

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2020-140

██████████-██████████ ██████████
YN2 (former)

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. After receiving the applicant's completed application on August 15, 2020, the Chair docketed the case and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated October 14, 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

The applicant is a former yeoman second class (YN2/E-5) who was Honorably discharged on November 27, 2019, after more than eight years of service, due to a "Condition Not a Disability." He alleged that he was erroneously and illegally discharged based on a false diagnosis of "Neurodevelopmental Disorder with persistent deficits in social communication."¹ The

¹ According to the DSM-5 the diagnostic criteria for a neurodevelopment disorder involving "social (pragmatic) communication disorder" are as follows:

- A. Persistent difficulties in the social use of verbal and nonverbal communication as manifested by all of the following:
1. Deficits in using communication for social purposes, such as greeting and sharing information, in a manner that is appropriate for the social context.
 2. Impairment of the ability to change communication to match context or the needs of the listener, such as speaking differently in a classroom than on a playground, talking differently to a child than to an adult, and avoiding use of overly formal language.
 3. Difficulties following rules for conversation and storytelling, such as taking turns in conversation, rephrasing when misunderstood, and knowing how to use verbal and nonverbal signals to regulate interaction.
 4. Difficulties understanding what is not explicitly stated (e.g., making inferences) and nonliteral or ambiguous meanings of language (e.g., idioms, humor, metaphors, multiple meanings that depend on the context for interpretation).

applicant asked the Board to correct his record by voiding his discharge, reinstating him on active duty, awarding him back pay and allowances, upgrading his reenlistment code from RE-4 (ineligible) to RE-1 (eligible), and removing all references to the erroneous diagnosis from his military personnel and medical records.

SUMMARY OF THE RECORD

The applicant immigrated to the United States from South America after completing high school. He enlisted in the Coast Guard at age 20 on April 19, 2011, completed basic training, and advanced to seaman. In 2013, he graduated as an Honor Student from Yeoman "A" School in 2013 to become a YN3/E-4. During his first tour of duty as a yeoman, he was recognized as his District's Enlisted Person of the Quarter for excelling in his duties and for contributing to his local community.

In 2017, the applicant advanced to YN5/E-2 and was transferred to a personnel office. He received good performance evaluations through the spring of 2019, which included a few mediocre marks in performance categories such as Human Relations, Work-Life Sensitivity, and Military Bearing.

On May 9, 2019, the applicant participated in the Service Wide Examination (SWE) for advancement to YN1. The applicant was later counseled about his behavior toward the proctor of the examination the next day and at the end of the counseling session, witnesses stated, the applicant grabbed the arm of his second line supervisor, a CWO, with both hands in an attempt to stop him from walking away.

On May 17, 2019, the applicant submitted a complaint of harassment and discrimination by the CWO to the Command Master Chief. (The applicant did not submit a copy of this complaint to the BCMR.) Filing a civil rights complaint initiates a 15-day mediation period in which the command attempts to resolve the matter at the lowest level.²

On June 3, 2019, according to the applicant, he learned that he would have to undergo a command-directed mental health evaluation. On June 4, 2019, the CO signed a notification to inform the applicant of the command-directed mental health evaluation.

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- B. The deficits result in functional limitations in effective communication, social participation, social relationships, academic achievement, or occupational performance, individually or in combination.
 - C. The onset of the symptoms is in the early developmental period (but deficits may not become fully manifest until social communication demands exceed limited capacities).
 - D. The symptoms are not attributable to another medical or neurological condition or to low autism spectrum disorder, intellectual disability (intellectual developmental disorder), global developmental delay, or another mental disorder.

DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FIFTH EDITION, DSM-5 (American Psychiatric Assoc., 2013), pp. 47-48.

² Coast Guard Civil Rights Manual, COMDTINST M5350.4C, Chap. 4.A.1.

On June 10, 2019, the applicant was evaluated by a Licensed Clinical Psychologist who was a captain in the Air Force. He underwent psychological testing in the morning and was interviewed by the psychologist in the afternoon. At the end of the first session, the psychologist signed a form indicating that the applicant was suitable/fit for continued military service.

Air Force Psychologist's Report

On June 21, 2019, however, the Air Force psychologist sent a memorandum to the applicant's CO. She stated that she had conducted the non-emergency command-directed evaluation of the applicant based on the following:

The service member's command provided a substantial list of behavioral issues that have produced concerns regarding the member's fitness/suitability for continued military service. This included recent statements and actions on both 09 May 2019 and 10 May 2019 following the service member's request to be allowed to record two additional answers during completion of the Service Wide Examination. Upon receiving counseling regarding this incident, the service member was witnessed grabbing his supervisor with both hands as a means to prevent him from leaving the room and ending the conversation. Of notable concern, is the member's continued deflection of responsibility and appearance of an inability to understand the impact of his actions.

The psychologist stated that her evaluation was "based upon information from a number of sources including the psychiatric diagnostic interview, extensive review of the electronic health records, behavioral observations, and review of psychological testing. Additionally, collateral information provided by the member's command incorporating documentation of specific observed behaviors since 27 July 2017."

