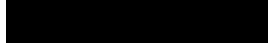


**DEPARTMENT OF HOMELAND SECURITY  
BOARD FOR CORRECTION OF MILITARY RECORDS**

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2022-075**

  
BM2 (Former)

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**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 February 8, 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 October 17, 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**

The applicant, a former Boatswain's Mate (BM2/E-5), who received an Honorable discharge on April 8, 2021, after being administratively separated for misconduct, asked the Board to correct his record by making the following changes:

- Remove the charges against him for violation of Articles 112 and 113 of the Uniform Code of Military Justice (UCMJ)
- Reinstate him into the Coast Guard with the same rank and grade that he held prior to his administrative separation and award him all backpay and allowances due as a result of his reinstatement.

A summary of the applicant's allegations follows the Summary of the Record.

**SUMMARY OF THE RECORD**

The applicant enlisted in the Coast Guard on May 5, 2007. He trained as a Coxswain.

### *Impaired Driving Incident*

On April 30, 2013, the applicant was issued a Member Counseling Report with comments explaining certain ratings. For “responsibility,” the reviewer wrote “[the applicant] has shown a lack of personal responsibility by being involved in alcohol incident during this marking period. Although he notified his chain-of-command immediately, and he did not try to hide or deny his involvement, his actions do not reflect those of a responsible 2<sup>nd</sup> class petty officer.” For “judgment,” the reviewer wrote:

[the applicant] displayed very poor judgment as indicated by a documented alcohol incident during this marking period. Although he promptly reported the incident through his chain-of-command, his lack of foresight to understand the negative impact on his CG career, by an incident of this nature is not accepted nor tolerated behavior from a second class petty officer in the USCG.

For “conduct,” the reviewer wrote “[the applicant] failed to meet minimum standards as evidenced by bringing discredit to the Coast Guard, receiving an adverse CG-3307 entry related to an alcohol incident during this marking period.” For “recommendation for advancement,” the reviewer wrote “[the applicant] has displayed unsatisfactory behavior during this marking period, as evidenced by receiving a documented alcohol incident, and is therefore not recommended for advancement.” The applicant’s Electronic Personnel Data Record (EDPR) does not include a CG-3307 for the referenced incident.<sup>1</sup>

### *Breathalyzer Test*

Several years later, on March 2, 2020, the applicant gave his voluntary consent to a search via a portable breathalyzer test. The applicant acknowledged he was not required to consent to the search, that the result could be used against him, and that no adverse conclusion could be drawn from his refusal.

The calibration log sheet for the portable breathalyzer with the serial number 089604 shows MK2 PM calibrated it on March 2, 2020 at 11:49am. The log then records two tests on March 2, 2020. The first test is at 12:16 and records a BAC of .052. The second test is at 12:26 and records a BAC of .048.

The calibration log sheet for the portable breathalyzer with the serial number 101313 shows MK2 PM calibrated it on March 2, 2020 at 11:31am. The log then records a test on March 2, 2020 at 12:29 and records a BAC of .046.

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<sup>1</sup> The applicant alleges that, in early 2013, he was driving at night and was cited by an Ohio traffic police officer for impaired driving. The applicant states that, despite it not being required, he immediately reported this citation to the Coast Guard. The applicant claims it would then be used as the basis for an unfavorable personnel review at the time the incident occurred. According to the applicant, the Coast Guard never issued a CG-3307, which is mandatory for a finding of an alcohol incident to be documented, entered into a service-member’s records, and then used for later disciplinary proceedings.

*Administrative Investigations*

On March 3, 2020, a Preliminary Investigating Officer (PIO) was assigned to investigate the applicant's alleged misconduct on or about March 2, 2020.

On March 4, 2020, the applicant was informed of his Article 31(b) Miranda/Tempia Rights, wherein he was advised of his rights by the PIO and informed that he was being investigated and questioned about being on duty under the influence of alcohol. The applicant acknowledged his rights and elected not to consult with a lawyer but to provide a statement and/or answer questions.

On March 9, 2020, the PIO submitted his Report on Investigation (ROI) which is summarized below:

FINDINGS OF FACT

...

2. On Sunday, 1 March 2020 at approximately 1430 [the applicant] stated that he consumed 1 standard glass of wine by himself at his home and finished that drink by 1530. (Exhibit 1)

3. He and his wife then went to dinner at [redacted]. At approximately 1715 on 1 March [the applicant] stated he consumed a pint size glass of beer at dinner. [The applicant] finished that drink by 1800. [The applicant] stated that he consumed no alcoholic beverages after 1800 on 1 March 2020. (Exhibit 1)

4. [The applicant] was scheduled to report to duty at 0830 on 2 March 2020, and did report on time. He stated he did not drink any alcoholic beverages on the morning of 2 March 2020. (Exhibit 1)

5. [The applicant] drove his car to work and had no passengers in his car. [The applicant] arrived at Station [redacted] at approximately 0825. At 0900, [the applicant] was present for all hands quarters for the unit. (Exhibit 1)

6. Between 0920 and 1050, [the applicant] was in the learning center at the unit conducting a Captains License test on the computer. During that time [the applicant] had casual conversations with BMCS H, BM1 S, and BM2 H. (Exhibit 1, 2)

7. Neither BCMS H, BM1 S, nor BM2 H noticed an odor of alcohol on [the applicant]. None of them reported noticing any signs of intoxication by [the applicant]. (Exhibit 1, 2)

8. Between 1030 to 1050 [the applicant] was getting supplies at the unit to go down to [redacted] Marina to work on a nonskid project on one of STA [redacted] boats. (Exhibit 1).

9. On 2 March, at approximately 1050 [the applicant] entered the MK shop and was talking to MK2 PM and MK1 R about going down to the [redacted] Marina to finish a nonskid project on a boat. MK1 R was sitting at his desk and smelled a moderate odor of an alcoholic beverage coming from [the applicant]. MK1 R was unaware that [the applicant] would be driving down to [redacted] Marina by himself. (Exhibit 5)

10. At 1100, MK1 R notified the XPO of STA [redacted], BMCS H, of what he observed during his recent conversation with [the applicant]. (Exhibit 5).

11. At 1101, [the applicant] drove his own vehicle with no other passengers to [redacted] Marina. On the way to [redacted] Marina, [the applicant] stopped by his house to pick up a sandwich for lunch. [The applicant] stated he had no Alcoholic Beverages and ate his sandwich on the drive to [redacted] Marina. (Exhibit 1)

12. At 1110, BMCS H directed MK1 R and MK2 MM to go down to [redacted] Marina and bring [the applicant] back to the station using one of the station's GVs. BMCS H directed them to tell [the applicant] that he wanted to see [the applicant] in his office to discuss the non-skid project. (Exhibit 2)

13. MK1 and MK2 arrived at [redacted] Marina at approximately 1125 and found [the applicant] by himself working on the nonskid project. MK1 R told [the applicant] to ride back to the station with them because BMCS H wanted to discuss the nonskid project with him. MK2 MM noted that he smelled a faint odor of an alcoholic beverage coming from [the applicant] on the car ride back to the station. MK2 MM did not smell any alcoholic beverages on the boat due to the glue remover being used on the boat project. (Exhibit 4)

14. At no time did MK1 R or MK2 MM talk to [the applicant] about the MK1's report to BMCS. (Exhibit 4 and 5)

15. At 1115, BMCS H instructed MK2 PM to calibrate 02 portable alcohol breathalyzers. (Exhibit 2)

16. At 1131, MK2 PM a certified Boarding Officer and currently certified for DUI Enforcement calibrated alcohol breathalyzer with serial number 101313. (Enclosure 3)

