DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2022-027

[redacted]
SN

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 March 11, 2022, 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 March 15, 2024, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, a former Seaman (SN/E-3), who received a General[1] discharge on July 24, 2019, after being administratively separated for misconduct, asked the Board to correct his record by upgrading his characterization of service from General—Under Honorable Conditions to Honorable, changing the narrative reason for his separation from "Misconduct" to "Secretarial Authority," and removing a negative CG-3307 ("Page 7") dated May 4, 2018, wherein he was counseled for an alcohol incident that had occurred on April 21, 2018.

The applicant explained that upon entering the Coast Guard and arriving at his first duty station in New England, he felt a difference in treatment based on his race—the applicant is a black man. The applicant stated that this difference in treatment extended to the community at large and as a result, he felt the different treatment more keenly. According to the applicant, the area experienced several instances of Ku Klux Klan (KKK) activity, such as noose being hung from a telephone pole in the next town over. The applicant alleged that his leadership was aware that the area was known for having racist tendencies, but told the crew that by placing minorities in the area, the Coast Guard was combatting the racism, ignoring the effect it would have on its members.

[1] There are five types of discharge: three administrative and two punitive. The three administrative discharges are honorable, general—under honorable conditions, and under other than honorable (OTH) conditions. The two punitive discharges may be awarded only as part of the sentence of a conviction by a special or general court-martial.

The applicant alleged that his Chief told him that if he encountered any racist activity that could be linked to the KKK to let him know. The applicant further alleged that although he felt he was being treated differently by some of his superiors, he attributed it to being new to the station. For example, the applicant alleged that MK3 W had singled him out, and although MK3 W was younger and had only been at the station a month longer, MK3 W took that to mean he was superior to applicant and had the right to treat him poorly.

The applicant explained that on the night of April 21, 2018, he was invited by higher-ranking shipmates to go out and celebrate a colleague's birthday. The applicant stated that although he was not interested in going out, because he was the newest non-rate and was invited by superiors, he felt obligated to attend in order to gain acceptance and fit in with his colleagues. The applicant further explained that he, BM2 O, BM2 O's wife, MK3 W (who was also the designated driver), and BM2 R spent the evening together bar hopping. The applicant stated that he was excited to be included in the invitation because he thought it indicated he was being accepted by his fellow crew members. The applicant alleged that throughout the evening, BM2 O—his superior—bought the applicant a majority of his drinks, which was ironic because BM2 O was the station's Command Drug and Alcohol Representative (CDAR).

The applicant explained that each time they went to a new bar, the applicant would take his seat first and BM2 O's wife would end up sitting next to him, which made him feel uncomfortable. The applicant stated that it struck him as odd that BM2 O's wife would choose to sit next to him, but felt it was a sign of acceptance into the friend group. The applicant alleged that as the night progressed, BM2 R and BM2 O's wife displayed an abundance of comfort toward each other as they were constantly touching. According to the applicant, BM2 R drank so much throughout the evening that by the time the group decided to go home, he was sloppy drunk, and BM2 O's wife was not far behind him. The applicant alleged that while BM2 O's wife was not falling down like BM2 R was, her limbs were flying all over the place, her balance was exceptionally compromised, and her speech was slurred. The applicant explained that when the group went back to BM2 O's home, BM2 O's wife sat between himself and BM2 R in the truck. The applicant further explained that both he and BM2 R put their arms over the back of the seat to create more room. The applicant stated that BM2 O's wife later accused him of having put his hands down her pants and touching her during this car ride, which he alleged is patently untrue. The applicant alleged that no one else testified to seeing the applicant violate BM2 O's wife, and the entire incident was based solely on BM2 O's wife's statement. The applicant argued that not even BM2 R observed any such behavior and given the close proximity of everyone in the car, it would have been very difficult to do anything without the others seeing.

The applicant explained that when he arrived at BM2 O's home, all of the partygoers were invited inside to continue hanging out and celebrating BM2 R's birthday. The applicant stated that had BM2 O's wife been uncomfortable with him coming into the house, that would have been the time to say something. The applicant explained that at one point, he went into the kitchen and when he entered, he observed that BM2 O's wife was trying to reach something in the cupboards. The applicant explained that BM2 O's wife was still severely intoxicated and began to stumble in her attempt to reach the cupboard. The applicant stated that he quickly reacted to the situation and steadied BM2 O's wife by grabbing her around the hips, instinctively protecting her from hurting herself. At this point, the applicant alleged that BM2 O's wife proceeded to run out of the kitchen. He stated that he did not know what caused her to run away and certainly did not touch her in a

sexual way as later alleged by MK3 W. The applicant pointed out that MK3 W was the same individual who had expressed his derision for the applicant and treated him differently than he treated everyone else.

The applicant stated that after BM2 O's wife ran out of the kitchen, BM2 O entered the kitchen and spoke to him. The applicant alleged that he told BM2 O that nothing sexual had happened and that BM2 O's wife had almost fallen and that he caught her in order to prevent her from seriously injuring herself. The applicant further alleged that BM2 O persistently asked him if he wanted the BM2's wife, to which the applicant emphatically responded "no" in addition to expressing his confusion with the situation. The applicant explained that he is not the kind of man to overstep the boundaries with another man's wife, regardless of who it was. The applicant stated that his assurances seemed to calm BM2 O's hostility, and their conversation ended with a handshake and a hug and the applicant thought that was the end of it. However, the applicant explained that upon reporting to work on the next workday, April 23, 2018, he was informed by his Chief that he was being investigated for sexual assault. The applicant alleged that his Chief would not listen to what he had to say, and he was subsequently transferred to a new station.

The applicant stated that he was completely cooperative during the investigation until the Investigating Officer (IO) asked him about putting his hands down BM2 O's wife's pants. The applicant explained that at that point he realized the magnitude of the allegations being made against him and requested a lawyer, which he never received. The applicant alleged that after the investigation was opened he had no idea what was happening because no one would communicate with him. According to the applicant, he reached out to his commanders in July 2018, in an attempt to figure out what was happening with the investigation, but no clear answer was given. The applicant alleged that it was not until October 2018, that he was informed that the investigation into sexual assault was closed and that he would not face any consequences as a result of the allegations. However, the applicant explained that despite the investigation uncovering no wrongdoing on his part, he was given a negative Page 7 for an "Alcohol Incident" after his Command determined that alcohol was a significant and causative factor when he acted inappropriately toward a civilian female, BM2 O's wife. The applicant stated that this was his first documented alcohol incident, and despite the lack of proof, other than hearsay from a highly intoxicated woman and a crewmember who clearly disliked him, he was awarded the Page 7.

The applicant stated that as a result of this Page 7, in June 2018, he underwent alcohol screening, which did not result in any determination that he had a preexisting alcohol condition. On the contrary, the applicant alleged, the alcohol screener, LT B, made it clear that he did not and could not diagnose the applicant with a preexisting alcohol condition. The applicant stated that where the preexisting alcohol condition diagnosis came from was unclear. The applicant alleged that the only individuals claiming he had a preexisting alcohol condition were the members of his command—people without the knowledge and training to make such a diagnosis.

The applicant explained that on January 23, 2019, he was presented with a notification of his Command's intent to discharge him. The applicant alleged that he appeared before his leadership to contest his discharge and present them with LT B's email, which stated the applicant could not be diagnosed with a preexisting alcohol condition, but his Command told him that his leadership went with the alcohol discharge because it was easier to separate him using that route. According to the applicant, there was not enough evidence against him to convene a court-martial

and given the likelihood that the court-martial would be decided in the applicant's favor, taking the applicant to a court-martial was not a prudent course of action for the Coast Guard.

The applicant stated that in late April 2019, he was notified that a police report was made against him and that that he was being discharged for committing sexual assault. The applicant claimed that his command relied upon the Coast Guard Investigative Service's (CGIS) investigative report to determine that a preponderance of the evidence supported such a finding, but his command's position was faulty because the CGIS investigation did not result in punishment. The applicant stated that, had the CGIS investigation turned up anything that looked like a preponderance of the evidence, it was unclear to him why no action was previously taken. The applicant alleged that when he met with his Command a second time to object to his discharge, present his statement, and question the alleged new evidence, his command refused to provide any answers.

The applicant claimed that in June 2019, after he learned of his pending separation, he asked his stepfather, who was a supervisor in charge of an investigation unit,[2] to look into the situation and look over the police report, but no police report could be found. The applicant alleged that when he confronted his Master Chief about the missing police report, the Master Chief allegedly said there was no police report and that it had all been a lie. Unfortunately, the applicant stated, he did not get this statement in writing, and he was only shown an email from the victim asking the applicant's command about the outcome of her allegations. The applicant claimed that when he asked to take a picture of the email, he was told no, that it would have to be run through legal first.

The applicant claimed that his command did not listen to him; nor did they base their discharge on anything other than a phone call from an alleged victim asking what had been done to address her allegations. The applicant contended that rather than standing by the creed of the American justice system, "innocent until proven guilty," his guilt was assumed without proper evidence, without the ability to confront his accuser or rebut any evidence because there was no evidence to support an allegation he had committed a sexual assault. Instead, the applicant argued that he was forced to suffer the consequences of an inappropriate and egregious miscarriage of justice committed by his command.