The psychologist reported that the applicant had a mental health condition that made him unfit for continued military service, described as follows:

[The applicant] exhibits persistent deficits in social communication and interaction across multiple contexts. This is evidenced by his tendency to belabor points to the smallest of details, repeating himself four or five times to make a point. He demonstrates significant difficulty adjusting his behavior to suit various contexts, as he has displayed a lack of understanding of what behavior is considered appropriate in one situation but not another. He exhibits difficulty fully appreciating the consequences of his actions, evidenced by his tendency to deflect ownership in wrongdoing and his dismissive reaction to his behavior regarding the Service Wide exam and subsequent grabbing of a supervisor. Of note, he has been provided with corrective feedback on numerous occasions by peers and supervisors, and has failed to adjust his behavior to meet expectations. These characteristics are the result of a neurodevelopmental disorder that has negatively impacted his ability to incorporate feedback and effectively function within the military. His pattern of behavior and diagnosis suggest that he will continue to experience significant challenges in his ability to safely and successfully complete job tasks. Therefore, he cannot deploy and it is reasonable to expect that his unsuitable behavior will persist especially during times he feels challenged or stressed.

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While it appears that the service member has the cognitive ability to understand the difference between what is right and wrong, his capacity for understanding is limited. Due to the service member's deficits in judgement and social domains, this is particularly difficult for him in social contexts. Further, he exhibits a propensity for avoidance of discomfort and confrontation. This in turn leads his integrity to suffer as he uses dishonesty as a coping mechanism to avoid appearance of misunderstandings.

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The member exhibits an insistence on sameness, and an inflexible adherence to routines and patterns. He displays a rigid thought process that appears abnormal in intensity and focus. This is all demonstrated by various behaviors observed at work to include his attempts to control conversations, and his excessive detail to tasks. With a rigid approach to daily life, the service member is likely to become easily overwhelmed and stressed at the slightest deviation from his expectations. While the member has denied any past or present suicidal/homicidal ideation, intent, plan, or behavior, he is at risk for continued moments of acting out when things do not go his way.

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Due to the service member's deficits in social interactions and difficulty adjusting his behavior to suit various social contexts, it is not recommended for him to have access to sensitive personnel information. It is possible that he may use knowledge of sensitive information as a means to attempt to establish a social connection without fully appreciating the consequences of this behavior.

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3. The diagnosis, based on the current DSM is: 315.8 (F88) Neurodevelopmental Disorder associated with persistent deficits in social communication and interaction).^[3]

4. The disorder is so severe that the service member's ability to function in the military environment is significantly impaired. The service member's problem behaviors are expected to persist. Neurodevelopmental disorders are pervasive and long-standing.

5. The service member's diagnosis does not meet retention standards for continued military service. The member has been assessed for the presence of Post-Traumatic Stress Disorder and was determined to not meet criteria for this condition. There is no evidence that the member meets diagnostic criteria for any other condition (e.g. traumatic brain injury) that would require referral to a medical evaluation board for administrative adjudication.

6. The service member is not currently considered imminently dangerous or potentially dangerous upon summary of clinical data/rationale to support this determination. He denied any past or present suicidal/homicidal ideation, intent, plan, or behavior.

7. The following clinical treatment plan has been initiated: The service member will be offered supportive counseling services through ... AFB Mental Health Clinic. However, upon separation from service, the member is highly encouraged to seek specialized treatment from a neurodevelopmental specialist.

8. RECOMMENDATIONS TO THE COMMANDING OFFER: The service member is returned to his Command, with the following recommendations.

a. Precautions: As a precaution, Command should consider some form of supervision for service member when he is performing important duties. It is not recommended that service member participate in sensitive duties unsupervised due to his propensity for dishonesty and limited understanding of the impact of his behaviors.

b. Process for administrative separation because the neurodevelopmental disorder is so severe, the service member's ability to function effectively in the military environment is significantly impaired.

c. The service member is recommended for Duty and/or Mobility restrictions. Restrictions are: no access to weapons, no deployments, no TDY, and no PCS.

9. The above recommendations will be discussed with the service member during his feedback appointment on 24 June 2019 at ... AFB Mental Health Clinic.

³ The DSM-5 code 315.8 (F88) means either "Global Development Delay" or "Other Specified Neurodevelopmental Disorder."

10. The service member's diagnosis prevents him from fully understanding the actions taken and likely the recommendations made above.

At a follow-up appointment on June 24, 2019, the psychologist informed the applicant that she had diagnosed him with a "neurodevelopmental disorder with persistent deficits in social communication and interaction" and reported the following:

Patient is a 28 y/o, Single, Hispanic, male, AD USCG, E-5, working in customer service. Pt denied experiencing any past or present mental health related concerns. He denied interpersonal relationship problems, distress, and noted that he handles and copes well with anything that comes his way. However, pt is presently under command directed evaluation due to incidents occurring at work that have resulted in his leadership concern for his wellbeing and suitability for continued service. Pt was taking a service wide timed exam and upon completion insisted on answering two more questions, which gave the appearance of attempting to cheat. When confronted, command noted that he did not acknowledge his actions or understand the seriousness of the allegations. Furthermore, during a counseling session, his supervisor became frustrated that the patient was not acknowledging the event and did not appear to comprehend the need to take responsibility and hence began to leave the conversation. It was at this point, the pt attempted to block the supervisor's ability from exiting the conversation and ultimately grabbed him by the arm insisting that they finish the conversation. Pt was instructed by both the supervisor and another witness to "let go." It was noted that despite witnesses of this event, the member at first denied it and then stated that his actions were out of reflex and an accident. Collateral occupational information also described the pt as socially awkward, keeps to himself, and hyperactive (due to coffee/energy drinks). They noted member has difficulty concentrating when given direction and has been counseled numerous times for untruthful statements. It was stated that the member belabors points to the small of details, repeating himself four or five times to make a point. Further, they described issues with hygiene, as his clothes/uniform often smell moldy.