17. At 1149 MK2 PM calibrated alcohol breathalyzer with serial number 089604. (Enclosure 3)

18. At 1213 in BMCS H's office [the applicant] signed a voluntary consent to search form for an alcohol portable breathalyzer test. (Enclosure 2)

19. At 1216, MK2 PM instructed by BMCS H administered a portable alcohol breathalyzer test on [the applicant] with serial number 089604. The alcohol breathalyzer registered a BAC of .052. (Enclosure 3)

20. At 1226, MK2 PM administered a second portable breathalyzer test on [the applicant] with serial number 089604. The alcohol breathalyzer test registered a BAC of .048. (Enclosure 3)

21. At 1229, MK2 PM administered a third portable breathalyzer test on [the applicant] with a serial number of 101313. The alcohol breathalyzer test registered a BAC of .046. (Enclosure 3)

22. MK2 PM stated that while giving the portable alcohol breathalyzer test he smelled a moderate odor or an alcoholic beverage coming from [the applicant]. (Exhibit 3)

23. The people present for all three portable alcohol breathalyzer tests were BMCS H, MK1 R, and MK1 PM. (Exhibit 2, 3, 5)

24. Elements required to constitute a violation of Article 92, UCMJ, Dereliction in the performance of duties: (1) that the accused had certain duties; (2) that the accused knew or reasonably should have known of the duties; and (3) that the accused was (willfully) (through neglect or culpable inefficiency) derelict in the performance of those duties. (Reference d)

25. Reference (e) is a punitive order general order prohibiting a member from consuming alcoholic beverages less than 12 hours prior to the state of their duty period. (Reference h. p. 82)

26. Elements required to constitute a violation of Article 112, UCMJ. Drunkenness and other incapacitation offenses are:

- (1) That the accused was on a certain duty; and
- (2) That the accused was drunk while on this duty.

For purposes of Article 112, "drunk" means (i) the state of intoxication by alcohol that is sufficient to impair the rational and full exercise of mental or physical faculties.

27. The Military Drug and Alcohol Policy requires that military members must be free from the residual effects of alcohol consumption and required to be free from all alcohol effects when reporting for duty, commencing duties, and/or expiration of liberty. Research shows impairment can occur in BAC as low as 0.02% but is significant at BAC of 0.04%. (Reference e)

28. Elements required to constitute violation of Article 113, UCMJ. Drunken or reckless operation of a vehicle, aircraft, or vessel are:

- (1) That the accused was operating or in physical control of a vehicle, aircraft, or vessel; and
- (2) that while operating or in physical control of a vehicle, aircraft, or vessel, the accused:
  - (a) did so in a wanton or reckless manner, or
  - (b) was drunk or impaired, or
  - (c) the alcohol concentration in the accused's blood or breath equaled or exceeded the applicable limit under Article 113(b).

For the purposes of Article 113, the applicable limit on the alcohol concentration in a person's blood or breath is as follows:

- 1) In the case of the operation or control of a vehicle, aircraft, or vessel in the United States, such limit is the lesser of
  - a) the blood alcohol content limit under the law of the State in which the conduct occurred, except as may be provided under Article 113(b)(2) for conduct on a military installation that is in more than one State; or
  - b) the blood alcohol content limit specified in Article 113(b)(3)

29. Wisconsin Vehicle Revised Code § 346.63 states that "No person may drive or operate a motor vehicle while: Under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving with a BAC exceeding .08. (Reference f)

30. It is widely accepted that the human body can effectively metabolize alcohol at .015 BAC per hour. (Reference f)

31. [The applicant's] BAC at 1216 was .052. Pursuant to the average hourly rate of .015 to metabolize alcohol, there is sufficient information to calculate that [the applicant's] BAC while driving to [redacted] four hours earlier, at 0830, was above the legal limit for driving in Wisconsin. (Exhibits 01, 09, 013, 014, 015). Ref (f), (g)

32. Reference (e) defines an 'alcohol incident' as an event involving "any behavior, in which the CO/OIC determines by a preponderance of evidence after considering the relevant facts (i.e. police reports, eyewitness statements, and member's statements if provided) that alcohol was a significant or causative factor that result in the member's loss of ability to perform assigned duties or is a violation of the UCMJ, Federal State, or local laws. The military member need not be found guilty at court-martial, in civilian court, or be awarded non-judicial punishment for a behavior to be considered an alcohol incident."

OPINIONS

1. It is my opinion that the elements of Article 92, UCMJ (Failure to obey order or regulation) have been met. In that [the applicant] was under the influence of alcohol while at work and on duty which violations U.S. Coast Guard Station [redacted] Standing Orders and the Military Drug and Alcohol Policy. Three certified Boarding Officers had direct contact with [the applicant] and could smell an odor of alcoholic beverages on his breath. [The applicant] was administered three different portable alcohol breathalyzer tests and registered a BAC of .052, .048, and .046. (Findings of Fact 3, 4, 7, 8, 8, 10, 25)
2. Member knew he was required to report to work in a duty status. (Finding of Fact 4)
3. It is my opinion that the elements of Article 112, UCMJ (Drunk on duty) have been met as [the applicant] was on duty and member was found drunk or impaired at work on 02 Mar 20. (Finding of Fact 4, 19, 20, 21)
4. It is my opinion that the elements of Article 113, UCMJ (Drunken or reckless operation of a vehicle, aircraft or vessel) have been met as [the applicant] drove his vehicle to work while drunk or impaired. [The applicant's] BAC at 1216 was .052. Pursuant to the average hourly rate of .015 to metabolize alcohol, there is sufficient information to calculate that [the applicant's] BAC while driving to STA four hours earlier, at 0830, was above the legal limit for driving in Wisconsin at .08. (Finding of Fact 5, 19, 26)
5. I believe that alcohol was a causative factor in [the applicant's] violation of UMCJ Articles 92, 112, and 113.

RECOMMENDATION

1. I recommend that the charge of Article 92, UCMJ, Failure to Obey a Lawful General Order or Regulation; Dereliction in the performance of duties, be disposed of at Captain Mast. Evidence collected meet elemental requirements contained in Finding 24 (Opinion 1)
2. I recommend that the charge of Article 112, UCMJ, Drunk on duty be disposed of at Capt. Mast. Evidence collected meet elemental requirements contained in Finding 28. (Opinion 3).
3. I recommend that the charge of Article 113, UCMJ, Drunken or reckless operation of a vehicle, aircraft or vessel be disposed of at Capt. Mast. Evidence collected meet elemental requirements. (Opinion 5)
4. Alcohol consumption was the causative factor to the violators; a second Alcohol incident has been documented in [the applicant's] personal data record and he needs to be processed for separation according to Ref. (c), Article 2.B.9. (Opinion 1, 2, 3)

***Administrative Separation***

On May 21, 2020, the applicant was notified that action was initiated for involuntary separation under COMDTINST 1000.4 (series), Art. 1.B.17.b.(3) Commission of a Serious Offense. The conduct for the initiation was summarized below:

You received an alcohol incident on 2 March 2020 when your abuse of alcohol was determined to be a significant and/or causative factor in the following:

- a) It was determined you were under the influence of alcohol while at work and on duty, which is in violation of the CG STA [redacted] standing orders and the Coast Guard policy governing alcohol in a duty status identified in reference (d). Based on the preponderance of the evidence, you have violated article 92 (Failure to obey order or regulation) and article 112 (Drunk on duty) of the UCMJ.

