scale of intoxication with a .19% BAC. A person with a normal tolerance for alcohol should be feeling dizzy, nausea and possible [*sic*] blacking out. This is BM3 [applicant's] second DUI. When asked about her first DUI she stated that she could not believe that she had a .19% BAC this time. She stated that she drank many shots and 12 Heineken beers and blew a .24% BAC in California when she received her first DUI. (Finding (2, 4, 6, 7, 8, 9, 11, 12); Exhibit (5, 7, 8, 9, 15)).

RECOMMENDATION

1. I recommend that Article 92 (Failure to Obey Order or Regulation) offense be disposed of at NJP. (Opinions 1, 2, 3, 4)).

2. I recommend that Article 111 (Drunken or Reckless Driving) charge be disposed of at NJP pending outcome of the charges by civilian authority. (Opinion 2, 3)).

3. I recommend that Article 107 (False Official Statements) offense be disposed of at NJP. (Opinions (3, 4)).

On February 6, 2015, the applicant received formal written notice via a Memorandum, "Notification of Intent to Discharge," wherein the applicant was informed of her Command's intent to discharge her for her November 26, 2014, alcohol incident. This memorandum also served as notice to the applicant regarding the type of discharge she may receive, and any consequences that may flow from a less than honorable discharge. The applicant was informed of her right to submit a statement on her own behalf, and may disagree with her Commander's recommendation. The memorandum further informed the applicant that she was not eligible for the Commandant's Second Chance Program. Finally, the memorandum noted the applicant's November 6, 2014, agreement between the applicant and the medical board, wherein she agreed to their findings, of which included severance pay. The Commander informed the applicant that the Commander of PSC- would be the one to determine what impact the administrative discharge action would have on the applicant's potential medical discharge and any previous agreements signed by the applicant.

On February 6, 2015, the applicant signed a "First Endorsement" wherein she preserved her right to submit a written statement and to an attorney, and circled the "Do Not Object" to being discharged option of the endorsement. The applicant also acknowledged that if she were to receive a General discharge, she may encounter prejudice in her civilian life.[3]

On February 23, 2015, the applicant's acting commander issued a memorandum "Recommendation for Discharge" wherein she recommended the applicant be separated from the Coast Guard with a General characterization for misconduct. The Commander found two bases for the applicant's discharge. First, he found that the applicant was drunk and impaired while operating a motor vehicle in violation of the Uniform Code of Military Justice (UCMJ). Second, he determined that the applicant's arrest for driving under the influence of alcohol was an alcohol incident, representing the applicant's second incident. The Commander noted that the applicant did not meet the eligibility requirements under the Commandant's Second Chance Program, and was therefore not recommended for retention in the Coast Guard.

On April 13, 2015, the applicant was discharged from the Coast Guard. She received a General discharge, a narrative reason for separation of Misconduct, a separation code of JKQ, and an RE-4 reenlistment code.

VIEWS OF THE COAST GUARD

On April 7, 2020, a Judge Advocate (JAG) for the Coast Guard submitted an advisory opinion in which she recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center.

The JAG argued that under Article 2.C.11.a. of the Physical Disability Evaluation System (PDES), physical disability separation proceedings are placed on hold pending adjudication of administrative separation proceedings for misconduct, which is what occurred in the applicant's case. The JAG stated that on November 6, 2014, the applicant was found to be 10% disabled due to her right knee. However, just a few weeks later, on November 26, 2014, the applicant incurred

[3] There is no record of the applicant having submitted a written statement.

her second alcohol incident after she was arrested for driving under the influence, which was a criminal offense in the state where she was arrested. The JAG speculated that had the applicant not been arrested for driving under the influence, thereby incurring her second alcohol incident, she likely would have been medically separated with benefits, including severance pay, that she now seeks. The JAG explained that the reason the applicant was not medically retired instead of being administratively separated was not due to an error or injustice, but due to her own misconduct and Coast Guard policy.