Member appears to be exhibiting symptoms of a neurodevelopmental disorder. He exhibits persistent deficits in social communication and interaction across multiple contexts. While he appears to exhibit surface sociability, this is without depth. He has a tendency to belabor points to the smallest of details, repeating himself four or five times to make a point, as well as instances of not understanding sarcasm or jokes. He demonstrates difficulty adjusting his behavior to suit various contacts, as he has displayed a lack of understanding of what behavior is considered appropriate in one situation but not another. He shows difficulty in fully understanding the consequences of his actions, evidenced by his tendency to deflect ownership in wrongdoing and his dismissive reaction to his behavior regarding the service wide exam and subsequent grabbing of a supervisor. He has been provided with corrective feedback on numerous occasions by peers and supervisors, but fails to adjust his behavior to meet expectations. These characteristics are reflective of a neurodevelopmental disorder that has negatively impacted his ability to incorporate feedback and successfully complete Job tasks.

On August 7, 2019, the applicant sought a second opinion from a civilian Licensed Clinical Psychologist. This psychologist did not administer a test but wrote a memorandum dated August 12, 2019, in which she stated that "based on the diagnostic interview and the review of records provided by [the applicant], [he] does not currently meet any criterion for any mental health disorder. He denies any past history of mental health or past. ... At this time he appears to be emotionally and mentally stable."

On September 3, 2019, the applicant's command issued a report of an administrative investigation into the applicant's allegations of harassment by his supervisor, the CWO. The

investigator concluded that the allegations of prohibited harassment were unsubstantiated and that no further action was needed.

On October 1, 2019, the applicant was counseled about misconduct in violation of the Uniform Code of Military Justice (UCMJ) and the Coast Guard's Core Values:

On 09 MAY 2019 you participated in the Service Wide Examination (SWE). The routine SWE instructions, policies, procedures, and allotted time for completion was announced by the proctor, BMCM Officer-in-Charge, When allotted time had passed, the proctor advised you time had expired and instructed you to place your pencil down and to submit your test (IAW the script from the SWE Handbook). You proceeded to plead with the proctor to be given additional time to finish the exam, specifically to record two additional answers on the score sheet, but were denied additional time.

On 10 MAY 2019 your first and second line supervisors, YN 1 ... and CWO ... were notified of the SWE incident. Both supervisors held a joint counseling session with you, where they attempted to explain to you that your actions during the SWE were inappropriate. However, you were in denial of any wrongdoing and continued to deflect responsibility, stating the proctor's time was wrong and that your last unit would have allowed extra time. The unsuccessful counseling session ended and CWO... stood and proceeded to walk away. In an attempt to extend the conversation, you maneuvered in front of CWO ... to block his path. CWO ... told you to move and let him through. CWO ... then moved around you to exit, and as he passed, you grabbed his arm, with both hands, to stop him from leaving. CWO responded with, "let me go," at the same time, YN1 yelled out "what are you doing, let him go." At this point you released your grip, let him go and began to pace back and forth by YN1's cubicle in a visually agitated state.

You were taken to Chief's Council, where you failed to recognize it is inappropriate to request to record answers to a SWE after time has expired. You also attempted to justify your unacceptable action of placing your hands on your supervisor by insisting that your 'accidental' touching of CWO ... was provoked by him 'walking away from you aggressively'. Most concerning with these incidents is your continued deflection and unwillingness to take responsibility for your actions. In the months following the incident with your supervisor, you attempted to influence a primary witness and minimize the seriousness of the situation by drafting a statement on a witness' behalf and asking him to sign it, stating you "accidentally laid hands over Mr. ... forearm."

On the advice of the Chiefs Council, the command assigned a Preliminary Investigating Officer (PIO) to conduct an investigation into the facts surrounding these incidents on 16 JUL 2019.

The PIO completed his investigation on 30 AUG 2019 and recommended the matter be disposed of through Captain's Mast, UCMJ Article 15. I have decided to forego Captain's Mast proceedings and handle this matter through documented counseling.

By the preponderance of the evidence, and pursuant to the Manual for Courts-Martial (2019 Ed.), I find you in violation of the following UCMJ Articles: 1) Article 91(3) Insubordinate conduct towards a warrant officer, noncommissioned officer, or petty officer and 2) Article 128 - Assault upon a commissioned, warrant, noncommissioned, or petty officer. Violations of either UCMJ article qualify as a Commission of a Serious Offense as defined in paragraph 1.B.17.b(3) in the Military Separations Manual, COMDTINST M1000.4.

Your actions lack the judgment and responsibility expected of a Second Class Petty Officer, let alone a member competing for advancement to First Class Petty Officer. Therefore, your recommendation for advancement is hereby rescinded.

Discharge Proceedings

On October 10, 2019, the applicant's Commanding Officer (CO) notified him that he was initiating the applicant's discharge for "condition, not a disability, which interferes with performance of duty" based on his psychological diagnosis by the Air Force psychologist. The CO noted that the condition was coded 315.8 (F88) under the DSM-5 but coded 299.80 under the DSM-4. He noted that the Medical Manual still used the codes in DSM-4 and that under the Medical Manual, the applicant's diagnosis was medically disqualifying for retention in the Service. The CO advised him that he had a right to submit a statement on his own behalf.

On October 18, 2019, the applicant acknowledged receiving the notification, objected to the proposed discharge, and submitted a statement for consideration.

On October 18, 2019, the applicant submitted a 24-page response to the notification of discharge. In this response, the applicant summarized many issues he had with his chain of command, including the following:

- On May 13, 2019, at a counseling session with the Chief's Counsel, the Master Chief accused him of trying to deflect responsibility for an incident on May 10, 2019, between the applicant and his supervisor, a Chief Warrant Officer.
- The applicant claimed that the command had not properly processed his harassment complaint against his supervisor.
- The applicant stated that his good performance evaluations contradicted the Air Force psychologist's assessment and yet the Coast Guard had ignored the second opinion he had received. He submitted copies of his recent evaluations showing good marks and other documents reflecting successful performance.
- When given the notification of discharge on October 10, 2019, he was pressured to sign the acknowledgment form and insisted on consulting a JAG. The JAG intervened to ensure he had time to consult counsel.
- The applicant disputed his command's claims that he was socially awkward, could not understand jokes or sarcasm, often repeated himself four or five times, and "belabored points to the smallest of details." He attributed these claims to misperceptions based on his national origin and native language, which is Spanish.