- b) The Officer in Charge of STA [redacted] determined, based on the preponderance of the evidence, you drove your personal motor vehicle while impaired. This is in violation of article 113 of the UCMJ (Drunken or reckless operation of a vehicle, aircraft, or vessel).

On June 1, 2020, the applicant elected to appear before an Administrative Separation Board (ASB). On September 22, 2020, the ASB held a hearing on the applicant's case.

On September 25, 2020, the ASB issued its report. The Findings of Fact included "[i]n September 2012, [the applicant] received his first documented alcohol incident," and generally repeated the findings in the PIO's ROI. The Opinions are summarized below:

1. [The applicant] knew he was required to report for duty on board Station [redacted] on the morning of 02 March 2020. [The applicant] violated Article 112 of the UCMJ when he reported for duty drunk on the morning of 02 March 2020. [The applicant's] BAC at 0825 was at or around .11 mg/dl which meets the elements of drunk on duty as per UCMJ Article 112.
2. [The applicant] committed a serious offense, as defined by COMDITINST M1000.4, when he was drunk on duty the morning of 2 March 2020. The board found by a preponderance of the evidence that he violated Article 112, which warrants a punitive discharge under the UCMJ. Under the specific circumstances of this case, to include the level of intoxication and the fact that this was his second AI, the board believes that the act warrants separation.
3. [The applicant] violated Art 113 of the UCMJ when he drove his vehicle from his home to STA [redacted] between 0810 and 0825 on 02 March 2020. [The applicant's] BAC at 0816 was .112 mg/dl which meets the elements for drunken or reckless operation of a vehicle, aircraft or vessel as per Article 113 of the UCMJ.
4. [The applicant] committed a serious offense, IAW COMDITINST M1000.4, when he drove drunk to work on the morning of 2 Mar 2020. The board found by a preponderance of the evidence that he violated Article 113, which warrants a punitive discharge under the UCMJ. Under the specific circumstances of this case, to include the level of intoxication, the fact that this was his second AI, and his act of driving to the Marina w/ alcohol in his system, we recommend separation.
5. [The applicant] meets the criteria for separation based on his having received a second alcohol incident.
6. With the exception of his two alcohol incidents, one which involved serious misconduct, [the applicant] consistently personified the Coast Guard Core Values of Honor, Respect and Devotion to Duty, and has never brought discredit to the Coast Guard. As per Coast Guard policy his service is eligible to be characterized as honorable.
7. Probation is not warranted in this case due to the Coast Guard policy of mandatory administrative discharge process for commission of a serious offense. Additionally, this is [the applicant's] second alcohol incident which is grounds for separation and does not warrant probation.

The ASB recommended two bases for separation: 1.B.17.b.(3) Commission of a Serious Offense and 4.H.2.c Enlisted Member Involved in a Second Alcohol Incident.

On October 5, 2020, the applicant submitted a "Letter of Deficiency" in accordance with the applicant's ASB. The applicant claimed that his ASB had the following deficiencies: 1) The Recorder improperly stated the law and facts of the case several times and the Board improperly relied upon these statements over Defense objections and in direct opposition to prior position

taken by the Convening Authority and respondent's Officer-in-Charge; and 2) The Board was not provided enough evidence to satisfy the elements of the offense and produced a finding that was legally insufficient.

On October 10, 2020, the applicant submitted rebuttal comments on the ASB's report to the Personnel Service Center (PSC) and requested PSC set aside the findings and conclusions and convene a new ASB. The applicant challenged the finding that the 2013 incident was an alcohol incident.

### *Action of Final Reviewing Authority*

On March 3, 2021, the Final Reviewing Authority issued the below action:

The record, Findings of Fact, Opinions, and Recommendations of the Administrative Separation Board for [the applicant] held on 22 September 2020 have been reviewed and are approved subject to the below caveat.

The Board identified in Recommendation #8.a, two bases to separate [the applicant]: one for "Other" due to being involved in second Alcohol Incident (AI); the second one for Misconduct due to Commission of a Serious Offense for violation of Article 113 (Drunken or reckless operation of a vehicle) and/or violation of Article 112 (Drunkenness and other incapacitation offenses, Drunk on Duty), of the Uniform Code of Military Justice. I agree with the board that there are two bases to separate [the applicant].<sup>1</sup> However after careful review of the Board's record, I conclude that Misconduct due to Commission of a serious offense is more appropriate of the two bases for the violation of Article 112 when he was found to be drunk on duty the morning of 2 March 2020 as determined by the Board and explained in its Opinions 1 and 2 the Board's Report.

[The applicant] shall be separated from the Coast Guard in accordance with Article 1.B.17.b.(3) of the Military Separations Manual, COMDTINST M1000.4 (series) for Misconduct due to Commission of a Serious Offense, with an Honorable characterization of service.

<sup>1</sup>Substantial evidence exists supporting the existence of a first AI in September 2012. The current lack of a CG-3307 in the member's PDR does not negate the existence of the incident. See exhibits 26, 27, and 29.

### *DD Form 214*

The applicant's DD Form 214 lists his separation as an honorable discharge, under the separation authority COMDTINST M1000.3 1.B.17, and the narrative reason for separation as misconduct.

## **THE APPLICANT'S ALLEGATIONS**

The applicant alleges he was wrongfully accused of having violated Articles 112 and 113 of the UCMJ by being drunk on duty and driving while intoxicated, despite there being no evidence to satisfy the necessary element of drunkenness. According to the applicant, after his wife was accused of having reported members of CGS [redacted] for drug use and sales, the station personnel retaliated against him, including by attempting to break into his family's home. The applicant alleges that his command completed this retaliation by separating the applicant from the Coast Guard through a deeply unjust ASB whose findings were replete with both factual and legal error. The applicant requests that the ASB's findings be overturned, that the unjust and erroneous charges against him be stricken from his files, that his separation be undone and that he be returned

to service at his prior rank, and that he be awarded the backpay his is due for the time he spent unjustly forced out of the ranks of the Coast Guard.

### ***Administrative Separation Board's Finding of a Previous Alcohol Incident***

The applicant argues that the ASB lacked the basic legal authority to find that he had a prior official alcohol incident. The applicant alleges that Coast Guard Regulations COMDINST M1000.10A at Article 4.G restricted the finding of an alcohol incident to only the commanding officer, or officer in charge of a service member, and such a finding could only occur through a Form CG-3307 entered into the service member's file. According to the applicant, no such form was even written or entered. In addition, the applicant argues that, under COMDISNT M1000.14D at 9, such a form could only be issued within two years of when command knew, or should have known about the incident, and the applicant's command cited the incident in 2013 in an evaluation report, meaning they clearly knew at the time.

According to the applicant, in short, the finding that a preponderance of the evidence supported that the applicant had a prior alcohol incident was a serious legal error. The applicant claims that the upholding of such a finding by the ASB Board, after being clearly informed as to the fact that its very convening authority had stated that no such prior incident had occurred, was not just a massive error, but a colossal injustice. The applicant alleges that, as noted by the his counsel at the time, it revealed just how much the ASB was seeking to either find or invent ways to separate him.

### ***Evidence of Impairment***

According to the applicant, both UCMJ Articles 112 and 113 have as a necessary element a finding that the accused service-member was drunk. The applicant states that the Manual for Courts-Martials explains that "drunk" means *either*:

- (1) A state of intoxication by alcohol sufficient to impair the rational and full exercise of mental or physical faculties; or
- (2) The state of meeting or exceeding a blood alcohol content limit of .08.

MCM (2019) at IV-65, 69.

The applicant states that, in order to find this necessary element, the preliminary investigation and administrative separation board must have found a preponderance of the evidence in order to satisfy either (1) or (2).