The JAG noted that the applicant pointed to the fact that she was never convicted of the OUI as a reason the Coast Guard should not have found that she committed the underlying misconduct—drunken and/or reckless operation of a motor vehicle. However, the JAG argued that the applicant pled guilty to a lesser criminal offense of negligent operation of a motor vehicle, or "driving to endanger" as the jurisdiction of her arrest frames the offense. As a result, the JAG claimed the Coast Guard had proof beyond a reasonable doubt (admission) that the applicant negligently operated a motor vehicle in November 2014. According to the JAG, in order to issue a negative Page 7 for an alcohol incident, the member's commanding officer must find the member's consumption of alcohol was a significant or causative factor that results in the member's loss of ability to perform assigned duties, brings discredit upon the uniformed services, or is a violation of the Uniform Code of Military Justice (UCMJ), federal, state, or local laws. The JAG argued that the negative Page 7 issued to the applicant on December 15, 2014, established those facts in the applicant's case. The JAG stated that a more recent update to the Coast Guard Drug and Alcohol Abuse Program Manual clarifies that the Commanding Officer (CO) or the Officer-in-Charge (OIC) may make this determination based on a preponderance of the evidence. The JAG argued that based on the applicant's Blood Alcohol Count (BAC) of 0.19%, the arresting agency's policy report, the field sobriety results, court filings, and other evidence in the applicant's application, it was not erroneous for the Coast Guard to find, by a preponderance of the evidence, that the applicant operated a motor vehicle while intoxicated. The JAG argued that the applicant's discharge, after her second DUI offense in roughly four years—regardless of whether the applicant pled guilty to lesser offenses—does not shock the sense of justice

The JAG claimed that although the applicant does qualify for liberal consideration under the Department of Homeland Security's 2018 memorandum, the Board should not exercise discretion to afford the requested relief. The JAG argued that the Coast Guard psychiatrist noted that "[t]he alcohol abuse, particularly her lack of insight into her alcohol abuse leading to poor judgement, was a factor in her OUI in 2014…" The psychiatrist further noted "[t]he likely alcohol abuse in November 2014 with limited insight into her alcohol abuse as noted by the treatment team in the discharge note Feb 2015 from the intensive alcohol treatment facility, may have led to poor judgment leading to the OUI in November 2014." The JAG argued that these statements are bolstered by the applicant's own words found in her March 27, 2012, negative Page 7 wherein after being asked how many drinks she had consumed, she stated, "Not too many. Maybe 10-12 drinks." The JAG claimed that objectively, 10 to 12 drinks is quite a lot of alcohol to consume in one session, and this shows that she did not seem to appreciate the severity of her alcohol abuse.

The JAG further claimed that the applicant had an appointment with a mental health provider on November 18, 2014, just days before her second impaired driving arrest. The applicant's provider noted that the applicant "remains accountable for behaviors/actions and

subject to the normal channels of counseling and discipline." The mental health provider also noted that the applicant "failed to mention any stressors related to her husband /boyfriend or father and expressed a general satisfaction with her life with failure to understand the need for ongoing psychotherapy." As such, the JAG argued that it does not appear that the applicant was suffering from any acute symptoms of her diagnosed anxiety or depressive disorder in the weeks leading up to her second OUI. The JAG explained that the applicant was not separated simply because she received her second alcohol related incident, but because she received her second arrest for driving while impaired. The JAG contended that the applicant's negative Page 7s indicate that the applicant was not taking the adequate steps to treat her condition in the years between her first and second arrests for driving while impaired. The JAG noted that the Coast Guard is a law enforcement agency, and the applicant was a Boatswain's Mate and easily could have served on a boarding team on the front lines of the Coast Guard law enforcement operations in the field. The JAG argued that it would be incongruous and a discredit to the Coast Guard to permit members to upgrade their discharges and seek medical separation where a pattern of alcohol abuse led to them to, on multiple occasions, drive while intoxicated against state and military law.

The JAG concluded by stating the applicant has failed to meet her burden of establishing, via a preponderance of the evidence, that the Coast Guard committed an error or injustice. Although the JAG argued the Board should liberally consider the applicant's request, it should nonetheless deny relief in this case.