The applicant concluded the following:

[I]t is evident that my unit's intents to process me for separation from the Coast Guard are a product of discrimination, favoritism, reprisal, and a hostile work environment. I have attempted on various occasions with the command to request a resolution for the incident concerning the misinformation in the collateral reports that the unit gave the psychologist, I requested that appropriate corrections be made to my medical record through Coast Guard Medical, as recommended by my JAG lawyer, but the unit still refused to cooperate, commenting that the collateral reports that the unit gave to [the psychologist] didn't matter.

Therefore, I felt I had no other option except to file an Equal Opportunity complaint on 18 Oct 2019 against [his command]. The complaint was file due to the misinformation contents related to

my National Origin due to bias and comments associated about communication, which also contributed to the misdiagnosis of my first psychological evaluation. I have contacted Naval Hospital ... Mental Clinic in ... on 11 Oct 2019, 15 Oct 2019 and 17 Oct 2019 to request an appointment for a third psychological evaluation in case a third opinion is necessary. I'm still awaiting a call back from the military treatment facility for appointment availability.

On October 18, 2019, the applicant's CO recommended to Commander, Personnel Service Center that the applicant be honorably discharged due to a condition, not a disability, which interfered with his performance of duty. The CO noted the applicant's diagnosis was disqualifying for retention under Chapter 5.A.18.h. of the Medical Manual. The CO attached to this memorandum the applicant's medical records, the applicant's statement objecting to the proposed discharge, and a summary of the applicant's military record and conduct prepared by the Executive Officer (XO). The XO described the applicant's counseling by the Chiefs' Council as follows:

[The applicant] went before a Chief's Council regarding the SWE and counseling session actions. Member did not take responsibility for his actions. [He] admitted to accidentally placing his hands on CWO [The applicant] tried to justify his actions as if he was provoked, stating "CWO ... walked away from me aggressively." Member showed no acknowledgement to understand the difference between appropriate responsible behavior regarding the integrity of the SWE and standardized time limitations. Further, the member showed no understanding it is inappropriate to touch a shipmate. This led the Chiefs to question if the member has the cognitive ability to understand the difference between right and wrong. Chiefs also observed the member appeared to want to control the conversation and was quick to deflect any and all responsibility and cite grievances he has with his second line supervisor.

Chiefs Council recommended the following:

- [The applicant] be evaluated medically by qualified person for suitability
- Upon completion, and depending upon the results of the Mental Health screening, an investigation of the SWE and counseling session incident.
- Rescind [the applicant's] advancement recommendation.

The XO noted that two days after the Chiefs' Council, the applicant had reported grievances against his supervisor, the CWO. The applicant had explained that he "wanted to protect his career" and alleged that the CWO intimidated him during counseling sessions, "referred to his 'Hispanic' culture as a reason he talked to much in customer service interactions, sent erroneous and an increased number of e-mails which documented [the applicant's] unfavorable work performance and was insensitive in his rationale that supported [the applicant's] numerical marks during April's semi-annual Enlisted Rating Review." However, the grievance were investigated and "were not found to be in alignment with actual events within the division or between members." The applicant's complaints against his supervisor were unsubstantiated and the applicant was found to have tried to persuade a witness to say that he grabbed the CWO's arm accidentally. The XO stated that the command was concerned that the applicant could become "a threat or liability to others when put in an unpredictable circumstance when he is not getting his way." The XO also explained the following:

The member is found to repeat himself multiple times during command engagements when he is not getting his way and is relentless in coming back to his perspective. The member does not appear to be open to seeing any other perspective than his own. Through multiple attempts to counsel the member regarding his actions, he still does not understand the gravity of his actions. Member continues to insist his second line supervisor, CW02, is to blame for passing false reports

that led to his mental health evaluation. This is simply not true. It was the member's actions at the SWE, Counseling Session and Chiefs Council that directly led to the recommendation for a mental health evaluation.

On October 31, 2019, the applicant underwent a pre-separation physical examination. The physician noted that the applicant "was unable to sit still during interview. Repeated himself 4-5 times. Had difficulty following simple instructions." The physician noted that the applicant was not qualified for military service due to Neurodevelopment disorder with persistent deficits in social communications.

The Personnel Service Center approved the recommendation for discharge and on November 27, 2019, the applicant was honorably discharged. His DD 214 states that he was discharged due to a "Condition, Not Physical Disability," pursuant to Article 1.B.12. of the Military Separations Manual, with an RE-4 reenlistment code.

APPLICANT'S ALLEGATIONS

The applicant alleged that he was unjustly referred for a mental health evaluation in June 2019 after "two minor incidents that occurred in May 2019," including his requests for extra time to take the Service Wide Examination for advancement and the counseling session with the Chiefs' Mess, when he accidentally touched his supervisor's arm with both hands. The applicant explained that during the counseling session, the CWO was not interested in his explanations for his actions the day before, became upset, and abruptly started to leave. The applicant, reasonably fearing lower evaluation marks as punishment, tried to approach the CWO to apologize for upsetting him and to continue their conversation. At that point, the applicant "inadvertently and accidentally placed his hands on [the CWO's] arm the moment [the CWO] moved around him."