According to the applicant, evidence of impairment under the UCMJ includes noticeable swerving or drifting while driving, bloodshot eyes, the odor of alcohol, slurred speech, and slowed or impaired reactions. The applicant claims that out of all of these factors, the only factor ever alleged against him was the subjective findings by witness of the odor of alcohol.

The applicant claims that, at no point during March 2, 2020, did anyone who interacted with him at CGS [redacted] allege noticing any evidence of impairment. The applicant alleges

there are no reports of slurred speech, bloodshot eyes, difficulties driving, or slow or impaired reactions.

According to the applicant, at 9:00 he participated in an all-hands meeting, where, despite the large crowd, no one noticed any signs of intoxication. The applicant states that he briefly spoke with BM1 AS during this meeting, who would testify that he was about two feet away from her, showed no signs of intoxication, and that she would have been able to notice if he was at a .01 BAC, as alleged by the PA and ASB. The applicant claims that, at 9:10, he talked with BM2 H about finishing the application of non-skid product on CG [redacted]. The applicant states that, at 9:30, he spoke with BMCS H in regard to taking his Towing Endorsement test for his captain's license. The applicant states that, at 10:00, he received his towing test from BCMS H. The applicant claims that, at 10:05, he was in a small room with MK2 MM and BM3 K while taking the test. The applicant claims, at 10:40, he returned the test to BCMS H, while BMCM O was in the same room. The applicant states, that at 10:50, he went to MK2 PM to tell him that he was heading out to complete the application of Non-Skid on CG [redacted]. According to the applicant, MK1 O, FN G, and MK1 R were all also in the shop when he reported to MK2 PM.

The applicant claims that, from 9:00 to 10:50, he was around significant amounts of station personnel collectively, while also personally interacting with BM2 H, BMCS H repeatedly, MK2 MM, BM3 K, BMCM O and MK2 PM. According to the applicant, at no point, did any of these individuals notice any sign of impairment or intoxication. The applicant claims that MK1 R, the machinery technician who reported the applicant after he passed by the shop at 10:50, testified in September of 2020 that he did not notice any signs of impairment besides the alleged smell of alcohol. In addition, the applicant claims that MK1 R and MK2 MM testified that they did not notice any signs of impairment when they visited the applicant up at [redacted] Marina at 11:35. According to the applicant, this is particularly noteworthy given that MK1 R was the one who first reported an alleged smell of alcohol on the applicant less than 50 minutes prior and was on watch for any other signs of intoxication. The applicant alleges, in short, despite a large number of individuals having repeated opportunities to notice any signs of impairment, no one ever did. The applicant claims this is unsurprising, because he was never impaired.

The applicant states that the first witness to report a smell of alcohol on him was MK1 R, who alleged smelling the odor of alcohol on the applicant at approximately 10:50, and then notified BCMS H of this observation. The applicant argues that MK1 R made this observation despite sitting in an adjoining office. The applicant claims this is contradicted by MK2 PM, who he was speaking with, who testified that he did not smell of alcohol when he reported to the shop.

The applicant states that the second witness to allege smelling alcohol on him was MK2 MM, who testified as to smelling a light alcohol smell on the applicant while driving back to CGS [redacted] in the truck. The applicant argues that it is important to note that he had just been working with substantial quantities of alcohol-based substances, with MK1 R even noting that the entire boat reeked of alcohol due to the products being used.

The applicant states that the third witness to report an odor of alcohol was the beforementioned MK2 PM, who alleged smelling alcohol on the applicant during his performance of the breathalyzer test on the applicant. The applicant claims that smell was a "sweet alcohol

smell,” like “rubbing alcohol or Purell,” which was used as evidence that he was impaired. According to the applicant, BMCS H, continuing the trend of witnesses contradicting each other, testified as to not smelling any alcohol on him.

The applicant argues, he had just been using “Goof Off Gunk and Adhesive Remover” as part of the non-skid project, a product very similar to rubbing alcohol, and whose primary ingredients included 2-Butoxyethanol, which has a sweet odor, and Benzenemethanol, a benzyl alcohol, which also has a sweet odor. The applicant claims that at 12:10, 5 minutes prior to his breathalyzer test, he had also just washed his mouth with Micrell Antibacterial soap, which also includes alcohol and is very similar to Purell. The applicant states that it is important to note that he was informed that he was to be breathalyzed only after he had washed out his mouth, and that this was done because of his gum problems, which required special attention to ensure that substances did not infect them.

The applicant claims that two of the three primary allegation of smelling alcohol on him are directly contradicted by personnel who were in the same room at the time, with MK2 PM contradicting MK1 R concerning an alleged smell of alcohol at 10:50 when he passed by the shop, and BMCS H contradicting MK2 PM concerning an alleged smell of alcohol at 12:15 when he came in to be breathalyzed. The applicant claims MK2 MM’s allegation of smelling alcohol is more than explained by the substances that he had been working with, as they had almost certainly gotten at least in part of his clothing. The applicant argues that the same goes for MK2 PM’s allegation, which is further explained by the Micrell he had just used on his hands and mouth.

The applicant alleges that the PIO, and then the ASB, made a major legal error by using his breathalyzer tests as evidence of impairment. The applicant states that, at paragraph 27 of the PIO’s report, the PIO cites research showing that impairment can occur at a BAC as low as .02, which the PIO was clearly using as evidence to support a finding of impairment, an act replicated by the ASB at finding of fact 37. The applicant argues that doing so was legal error. According to the applicant, the Manual for Courts-Martial (MCM) defines intoxication via alcohol (the element that the service member was drunk) in the same way that state criminal laws do, by separating the definition of intoxication into impairment and per se intoxication. The applicant claims that impairment concerns showing drunkenness through evidence that alcohol was sufficiently impacting a person’s physical and mental capacities. According to the applicant these contrasts, per se (or statutory) intoxication is an entirely separate avenue for proving intoxication via showing the accused blood alcohol content exceeds a statutory limit.

The applicant argues that, if blood alcohol content was viable evidence for intoxication as defined by impairment, there would not be an entirely different category (“or”) defining intoxication via a distinct BAC level. The applicant claims that it would render per se intoxication via BAC completely pointless as a category. According to the applicant, the PIO and ASB, by using facts for impairment, the fact that it can occur at .02 or .04 BAC, was essentially reducing the threshold for per se intoxication from .08 BAC to .04 or .02 for the purposes of getting charges to stick under the UCMJ. The applicant claims that the UCMJ clearly states a per se limit of .08 BAC and the canon of interpretation of surplusage, that every provision in a statute should be given effect, if possible, clearly militates against using a lower BAC result as evidence to find drunkenness via impairment.

According to the applicant, the PIO and ASB, by using his BAC result from his breathalyzer tests, were applying evidence only suitable for one categorical definition of intoxication to another, completely unsuited one. The applicant argues that impairment under the MCM is strictly limited to the loss of capacity and has to be proven via evidence of said loss of capacity, of which there was none. The applicant claims that the ASB thus committed a grave legal error by using his alleged BAC as evidence that the element of drunkenness was met via impairment.

The applicant alleges that there is a large evidence base of interpersonal interactions between him and a large variety of CGS [redacted] personnel, none of whom reported any signs that either his mental or physical faculties were impaired. The applicant claims the only evidence of impairment was the ancillary evidence of the alleged smell of alcohol, which was based on two allegations, one of which was retracted and the other of which was more than sufficiently explained by the products the applicant had been using that day and disputed by another party who was in the room him and the alleger at the same time. According to the applicant, the smell of alcohol is merely an element that prompts the further investigation of the person in order to determine if they are impaired or not. The applicant claims that it is not evidence, in and of itself, of impairment, especially when there are no other signs of it. Finally, the applicant claims that his alleged BAC is impermissible evidence for a finding of impairment, given the specific separation of the proof of drunkenness within the UCMJ (and state criminal law) into two distinct categories of proof. The applicant claims that the ASB's finding that there was a preponderance of the evidence for the allegation that he was impaired is utterly ridiculous, completely unsupported by evidence, an obvious error, and contrary to law.