To support her memorandum, the JAG submitted the following documents:

- Arresting Agency's "Arrest Report," dated November 26, 2014, wherein the arresting officer detailed his encounter with the applicant. The following is a summary of the relevant parts of the Police Report:

> I stopped at the scene and observed a black Toyota Scion approximately 40 feet off of the right shoulder and facing in a westerly direction. I walked down to the Toyota and approached the driver's door (windows fogged). The female driver opened the door and was talking on her cellular phone. I asked if she was injured and she stated she was not. The female stated that she was in the center lane and lost control while moving into the left lane to pass. After coming to rest her vehicle was hit by a tractor trailer. The driver produced a [redacted] picture license and military I.D. card and was identified as [applicant's full name] date of birth [redacted]. She is stationed at the U.S. Coast Guard base in [redacted] and was enroute to visit friends in [redacted]. While speaking with [applicant] I overserved bloodshot and glassy eyes and, despite chewing gum, smelled intoxicants in the vehicle. I asked [applicant] to spit out her gum and blow in my direction. She blew out the corner of her mouth and away from me. She was directed three time [*sic*] to "blow toward me." The odor of intoxicants was present on her breath. I asked [redacted] how much liquor she's consumed before driving and she stated she had "two beers" and finished her last beer at 16:00 hours. She stated that she had her first beer at 11:00 AM and admitted to having liquor in the trunk of her vehicle.
>
> I pulled forward 150 yards to the [name redacted] tractor trailer to speak with the driver. [Redacted] stated that he watched the Toyota Scion attempt to change from the middle to left lane, lose control, collide with the median rail and come to rest in the middle of the road. [Redacted] added that, as he neared the Toyota, the driver began to back and he was unable to avoid colliding with the right/rear quarter. After striking the Toyota with his R/F bumper, it spun and came to rest off of the right shoulder. [Redacted] stated that he did everything to avoid a "T-bone" collision. I viewed damages and observed heavy damage to the bumper and saw that a plastic shield was against the R/F tire. [Redacted] stated that he went back to [applicant's] vehicle and verified that she wasn't hurt.

…

> At 18:20 hours I asked [applicant] to exit from her vehicle to perform sobriety tests. [Applicant] appeared unsteady on her feet as she walked to the area in front of my cruiser. [Applicant] was speaking with her friends and I overheard "…you'll be her in a couple minutes?"[4] The breakdown lane was plowed by had a light covering of snow.

The arresting officer completed the following tests: Horizontal Gaze Nystagmus, Walk and Turn, One Leg Stand, Finger to Nose. After completing these tests, the officer provided the following opinion:

> At 18:29 hours I determined that [applicant] was under the influence and couldn't operate a vehicle safely. She was placed under arrest, handcuffed (proper fit checked and double locked) and seated in the R/F of my cruiser. I advised [applicant] that she would be required to submit to a breath test and she became belligerent stating, "I passed all of your tests…there's no reason why I should. You found nothing wrong with me." At 18:32 hours, [applicant's] female friends arrived at the scene and took control of her purse. I explained that she would likely end up at the [redacted] county jail and to expect a call from her. I retained [applicant's] cell phone and house keys. [Applicant] stated to her friend, "He has nothing on me…that's why he's doing it."
>
> At 18:55 hours I checked the interior of [applicant's] mouth and verified that it was clear of foreign objects. I initiated the (15) minute abstinence and observation wait period; [applicant] remained in my immediate presence. At 19:20 hours I initiated the Intoxilyzer 8000 breath test and received a "calibration check out of tolerance" indication due to a low wet bath concentration (0.075%). I reinitiated another breath test immediately (19:25) and again received the same message, this time with a wet bath solution value of 0.079%. I terminated the breath test and asked the [redacted] police dispatcher to contact a blood technician. After about (15) minutes I walked into dispatch and determined that they were handling multiple E-911 calls and hadn't contacted a blood technician yet. Based on this information, inclement weather, and the sometimes lengthy wait time for a blood technician, I transported [applicant] to the [redacted] Police Department approximately (5) minutes away.
>
> At 20:10 hours I re-checked the interior of [applicant's] mouth and initiated another (15) minute abstinence and observation wait period. [Applicant] remained in my immediate presence and didn't eat, drink, burp, blech, regurgitate or vomit. At 20:36 she satisfactorily completed the breath test with a 0.19% BrAC result.