The applicant argued that he should never have been issued a negative Page 7 for the night of April 21, 2018, because "Units are prohibited from using the CG-3307 to document events not listed." The applicant claimed that his command chose to follow the alcohol incident authorized by the policy, but failed to abide by the edicts for issuing alcohol incidents via a Page 7. According to the applicant, the list of authorized Page 7 entries, for the purpose of an alcohol incident, the Page 7 is supposed to include the "reason for the arrest." However, the applicant explained that his alcohol incident did not have any indication of arrest because he was never arrested. The applicant claimed that the Page 7 was issued solely on the basis of accusations made by unreliable parties—one who was extremely drunk and one who had already shown his bias against the applicant on previous occasions. The applicant contended that the Page 7 was wrongfully awarded because it does not meet the requirements authorized by policy.

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[2] The applicant did not identify the unit or service.

The applicant explained that part of the strength in the military lies in the perception of the community that it is just, fair, and honorable and shaking that foundation causes a loss of faith in the authority of the military. According to the applicant, a disturbance in the community's trust in its military occurs when clearly biased parties are given the authority to perpetuate injustice. The applicant alleged that in his case, BM2 O was given that authority. The applicant explained that a Command Drug and Alcohol Representative serves as the "advisor to the command in administering the units substance abuse program," and while serving as that advisor, BM2 O put himself in an untenable situation when he bought a majority of the drinks the night of April 21, 2018. The applicant alleged that for BM2 O to then report the applicant based on dubious testimony from unreliable witnesses for unsubstantiated conduct, after plying the applicant with alcohol, creates a perception of bias that cannot be overcome. This is especially problematic because the only accuser was BM2 O's wife, who herself was "three sheets into the wind."[3]

The applicant claimed that he did not have a preexisting alcohol condition that would have warranted his separation. The applicant alleged that in an email from LT B, the applicant's screening physician, LT B stated that "at no point in that write-up did I state it was a pre-existing condition nor am I able to determine that." LT B further stated, "I told him he should seek legal advice if he is being discharged based upon an alcohol screening that was performed by me, an Addiction Oriented Healthcare Provider (AOHCP). He should not be punished for being honest during this medical appointment." The applicant argued that it is troublesome that his command, who was not in a position nor did they possess the knowledge required to make such a diagnosis, even though his examining physician did not, and used this erroneous determination to discharge him. The applicant contended that he does not have a preexisting alcohol condition. The applicant claimed that it was only after he disputed his discharge, using LT B's statement to support his objections, that it was decided to retain him in the service.

The applicant alleged that he was subsequently erroneously and unjustly discharged based upon the discreditable word of BM2 O's drunk wife, and his discharge was re-initiated only after her phone call to check on the status of her claims. The applicant further alleged that his command falsely told him that a police report had been filed and that it required he be discharged. According to the applicant, his command implied that he knew what he did and that the police report and CGIS investigation established that there was a preponderance of the evidence on which to base his discharge. The applicant alleged that the only evidence of wrongdoing was hearsay and was brought forth by a white woman, who was intoxicated and living in the middle of a town with plagued by racism, and MK3 W, a man who had already shown disdain for the applicant. The applicant argued that neither of these individuals were credible witnesses. The applicant contended that because the CGIS investigation resulted in no charges being brought against him, there is no evidence he committed the misconduct alleged.[4]

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on January 23, 2018.

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[3] "Three sheets into the wind" is an idiom for someone who is extremely intoxicated from alcohol.

[4] The applicant recited his allegations about an erroneous police report and his command's failures. Because these arguments and allegations were already adequately addressed elsewhere in this opinion, they will not be summarized here.

On March 22, 2018, after completing recruit training, the applicant executed Permanent Change of Station (PCS) orders to his first unit, which was in New England.

On April 21, 2018, according to a CGIS report, the applicant went out with shipmates from his unit to celebrate a birthday. The applicant, along with his shipmates consumed alcohol at multiple establishments. While on the way home from the night of drinking, the applicant sat in the back seat of a truck with another shipmate and the alleged victim between them. The victim subsequently alleged that while in the car, the applicant had put his hand down her pants and touched her in a sexual manner.

On April 22, 2018, CGIS was notified by Commander (CDR) MS, the applicant's Sector Commander, that the applicant had allegedly made unwanted sexual contact toward another service member's wife. As a result, CGIS initiated an investigation, and an investigating agent began interviewing all those involved. The CGIS interviews are recorded as follows:

- Victim [BM2 O's wife] stated the following: On Saturday night, 04/21/2018, she traveled to [redacted] restaurant in [redacted], to celebrate (PK [person with knowledge]) BM2 [R] and BM3 [KS's] birthdays, arriving at approximately 1700. She and her husband (PK) BM2 [O], traveled from their home in [redacted], to the Walmart parking lot in [redacted], where they met (W [witness]) MK3 [W], their designated driver. She, her husband, BM2 [O], (S [suspect]) SN [Applicant], and MK3 [W] traveled together from [redacted] Restaurant in [redacted]. Originally she thought it was just BM2 [R] they were meeting, and was not expecting (S) SN [Applicant]. MK3 [W] drove, BM2 [O] sat in the front passenger seat, BM2 [R] sat in the rear right seat, SN [Applicant] sat in the rear left seat, and she sat in the rear middle seat. This was the first time she had met (S) SN [Applicant], and the trip to [redacted] was uneventful. (S) SN [Applicant] made no sexual comments, gesture, or jokes during this trip and did not touch her.

  At approximately 1830, they departed [redacted] and went to [redacted]. The seating arrangement was the same, and the trip was uneventful. They were there for approximately thirty minutes, had one drink, and left because the place was "creepy." They traveled to the [redacted] in [redacted]. The seating arrangement in the vehicle remained the same, and there were no issues during the trip.

  At the [redacted] she was having a good time, she knew the owners and she felt safe. She had two vodka cranberries, one jaeger shot; and she was feeling out of it and that was enough for her. She recalled that (S) SN [Applicant] had two beers, one hard cider, and a Jaeger shot.

  They departed the [redacted], however she does not recall what the time was. BM2 [R] helped her into the vehicle. The seating arrangement in the vehicle was the same, with BM2 [R] in the back right seat, (S) SN [Applicant] in the back left seat, and she was seated in the back middle seat with her seatbelt on. During the ride from the [redacted] to her house, (S) SN [Applicant] put his arm on her shoulder; she shrugged her shoulder to move his arm away. She was leaning forward in her seat, and (S) SN [Applicant] than put his hand in her pants. She was wearing jeans, cotton panties, and a baseball T. (S) SN [Applicant] put his hand under her panties and against her skin and was rubbing both of her buttock cheeks, groping and caressing. (S) SN [Applicant] did not touch her anus or vaginal area, only her buttocks. She tried to push his hand away, but she was intoxicated, she could compute what was going on, but was not able to react. The ride from the [redacted] to her house takes approximately five minutes, and it felt to her that (S) SN [Applicant] was touching her during the entire ride. When they arrived at her house, BM2 [R] helped her out of the car and she told him that (S) SN [Applicant] had put his hand down her pants and touched her butt; BM2 [R] "freaked out." She was able to walk, but BM2 [R] helped her into the house.

  Inside the house she was standing in the kitchen and (S) SN [Applicant] came up behind her and put his hands on her hips, close to her waist, she felt this was a very intimate gesture. MK3 [W] witnessed this. She went into the living room crying, where her husband and BM2 [R] were at, and she told BM2 [R] what had

happened. Her husband, BM2 [O] was unable to understand the full extent of what was going on and thought that (S) SN [Applicant] was just flirting with her. She did nothing and said nothing that would have let (S) SN [Applicant] think she was interested in him, she was caught completely off guard and it was unexpected.

- In pertinent part, BM2 R stated the following: From the [bar] to the [victim's] home, the seating arrangement was the same. He did not witness any interactions between SN [Applicant] and [victim], because by this point he was drunk, his eyes were open, but he was looking straight ahead and out the front window in an attempt to keep from getting sick. When they arrived at the house, he helped [victim] out of the vehicle, and she told him that SN [Applicant] had touched her butt.

  They went into the house and he went straight to the couch in the living room. He was on the couch petting the dog, when [victim], who was sad, came in from the kitchen and came up to him and cried on his shoulder and said that SN [Applicant] had touched her butt. [Victim] asked him if it was bad that she had said something, and asked if she was a slut for it. He told her no, we're here to protect you. BM2 R stated that [victim] opens up when she is drinking. He has seen her emotional before, but never crying. BM2 [O] spoke to SN [Applicant] in the kitchen. Afterward, [victim] and BM2 [O] went into their bedroom to talk. He texted MK3 [W] and told him it was time to leave. He knocked on the bedroom door and told them they were leaving.

  During the ride back to the barracks to drop off SN [Applicant], SN [Applicant] stated "dude, I don't know what happened tonight, why people acting the way they are." He told SN [Applicant] that it was best that they don't talk. SN [Applicant] replied roger, and laid down in the back seat.

- In pertinent part, MK3 [W] stated the following: From the [bar] to the house he did not see or hear anything, the music was loud and he was just driving.