### ***BAC***

According to the applicant, there was clearly not a preponderance of the evidence that he was impaired on March 2, 2020, which means that the necessary element for his Article 112 and 113 charges can only be satisfied if a preponderance of the evidence showed he had a BAC above .08 at any point on March 2, 2020 (per se/statutory intoxication).

The applicant argues that breathalyzer tests are notoriously unreliable when it comes to determining BAC, which is why many states have rendered their results inadmissible for proof of intoxication. The applicant explains that one of those states is [redacted], where CGS [redacted] is located. The applicant claims that under [redacted] code, the results of breathalyzer tests (a.k.a. preliminary breath screening tests) are inadmissible in any action or proceeding, except for the narrow purpose of showing probative cause for arrest. The applicant argues that proceedings under the UCMJ have also noted the often highly unreliable results from breathalyzer tests.

According to the applicant, before the breathalyzer tests, he had been working with a large quantity of alcohol-based substances. The applicant states that he had been removing old Non-Skid with a heat gun from the ship and applying new Non-Skid with adhesive. The applicant claims that the adhesive was alcohol based and smelled very strongly of alcohol. The applicant states that in addition he was using Goof-Off to fix any errors, which is also alcohol based. The applicant claims that MK1 R would even testify as to how he could not smell any alcohol on him

while on the boat due to the way in which the entire boat smelled so strongly of it due to the chemicals he was working with.

According to the applicant, at 12:10, less than 5 minutes before his breathalyzer test, he carefully washed his hands and rinsed his mouth with Micrell Antibacterial hand sanitizer which contains both ethanolamine and chloroxylenol, both of which are alcohols. The applicant alleges that this was standard practice for him when working with toxic substances, as he had not only cut his gums that morning using his water pick, but he also had gum conditions which created pockets in his gums where toxic substances could accrue. The applicant claims that, at the time he washed his mouth, he was not aware that he was going to be breathalyzed. The applicant states that MK2 PM does not seem to have been aware that he had washed his mouth with the soap. The applicant alleges that the residual sanitizer remaining in his mouth after this cleaning could have easily caused the false breathalyzer results.

The applicant additionally claims there are also the issues as to whether or not MK2 PM had washed his own hands prior to performing the breathalyzer tests. The applicant states that a paper presented at the 2012 Society for Academic Emergency Medicine revealed that application of hand sanitizer prior to giving a breathalyzers test to another could drastically skew the results. The applicant states that in the findings, the group of 25 test subjects, despite having no alcohol in their blood stream registered a median of .051 BAC on a breathalyzer tests after the test giver had previously used hand sanitizer without properly drying his hands. The applicant claims that the test giver applying two pumps of sanitizer and not properly drying his hands resulted in an astounding median BAC result of .119 and this incident was occurring right at the start of the COVID pandemic and it is likely that MK2 PM was sanitizing his hands prior to being in close contact with others.

The applicant states that, beyond just his gum issues, which would trap substances that could lead to false positives on his breathalyzer tests, it is also important to note that certain dietary regimes can lead to false positives. The applicant claims that he was a frequent drinker of energy drinks and protein shakes and he and his wife frequently followed diets that involved fasting and avoiding carbohydrates. The applicant claims that, beyond just diets, he was suffering from severe stomach issues at the time, which was causing problems for him while eating, furthering weight loss. According to the applicant, on both February 26 and March 2, 2020, he showed elevated levels of both liver enzymes and blood protein levels. The applicant argues that all of the above factors, through causing the buildup of ketones and acetone within the body, could have impacted the breathalyzer readings.

The applicant argues that, even if the very doubtful accuracy of the breathalyzer tests are accepted, and even if the evidence is read in the best possible light to the PIO and ASB Board's finding, there is still no evidence that his BAC was ever over .08 on March 2, 2020. The applicant states that his BAC never showed a reading above .08. The applicant argues that the three tests performed on him at 12:16, 12:26, and 12:29 showed readings of .052, .048, and .046, respectively.

The applicant alleges that the ASB Board's findings that he had violated Articles 112 and 113 were founded on pure conjecture as to his untested BAC when he drove to the station at 8:16 and reported for duty at 8:25. The applicant states that opinion 1, stating that he violated Article

112, was based on a finding that his BAC was at or around .11 at 8:25 and opinion 3, stating that he had driven drunk at 8:16, was based on a finding that his BAC at that point was at or around .112. According to the applicant, both of these findings were derived purely from combining the results of the three highly questionable breathalyzer tests, and then applying a metabolic rate of .015 BAC per hour.

The applicant claims that there was no evidence to support an argument that he had any alcohol in his system in the morning. According to the applicant, at 7:20, he interacted with BMC O's wife while he was dropping his daughter off at school, she never reported any signs of intoxication and in fact sought to testify as such, something which BMC O apparently prevented. The applicant states that, at 9:00, when he would allegedly be still statutorily intoxicated, he was at the all hands meeting, where no one noticed any signs of impairment. The applicant claims that BM1 S specifically testified that they spoke at a close distance and that she clearly would have been able to tell if he was intoxicated, but she noticed no evidence of it. The applicant argues that most importantly, on September 23, 2020, MK2 PM, who testified that the applicant smelled of alcohol when he performed the breathalyzer test at 12:15, specifically stated that he did not smell of alcohol at 10:50 when the applicant went to ask permission to go to the marina. The applicant argues that, as noted in the picture of the shop from his personal narrative, MK2 PM was the person sitting closest to him, yet he smelled nothing.

The applicant argues that, even if the evidence base is stretched to the utter breaking point to support a finding that he had alcohol in his system on March 2, 2020, the earliest even reasonably possible moment at which he could have consumed the alleged alcohol that was reportedly detected in his system was at 10:50. He argues that, even then, it's important to note that this point is still contradicted by witness testimony.

According to the applicant, even if the Board uses this earliest possibly available starting point of 10:50, and accepts the highly problematic nature of his BAC tests, the ASB's own methods of using a  $>.015$  BAC per hour metabolic rate for alcohol would result in  $.0215$  BAC having been metabolized by 12:16,  $.024$  by 12:26, and  $.025$  by 12:29. The applicant states that this results in the highest possible BAC for the applicant being  $.0735$  based on the 12:16 reading,  $.072$  based on the 12:26 reading, and  $.071$  based on the 12:29 reading. The applicant argues that this assumes that all this alleged alcohol was consumed and entered into his blood stream instantaneously, which is completely contrary to how that biological process works.

The applicant argues that after jumping through every possible logical hoop and straining any even potential shred of alleged evidence to its breaking point to support the PIO and ASB's findings, the applicant, in this best possible case for the ASB, still never had an alleged potential BAC above  $.08$  on March 2, 2020. The applicant claims that this ludicrously generous reading not only fails to show a preponderance of the evidence that his BAC was sufficient to meet the necessary element of Articles 112 and 113, it shows zero evidence. According to the applicant, an actually reasonable reading of the evidence of the day, which clearly points to the fact that there's no evidence for him having consumed alcohol on Monday, and that his BAC test was due to the substances he had been using and working with, would similarly show zero evidence to support such a finding. The applicant argues that charges with no evidence backing them are clear errors and contrary to the law, and they must be corrected.