- An email from a Lieutenant Commander with the United States Public Health Service wherein he provided his medical opinions on the applicant's mental status at the time of her discharge. His comments are as follows:

> ***1. Did the veteran have a mental health condition or experience a sexual assault or sexual harassment that may excuse the conduct or poor performance that adversely affected the discharge or may otherwise warrant modifying the discharge?***
>
> The member had a diagnosis of anxiety disorder, depressive disorder and alcohol abuse after being referred for CDAR for assessment after her Nov 2014 OUI Charge and receiving treatment for alcohol abuse in December 2014 and Jan 2015.
>
> Per the record, pt self-referred herself for mental health after PCS to last duty station (station pt was discharged from) in 2013 with member stating she enjoyed the coast guard until she PCS's to her last duty station "I have stress from work issues". The member had 31 appointments with a

[4] [This was a direct quote from the actual police report.]

psychiatrist from Oct 2013 to Mar 2015 for diagnoses of anxiety and depressive disorder and was treated with both medications and acupuncture. An alcohol screening in Mar 2010 after first DUI indicated pt had a 'high probability" of having a substance dependence disorder. Patient was ordered by civilian court to attend treatment for 9 months and was on probation for 5 years.

According to psychiatric records, after the patient's DUI was discovered by her command (patient did not disclose to command on the advice of another person), the command became hostile towards member and was abruptly separated on 15 Mar 2015 for misconduct with the patient terminating care and moving to another part of the country. According to a psychiatric note in Feb 2015 after intensive outpatient alcohol treatment reports that prior to the arrest for DUI, her husband left her in Nov 2014 and she was going to get a divorce and her father was critically ill. Member stated she was going back to the command station for failure to advise them on the OUI. This information was contradicted by a CDAR evaluation Dec 18 2014 (a few weeks after the OUI arrest), where the patient stated she got into an accident with her car, got nervous, and took out a bottle of vodka she bought in New Hampshire and drank on the side of the road leading to her arrest. Further, patient had an initial mental health intake on Nov 18, 2014 with a new psychologist (prior psychologist retired) that failed to mention any stressors related to her husband/boyfriend or father and expressed a general satisfaction with her life with failure to understand the need for ongoing psychotherapy with the assessment stating "Pt remains accountable for behaviors/actions and subject to the normal channels of counseling and discipline."

The member was going through a med board for internal derangement of knee, anxiety disorder and factor V leiden mutation and requested a transfer of duties or to be assigned a medical billet which was denied. Patient was noted to hoping have a medical discharge soon and noted the change in leadership in the summer of 2014 reduced her work stress. Pt stated in a therapy session in Jan 2014 "I hope I can get a board" for anxiety, and leave the coast guard sooner.

The alcohol abuse, particularly her lack of insight into her alcohol abuse leading to poor judgement, was a factor in her OUI in 2014.

2. Did the mental health condition exist or did the experience of sexual assault or sexual harassment occur during military service?

Yes, all the mental health diagnoses were diagnosed (according to medical records) while in the military

3. Does the mental health condition or experience of sexual assault or sexual harassment excuse the conduct or poor performance that adversely affected the discharge?

The military record is absent of any poor performance or conduct-related issues from the year 2012 onward. The likely alcohol abuse in November 2014 with limited insight into her alcohol abuse as noted by the treatment team in the discharge note Feb 2015 from the intensive alcohol treatment facility, may have led to poor judgement leading to OUI in November 2014

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 7, 2020, the Chair sent the applicant a copy of the Coast Guard's advisory opinion and invited him to respond within thirty days. As of the date of this decision, no response was received.