  When they arrived at the house, SN [Applicant], BM2 [O], and he went into the house, while [victim] and BM2 [R] were outside talking, and it seemed that something was wrong. In the house, BM2 [O] and BM2 [R] went into the living room to set up the karaoke machine. He was in the dining room and saw [victim] reaching up and trying to get something from the cupboard above the refrigerator. As she was doing this, he saw SN [Applicant] come up behind [victim] and put his hands on her waist, near her hips. SN [Applicant] moved in close to her and his body was touching her or was close to touching her. He described this touch as being sexual in nature, based on where and how he touched her. He did not see it as SN [Applicant] trying to help her get something out of the cupboard. [Victim] immediately stopped, started crying, and went to BM2 [O] in the living room for help. BM2 [O] went into the kitchen and spoke to SN [Applicant]. He and BM2 [R] decided to get SN [Applicant] out of the house and they left.

  On the trip back to the barracks, SN [Applicant] stated something to the effect of "I'm confused what's going on." Then SN [Applicant] went to sleep in the back seat. MK3 [W] provided a written statement (MK3 [W] Affidavit dated 04/23/2018).

- April 24, 2018: In pertinent part, the applicant stated the following: He thought that it was sexual harassment that we wanted to talk to him about. He was under the impression, maybe it was harassment, and it would not be sexual assault, because his Chief at the Station told him he was accused of sexual harassment.

  At the [bar], (V) [Victim] showed him a lot of attention. He wouldn't say she was flirty, or that she was interested in him, but she showed him a lot of attention. On the ride from the [bar], while in the truck, he and (V) [Victim], were laughing and joking, and he put his arm around her twice. He received no signs that she did not like it.

  At the [Victim's] home, in the kitchen, BM2 [O] asked him if he wanted his wife. SN [Applicant] was baffled that BM2 [O] thought that he wanted to get with his wife. SN [Applicant] thought that BM2 [O] did not like that his wife was showing him a lot of attention. He described the attention (V) [Victim] was showing him as laughing, goofing around, and telling BM2 [R] that she liked this kid, he was a good guy, and she should hook him up with one of her friends.

> When asked about putting his hands on (V) [Victim's] hips, as witnessed by MK3 [W] and described as sexual in nature, (S) SN [Applicant] ended the interview at approximately 1050, and signed the Article 31(b) Rights Form identifying that he wanted a lawyer.

On May 4, 2018, the applicant received an alcohol incident via a form CG-3307 ("Page 7") after it was determined that his alcohol consumption on April 21, 2018, was a significant or causative factor when he acted inappropriately towards a civilian female. The Page 7 stated that the applicant's actions were a violation of the Uniform Code of Military Justice (UCMJ) and brought discredit upon the service. This was the applicant's first documented alcohol incident.

Due to having received an alcohol incident, the applicant was required to undergo alcohol screening with a Coast Guard Addiction Oriented Healthcare Provider (AOHP).[5]

On January 23, 2019, the applicant's parent command issued a memorandum wherein it notified the applicant that it was initiating discharge proceedings due to a diagnosis of substance abuse disorder within the first 180 days of service. The applicant acknowledged this notice, objected to his discharge, and submitted a statement. Personnel Service Center - Enlisted Personnel Management (PSC-EPM) rejected the command's recommendation based on a different interpretation of the Coast Guard's pre-existing alcohol dependency policy.

On May 2, 2019, more than a year after the incident, Captain (CAPT) L, the applicant's Sector Commander, issued a memorandum wherein he notified the applicant that he had initiated separation proceedings against him due to his "commission of a serious offense." CAPT L stated that the reasons for his action were based upon the CGIS investigation covering the April 21, 2018, incident wherein a preponderance of the evidence showed that he had committed abusive sexual contact by causing bodily harm. That same day the applicant acknowledged receipt of CAPT L's notification, elected to submit a statement, which he did, and objected to his separation.

On May 8, 2019, CAPT L issued a memorandum wherein he recommended the applicant be separated from the Coast Guard. The relevant portions of this memorandum are recorded as follows:

> 2. On 21 April 2018, SN [Applicant] was involved in an incident where it was determined that he committed abusive sexual contact. He was also given an alcohol incident for the events that occurred.
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> 3. SN [Applicant's] case went to District [redacted] for disposition in the late spring 2018. District [redacted] elected not to act because the victim stated she would be out of the country and unavailable at any potential proceedings. At the Sector level, we interpreted the administrative alcohol policy such that we expected SN [Applicant] would be discharged for pre-existing alcohol dependency. This process did not require victim participation. Based on these factors, Sector pursued an administrative separation, which was subsequently returned by EPM-1 with a contradictory interpretation of the pre-existing alcohol dependency policy. To be clear, Sector did not request retention but did report that SN [Applicant's] attitude and work ethic were commendable given the prevailing circumstances. Recently, the victim contacted the Coast Guard and local law enforcement, prompting the Sector to re-evaluate the case.

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[5] In the background section of its advisory opinion, the JAG claimed that the AOHP diagnosed the applicant with a substance abuse disorder. However, the Coast Guard failed to provide any records to support this claim and the AOHP's subsequent statement on behalf of the applicant contradicts the JAG's claims.

On July 24, 2019, the applicant was separated from the Coast Guard with a General—Under Honorable Conditions characterization of service, a narrative reason for separation of "Misconduct," and a reenlistment code of RE4.

VIEWS OF THE COAST GUARD

On October 11, 2022, a judge advocate (JAG) for the Coast Guard submitted an advisory opinion in which he 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 the applicant failed to prove an error or injustice with the issuance of an alcohol incident for his conduct on April 21, 2018. The JAG contended that the applicant conflated the draft language in an alcohol incident template form as a policy requirement when he claimed that because his alcohol incident did not include any indication of arrest. The JAG explained that the full language from the Page 7 alcohol incident template forms states, "The description *should* include the time, date, location, reason for arrest (i.e., driving under the influence, public intoxication, etc.), BAC (if known), and other pertinent information." (emphasis added). The JAG argued that it is clear from this language that an alcohol incident does not require arrest information, but is simply an example of pertinent information that should be included if applicable. In this instance, the JAG stated that the applicant was not arrested, so any information regarding an arrest would not have been included. The JAG argued that the absence of arrest information does not nullify the applicant's Page 7 alcohol incident.

The JAG further argued that the applicant failed to prove an error or an injustice with his separation. The JAG claimed that the although the applicant claims there was no evidence of misconduct, his contentions are contradicted by his own admission that the victim made statements accusing him of misconduct. The JAG noted that the applicant also admitted that witnesses observed his actions and provided witness statements outlining their observations. The JAG argued that victim and witness statements are evidence of misconduct that may be considered by the command. Second, the JAG stated that while the applicant relied on a lack of punishment as his basis for claiming that there was insufficient evidence for his separation, his argument fails because policy does not require prior punishment for a misconduct determination. The JAG explained that there is broad statutory authority given to commanding officers to maintain Coast Guard units and bases, including order and discipline.[6] The JAG argued that the applicant's command choosing to administratively separate the applicant, instead of utilizing non-judicial punishment or court-martial, does not support the applicant's assertion that there was insufficient evidence for a finding of misconduct by a preponderance of the evidence. Furthermore, the JAG argued, the applicant's command did try to use the military judicial system, but the victim was allegedly unavailable for the proceedings. Accordingly, the JAG argued, for logistical reasons, not a lack of evidence, the applicant's command did not utilize the military judicial system.

The JAG claimed that the applicant's contentions that the only evidence against him was hearsay and from individuals who were biased and racist must also fail because he failed to provide any evidence to support his claims. The JAG alleged that the thrust of the applicant's arguments seems to be an attempt to undercut the reliability of the evidence against him. The JAG stated that

[6] 14 U.S.C. § 504(e) and 18 U.S.C. § 7(3).

although the applicant makes his own determinations about the veracity of the evidence, this does not rebut the commanding officer's findings. The JAG argued that it was exclusively within the authority and discretion of the command to weigh the evidence when determining misconduct. The JAG stated that although the applicant may believe that his account of the incident should be given more weight than whatever evidence the command relied upon, nothing in policy required the commanding officer to accept the applicant's account and give it more weight than other evidence. The JAG argued that neither the applicant's unsupported assertions that the witnesses' evidence should be discounted nor the applicant's disagreement with the commanding officer's reliance on particular evidence prove error or injustice regarding a finding of misconduct.

Regarding the applicant's claim that his due process rights were violated, the JAG explained that the applicant failed to articulate the particular procedures he believed the Coast Guard violated. Nevertheless, the JAG claimed that the applicant's assertions are unfounded. The JAG argued that the applicant was provided all due process afforded to him under the law and policy. The JAG explained that the applicant was provided notice of the Coast Guard's intent to separate him due to the commission of a serious offense, the applicant was notified and acknowledged the he could consult with an attorney, and he was provided with an opportunity to submit a statement on his behalf, which he did. The JAG argued that the Coast Guard followed separation policy as outlined in Article 1.B.17.e. of the Military Separations Manual, COMDTINST M1000.4.

Finally, the JAG argued that the applicant is not entitled to an upgraded form DD-214 because the underlying basis for the applicant's separation was for "commission of a serious offense," specifically, abusive sexual contact, and therefore, the applicant's current characterization of service and narrative reason for separation are accurate and within the discretion of the Separation Authority.

APPLICANT'S RESPONSE TO VIEWS OF THE COAST GUARD

On October 25, 2022, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within 30 days. The Chair received the applicant's response through counsel on June 21, 2023. However, upon preparing the decision for the Board, the Staff Attorney requested the CGIS Report on Investigation and upon receiving both a redacted and unredacted copy of the report, the Staff Attorney sent the redacted report to the applicant's attorney and invited her to respond within 30 days. The applicant's attorney requested and was given multiple extensions to file a response to the CGIS reports. The Chair received the applicant's final response on September 11, 2023.