*ASB Decision*

The applicant states that it is important to consider the evidence that has been presented. The applicant states that he was separated on two grounds: two charges in 2020, which both require as a necessary element that a preponderance of the evidence showed that he was drunk on March 2, 2020, and an alleged prior alcohol incident which rendered the alleged March 2020 incident his second.

The applicant argues that the ASB, after being informed of the fact that the convening authority of the Board had specifically stated he did not have a prior documented alcohol incident, still ridiculously struck to its position that a preponderance of the evidence showed that it was an alcohol incident. The applicant states the very finding of an alleged alcohol incident in the first place, when there was no CG-3307 for any such incident, was in flagrant violation of Coast Guard regulations and outside their legal authority.

According to the applicant, the ASB's finding of drunkenness for both the Article 112 and 113 charges required a preponderance of the evidence that he was either impaired or per se intoxicated via blood alcohol content. The applicant argues that there is zero evidence that he was impaired, barring an alleged smell of alcohol that has not only been contested by contradictory testimony, but is also more than sufficiently explained, if it existed by the substances he was working with. The applicant argues that, not only were the breathalyzer tests performed on him deeply unreliable as evidence, but even in the best-case scenario for the ASB Board's findings available under the evidentiary record, he was never statutorily intoxicated. The applicant urges the Board to consider that, on September 19, 2020, he took and passed a polygraph, performed by a seasoned veteran with thousands of previous tests of experience, where it was assessed that he was truthful when he stated that he had consumed no alcohol after 6 p.m. on March 1, 2020.

According to the applicant, all of this weight of evidence, when combined with the clearly highly suspicious nature of his separation, points to the fact that his separation was not just a clear legal error as it was based on charges whose necessary elements had not been established, but also a deep injustice. The applicant claims that a clique of Coast Guard personnel, seeking to retaliate against a station member they disliked, took the opportunity to frame him for a crime he did not commit. The applicant alleges that, after a summer of intense retaliation by station personnel for his family's alleged whistleblowing, including attempted burglary, he was put through an utter farce of a hearing and separated based on that hearing's findings.

The applicant claims that there are many people who deserve to be separated for the actions surrounding the broken culture at CGS [redacted] during 2019 and 2020. The applicant states that many already have, given the substantial Coast Guard investigations that have since occurred into the actions of station personnel. The applicant argues that he is not one of them. The applicant argues that, to uphold the findings of his separation hearing would be the very definition of an unlawful action under the Administrative Procedure Act, as arbitrary and capricious decision making, contrary to the law, and unsupported by substantial evidence.

### VIEWS OF THE COAST GUARD

On March 8, 2023, 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 argues that the applicant fails to carry his required burden to prove that the separation basis of the Commission of a Serious Offense, specifically drunk on duty, was erroneous or unjust because absent strong evidence to the contrary, government officials are presumed to have carried out their duties correctly, lawfully, and in good faith and moreover, the applicant bears the burden of proving error.

The JAG states that the applicant bases his claim of error on the argument that UCMJ article 112 – drunk on duty, was not sufficiently proven, and therefore could not form a basis for separation. In response to the applicant’s claims that there was insufficient evidence for finding that the applicant was “drunk” on duty for the purposes of a violation of article 112, UCMJ, the JAG states that this is incorrect. The JAG explains that the definition of drunk under the UCMJ for this particular article is either that the applicant had a breath alcohol concentration of .08, *or* that the applicant attained *a state of intoxication* by alcohol that is *sufficient* to impair the rational and full exercise of mental or physical faculties. The JAG states that the applicant first attacks the Coast Guard’s finding that the applicant was sufficiently impaired for the purposes of UCMJ, Article 112. In response to the applicant’s allegation that this requires that there be observable evidence of impairment, noting that the odor of alcohol is acceptable evidence of impairment, the JAG argues that the applicant fails to acknowledge that by his own argument, there was acceptable evidence of impairment because multiple shipmates testified that they smelled alcohol coming from the applicant. The JAG argues that, nevertheless, the definition does not require external manifestation of impairment, but simply that that accused have enough alcohol in his system *sufficient* for impairment. The JAG notes that, in this case, the applicant registered anywhere from .052-.046 BAC a few hours after commencing duty. The JAG states that CG policy explains that, in regards to being on duty, a BAC of .02 is a state of intoxication that is “*sufficient*” to impair the rational and full exercise of mental faculties, but that a BAC of .04 (which the applicant was above) may cause significant impairment. Additionally, the JAG argues that the applicant did not need to be found to be drunk at the beginning of duty, as UCMJ article 112 only required that the applicant be drunk *while* on duty.

The JAG states that the applicant also attacks the Coast Guard’s finding that he had a BAC over .08 while on duty and the applicant states that applying a metabolic rate of .015 BAC per hour was erroneous to determine that the applicant’s BAC was ever over .08. The JAG states that the applicant also argues that the first time anyone smelled alcohol on the applicant was 10:50, and therefore this is the furthest back that the metabolic rate can be applied to calculate BAC. The JAG argues that, using the .015 BAC metabolic rate, the applicant’s calculations seem correct that the applicant’s BAC may not have been over .08 at 10:50, but, as noted by the applicant, .015 BAC was a generalized metabolic rate. The JAG argues that, looking at the applicant’s actual metabolic rate, he metabolized .006 BAC between 12:15 and 12:19 (14 minutes), or approximately .026 per hour. The JAG states that utilizing this rate, and the applicant’s claimed starting point of 10:50, the applicant was at or over .08 BAC by 10:50.

The JAG responded to the applicant's argument that it was erroneous to find that he was drunk on duty because there were alternative justifications for why the applicant was registering a BAC with the portable alcohol breathalyzer tests. The JAG argues that, while the applicant raises these issues to the BCMR, there is no evidence that he provided these arguments to the investigating officer, the portable alcohol breathalyzer test administrator, or his command. The JAG notes the applicant may have raised this at his ASB. The JAG states that the ASB met and heard testimony and accepted evidence from both the Government and the applicant and, at the conclusion of the hearing, the board found that the elements of UCMJ article 112 were met by a preponderance of the evidence. The JAG argues that, as such, the Coast Guard was not erroneous in find that there was sufficient evidence for the commission of a serious offense, drunk on duty. Therefore, the JAG argues that the applicant was correctly separated in accordance with policy.

### **APPLICANT'S RESPONSE TO VIEWS OF THE COAST GUARD**

On May 17, 2023, 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 on November 13, 2023. Through counsel, the applicant restated almost the entirety of his initial memorandum to this Board and therefore for efficiency, only that information that is dispositive of the applicant's claims and was not previously recorded elsewhere in this decision will be summarized here.

The applicant adjusted his request for relief to include:

- Dismissal and removal of the March 2, 2020 UCMJ Article 112 violation charge, and removal of any derogatory reference of the dismissed charge;
- Dismissal and removal of the March 2, 2020 UCMJ Article 113 violation charge, and removal of any derogatory reference of the dismissed charge;
- Dismissal and removal of the March 2, 2020 Alcohol Incident, and removal of any derogatory reference of the dismissed Alcohol Incident;
- Correction of his narrative reason of separation from "misconduct" to "Secretarial Authority";
- Reinstatement to the USCG with the applicant's prior rank of Boatswain Mate 2nd Class;
- All backpay and benefits that he would have otherwise been entitled to had he not been erroneously discharged; and
- Any other relief the Board deems just and proper.