APPLICABLE LAW AND POLICY

Article 1 of the Coast Guard Drug and Alcohol Abuse Program Manual, COMDTINST M1000.10, provides the necessary guidance on the procedures for alcohol incidents. In relevant part:

> **1.A.2.d. Alcohol Incident**
>
> (1) Alcohol is the Significant or Causative Factor. Any 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.
>
> (2) Alcohol Must be Consumed. The member must actually consume alcohol for an alcohol incident to have occurred. Simply being present where alcohol is consumed does not constitute an alcohol incident. The member may be counseled on appropriate behavior or may be held jointly responsible for any damage or untoward behavior associated with the group. Purchasing alcohol for use by minors is not an alcohol incident, but does represent a serious breach of discipline and subjects the member to civil or military (UCMJ) penalties.
>
> **…**
>
> **2.B.2. Alcohol Incident.** The definition of an alcohol incident (See Article 1.A.2.d. of this Manual.) gives commands broad latitude in curbing intemperate alcohol use. A key fact to keep in mind is that the member must actually consume alcohol for an alcohol incident to have occurred.
>
> **…**
>
> **2.B.8.b. Second Alcohol Incident. Enlisted**. Enlisted members involved in a second alcohol incident will normally be processed for separation in accordance with Article 1.B.15. of reference (c), Military Separations, COMDTINST M1000.4 (series).
>
> **...**

Chapter 2.C.11. of the Physical Disability Evaluation System Manual states the following:

> Cases Involving Disability Evaluation and Disciplinary Action Concurrently.
>
> a. Disability statutes do not preclude disciplinary or administrative separation under applicable portions of the Personnel Manual, COMDTINST M1000.6 (series). If a member is being processed for a disability retirement or separation, and proceedings to administratively separate the member for misconduct, disciplinary proceedings which could result in a punitive discharge of the member, or an unsuspended punitive discharge of the member is pending, final action on the disability evaluation proceedings will be suspended, and the non-disability action monitored by the Commander, Coast Guard Personnel Command. (see Article 12-B-1.e., Personnel Manual, COMDTINST M1000.6 (series)).
>
> b. If the court martial or administrative process does not result in the execution of a punitive or an administrative discharge, the disability evaluation process will resume. If a punitive or administrative discharge is executed, the disability evaluation case will be closed and the proceedings filed in the member's official medical record.

10 U.S.C. § 1552 provides the necessary guidance for reconsideration. In relevant part:

> (a)(3)(D) Any request for reconsideration of a determination of a board under this section, no matter when filed, shall be reconsidered by a board under this section if supported by materials not previously presented to or considered by the board in making such determination.

FINDINGS AND CONCLUSIONS

1. The Board has jurisdiction over this matter under 10 U.S.C. § 1552(a) because the applicant is requesting correction of an alleged error or injustice in her Coast Guard military record. The Board finds that the applicant has exhausted her administrative remedies, as required by 33 C.F.R. § 52.13(b), because there is no other currently available forum or procedure provided by the Coast Guard for correcting the alleged error or injustice that the applicant has not already pursued.

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.[5]

3. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice.[6] The applicant was discharged in 2015. As a result of this discharge, the applicant received and signed her DD 214 showing a General discharge for Misconduct, rather than Physical Disability, and a reenlistment code of RE-4. Therefore, the preponderance of the evidence shows that the applicant knew of the alleged error in 2015, and the application is untimely. However, the Board may excuse the untimeliness of an application if it is in the interest of justice to do so,[7] and the Board will excuse the untimeliness in this case because the applicant's request falls under the Board's "liberal consideration" guidance since the applicant is challenging that her type of discharge was based in part on an alleged mental health problem.[8] Therefore, the Board waives the statute of limitations in this case.