Through counsel, the applicant claimed that based on research on the unreliability of eyewitness memory recollection and perception of events, experts argue that the "legal system should not convict individuals on eyewitness testimony alone, but rather should require corroborative evidence."[7] According to the applicant, that was what happened in his case because

[7] Lacy JW, Stark CEL. *The neuroscience of memory: implications for the courtroom*. Nat Rev Neurosci. 2013 Sep;14(9):649-658; *see also*
Lola Henry, *Is Memory Reliable?* (Dec. 1, 2022), available at https://theclassicjournal.uga.edu/index.php/2022/12/01/ismemoryreliable/#:~:text=Memory%20is%20generally%20unreliable%20for%20highly%20accurate%20recolections.

there was a conviction based on zero corroborative evidence.[8] The applicant claimed that the erroneous allegations against him were based solely on two witness statements: an intoxicated alleged victim and a man who had a history of mistreating the applicant. Other than these two individuals, the applicant stated, no other individuals claimed to have witnessed any abusive sexual contact. The applicant stated there was no other evidence that corroborates the witness statements. No tangible evidence whatsoever. No photos. No recordings. No video. No DNA evidence. The applicant contended that at the end of the day, this is a case of "he said, she said," and should have been treated as such pursuant to the policy of "innocent until proven guilty." The applicant alleged that instead of corroborating the witness statements with reliable and tangible evidence, the witness statements were taken as hard fact, which led to numerous additional erroneous allegations and misapplications of law and policy.

The applicant noted that the alleged victim herself was not even available to participate in further proceedings and thus the Coast Guard was unable to corroborate her hearsay allegations even if they wanted to. According to the applicant, there is no credible or corroborated evidence in this case to support the allegations made against him by the required preponderance of the evidence standard of proof, and the only extant evidence is hearsay.

The applicant argued that the error in this case is that the Coast Guard command, after a CGIS Investigation riddled with errors, erroneously and contrary to law sustained allegations of abusive sexual contact and an alcohol incident against him. The applicant further argued that the injustice and further error is that the Coast Guard command misinterpreted the medical screening which came from the alcohol incident and from the misinterpretation decided that he had a pre-existing alcohol condition that, in conjunction with the abusive sexual contact allegations, led to his subsequent separation from the Coast Guard. The applicant stated that as a result of these errors, he was discharged with a "Under Honorable Conditions" categorization and a narrative reason of "Misconduct," which caused him to endure severe personal and professional tribulations and harm.

The applicant explained that two days after the alleged incident, he reported for work and was told by his Chief, prior to his rights being read to him, that he was being investigated for sexual harassment, but that was later changed to abusive sexual contact. The applicant claimed that he was not read his rights because his Chief was allegedly only informing the applicant of the investigation. The applicant stated that naturally he wanted to defend himself, and he denied the allegations, but his Chief would not listen to what he had to say. Instead, the applicant claimed that he was moved from the Sector and the CGIS investigation was started that same day.

The applicant alleged that when the CGIS investigation commenced, it was then that he was read his rights and told that he was not being investigated for sexual harassment but for "sexual assault." The applicant stated that he completely cooperated until the investigating officer questioned him about placing his hands on the victim's hips to keep her from falling. At that point, the applicant claimed, he realized the magnitude of the false accusations against him and requested an attorney, but received no attorney. In addition to not receiving an attorney when he requested one, the applicant stated that he had no idea what was happening with the investigation because no one communicated with the applicant. The applicant alleged that he reached out in July 2018

[8] The Board notes that the applicant was not convicted on any charges through Non-Judicial Punishment or a court-martial, but was administratively separated for misconduct due to the commission of a serious offense.

to ask what was happening with the investigation, but no one would provide him with an answer. However, he stated that in October 2018, Chief Warrant Officer (CWO) H verbally notified the applicant that nothing had come of the alleged abusive sexual contact allegations and the investigation was closed. The applicant stated that no charges were pursued against him in the form of NJP or court-martial.

The applicant explained that the interviews probing the witnesses' recollection about what they believed to have occurred did not commence until two days after the alleged incident between the applicant and the victim. The applicant argued that there are countless empirical research studies that show that the accuracy of eyewitness testimony erodes over time.[9] The applicant claimed that eyewitnesses can also perceive events as different than they actually were and even build false recollections about people or things that they only think they saw.[10] The applicant explained that of the two alleged abusive sexual contact incidents that he was accused of, only the second was allegedly witnessed by another person, MK3 W, and the only eyewitness to the first was the alleged victim. The applicant stated that everyone else in attendance was intoxicated and claimed not to have witnessed the alleged incidents take place. Other than the victim's statement and MK3 W's statement, the applicant claimed, there was no other evidence found during the investigation to collaborate the allegations of abusive sexual contact.

The applicant argued that pursuant to Article 1.A.d.2. of the Coast Guard's Drug and Alcohol Manual, COMDTINST M1000.10, an alcohol incident is:

> 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 applicant contended that despite the first CGIS investigation being unable to substantiate any of the allegations made against him, on May 4, 2018, his command issued him an alcohol incident. The applicant alleged that at this point in time, his commanding officer, officer-in-charge, or the CGIS investigation had determined that he had: (1) loss of ability to perform assigned duties; (2) brings discredit upon the Uniformed Services; (3) violated the Uniform Code of Military Justice (UCMJ); or (4) violated Federal, state, or local laws. The applicant argued that despite having met none of these requirements outlined in policy, he was still given an alcohol incident. The applicant contended that the remarks made in the alcohol incident were false at the time and continue to be false because he was not officially found to have committed a violation of the UCMJ until a year later on May 1, 2019. The applicant claimed that this was his first and only alcohol incident and that he had no documented history of alcohol issues up to his point. The applicant pointed out that the Page 7 documenting the alcohol incident failed to note that his unit's Command Drug and Alcohol Representative, BM2 O, a superior enlisted service member and the alleged victim's husband, purchased most of the alcohol and drank in excess with him that night.

The applicant argued that when an agency makes a determination such as the one made by the Coast Guard in this case, the agency has to consider relevant factors and articulated a rational

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[9] Lin, W., Strube, M.J. & Roediger, H.L. The effects of repeated lineups and delay on eyewitness identification. Cogn. Research 4, 16 (2019). https://doi.org/10.1186/s41235-019-0168-1.

[10] Stephen L. Chew, *Myth: Eyewitness Testimony is the Best Kind of Evidence*, (Aug. 20, 2018), https://www.psychologicalscience.org/uncategorized/myth-eyewitness-testimony-is-the-best-kind-of-evidence.html.

connection between the facts found and the choice made, or otherwise be subject to a federal court overturning the decision for being arbitrary or capricious.[11] The applicant claimed that an agency action is arbitrary and capricious if the agency has: (1) relied on factors that Congress or a state legislature (as the case may be) had not intended it to consider, (2) entirely failed to consider an important aspect of the problem, (3) offered an explanation for its decision that runs counter to the evidence before the agency, or (4) issued a decision so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[12] The applicant stated, in other words, if an agency commits any one of these four violations of the Administrative Procedure Act ("APA") their action is deemed arbitrary or capricious and thus contrary to law. The applicant alleged that this Board should grant the applicant's request for relief because a denial would likely be overturned and ruled arbitrary and capricious by a federal court since a denial would fail to consider relevant factors and articulate a rational connection between the facts found and the choice made.

First, the applicant claimed that the CGIS investigation results and the advisory opinion's recommended denial are arbitrary and capricious because they relied on factors that Congress had not intended it to consider such as inadmissible evidence, such as hearsay and uncredible witness statements. Second, the applicant claimed that the CGIS investigation results and the advisory opinion's recommended denial are arbitrary and capricious because they entirely failed to consider an important aspect of the problem, such as the applicant's presumption of innocence, his side of the story, and medical statements that he does not have an alcohol disorder. The applicant contended that the advisory opinion also failed to properly consider the Board's mandate under Title 10, U.S. Code § 1552 to correct errors and injustices in the record. Third, the applicant claimed that the CGIS investigation results and the advisory opinion's recommended denial are arbitrary and capricious because they offered an explanation for its decision that runs counter to the evidence before the agency. According to the applicant, their decisions claim that the evidence met the burden of proof by a preponderance of the evidence when it did not. Finally, the applicant claimed that since the allegations cannot be supported by the evidence in this case, the CGIS investigation results and the advisory opinion's recommended denial are arbitrary and capricious because they issued a decision so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

The applicant alleged that on the issue of abusive sexual contact, the Coast Guard's failures to abide by its rules and policy of providing an attorney to the applicant when he requested one, informing him of the proceedings commenced against him, and informing him of his right to an Administrative Separation Board (ASB)[13] and allowing him to exercise that right was arbitrary and capricious.[14] The applicant contended that not only were these violations per se arbitrary and capricious for violating the Coast Guard's own rules and policies, but they also violated his Fifth

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[11] *AT&T Corp. v. F.C.C.*, 349 F.3d 692 (D.C. Cir. 2003).
[12] Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983); In re Review of 2005 Annual Automatic Adjustment of Charges for All Elec. and Gas Utilities, 768 N.W.2d 112 (Minn. 2009); *see also* 2 Am. Jur. 2d Administrative Law § 477.
[13] Article 1.B.17.e. of the Coast Guard Military Separations Manual, COMDTINST M1000.4, states that members with fewer than eight years of service are not entitled to an Administrative Separation Board.
[14] *Guier v. Teton County Hosp. Dist*., 2011 WY 31, 248 P.3d 623 (Wyo. 2011).