The applicant stated that two days later he decided to file a harassment and discrimination complaint against the CWO based on "a variety of incidents that had occurred since March 2019, culminating with how he was being treated for the misunderstanding that had occurred on 9 and 10 May." In retaliation, the CWO accused him of assault for the "accidental touching of 10 May 2019." He was taken to mast for the assault but NJP was not awarded. Instead, he received the Page 7 dated October 1, 2019. The applicant complained that the processing of his own complaint against the CWO was significantly delayed, which showed that the command was not interested in pursuing it. The investigation finally started on July 19, 2019, and ended on August 22, 2019.

The applicant stated that on June 3, 2019, just a couple of weeks after the Chiefs' Council, he learned that he would undergo a command-directed mental health evaluation on June 10, 2019. He alleged that the CO's decision to refer him for the evaluation was retaliatory for the harassment and discrimination complaints he had filed, although on June 4, 2019, the CO told the applicant that his complaint had not yet been forward to the CO.

The applicant claimed that when he was first evaluated by the Air Force psychologist on June 10, 2019, he was not afforded the opportunity to take the MMPI-2 in Spanish. His interview with the psychologist "lasted only about one hour" and they discussed approximately 10 of his answers to the 567 questions on the test. The applicant alleged that he "did make it known that

there was a language barrier that impacted his ability to complete the examination to the best of his abilities.” He alleged that at the end of that interview, the psychologist signed a form stating that he was suitable/fit for continued military service and was not being referred for administrative separation.

During his follow-up appointment with the Air Force psychologist on June 24, 2019, however, the psychologist shockingly diagnosed the applicant with a “neurodevelopmental disorder with persistent deficits in social communication and interaction” even though the applicant had not completed the MMPI-2 in Spanish, his native tongue; had never previously been diagnosed with any neurodevelopmental disorder or mental health disorder; and had not been diagnosed with anything following their first appointment. Moreover, the psychologist suggested he read about Autism Spectrum Disorders although that was not his diagnosis. The applicant stated that this suggestion was “reckless and unprofessional.”

The applicant argued that the Air Force psychologist had provided a “sham diagnosis” after the command initiated the mental health evaluation in retaliation for the applicant’s “valid and credible allegations of harassment and discrimination.” He argued that his prior eight years of successful military service prove that the diagnosis is false, and it is preposterous to think that the psychologist could diagnose him after a single interview and an MMPI-2 conducted in a language that is not his native tongue. Moreover, he claimed, under the rules, before discharging him, his command should have considered whether medical treatment could resolve his condition in a reasonable amount of time, but no such treatment was considered. Instead, he was sent for a single evaluation and had to pay for his own second opinion.

The applicant compared his case to BCMR Docket No. 2012-108, wherein the Board removed “Personality Disorder” from the applicant’s DD 214 because the diagnosis was based on a single evaluation session, which “casts some doubt on its accuracy” and because having the term “Personality Disorder” on your DD 214 is highly prejudicial to future employment. The applicant argued that the psychologist’s false insinuation that he might be on the Autism spectrum, when she recommended that he read about it, is similarly prejudicial.

The applicant alleged that members of his command had been harassing and discriminating against him because they wanted him to be discharged. He claimed that they confused an occasional language barrier with symptoms of mental illness, which they called “deficits in reasoning” and “repeating himself four to five times to make a point.”

The applicant stated that because the Coast Guard refused to accept the second opinion he had received on August 7, 2019, he sought another opinion from a Navy psychologist on November 22, 2019. However, he alleged, she told him that “she could not change the previous diagnosis because of what she had heard from his command” and because it had taken him too long to complete a computer survey, even though there had been technical issues with the survey and “it was not even clinical in nature.”

The applicant stated that after receiving his CO’s notification of intent to discharge, he submitted his rebuttal and reopened his harassment and retaliation complaint. He stated that a performance evaluation with low marks that he received on November 20, 2019, was retaliatory,

as was the command's decision to pass "unsubstantiated negative information [about him] to the Navy psychologist" when the psychologist directed the applicant to wait outside her office and telephoned the applicant's command.

The applicant concluded that he was unjustly discharged because he had been improperly diagnosed after his claims of harassment and discrimination became a burden to his command and so they retaliated by referring him for a command-directed mental health evaluation, which resulted in the false, prejudicial diagnosis.

To support his allegations, the applicant submitted documentation of his discharge and other records that are included in the Summary of the Record, above, and the following:

- A retired commander wrote on behalf of the applicant that he worked with him from July 2015 to May 2017. He stated that the applicant had an outstanding customer service attitude, work ethic, productivity, and uniform appearance. He stated that he was shocked to hear that the applicant was being discharged and thinks that there might have been a problem if the command did not understand that English is not the applicant's first language. He stated that the applicant initiative, coupled with English being his second language, could have been "misinterpreted as performance problems," which might persuade a "medical officer towards rendering a negative diagnosis."
- A group leader at a church where the applicant volunteered praised the applicant's friendliness and commitment. He noted that the applicant is bilingual and served as an interpreter.
- Photographs of himself with members of his family.
- Citations for medals and commendations praising his work in customer service for personnel offices.
- Some of the applicant's Coast Guard medical records, including those summarized above.

VIEWS OF THE COAST GUARD

On March 3, 2021, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief in this case.

As required by 10 U.S.C. § 1552(g), the JAG included with the advisory opinion the opinion of a clinical psychiatrist who reviewed the application and medical records. The psychiatrist stated that "the symptomatology described in the member's record is consistent with behavioral patterns described by Neurodevelopmental Disorder." In fact, based on his review, he stated that he thinks the applicant should have undergone a "full autism evaluation."