4. The applicant alleged that the Coast Guard committed an error when it administratively separated her for misconduct, when it should have medically separated her. 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 the military record, and the applicant bears the burden of proving, by a preponderance of the evidence, that the disputed information is erroneous or unjust.[9] 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."[10]

5. The applicant argued that because she was never convicted of OUI, the Coast Guard should not have separated her for misconduct, but instead should have medically separated her. To support her argument, the applicant submitted court documents that show she was not convicted

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[5] *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).
[6] 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.
[7] 10 U.S.C. § 1552(b).
[8] DHS Office of the General Counsel, "Guidance to the Board for Correction of Military Records of the Coast Guard Regarding Requests by Veterans for Modification of their Discharges Based on Claims of Post-Traumatic Stress Disorder, Traumatic Brain Injury, Other Mental Health Conditions, Sexual Assault, or Sexual Harassment" (signed by the Principal Deputy General Counsel as the delegate of the Secretary, June 20, 2018).
[9] 33 C.F.R. § 52.24(b).
[10] *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

of Criminal OUI, but was instead charged with Driving to Endanger. For the following reasons this Board disagrees:

a. The record shows that although the applicant was not convicted of Criminal OUI, she did plead guilty to a lesser offense of Driving to Endanger, which was the result of her driving while in an intoxicated state. The record also shows that at the time of her second arrest, the applicant had a BAC of 0.19%, which is more than double the legal limit. According to the arresting officer's police report, due to low wet bath solutions, he was unable to initiate a breathalyzer test on the applicant immediately following her arrest. As a result, the applicant's BAC was taken almost two and a half hours after the arresting officer arrived on the scene of the accident, indicating that the applicant's BAC was actually higher at the time of her accident and subsequent arrest. Upon further review of the arresting records, the evidence shows that the applicant was unable to pass the field sobriety tests and at times had slurred speech. Therefore, the Board finds that the preponderance of the evidence shows that the applicant was driving while under the influence of alcohol.

   Article 1.A.1.b. of the Coast Guard Drug and Alcohol Abuse Program Manual states that the goal of the substance and alcohol abuse program is to enable the Coast Guard to accomplish its missions unhampered by the effects of substance and alcohol abuse. Article 1.A.2.d. of the same manual states the following:

   > **Any 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.**

   This policy clearly states that the service member does not need to be found guilty of a particular offence for the behavior to be considered an alcohol incident. Although the applicant is correct that she was never convicted of Criminal OUI, she ignores the fact that she was found to have had a BAC of 0.19%, and was still convicted of Driving to Endanger, which was the direct result of her driving under the influence of alcohol. Her plea deal resulted in a $1,200 fine and the suspension of her drivers license for 30 days. Article 2.B.8.b. states that enlisted members involved in a second alcohol incident will normally be processed for separation. The applicant did not contest the findings of her breathalyzer test and pled guilty to a lesser offense of Driving to Endanger. Therefore, the preponderance of the evidence shows that the applicant incurred two alcohol incidents and was separated in accordance with Coast Guard policy. The record is presumptively correct, and the applicant has failed to overcome the presumption of regularity. Her request for relief should therefore be denied.

b. The applicant alleged that she should have been medically separated instead of being administratively separated due to misconduct. However, Article 2.C.11. of

the Coast Guard's Physical Disability Evaluation policy manual states the following:

> **If a member is being processed for a disability retirement or separation, and proceedings to administratively separate the member for misconduct, disciplinary proceedings which could result in a punitive discharge of the member, or an unsuspended punitive discharge of the member is pending, final action on the disability evaluation proceedings will be suspended, and the non-disability action monitored by the Commander, Coast Guard Personnel Command.**