Amendment right against self-incrimination, *Miranda*,[15] and his Sixth Amendment right to counsel.[16] On the issue of the alcohol incident, preexisting alcohol condition, and subsequent discharge, the applicant claimed that the Coast Guard's failures to abide by its rules and policies was also arbitrary and capricious.[17] According to the applicant, he has viable claims for damages under the Privacy Act.

The applicant explained that the Privacy Act safeguards the public from the unwarranted collection, maintenance, use, and dissemination of personal information contained in agency records; it does so by allowing an individual to participate in ensuring that his records are accurate and properly used, and by imposing responsibilities on federal agencies to "maintain" their records accurately.[18] Here, the applicant argued that pursuant to the Privacy Act 5 U.S.C. § 552a(g)(1)(A) and (C), he has a valid amendment claim to expunge the inaccurate information in his record, and a valid adverse determination claim to award him a retroactive promotion or at the minimum a referral to an SSB.[19] The applicant stated that if he is forced to pursue these claims in federal court he will also seek, and likely be granted: (1) monetary damages for the Defendants' refusal and/or failure to comply with the Privacy Act which caused him severe injury, pursuant to 5 U.S.C. § 552a(g)(4)(A); and (2) responsible attorney's fees and costs of this action in accordance with the Privacy Act, including but not limited to 5 U.S.C. § 552a(g)(2)(B) and 5 U.S.C. § 552a(g)(4)(B).

The applicant argued that the abusive sexual contact allegations are based on unreliable and inadmissible evidence because the majority of the evidence is inadmissible hearsay and based on uncredible and biased witnesses. The applicant alleged that the advisory opinion recommended denial is arbitrary or capricious because it relied on factors that Congress had not intended it to consider such as inadmissible evidence, like hearsay and uncredible witness statements.[20]

The applicant further argued that the witnesses' credibility should be questioned due to the lapse of time between the alleged misconduct and the taking of witness statements. The applicant stated that the alleged misconduct took place on a Saturday night, April 21, 2018, but the witness interviews did not take place until two days later on Monday, April 23, 2018. The applicant stated that empirical research suggests that the statements of eyewitnesses alone, without corroborating evidence, is not enough to substantiate the allegations. As a result of such research on the unreliability of eyewitness memory recollection and perception of events, experts argue that "legal system should not convict individuals on eyewitness testimony alone, but rather should require

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[15] The record shows that the applicant was given his Article 31(B) *Miranda/Tempia* rights prior to the start of the CGIS interview, at which point the applicant waived his rights. However, after being asked by investigators if he had put his hands on the victim's hips, the applicant signed a new Article 31(B) form, requesting an attorney.

[16] The record shows that after the applicant requested an attorney, CGIS investigators ended the interview and the applicant was not interviewed by investigators again.

[17] *Guier v. Teton County Hosp. Dist*., 2011 WY 31, 248 P.3d 623 (Wyo. 2011).

[18] 5 U.S.C. § 552a; *see Doe v. U.S. Dep't of Treasury*, 706 F. Supp. 2d 1, 6 (D.D.C. 2009); *see also Palmieri v. United States*, 194 F. Supp. 3d 12, 17 (D.D.C. 2016).

[19] Special Selection Boards are for Coast Guard officers, not enlisted members, who have proven an administrative and/or material error existed in their record during a specific promotion board and are therefore inapplicable to enlisted members and the applicant's case.

[20] The applicant submitted extensive arguments about hearsay rules such as Military Rules of Evidence (MRE) 801(c) and 802. However, these rules and arguments are inapplicable to the applicant's case because he was not involved in a criminal proceeding but an administrative proceeding, which is not governed by the MRE. Accordingly, for efficiency and clarity, these arguments will not be summarized here.

corroborative evidence."[21] The applicant cited to experts' recent 2022 research, that support the requirement for corroborative evidence and state that:

> The unreliability of memory is also not limited to complex information or events, but affects simple recollection of personal information. We should, therefore, not rely on memory for information in which perfect accuracy is required, such as in criminal proceedings… As we examine the unreliability of memory it is important that we not only critically evaluate societal processes that rely on memory, but that we critically examine and attempt to mitigate the societal mechanisms which may result in unreliable memories as well.[22]

Here, the applicant claimed that the allegations against him were substantiated based solely on two witness statements; an intoxicated alleged victim and one witness (MK3 W) who has a history of mistreating the applicant. The applicant emphasized again that no other witnesses claim to have seen the alleged abusive sexual contact and that there was no other evidence that corroborates the witness statements. No tangible evidence whatsoever. No photos. No recordings. No video. No DNA evidence. According to the applicant, the evidence in this case is human statement and human statements alone. Nothing else supports the allegations against him. Everything was tainted by a high possibility of human-error. Thus, he should not be convicted based solely on uncorroborated witness statements.

The applicant alleged that even if the evidence was not tainted by bias and inadmissible hearsay, the Coast Guard has not met its burden of proof of establishing the alleged misconduct by a preponderance of the evidence and rebutting the presumption of innocence, as is mandated by law. Here, the applicant claimed that Coast Guard did not meet its burden of proving by a preponderance of the evidence that he is more likely than not guilty of an alcohol incident (i.e., by a preponderance of the evidence) because the Coast Guard has not established the misconduct of abusive sexual misconduct where he had intent to sexually touch the victim without her consent as a means to arouse sexual desire.[23] The applicant claimed that for him to be guilty of abusive sexual misconduct the Coast Guard had to demonstrate that he had intent to cause bodily harm and that he had the intent to arouse or gratify the sexual desire of another person. The applicant argued that the Coast Guard has failed to prove those elements.[24]

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[21] Lacy JW, Stark CEL. *The neuroscience of memory: implications for the courtroom*. Nat Rev Neurosci. 2013 Sep;14(9):649-658. doi: 10.1038/nrn3563. Epub 2013 Aug 14. PMID: 23942467; PMCID: PMC4183265; *see also* Lola Henry, *Is Memory Reliable?* (Dec. 1, 2022), https://theclassicjournal.uga.edu/index.php/2022/12/01/ismemoryreliable/#:~:text=Memory%20is%20generally%20unreliable%20for%20highly%20accurate%20recollections.

[22] *see also* Lola Henry, *Is Memory Reliable?* (Dec. 1, 2022), https://theclassicjournal.uga.edu/index.php/2022/12/01/is-memoryreliable/#:~:text=Memory%20is%20generally%20unreliable%20for%20highly%20accurate%20recollections.

[23] *See* Steadman v. SEC, 450 U.S. 91, 98 (1981); *see also* Greenwich Collieries v. Dir., Office of Workers' Comp. Programs, 990 F.2d 730, 736 (3d Cir. 1993); *see also* Dir., Office of Workers' Comp. Programs v. Greenwich Collieries, 512 U.S. 267 (1994); *see also* COAST GUARD HEARING OFFICE, "Hearing Office is Our Name, Maritime Safety and Security is our Aim" Vol 8 (April 2010), available at: https://www.uscg.mil/Portals/0/Headquarters/Legal/CGHO/CGHO_doc/cgho.nwl.vol8.pdf?ver=2017-07-24-151440-370.

[24] The applicant provided an account of the April 21, 2018, events as he remembered them, however, many of his statements have already been recorded elsewhere in this decision, so for efficiency and clarity, only those statements not adequately recorded elsewhere in this decision will be summarized here.

The applicant alleged that MK3 W's original statement actually shows that he was not in the same room where the alleged incident occurred, which was in the kitchen, but rather he was in the dining room. The applicant further alleged that MK3 W even stated that he was doing something else—turning the television on.[25] The applicant claimed that while MK3 W was in another room, attempting another task, he allegedly witnessed the applicant grab the victim's hips and that he "felt"—not that he knew but that he merely "felt"— the applicant was "trying to be sexually [*sic*] with [Victim]." The applicant argued that MK3 W's statement was based entirely on his feelings or beliefs, not on objective facts. Furthermore, the applicant stated that he admitted to having put his hands on the victim's hips, but swore under oath and penalty of perjury that he grabbed the victim to prevent her from falling, nothing more.

Regarding his interview with CGIS investigators, the applicant alleged that after he decided to exercise his Fifth Amendment rights, and signed an Article 31(B), clearly indicating that he wanted to speak with an attorney and cease all questioning until after his lawyer was present, the investigators turned off the camera, but continued to ask him questions about the alleged incident even though he had clearly invoked his right to counsel.[26] The applicant argued that the custodial interrogation should have ended until his attorney arrived, however, the conversation continued in violation of his Fifth Amendment rights and *Miranda*. According to the applicant, by asking him about the second alleged sexual contact after he invoked his rights and asked for an attorney, the CGIS investigator used words and conduct that he knew or should have known would reasonably likely elicit an incriminating response. The applicant explained that in response to the investigators questions, he denied the first contact in the car but admitted to the second contact of grabbing the victim's hips and tried to explain that the second contact was only to prevent the victim from drunkenly falling. Accordingly, the applicant alleged that his statements were taken in violation of his Fifth Amendment and *Miranda* rights, and arguably also in violation of his Sixth Amendment right to counsel.