The JAG noted that the "second opinion" received by the applicant in August 2019 conflicts with the diagnosis of the Air Force psychologist. However, he argued, the new opinion of

the clinical psychologist supports the diagnosis of the Air Force psychologist. Therefore, the civilian psychologist's opinion does not overcome the presumption of regularity accorded the diagnosis of the Air Force psychologist.

In response to the applicant's claim that the disputed diagnosis and discharge were retaliatory for his complaints of harassment and discrimination, the JAG argued that the applicant has not met his burden of proving these assertions by a preponderance of the evidence. The JAG noted that the applicant's complaints were investigated and found to be unsubstantiated, and the applicant has submitted no evidence supporting his allegations of harassment or discrimination.

The JAG also argued that pursuant to COMDTINST M1900.4E, Article 9.b., a DD 214 is supposed to be "an authoritative source of personnel information for administrative purposes and for making enlistment or reenlistment eligibility determinations." The JAG noted that the information in the last eight blocks at the bottom of the DD 214, including the reenlistment code, are "data fields for internal agency use" and are labeled as such on the long version of the form, which shows the last eight blocks. The JAG also noted that veterans may request waivers of their reenlistment codes and be considered for reenlistment. Nor is a reenlistment code issued by the Coast Guard binding on the other military services.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On July 7, 2021, the applicant's attorney responded to the views of the Coast Guard and asked the Board to disregard them and grant the requested relief. The applicant submitted a new psychological assessment dated June 13, 2021, which was conducted by a bilingual clinical psychologist. The new psychologist's report states that because of the prior diagnosis of a neurodevelopmental disorder, the applicant was seen in five telehealth sessions lasting from a half-hour to two hours to challenge the diagnosis. Testing was conducted in Spanish "when available" and the interview was mostly conducted in Spanish. The psychologist also reviewed the reports of the psychologists who interviewed the applicant before his discharge. Her observations of the applicant included the following:

[The applicant] is a 30-year-old Hispanic, single, male. He was adequately dressed and groomed for the interview. ... [He] identified his primary language as Spanish and being fluent in English. Speech rate and volume were normal. Fluency was conserved. Mood was reported as "good" and affect was blunt and anxious. The client appeared to stare at times.

Attention was identified as fair to poor. Initially he was given instructions and he will not follow them. He required repetition and feedback was asked at time to confirm understanding of tasks. Once attention is placed, he had good understanding of instructions. He seems easily distracted and slightly impulsive, missing some things during exchange of verbalizations. He responded well to feedback and redirections. On occasions [he] will attempt to justify his mistakes, which impede the process of instruction and correction.

There was no identified problem with fine or gross motor functioning. Thought process were coherent, linear, logical, and goal oriented. Thought content was directed towards questions asked. Spontaneous conversation was directed towards perceived wrongdoing. Immediate and recent memory were identified conserved. [He] did not seem to be responding to internal stimuli and no psychotic features were identified.

The psychologist reported that the following tests were conducted:

- Patient Health Questionnaire (PHQ-9) showed no markers of depression;
- Generalized Anxiety Disorder (GAD-7) showed no to minimal anxiety;
- Raven's Progressive Matrices (Raven's-2) showed average intellectual functioning;
- Vineland Adaptive Behavior Scales-3 (Vineland-3) showed that the applicant's results on the Communication, Daily Living Skills, and Adaptive Behavior Composite scales were "adequate" while his results on the Socialization scale was "moderately high."
- Childhood Autism Rating Scale – 2 (CARS-2) showed that the applicant had "significant difficulties to acknowledge even the slightest mishap, difficulty, or limitation, even expected ones. The applicant's father showed the same tendency. However, the test showed that the applicant has "minimal to no symptoms of autism spectrum disorder."
- Social Responsiveness Scale – 2 (SRS-2) Self-Report, which measures the abilities of people "on the autism spectrum," showed scores on "all subscales were within the normal range and no impairment or limitation was identified for Social Awareness, Social Cognition, Social Communication, Social Motivation, and Restricted Interests and Repetitive Behavior"; and
- Minnesota Multiphasic Personality Inventory – (MMPI-3) Spanish, which measures mental health and provides evidence of mental disorders, showed the following:

Scores on the MMPI-3 Validity Scales raise concerns about the possible impact of unscorable responses and under-reporting on the validity of this protocol. The test taker answered less than 90% of the items on the Inefficiency scale (89%). All other scales had enough responses for interpretation. There are no indications of over-reporting. The test taker presented himself in a positive light by denying minor faults and shortcomings that most people acknowledge. This level of virtuous self-presentation may reflect a background stressing traditional values. He also presented himself as well-adjusted. Any absence of elevation on the Substantive Scales should be interpreted with caution. Elevated scores on the Substantive Scales may underestimate the problems assessed by those scales.

With caution noted, there are no indications of somatic or cognitive complaints, or of emotional, thought, behavioral, or interpersonal dysfunction. ... Although not at a clinical level, this individual had a slight elevation on the Dominance scale, which is indicative of tendency of being domineering in relationship with others.

The psychologist did not diagnose the applicant and concluded the following:

Given clinical interview, tests conducted, records reviewed, clinical observations, and collateral interview the client does not meet criteria for a specific diagnosis. The client displayed some difficulties in paying attention. He was able to start and stay on task and complete tasks independently on a timely manner. He also showed some staring behavior and defensiveness. He appeared anxious with the evaluation situation and the reasons for this assessment. This is likely to have impacted performance on MMPI-3 where there was a tendency to present himself in a favorable light. He would benefit from discussing events leading to dismissal, distractibility during verbal conversations, and needs to present himself in such a favorable light or explain mishaps even concerns that may be considered within the normal range. Slight elevation in Dominance scale in the MMPI-3 suggests traits of rigidity and needs to control.