Here, on November 6, 2014, the IPEB found that the applicant was 10% disabled due to her knee condition but was psychiatrically fit for duty and had no other conditions that were physically disabling. The second page of the IPEB report states that the applicant was advised by an attorney as to the consequences of the board's findings and recommendations and after being advised by this attorney, the applicant chose to accept the board's findings and recommendations, waiving her right to a formal hearing. The record further shows that the applicant incurred her second alcohol incident on November 26, 2014. Upon this second alcohol incident, Coast Guard policy required that the final action on the applicant's disability proceedings be suspended, and the non-disability separation action continue. Policy states that only if the administrative process does not result in a punitive discharge or administrative discharge, will the disability proceedings continue. That is not what happened here. Here, the applicant's administrative proceedings resulted in a punitive discharge. As such, the disability proceedings would have been permanently suspended and the applicant would have been processed for separation for Misconduct as required by policy, which is what occurred in the applicant's case. The record is presumptively correct, and the applicant has not proven, by a preponderance of the evidence, that the Coast Guard erred when processing her for separation due to her second alcohol incident, instead of processing her through the PDES. Therefore, her request for relief should be denied.

c. The applicant alleged that her administrative separation was erroneous. However, the record shows that the applicant did not object to her discharge at the time of her separation. On a February 6, 2015, First Endorsement letter, the applicant preserved her right to speak with an attorney and to submit a written statement on her behalf. However, the record does not show that she consulted an attorney or submitted a written statement objecting to the charges and discharge. On the contrary, on the February 6, 2015, First Endorsement, the applicant circled the "I DO NOT OBJECT to being discharged" option contained with the First Endorsement. The record shows that the applicant was given multiple opportunities to object to the findings and recommendations of her administrative separation, and not only did she not exercise her rights to object, but she also willingly agreed to the administrative separation.[11] As such, the applicant has failed to prove, by a preponderance of the

[11] Because the applicant did not have 8 or more years of continued service at the time of her separation, she was not entitled to an Administrative Separation Board under Article 1.B.17.e. of the Military Separations Manual, COMDTINST M1000.4.

evidence, that the Coast Guard erred when separating her for Misconduct, and her request for relief should be denied.

6. Although the applicant did not allege that her misconduct was the result of previously diagnosed mental health issues, the possibility that mental health diagnoses were a contributing factor in the applicant's misconduct was discussed by the JAG, and so it will be addressed here. The record shows that prior to her second alcohol incident, the applicant was seen by mental health professionals and subsequently diagnosed with anxiety disorder, depressive disorder, and alcohol use disorder. The record also shows that on November 18, 2014, the applicant was seen by a mental health care professional who determined that the applicant "remains accountable for behaviors/actions and subject to the normal channels of counseling and discipline." In addition, during this session the applicant "failed to mention any stressors related to her husband/boyfriend or father and expressed a general satisfaction with her life, with a failure to understand the need for ongoing psychotherapy." During the applicant's second arrest for driving under the influence, the applicant admitted to "having an alcohol addiction and attended A.A. meetings on and off for the past several years." Despite the applicant's understanding of her alcohol addiction, the record shows that on multiple occasions she failed to appreciate the severity of her addiction, minimizing both the number of drinks she consumed and the level of her intoxication, which ultimately led to her putting innocent lives at risk when she chose to drive while under the influence of alcohol, not once but twice. The record also shows that prior to her second arrest, the applicant failed to mention any stressors in life, but instead expressed a general satisfaction with her life. Therefore, the Board finds that the preponderance of the evidence shows that the applicant was able to understand and appreciate the consequences of her actions and was properly subject to the same disciplinary measures as other service members. The Board also finds that the although the applicant was not exhibiting any stressors or circumstances that would have contributed to her misconduct, such stressors would likely not have excused her misconduct of driving under the influence of alcohol.

7. For the reasons outlined above, the applicant has not met her burden, as required by 33 C.F.R. § 52.24(b), to overcome the presumption of regularity afforded the Coast Guard that its administrators acted correctly, lawfully, and in good faith.[12] She has not proven, by a preponderance of the evidence, that her General discharge for "Misconduct" with an RE-4 reenlistment code is erroneous or unjust. Accordingly, the applicant's request should be denied.

[12] *Muse v. United States*, 21 Cl. Ct. 592, 600 (1990) (internal citations omitted).

ORDER

The application of former [redacted] for correction of her military record is denied.

November 18, 2022

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