The applicant alleged that his alcohol incident is erroneous and unjust because he did not violate the UCMJ or bring discredit upon the service. The applicant explained that to be guilty of an alcohol incident under the Drug and Alcohol Manual in effect at the time, the alcohol consumption would have to have been a significant or causative factor resulting in the applicant's: (1) loss his ability to perform assigned duties; (2) bring discredit upon the Uniformed Services; (3) violate the Uniform Code of Military Justice (UCMJ); or (4) violate Federal, state, or local laws. Furthermore, the applicant argued that because his Officer-in-Charge and not his Commanding Officer issued the alcohol incident, it was issued in violation of Coast Guard policy. The applicant stated that the Coast Guard's advisory opinion and CGIS investigation both relied upon the Coast Guard's 2011 Drug and Alcohol manual, which states, "any behavior, in which alcohol is

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[25] MK3 W did not tell CGIS investigators that he was turning the television on, but instead stated, "[Victim] and [Applicant] were in the kitchen. I was in the dining room and [O] and [R] were in the living room getting the TV turned on."

[26] The Board notes that the applicant provides conflicting allegations regarding his CGIS interview. On page 24 of the applicant's memorandum in response to the advisory opinion, the applicant claims that after he invoked his right to counsel, the CGIS "***investigators turned off the camera"*** and continued to ask him questions. However, on page 40 of the same memorandum the applicant states, "After [Applicant] invoked his Fifth Amendment rights, the CGIS investigator proceeded to continue to ask [Applicant] about the first alleged sexual contact in the car. This interview was recorded and [Applicant] is confident that if he needs to bring this case to federal court, discovery of this recording will show that this violation of his rights occurred."

determined, ***by the commanding officer***, to be a significant or causative factor…" [emphasis added.][27] The applicant alleged that two months after the incident, the Coast Guard's policy changed, defining an alcohol incident as, "any behavior that the ***CO/OIC determines by a preponderance of evidence*** after considering the relevant facts (i.e., police reports, eyewitness statements, and member's statement, if provided)..."[28] [emphasis added.] According to the applicant, based on these differences, only his commanding officer could have made an alcohol incident determination, because Officers-in-Charge were not given this authority until the 2018 edition of COMDTINST M1000.10A. The applicant argued that this policy violation renders the alcohol incident *per se* arbitrary and capricious because the Coast Guard failed to follow its own rules.

The applicant further alleged that he did not bring discredit upon the Coast Guard because all he did was drink alcohol at a party, like BM2 O and BM2 R, but unlike these two individuals, the applicant received an alcohol incident and they did not. The applicant claimed that BM2 O, who was his superior officer and the Command's Drug and Alcohol Representative, should have also received a reprimand since he was the one providing the alcohol for the incident in question. The applicant explained that the Command Drug and Alcohol Representative serves as the "advisor to their command in administering the unit's substance abuse program," and as that advisor, BM2 O put himself in a questionable position when he purchased the majority of alcohol the night of the alleged incident. The applicant further argued that even if he did bring discredit upon the service, he still should not have received an alcohol incident because two months after the alleged incident, the Coast Guard removed the requirement that the member bring discredit on the service as a reason to issue an alcohol incident. The applicant claimed that the Coast Guard has obviously realized it would be unfair to convict someone of an alcohol incident because a service member brought discredit upon the service. The applicant stated that since the original rule does not define clearly what constitutes discredit upon the service, it's too subjective of a determination to make.[29]

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.1. <u>Alcohol is the Significant or Causative Factor</u>**. 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

[27] Article 1.A.2.d. COMDTINST M1000.10A.

[28] Article 1.A.2.d. of COMDTINST M1000.10A does state "commanding officer," however, Article 1.A.2.f. of the same manual states, "Commanding Officer, as used in this chapter, 'commanding officer' includes commanders, commanding officers, and officers-in-charge."

[29] Following these arguments, the applicant provided extensive arguments as to why the preexisting alcohol condition used to discharge him was not supported by the evidence. However, the applicant was not discharged for a preexisting alcohol condition, but for misconduct. The record shows that Coast Guard PSC, like the applicant, did not agree with the Command's interpretation of the preexisting alcohol condition policy and therefore denied the Command's recommendation to discharge the applicant under the preexisting alcohol condition policy. Accordingly, these arguments will not be summarized here.

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.

. . .

1.A.2.f. Commanding Officer. As used in this chapter, "commanding officer" includes commanders, commanding officers, and officers-in-charge.

. . .

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.7. First Alcohol Incident. The first time a member is involved in an alcohol incident, except those described in Article 2.B.6.[30] of this Manual, the commanding officer shall ensure this counseling is conducted; for enlisted members recorded on an Administrative Remarks, Form CG-3307, entry in the member's PDR; acknowledged by the member; and a copy sent to Commander (CG PSC-EPM) and (CG PSC-PSD-MR). For officers, the record of counseling shall be by letter with copy to Commander (CG PSC-OPM) and (CG PSC- PSD-MR). This entry is in addition to that required by Article 2.B.5. of this Manual.

. . .

The Military Separations Manual, COMDTINST M1000.4, provides the following guidance on separations for misconduct.

. . .

1.B.17. Misconduct.

a. Policy. Except as specifically provided here, only Commander (CG PSC) may direct a discharge for misconduct and the type of discharge (under other than honorable, general, or honorable) as warranted by the particular circumstances of a given case (see Article 1.B.2. of this Manual.). Disability evaluation processing will be terminated as described in Article 1.B.1.e. of this Manual for members discharged for misconduct. See Article 1.B.39. of this Manual when recommending the discharge of a first-term perfo1mer for misconduct.

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

3. Commission of a Serious Offense. Commission of a serious offense does not require adjudication by non-judicial or judicial proceedings. An acquittal or finding of not guilty at a judicial proceeding or not holding non-judicial punishment proceeding does not prohibit proceedings under this provision. However, the offense must be established by a preponderance of the evidence. Police

[30] Article 2.B.6. of COMDTINST M1000.10 applies to enlisted members who have been in the Coast Guard for more than two years but have failed to advance past the rank of E-2. Because the applicant enlisted as an E-3, this article does not apply to him.

reports, CGIS reports of investigation, etc. may be used to make the determination that a member committed a serious offense.

(a) Members may be separated based on commission of a serious military or civilian offense when:

(1) The specific circumstances of the offense warrant separation; and

(2) The maximum penalty for the offense or closely related offense under the UCMJ and Manual for Courts-Martial includes a punitive discharge. The escalator clause of Rule for Courts-Martial 103(d) shall not be used in making this determination.

. . .

1.B.17.e. Discharging Members with Fewer than Eight Years Service for Misconduct. Commanding officers shall process members with fewer than eight years of total active and inactive military service recommended for honorable or general discharge for misconduct as follows:

(1) Inform the member in writing of the reason(s) for being considered for discharge (specifically state one or more of the reasons listed in Article 1.B.17.b. of this Manual supported by known facts).

(2) Afford the member an opportunity to make a written statement. If the member does not desire to do so, the commanding officer sets forth that fact in writing over the member's signature. If the member refuses to sign a statement his or her commanding officer will so state in writing.

(3) Afford the member an opportunity to consult with a lawyer as defined by Article 27(b)(1), UCMJ, if contemplating a general discharge. If the member requests counsel and one is not available, the commanding officer must delay discharge proceedings until such time as counsel is available.

(4) Send the case containing a recommendation and these documents to Commander (CG PSC-EPM-1) for action:

(a) The reason(s) for processing (include reason such as repeated military offenses, drug abuse, indebtedness, etc.)

. . .

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 law:

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 his Coast Guard military record. The Board finds that the applicant has exhausted his 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 application is timely because it was filed within three years of the applicant's discovery of the alleged error or injustice in the record, as required by 10 U.S.C. § 1552(b).

3. The applicant alleged that the Coast Guard erred when they issued him an alcohol incident for unsubstantiated allegations that he sexually assaulted the wife of a superior shipmate on the night of April 21, 2018. The applicant further alleged that the Coast Guard erred when it discharged him for misconduct. 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.[31] 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."[32]

4. **Alcohol Incident.** The applicant alleged that the Coast Guard erred when it issued him an alcohol incident on April 21, 2018, because the allegations against him were unsubstantiated by anyone other than a superior enlisted member who had, in the past, shown bias and racist tendencies toward him, and the alleged victim, who was so drunk she could not walk on her own. The applicant further alleged that the alcohol incident was erroneous because the COMDTINST M1000.10 in effect at the time of the alleged incident did not permit OICs to issue alcohol incidents, but only commanding officers. Finally, the applicant alleged that the alcohol incident failed to follow policy because it lacked pertinent information, such as arrest information. For the reasons outline below, the Board disagrees:

a. The Board's review of the record shows that on the night of April 21, 2018, the applicant went out with members of his unit to celebrate the birthdays of two crewmembers. During these celebrations, the applicant and all but one individual, MK3 W (the designated driver), ended up severely intoxicated. The record further shows that during the car ride home the applicant, the victim, and BM2 R all sat in the back of the car, with the victim sitting in the middle. During this car ride home, the victim told CGIS, the applicant put his hand down her pants and underwear and rubbed her buttocks. BM2 R stated that he did not witness this because he was concentrating on looking forward during the drive in an effort to avoid vomiting. After arriving at the victim's home (the victim and BM2 O were married and lived at the same residence), the victim was so intoxicated that she needed help getting out of the car, which was provided by BM2 R. At this point, BM2 R claimed, the victim informed him that the applicant had touched her butt. MK3 W witnessed their discussion without overhearing it, but sensed that something was wrong. Then BM2 R helped the victim into the house where everyone continued the celebrations.