### ***Breathalyzer***

The applicant argues that the Coast Guard examiner failed to properly calibrate the breathalyzer prior to administering the breathalyzer examination, the results of the breathalyzer examination became per se arbitrary and capricious as is the failure of an administrative body to conform to prior procedure without adequate explanation of the change. The applicant states that, on March 2, 2020, he arrived at CG [redacted] at 12:13pm and was left unattended in the restroom for twenty minutes prior to the breathalyzer test commencing. The applicant further states that he was told by MK2 PM, the breathalyzer test administer, that he had not calibrated the portable breathalyzer or administered a test in over eight years. The applicant claims that three portable

breathalyzer tests were used in total, which is not only uncommon, but neither of the three units were calibrated in the presence of the applicant properly. The applicant alleges that MK2 PM never broke the seal of the portable breathalyzer tests in the presence of the applicant.

The applicant argues that when the Coast Guard examiner failed to administer the breathalyzer exam in the proper order, the results of the breathalyzer examination became per se arbitrary and capricious as is the failure of an administrative body to conform to prior procedure without adequate explanation for the change. The applicant claims that he was left unattended for up to twenty minutes in the restroom prior to the breathalyzer test, then immediately brought into the CGS [redacted] room for breathalyzer testing. He alleges he had gum in his mouth when he arrived at CGS [redacted] at 12:13pm and was not closely monitored for any period before testing.

### *Administrative Separation Board's Alleged Failure to Consider Arguments*

The applicant argues that the ASB results and the Advisory Opinion's recommended denial are arbitrary and capricious because the Coast Guard entirely failed to consider the aspects of the problem such as the applicant's presumption of innocence, his side of the story, and the numerous breaches in protocol when conducting the breathalyzer test such as a strip never being broken in front of him. The applicant alleges that, at the end of the day, this is a clear case of retribution and should have been treated as such pursuant to the policy of "innocent until proven guilty." The applicant claims that, instead of corroborating MK1 R's statement with reliable and tangible evidence, the witness's statement was taken as fact, which led to numerous additional erroneous allegations and misapplication of law and policy. The applicant argues 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.

### **APPLICABLE LAW AND POLICY**

The Military Drug and Alcohol Abuse Policy Manual, COMDTINST M1000.10A, provides the necessary guidance on alcohol incidents (AI). Specifically, Article 4.D. states:

1. Except as set forth in Paragraph 4.D.3. below [providing alcohol to underage military members], any behavior, in which 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) that alcohol was a significant or causative factor that resulted in the member's loss of ability to perform assigned duties or is a violation of the UCMJ, Federal, State, or local laws. The military member need not be found guilty at court-martial, in civilian court, or be awarded non-judicial punishment for a behavior to be considered an alcohol incident.
2. Except as set forth in Paragraph 4.D.3. below, the military member must actually consume alcohol for an alcohol incident to have occurred. Simply being present where alcohol is consumed does not constitute an AI.  
...
4. The following events must all be considered an Alcohol Incident:  
...
  - b. Impairment while on duty. All military members must be free from the residual effects of alcohol consumption and required to be free from all alcohol effects when reporting for duty, commencing duties, and/or expiration of liberty. Research shows impairment can occur in BAC as low as 0.02% but is significant at BAC of 0.04%.

The Manual for Courts-Martial, United States pt. IV, section 49, Article 112 of the UCMJ—Drunkenness and other incapacitation offenses(2019), provides that:

a. *Text of the statute.*

**(a) DRUNK ON DUTY.—Any person subject to this chapter who is drunk on duty shall be punished as a court-martial may direct.**

...

b. *Elements.*

(1) *Drunk on duty.*

- (a) That the accused was on a certain duty; and
- (b) That the accused was drunk while on this duty.

...

c. *Explanation.*

(1) *Drunk on duty.*

(a) *Drunk.* “Drunk” means—

- (i) the state of intoxication by alcohol that is sufficient to impair the rational and full exercise of mental or physical faculties; or
- (ii) the state of meeting or exceeding a blood alcohol content limit with respect to alcohol concentration in a person’s blood of 0.08 grams of alcohol per 100 milliliters of blood and with respect to alcohol concentration in a person’s breath of 0.08 grams of alcohol per 210 liters of breath, as shown by chemical analysis.

Article 1 of the Military Separations Manual, COMDTINST M1000.4 (August 2018), provides the necessary guidance on discharging a service member with eight or more years of active service. In relevant part:

**1.B.1.d. Retention or Separation.** In determining whether a member should retain current military status or be separated administratively, the Service may evaluate the member’s entire military record, including records of non-judicial punishment imposed during a previous enlistment or period of service, all courts-martial records or convictions, and any other material or relevant factors. Commanding officers, investigating officers, administrative discharge boards, and other agencies charged with making such decisions consider records of non-judicial punishment imposed during a previous enlistment or period of service only if, under the case’s particular circumstances, the records would have a direct, strong probative value in determining whether retention or administrative separation is appropriate.

...

**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 performer 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

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.

...

(c) Voluntary alcohol consumption is not an excuse for misconduct and does not mitigate the impact of misconduct. This basis for separation, not unsuitability under Article 1.B.15 of this Manual, shall be used for all members receiving an alcohol incident that involve serious misconduct (including, but not limited to: domestic violence; hazing; drunken or impaired operation of a vehicle, aircraft, or vessel; or other misconduct that meets the definition of a serious offense in this Article). With the exception of cases involving a second or third alcohol incident, or drunken or impaired operation of a vehicle, aircraft, or vessel, *commanding officers have discretion to determine whether or not to initiate administrative discharge processing for commission of a serious offense*, after a careful review of the circumstances of the case. However, commanding officers and administrative boards are prohibited from designating unsuitability as the basis for separation if administrative separation processing is required by this Manual or Reference (h), Military Drug and Alcohol Policy, COMDTINST M1000.10 (series), and the evidence supporting separation includes any misconduct addressed in this Article. Unsuitability shall only be designated as the basis for separation in alcohol incident cases involving minor misconduct (including but not limited to: underage drinking that does not involve the commission of a serious offense, and short periods of unauthorized absences of several hours or less). (emphasis added)

The Enlisted Personnel Administrative Boards Manual, COMDTINST M19210.1, provides the following guidance on the duties and authority of ASBs:

**Article 1.J. Board Recommendations and Final Action by CG PSC.** Unless terminated as authorized by Article 8.C. of this Manual, final action on all boards controlled by this Manual is taken by Commander, Coast Guard Personnel Service Center. A board's report, including its findings of fact, opinions, and recommendations, *is advisory only; it will be thoroughly and carefully reviewed and considered, but it is not binding on CG PSC.* CG PSC is responsible for enforcing policy that is in the best interests of the entire Coast Guard and for ensuring the consistent application of military personnel policy across the Coast Guard. Whether CG PSC accepts the board's recommendations or not, the board process is inherently valuable for the following reasons.

## 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 applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.<sup>2</sup>

3. 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).

4. The applicant alleged that the Coast Guard erred when it found he was drunk on duty and separated him for the commission of a serious offense, UCMJ Article 112. 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.<sup>3</sup> 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."<sup>4</sup>

5. **Finding of a previous Alcohol Incident and Article 113 violation.** The applicant alleges the ASB erred when it found that he had a prior official alcohol incident and violated Article 113. According to the applicant, he was cited for impaired driving and reported it to the Coast Guard, who declined to give him an alcohol incident. The applicant's record mentions an alcohol incident documented by a CG-3307 in his record, but there is no CG-3307 in his record. The ASB found that he had a previous alcohol incident in 2012 and recommended he be separated as this was his second alcohol incident. Additionally, the ASB made findings and recommendations regarding whether the applicant violated Article 113.