The applicant argued that this thorough psychological assessment proves definitively that he was misdiagnosed by the Air Force psychologist and thus erroneously and unjustly discharged for a condition he did not even have. He continued to argue that the Air Force psychologist lacked sufficient supporting evidence to justify the diagnosis and complained that the JAG failed to address it. The applicant also claimed that evidence supports his belief that he was a victim of blatant harassment and discrimination. He alleged that the CO sent him to the command-directed evaluation just one day before the CO formally acknowledged receiving the applicant's harassment and discrimination complaint even though the complaint had been submitted to the Executive Officer and Command Master Chief on May 17, 2019.

Therefore, the applicant argued, the Board should void his separation and reinstate him on active duty with back pay and allowances.

APPLICABLE LAW AND POLICY

Military Separations Manual, COMDTINST M1000.4

Article 1.B.12.a. of the Military Separations Manual authorizes Commander, PSC to direct the separation of enlisted members "for the convenience of the Government." Members discharged for the convenience of the Government are not entitled to a hearing before an Administrative Separation Board. The authorized reasons for this kind of discharge include general demobilizations, immediate reenlistment, nonavailability for worldwide assignment, conscientious objection, motion sickness, obesity, and

A condition that, though not a physical disability, interferes with performance of duty. This basis for separation includes any medical condition identified in reference (d), Coast Guard Medical Manual, COMDTINST M6000.1 (series), which is disqualifying for appointment, enlistment or induction, but does not qualify the member for processing under reference (c), Physical Disability Evaluation System, COMDTINST M1850.2 (series). Before ordering separation, Commander (CG PSC-EPM-1) should consider evidence of the likelihood that medical treatment will resolve the condition in a reasonable amount of time, particularly in cases involving alcohol dependence or inadvertent misuse of controlled substances that results in drug dependence. However, evidence of unsuccessful treatment, treatment failure, refusal to participate in treatment, or a relapse or recurrence of the medical condition after treatment, shall also be considered, and sway heavily in favor of separation.

Article 1.B.12.d. states that a member being discharged for the convenience of the Government is entitled to consult an attorney only if the member is to receive a General discharge.

Medical Manual, COMDTINST M6000.1F

Chapter 3.F. of the Medical Manual includes the physical standards applicable to all Coast Guard military members. Chapter 3.F.1.c. states the following:

Fitness for Duty. Members are ordinarily considered fit for duty unless they have a physical impairment (or impairments) that interferes with the performance of the duties of their grade or rating. A determination of fitness or unfitness depends upon the individual's ability to reasonably perform those duties. Active duty or reserves on extended active duty considered permanently unfit for duty shall be referred to a Medical Evaluation Board (MEB) for appropriate disposition.

The remainder of Chapter 3.F. is a list of “conditions and defects that are normally disqualifying” for continuation in military service and require evaluation by an MEB. Chapter 3.F.16.f. states that developmental disorders that usually become evident in childhood or adolescence “may render an individual administratively unfit rather than unfit because of a physical impairment” and directs the reader to Chapter 5 concerning disposition. Chapter 5.A.18. states that developmental disorders are disqualifying enlistment or induction or “if identified on active duty shall be processed in accordance with Military Separations, COMDTINST M1000.4(series) if the condition significantly impacts, or has the potential to significantly impact performance of duties (health, mission, and safety).

Physical Disability Evaluation System (PDES) Manual

Chapter 2.A. of the PDES Manual includes the following “definitions”:

9. Conditions or Defects not Physical Disabilities. Certain conditions and defects may cause a member to be unfit for continued duty and yet not have physical disabilities within the meaning of the law, thereby subjecting the member to administrative separation. These conditions include, but are not limited to, alcoholism; allergy to uniform clothing; character disorders; enuresis; heat intolerance with disturbances of thermal regulation; inability to be fitted in uniform clothing; motion/travel sickness; obesity; primary mental deficiency; pseudofolliculitisbarbae of the face and/or neck; somnambulism; stuttering or stammering; systemic or marked allergic reactions following stings by red ants, bees, wasps or other stinging insects; unsanitary habits including repeated venereal disease infections. A full listing of personality and intelligence disorders is contained in chapter 5 of the Medical Manual, COMDTINST M6000.1 (series).

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions based on the applicant’s military record and submissions, the Coast Guard’s submission and applicable regulations:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely filed within three years of the applicant’s discharge.⁴

2. The applicant alleged that his administrative discharge for “Condition, Not a Disability” was erroneous and unjust and that his discharge should be voided so that he may return to active duty with back pay and allowances. 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 on the record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.⁵

3. The applicant alleged that he was a victim of harassment and discrimination, which resulted in a command-directed mental health evaluation, a false diagnosis, and his unjust discharge for Condition, Not a Disability. The timing of the mental health evaluation appears to support his allegation, but the applicant did not submit a copy of his civil rights complaint to the

⁴ 10 U.S.C. § 1552(b).

⁵ 33 C.F.R. § 52.24(b).