   At some point after entering the home, the applicant and the victim were in the kitchen together. According to the applicant, the victim began to reach for something in a cabinet when she became unstable due to her intoxicated state. The applicant alleged that he then came up behind her, grabbing her hips in an alleged attempt to stabilize the victim and prevent her from falling and injuring herself. From outside the kitchen, MK3 W saw the victim reach for the cabinet and saw the applicant grab her hips from behind. However, MK3 W claimed that the applicant's actions appeared to be sexual in nature and did not

[31] 33 C.F.R. § 52.24(b).
[32] *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

appear to be done to protect the victim from falling. The alleged victim stated that this touching felt "intimate," and she went into the living room and began to cry. As a result of the victim's and MK3 W's allegations, the applicant's command issued him an alcohol incident after it found that the applicant's consumption of alcohol was a significant and/or causative factor that brought discredit upon the service. Specifically, the Page 7 documenting the alcohol incident stated that the applicant had inappropriately touched a shipmate's wife multiple times.

Article 1.A.2.d.1 of the Drug and Alcohol Manual, COMDTINST 1000.10A, defines an alcohol incident as, "Any behavior, in which alcohol is determined, by the commanding officer, to be a significant or causative factor that…brings discredit upon the Uniformed Services…" Article 2.B.2. of COMDTINST M1000.10 states, "The definition of an alcohol incident (See Article 1.A.2.d. of this Manual) gives commands broad latitude in curbing intemperate alcohol use." Finally, Article 2.B.7. states, "The first time a member is involved in an alcohol incident, except those described in Article 2.B.6. of this Manual, the commanding officer shall ensure this counseling is conducted; for enlisted members recorded on an Administrative Remarks, Form CG-3307, entry in the member's PDR; acknowledged by the member; and a copy sent to Commander (CG PSC-EPM) and (CG PSC-PSD-MR)."

Therefore, in order for commanding officers to issue an alcohol incident, they must conclude that a preponderance of the evidence establishes—i.e., that the evidence shows that it is more likely than not—that the individual's consumption of alcohol either contributed to or caused behavior that, in this instance, brought discredit upon the armed services. In addition, Article 2.B.7. requires that commanding officers ensure that counseling for the alcohol incident is issued via a Page 7 to all first time offenders. Although the applicant denied touching the victim inappropriately in the car and no one but the alleged victim attested to his alleged behavior in the back of the car, the Board cannot conclude that the applicant's commanding officer erred by finding that the preponderance of the evidence supported the victim's allegation that he had rubbed her buttocks, especially because she complained about it immediately upon exiting the car and after entering the home. And both the victim and MK3 W reported that the applicant had grabbed the applicant's hips from behind in an intimate or sexual way when they were in the kitchen. Here, the applicant bears the burden of proof, and the Board finds that he has failed to prove by a preponderance of the evidence that his CO erred in concluding that the preponderance of the evidence shows that the applicant's alcohol consumption caused or contributed to him inappropriately touching a superior petty officer's wife on the evening of April 21, 2018.

The applicant noted that apart from the victim and MK3, the victim's allegations went largely unsubstantiated, but so have his. The fact that the alleged victim was drunk does not automatically render her statements blatantly false especially given that she complained immediately upon exiting the car. The applicant submitted no evidence to show that his alcohol incident resulted from racism, that MK3 W had harassed him, that he was pressured into going to the birthday celebrations, that he was made to drink alcohol involuntarily, or that he did not in fact touch the victim in an inappropriate manner. Although the Board can

weigh the evidence and overturn a finding of an alcohol incident when the evidence does not support such a finding, in this case, the Board finds that the applicant has failed to produce evidence sufficient to overcome the presumption afforded to the Coast Guard and its officials.[33]

b. The applicant alleged that the alcohol incident was erroneous and unjust because the policy in effect at the time only permitted commanding officers and not OICs to issue alcohol incidents. The Board finds that the applicant's arguments are not supported by the policy. The applicant is correct that Article 1.A.2.d.1 of COMDTINST M1000.10 states, "Any behavior, in which alcohol is determined, by the commanding officer, to be a significant or causative factor…" However, Article 1.A.2.f. of the same manual states that for the purposes of COMDTINST M1000.10, the term "Commanding Officer" includes commanders, commanding officers, ***and officers-in-charge***. Therefore, the Board finds that the applicant's OIC was authorized under Article 1.A.2.d.1. of COMDTINST M1000.10 to issue the applicant an alcohol incident.

c. Finally, the applicant alleged that the alcohol incident was erroneous and unjust because it did not contain pertinent information required by policy such as arrest information. However, as argued by the JAG, the verbiage relied upon by the applicant was retrieved from a template that is used only as an example of the kind of information that should be included if relevant to the finding of an alcohol incident, not information that must be included for an alcohol incident to be valid. Other than this template, the applicant failed to point to one Coast Guard policy that specifically states that in order for an alcohol incident to be valid, the servicemember must have been arrested as a result of alcohol consumption. Coast Guard policy only requires that the alcohol consumption 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."[34] The applicant also argued that the policy relied upon to issue the alcohol incident was unjust because it was changed just a couple of months later to no longer include the phrase "brought discredit upon the armed forces." However, subsequent changes to a manual or instruction do not render previous versions erroneous or unjust.

5. **Characterization of Service**. The applicant alleged that it was erroneous and unjust for the Coast Guard to issue him a General discharge instead of an Honorable discharge. The Board will begin its analysis with the applicant's error argument. Article 1.B.17.b.3 of the Military Separations Manual, COMDTINST M1000.4, states that the Commander of PSC may direct a discharge for misconduct for the commission of a serious offense, which does not require adjudication by non-judicial or judicial proceedings. However, the offense must be established by a preponderance of the evidence, which may be established by police reports, CGIS reports of investigation, etc. Finally, under Article 1.B.17.b.3.a.2., the maximum penalty for the offense or closely related offense under the UCMJ and Manual for Courts-Martial must include a punitive discharge. The record shows that the applicant was alleged to have committed "abusive sexual contact," which under Article 120 of the Uniform Code of Military Justice holds a maximum

[33] *Id*.
[34] Article 1.A.2.d.1. of the Coast Guard Drug and Alcohol Policy Manual, COMDTINST M1000.10.

punishment of dishonorable discharge, forfeiture of all pay and allowances, and confinement for 7 years. "Abusive sexual contact" is defined in Article 120 of the UCMJ as follows: "Any person subject to this chapter who commits or causes sexual contact upon or by another person, if to do so would violate subsection (b) (sexual assault) had the sexual contact been a sexual act, is guilty of abusive sexual contact and shall be punished as a court-martial may direct." Given that that the alleged victim reported that the applicant had rubbed her buttocks in the confines of the car and the reported sexual or intimate nature of his touching of her hips in the kitchen, the Board finds that the applicant has not proven by preponderance of the evidence that the Coast Guard erred in finding that the preponderance of the evidence shows that the applicant had committed "abusive sexual contact" in violation of Article 120 of the UCMJ.

Next, the Board will address the applicant's claims of injustice. The applicant argued that because the victim's claims were unsubstantiated and the Coast Guard did not pursue administrative separation against the applicant until over a year later, and only after the victim inquired about the status of her complaint, it was unjust to issue him a General discharge instead of an Honorable one. Under 10 U.S.C. § 1552(a) the Board may "remove an injustice" from a veteran's record, as well as correct an error in the record. The Board has authority to determine whether an injustice has been committed on a case by case basis.[35] Therefore, the Board must consider whether the applicant's General discharge constitutes an injustice.

Article 1.B.2.f. of the Military Separations Manual, COMDTINST M1000.4, states that a member may be eligible for an Honorable discharge even if separated for misconduct, so long as that misconduct was not due to involvement with drugs or obstructing drug urinalysis testing by tampering. Here, the record is clear that the applicant was not accused of any involvement with drugs or tampering with urinalysis evidence and was therefore eligible for an Honorable discharge despite allegations of misconduct. The record also shows that at the time of the alleged incident the applicant was a 22-year-old Seaman who had only been enlisted for 90 days and had been assigned to his first unit for just 30 days. The record further shows that the applicant was commended by PSC after PSC rejected the applicant's command's request to discharge the applicant for a preexisting alcohol condition. PSC stated that the applicant's "attitude and work ethic were commendable given the prevailing circumstances."[36] Furthermore, despite being recommended for separation, the applicant's Captain recommended that the applicant receive an Honorable discharge.

Like the applicant, the Board questions the Coast Guard's delay in pursuing his administrative discharge despite the allegations of "abusive sexual contact" against him. The record is clear that the applicant's command was aware of the CGIS investigation and the evidence against the applicant in April 2018. After the victim stated she was leaving the country and would not be available to testify, his command chose initially to pursue separation based on an alleged

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[35] Decision of the Deputy General Counsel, BCMR Docket No. 2001-043. According to *Sawyer v. United States*, 18 Cl. Ct. 860, 868 (1989), *rev'd on other grounds*, 930 F.2d 1577, and *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976), purposes of the BCMRs under 10 U.S.C. § 1552, "injustice" is "treatment by military authorities that shocks the sense of justice."