However, Article 1.J. of the Enlisted Personnel Administrative Boards Manual, COMDTINST M19210.1, states that an ASB's report, including its findings of fact, opinions, and recommendations, is advisory only; it will be thoroughly and carefully reviewed and considered, but it is not binding on CG PSC. CG PSC is responsible for enforcing policy that is in the best interests of the entire Coast Guard and for ensuring the consistent application of military personnel policy across the Coast Guard." Coast Guard policy makes it clear that the ASB's report is advisory only and that the Final Reviewing Authority is not bound by those recommendations put forth by the ASB. Here, the Final Reviewing Authority, acknowledging there was substantial evidence of a first alcohol incident, declined to use the finding of a first alcohol incident or

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<sup>2</sup> *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

<sup>3</sup> 33 C.F.R. § 52.24(b).

<sup>4</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

violations of Article 113. The applicant was separated for his violation of Article 112. Thus, no relief is warranted with respect to the finding of a first alcohol incident or violation of Article 113.<sup>5</sup>

6. **Evidence of Impairment.** The applicant alleges that the Coast Guard erred in finding that he was impaired on March 2, 2020, which is a necessary element of UCMJ Article 112.

- a. The applicant argues that the odor of alcohol was insufficient to find he was impaired because several people did not report smelling alcohol and he was working with alcohol-based substances, which shows he was not drunk. The applicant argues that because several people he interacted with did not report smelling alcohol that he could not have been impaired. However, the PIO interviewed witnesses who stated he smelled like alcohol and witness who stated he did not smell like alcohol. The ASB had evidence from witnesses on both sides of the issue as well. The Coast Guard made the determination that the applicant was impaired using a preponderance of the evidence standard, which does not require no evidence to the contrary, just a more likely than not standard. Additionally, the applicant provided to the Board alternative justifications for why he smelled like alcohol, including he was working with alcohol-based substances. There is no evidence he provided these arguments to the investigator or his command. Thus, the Coast Guard did not err in accepting the odor of alcohol as evidence of impairment.
- b. The applicant argues that the only evidence of impairment was the odor of alcohol. While the odor of alcohol is evidence of impairment, the applicant's BAC is also evidence of impairment. Manual for Courts Martial, Part IV (Article 112 of the UCMJ)—Drunkenness and other incapacitation offenses offers the explanation of “drunk” as meaning either:
  - (i) the state of intoxication by alcohol that is sufficient to impair the rational and full exercise of mental or physical faculties; or
  - (ii) the state of meeting or exceeding a blood alcohol content limit with respect to alcohol concentration in a person's blood of 0.08 grams of alcohol per 100 milliliters of blood and with respect to alcohol concentration in a person's breath of 0.08 grams of alcohol per 210 liters of breath, as shown by chemical analysis.

The applicant's BAC registered at .052, .048, .046, which does not meet the threshold of the second prong. However, the applicant's BAC exceeded .04, which meets the threshold of impaired in the Military Drug and Alcohol Abuse Policy Manual, COMDTINST M1000.10A, Article 4.D. The Military Drug and Alcohol Abuse Policy Manual states, “[r]esearch shows impairment can occur in BAC as low as 0.02% but is significant at BAC of 0.04%.” Thus, under the UCMJ and Coast Guard policy, the applicant's BAC was evidence of impairment and the Coast Guard did not err in finding he was impaired.

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<sup>5</sup> The applicant makes several arguments regarding the metabolic rate and whether his BAC was elevated earlier in the day. These arguments relate to whether the applicant violated Article 113, which is not a basis on which he was discharged so the Board is not addressing the merits of those arguments.

- c. The applicant challenges the breathalyzer tests' reliability and offers alternative justifications for why his BAC was elevated. The applicant argues that breathalyzer tests are "notoriously unreliable." However, breathalyzer tests are not only a widely accepted manner of determining BAC, but also authorized under Coast Guard policy. BAC testing methods include breath, blood, or urine measurements for alcohol content. Additionally, the applicant provided to the Board alternative justifications for why his BAC was elevated, including he rinsed his mouth out with hand sanitizer. There is no evidence he provided these arguments to the breathalyzer test administrator, the investigator, or his command. Thus, the Coast Guard did not err in relying on the breathalyzer result as evidence of the applicant's BAC.

7. The applicant made numerous allegations with respect to the actions and attitudes of various officers. For example, the applicant claimed that he was illegally detained for over 48 hours and the victim of a campaign of harassment. Those allegations not specifically addressed above are considered to be unsupported by substantial evidence sufficient to overcome the presumption of regularity and/or are not dispositive of this case.<sup>6</sup>

8. **Injustice.** Under 10 U.S.C. § 1552, the Board is authorized not only to correct errors but to remove injustices from any Coast Guard military record. For the purposes of the BCMRs, "injustice" is sometimes defined as "treatment by the military authorities that shocks the sense of justice but is not technically illegal."<sup>7</sup> The Board has authority to determine whether an injustice exists on a "case-by-case basis."<sup>8</sup> Indeed, "when a correction board fails to correct an injustice clearly presented in the record before it, it is acting in violation of its mandate,"<sup>9</sup> and "[w]hen a board does not act to redress clear injustice, its decision is arbitrary and capricious."<sup>10</sup> In this instance, while the applicant focuses much of his argument on allegations of error in the investigation and subsequent involuntary separation, he also argues that the investigation was the result of false accusations by Station personnel in retaliation after his wife was accused of having reported members for drug use and sales and the ASB was a "kangaroo court with predetermined results." The Board finds these assertions unsupported by the evidence of record. Beyond the applicant's bald assertions, there is nothing in the record that reflects the investigation was undertaken as the result of retaliation or that the ASB had a predetermined outcome. The PIO interviewed multiple witnesses, including the applicant, and determined, by a preponderance of the evidence, that the applicant had committed the alleged misconduct. Further, the ASB took testimony and accepted evidence from both the government and the applicant, who was represented by counsel, in reaching its findings and recommendations. The evidence does not reflect any impropriety in

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<sup>6</sup> 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").

<sup>7</sup> *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976); but see 41 Op. Att'y Gen. 94 (1952), 1952 WL 2907 (finding that "[t]he words 'error' and 'injustice' as used in this section do not have a limited or technical meaning and, to be made the basis for remedial action, the 'error' or 'injustice' need not have been caused by the service involved.").

<sup>8</sup> Docket No. 2002-040 (DOT BCMR, Decision of the Deputy General Counsel, Dec. 4, 2002).

<sup>9</sup> *Roth v. United States*, 378 F.3d 1371, 1381 (Fed. Cir. 2004) (quoting *Yee v. United States*, 206 Ct. Cl. 388, 397 (1975)).

<sup>10</sup> *Boyer v. United States*, 81 Fed. Cl. 188, 194 (2008).

either of proceeding. Therefore, the Board finds that the applicant's involuntary separation does not shock the sense of justice.

9. 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.<sup>11</sup> He has not proven, by a preponderance of the evidence, that the Coast Guard erred when it found he was drunk on duty and separated him for the commission of a serious offense, UCMJ Article 112. Nor has the applicant demonstrated by a preponderance of the evidence that the Coast Guard's decision to separate him for commission of a serious offense was otherwise unjust. Accordingly, relief should be denied.

**(ORDER AND SIGNATURES ON NEXT PAGE)**

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<sup>11</sup> *Muse v. United States*, 21 Cl. Ct. 592, 600 (1990) (internal citations omitted).

**ORDER**

The application of former BM2 [REDACTED], USCG, for correction of his military record is denied.

October 17, 2024