Board or other evidence of harassment or discrimination. In addition, the record before the Board contains substantial the evidence showing that the command-directed mental health evaluation was justified based on the applicant's misconduct and inability to admit mistakes. The record shows that on May 9, 2019, the applicant repeatedly asked the proctor of the SWE to let him complete two more test questions after the examination period had ended, which would be cheating. Then at a counseling session with the Chiefs' Council the next day, the applicant denied any wrongdoing, failed to recognize or acknowledge his misconduct, and deflected responsibility by trying to blame the proctor. When the CWO started walking away from this counseling session, witnesses observed the applicant grabbing the CWO's arm with both hands to try to keep him there. Subsequently, the applicant has repeatedly denied having grabbed the CWO's arm and claimed the contact was accidental. He also tried to blame the CWO for the contact by accusing him of "walking away aggressively." Based on the applicant's conduct during this counseling session, the Chiefs recommended that the applicant undergo a mental health evaluation, and on June 4, 2019, the CO signed the order for a command-directed mental health evaluation. Then, in her report dated June 21, 2019, the Air Force psychologist agreed that the command-directed evaluation was appropriate.

4. The fact that the applicant filed his complaint before his CO ordered him to undergo the mental health evaluation is evidence but not proof that the CO's motivation was retaliatory. Based on the applicant's conduct on May 10, 2019, the CO's decision to order the mental health evaluation appears to be justified, and the Air Force psychologist stated that the CO's decision was appropriate. Although the applicant argued that the Command Master Chief's failure to forward his civil rights complaint to the CO quickly after he submitted it on May 17, 2019, is evidence of retaliation, that argument fails because under the Civil Rights Manual, the Command Master Chief was required to attempt to mediate the applicant's complaint for at least two weeks at the lowest possible level.⁶

5. In light of findings 3 and 4, above, the Board finds that the applicant has not proven by a preponderance of the evidence that the command-directed mental health evaluation, the applicant's discharge, or any of the CO's other actions constituted harassment, discrimination, or retaliation.

6. The applicant alleged that the Air Force psychologist's diagnosis of a "neuro-development disorder with persistent deficits in social communication" was made with insufficient information and was false. The record shows that on June 10, 2019, the applicant underwent psychological testing in the morning and was interviewed by the psychologist in the afternoon. Because the test documents are not in the record, it is unclear what tests were conducted that day, but according to the applicant, they included at least the MMPI-2, albeit in English, and the psychologist reported that the CO had requested a "comprehensive" evaluation. Whether the applicant's test results might have been distorted by the need to use his English is also unclear. Although the applicant claimed that the results must have been distorted by his having to use English, documents in the record state that the applicant was fluent in English as well as Spanish and had volunteered to serve as a translator in the past.

⁶ Coast Guard Civil Rights Manual, COMDTINST M5350.4C, Chap. 4.A.1.

7. The second opinion that the applicant received from a civilian psychologist in August 2019 is unpersuasive. There is no indication that any tests were conducted, and the psychologist noted that she had had to rely only on documents provided by the applicant, who was trying to challenge the diagnosis.

8. In his response to the advisory opinion, the applicant submitted significant new evidence in the form of a lengthy report of another comprehensive mental health evaluation that the applicant underwent in June 2021. This psychologist elaborated on the test results and their meaning. Although this psychologist described a few of the same odd behaviors or tendencies that had led the Air Force psychologist to diagnose the applicant with a neurodevelopmental disorder in June 2019, this psychologist made no diagnosis.

9. Although the applicant alleged that the June 2021 psychologist's report thoroughly refutes the June 2019 psychologist's report, the Board disagrees. While the June 2021 report is more thorough, especially in its discussion of the testing, it was made expressly in response to the applicant's desire to challenge the June 2019 diagnosis, whereas in June 2019, the psychologist had no reason to explain the details of the testing and test results. The Board finds these reports equally persuasive but contradictory.

10. The applicant argued that his successful completion of eight years of active duty is strong evidence that he did not suffer from "neurodevelopment disorder with persistent deficits in social communication." But a member's circumstances, responsibilities, and stressors change over time and can elicit different responses. The applicant has not shown that a yeoman's ability to successfully complete eight years of active duty in particular assignments and circumstances necessary precludes a diagnosis of "neurodevelopmental disorder with persistent deficits in social communication."

11. The report and diagnosis of the Air Force psychologist bears a strong presumption of regularity,⁷ and the applicant has not proven by a preponderance of the evidence that the diagnosis is necessarily wrong. Therefore, the Board cannot conclude that the applicant's discharge for Condition, Not a Disability as a result of the diagnosis was necessarily erroneous or unjust. The applicant has not proven that he is entitled to have his discharge voided and to be reinstated on active duty with back pay and allowances.

12. The new psychologist's report, however, certainly casts doubt on the Air Force psychologist's diagnosis and therefore the accuracy of the applicant's narrative reason for separation and reenlistment code. Accordingly and because the applicant has complained that those entries on his DD 214 are hampering his ability to find gainful employment, the Board finds that in the interest of justice, the applicant's narrative reason for discharge should be corrected from "Condition, Not a Disability" to "Secretarial Authority"; his separation code should be corrected to match the new narrative reason for separation; and his reenlistment code should be upgraded from RE-4 to RE-3, which allows a member to reenlist if a waiver is granted.

⁷ 33 C.F.R. § 52.24(b).

13. Therefore, the applicant's request for reinstatement on active duty should be denied, but his narrative reason for separation on his DD 214 should be corrected to Secretarial Authority and his reenlistment code should be upgraded to RE-3. Reconsideration of the applicant's harassment, discrimination, and retaliation claims will be granted if the applicant submits a copy of his May 17, 2019, or other substantial evidence of the alleged harassment, discrimination, and retaliation against him.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of former YN2 [REDACTED] [REDACTED] [REDACTED] USCG, for correction of his military record is denied, but alternative relief is granted. The Coast Guard shall issue him a new DD 214 with "Secretarial Authority" as the narrative reason for separation; the corresponding separation code; and an RE-3 reenlistment code.

October 14, 2022

[REDACTED] [REDACTED]
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