[36] The Board reached out to the Coast Guard for copies of PSC's memorandums but the Coast Guard delayed in responding and when it did respond, they stated the documents could not be found.

preexisting alcohol condition. After that effort was thwarted by PSC,[37] the applicant's command made no effort whatsoever to discharge the applicant for misconduct until months later, after the alleged victim asked what actions had been taken. The evidence seems to indicate that the Coast Guard initiated the applicant's separation because they wanted to appear to be "doing something" in response to the victim's complaint when she contacted them in May 2019, a year after the alleged misconduct. The command's reasoning for not pursuing disciplinary action after the allegations were made was because the victim would be out of the country and unavailable for possible court-martial proceedings in which the burden of proof is "beyond a reasonable doubt." But given the evidence in the CGIS report, the victim's presence was not required for administrative separation based on a "preponderance of the evidence" standard.

Given the operational demands of a Coast Guard unit, the Board is not persuaded that the delay in the applicant's administrative discharge for misconduct was *per se* erroneous or unjust. But apart from the alleged misconduct, the record shows that the applicant served admirably despite the circumstances, as stated by PSC, and had no further disciplinary issues. This, in addition to the Captain's recommendation and PSC's commendation of the applicant, cause the Board to question whether the applicant's General characterization of service was appropriate in this instance. An Honorable discharge does not require perfect, blemish-free service. In this case, the record shows that the applicant committed a serious offense while drunk shortly after being assigned to his first unit but then served admirably for another year despite considerable stress. Therefore, although the Board will not remove the alcohol incident or reverse the applicant's separation because the applicant failed to overcome his burden, the Board finds that it is in the interest of justice to upgrade the applicant's characterization of service from General—Under Honorable Conditions to Honorable.

6. **Narrative Reason for Separation**. The applicant alleged that his narrative reason for separation was erroneous because there was no evidence to support a finding that he had committed misconduct. According to the applicant, a more appropriate narrative reason for separation is "Secretarial Authority." The record shows that the applicant was given a narrative reason for separation of "misconduct" and a separation code of JKQ which reflects an involuntary discharge for a member who had no board entitlement, who committed a serious military or civilian offense. While the applicant in this case was clearly discharged based on the preponderance of the evidence showing that he committed misconduct, the Board notes that the evidence corroborating the victim's complaint in this case was relatively slim. Given that the narrative reason for separation is entered on a veteran's DD 214, which he must show to prospective employers, bank managers, etc., to prove his military service, and given the fine quality of the rest of the applicant's military service, the Board is persuaded that the applicant's narrative reason for separation should be upgraded from "Misconduct" to "Secretarial Authority." Therefore, the Coast Guard should upgrade the applicant's narrative reason for separation from "Misconduct" to "Secretarial Authority" with a separation code of "JFF." Pursuant to ALCOAST 125/10 a separation code of "JFF" has a default reenlistment code RE-3 for all members discharged prior to the end of their enlistment. Given the directives outlined in ALCOAST 125/10, the Coast should also upgrade the applicant's reenlistment code from RE-4 to RE-3.

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[37] As stated in the previous footnote, the Board is unclear as to when PSC officially denied the applicant's command's recommendation for separation based on a preexisting alcohol condition because the Coast Guard was unable to locate those documents.

7. **Failure to Provide Attorney**. The applicant alleged that his Sixth and Fifth amendment rights were violated when he was denied an attorney after he requested one and because CGIS investigators continued to question him after he requested an attorney. The record shows that the applicant was given his Article 31(B) *Miranda/Tempia* rights prior to the start of his CGIS interview, which was conducted on April 24, 2018, and initially waived his rights and agreed to be interviewed without an attorney. However, after being asked by investigators if he had put his hands on the victim's hips, the applicant signed a new Article 31(B) form, requesting an attorney. It is undisputed that the applicant re-signed his Article 31(B) form, however, the Board is not persuaded by the applicant's claims.

In his original application to the Board, the applicant indicated that he had stopped the interview by requesting an attorney and made no mention of any further questions. But on page 24 of the applicant's memorandum in response to the advisory opinion, the applicant claimed that after he invoked his right to counsel, the CGIS investigators "turned off the camera" and continued to ask him questions. However, on page 40 of the same memorandum the applicant states, "After [Applicant] invoked his Fifth Amendment rights, the CGIS investigator proceeded to continue to ask [Applicant] about the first alleged sexual contact in the car. This interview was recorded and [Applicant] is confident that if he needs to bring this case to federal court, discovery of this recording will show that this violation of his rights occurred." The applicant's conflicting statements cast substantial doubt on his claim that CGIS investigators continued to asked him questions despite his request for an attorney and the applicant failed to provide any evidence to support his claims outside of his own allegations. Furthermore, the fact that the applicant was not provided with an attorney does not surprise the Board because the applicant was not questioned again and no criminal charges were brought up against the applicant, and therefore no attorney was required.

Regarding his administrative separation, the record shows that the applicant signed his First Endorsement on May 2, 2019, wherein he exercised his right to submit a statement, objected to his separation, and acknowledged his right to speak with an attorney. The applicant submitted no evidence to show that he specifically requested to speak with an attorney regarding his administrative separation or that the Coast Guard failed to grant his request. The applicant's records are presumptively correct, and the applicant has failed to prove by a preponderance of the evidence that the Coast Guard failed to provide him with an attorney for either his administrative separation or CGIS investigation or continued to question him after he asked for an attorney.

8. **Administrative Separation Board**. The applicant alleged that his separation was erroneous and unjust because the Coast Guard failed to inform him of his right to an Administrative Separation Board. However, Article 1.B.17.e. of the Military Separations Manual, COMDTINST M1000.4, makes it clear that members with less than eight years of service are not entitled to an Administrative Separation Board as alleged by the applicant. The record shows that at the time of the applicant's separation from the Coast Guard, he only had approximately sixteen months of total active duty service and was therefore not entitled to an ASB as alleged by the applicant.

9. **Retroactive Promotion or Special Selection Board**. The applicant alleged that due to the errors and injustices committed by the Coast Guard, he has a valid claim for

reinstatement and retroactive promotion or at the minimum a referral to an SSB. However, the Board has found no error or injustice in the Coast Guard's decision to discharge the applicant. The Board is only upgrading the characterization of that discharge on his DD 214 in the interest of justice and based largely on his admirable service after his misconduct. Moreover, pursuant to 14 U.S.C. § 2120,[38] special selection boards are reserved for ***officers*** who were not selected for promotion to the next grade due to an administrative or material error in their record. The applicant was not an officer but was an enlisted member, holding the rate of E-3 at the time of his separation. Therefore, 14 U.S.C. § 2120 and does not apply to the applicant because he was an enlisted member who would have gone through a completely different and separate advancement process than that of a Coast Guard officer. Regarding advancement to E-4 or above, the applicant has not proven he is entitled to such relief as there is no evidence that he was or should have been advanced prior to his discharge.

10. **Witness Testimony and Rules of Evidence**. The applicant made extensive arguments about how the Coast Guard failed to abide by the creed of the justice system—that he is innocent until proven guilty—and how eyewitness testimony should not be relied upon to convict an accused. First, the applicant was never subjected to the criminal justice system and was never "found guilty" of anything. The findings of administrative proceedings do not amount to findings of "guilt" like those in criminal proceedings. Second, the applicant was subjected to administrative procedures which are not bound by the same rules of evidence as the criminal justice system, including how witness statements are used. Coast Guard policy is clear that commanders only need to find by a preponderance of the evidence that the applicant engaged in the alleged serious misconduct to warrant initiating an administrative discharge for misconduct. Outside of this, the applicant has failed to point to one applicable policy or instruction, and the Board could find none, that bound the applicant's administrative separation proceedings to the same evidentiary and legal standards as a criminal trial.

11. The applicant made varied allegations and arguments. Those allegations not specifically addressed above are considered to be unsupported by substantial evidence sufficient to overcome the presumption or regularity and/or are not dispositive of the case.[39]

12. For the reasons outlined above, the applicant has not met his 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.[40] He has not proven, by a preponderance of the evidence, that the Coast Guard erred when they entered the alcohol incident in his record and discharged him. However, partial relief is granted. The Coast Guard should upgrade the applicant's characterization of discharge from General to Honorable, his narrative reason for separation from "misconduct" to "secretarial authority" and his reenlistment code from RE-4 to RE-3.

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[38] Formerly 14 U.S.C. § 263.
[39] 33 C.F.R. § 52.24(b); *see Frizelle v. Slater*, 111 F.3d 172, 177 (D.C. Cir. 1997) (noting that the Board need not address arguments that "appear frivolous on their face and could [not] affect the Board's ultimate disposition").
[40] *Muse v. United States*, 21 Cl. Ct. 592, 600 (1990) (internal citations omitted).

ORDER

The application of former SN [redacted] USCG, for correction of his military record is denied, but alternate relief is granted. The Coast Guard shall upgrade the applicant's characterization of service from General—Under Honorable Conditions to Honorable. The Coast Guard shall also upgrade the applicant's narrative reason for separation from "misconduct" to "secretarial authority" and his reenlistment code from RE-4 to RE-3.

March 15, 2024

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