DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2023-037

FS3 (former)

FINAL DECISION ON REMAND

This proceeding was conducted under the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case upon receiving a Remand Order from the United States Court of Federal Claims and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated October 11, 2023, 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 is a former Food Service Specialist, Third Class (FS3/E-4) who enlisted on active duty on December 2, 2014, and received a general, Under Honorable Conditions discharge for "Misconduct" on August 15, 2017, but whose discharge was changed by the Discharge Review Board (DRB) to show an Honorable discharge for "Miscellaneous/General Reasons." He filed suit after receiving the decision of the DRB, and the United States Court of Federal Claims remanded the case to the BCMR.

The applicant asked the BCMR to void his discharge and reinstate him on active duty with back pay and allowances; to correct all of his records to show that he was not discharged; to "amend his investigative records to ensure that they are consistent with the preliminary hearing officer's findings"; and to grant any other relief the Board deems fair, proper, and just.

The applicant stated that he was wrongfully administratively discharged from the Coast Guard because of "overstated allegations of misconduct that dramatically exaggerated the actual conduct in question" and because those allegations were not supported by a preponderance of the evidence, as required by the Military Separations Manual. And even though all of the charges against him were dismissed, he "was accused of the same misconduct and also of violating Article 128 [Assault] as well" during the subsequent administrative discharge proceedings. The applicant

argued that there is no evidence supporting the allegations that he violated Articles 107,[1] 120,[2] and 134[3] of the UCMJ.

The applicant stated that the evidence shows that his alleged victim (hereinafter, AV) had kissed him and flirted with him both in the living room and in his bedroom before they engaged in consensual sexual intercourse. He admitted that he had provided her with some alcohol despite the fact that she was underage. He also admitted that after she fell asleep, he carried her from the living room to his bed "so she could sleep on his bed." He claimed that she took off her own bra so he could give her a back rub, and they then had consensual intercourse in his bathroom. He stated that, "[d]uring the intercourse in his bathroom, [AV] asked [the applicant] to take out his finger from her anus and he complied." After their intercourse, they both fell asleep in his bed, and when AV woke up, he walked her to the door of his apartment.

The applicant also stated that when CGIS agents questioned him about the incident several months later, he did not remember all of these details and told the CGIS agents that he could not remember "all the details of who said what and what exactly happened." The Preliminary Hearing Officer reviewed the evidence and found probable cause for only one of five specifications of violating Article 107 (False official statements). He noted that the Preliminary Hearing Officer "observed that [the applicant] repeatedly told the investigator that he did not remember all of the details from the event, and that it appeared that [the applicant] did not mean his statements to be definitive" when he denied having done certain things on the night in question. The applicant also claimed that there was no evidence to show that he actually did remember the details when he was being interviewed by the CGIS agents.

Regarding the two specifications under Article 120 (Rape and Sexual Assault), the applicant pointed out that the Preliminary Hearing Officer found insufficient evidence and no probable cause to support the first specification, concerning their vaginal intercourse, but found probable cause to support the second specification, concerning his finger penetrating AV's anus. However, the Preliminary Hearing Officer also concluded that the anal penetration was not criminal and that "if anything [the applicant] was simply mistaken [as] to [AV's] consent regarding an ancillary sexual act to the consensual sexual intercourse."

Regarding the sole specification under Article 134 (General article), the applicant noted that although the Preliminary Hearing Officer found sufficient evidence for probable cause that

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[1] Article 107 of the UCMJ, codified at 10 U.S.C. § 907, prohibits making a false official statement while knowing it to be false and with the intent to deceive.

[2] Article 120 of the UCMJ, codified at 10 U.S.C. § 920, prohibits rape and sexual assault. It defines rape as committing a sexual act of penetration of the vulva, mouth, or anus upon another person by doing one of the following: using unlawful force; using force causing or likely to cause death or grievous bodily harm or kidnapping; rendering the person unconscious; or "administering to that other person by force or threat of force, or without the knowledge or consent of that person, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of that other person to appraise or control conduct." The Manual for Courts-Martial states that a person cannot consent while sleeping or while under threat or fear, and "[l]ack of consent may be inferred based on the circumstances of the offense. All the surrounding circumstances are to be considered in determining whether a person gave consent, or whether a person did not resist or ceased to resist only because of another person's actions."

[3] Article 134 of the UCMJ, codified at 10 U.S.C. § 934, authorizes punishment of other "disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty."

the applicant had bought alcohol for AV, who was underage, he recommended that the Article 134 charge be disposed of at mast through non-judicial punishment (NJP).

The applicant stated that despite the Preliminary Hearing Officer's findings and recommendations, his command referred slightly modified charges against him to a general court-martial for trial. When AV refused to testify against him, his chain of command did not proceed with the charges, which were dismissed, and instead initiated an administrative discharge for misconduct based on their continued exaggeration of the allegations against him. Although he responded to the notification of discharge by pointing out the lack of probable cause "for the vast majority of the allegations" and the Preliminary Hearing Officer's recommendation that there be no court-martial, his chain of command continued to claim that he had coerced AV into sexual intercourse even though "the evidence showed that there was no coercion and the intercourse was consensual." The applicant argued that his chain of command ignored the findings of the Preliminary Hearing Officer and the evidence showing that the sex was consensual and that he did not make false statements to CGIS. He also argued that the District Commander's statement that AV felt like "she had no other choice" but to have sex with the applicant "was completely not supported by the facts or the law." He also noted that "coercing" someone to have sex by promising to have a relationship is not grounds for separation. Moreover, the applicant pointed out, neither his discharge notification nor the memorandum to the Personnel Service Center (PSC) recommending his discharge mentioned the findings and recommendations of the Preliminary Hearing Officer.

The applicant also noted that in positively endorsing the Sector Commander's recommendation for discharge, the District Commander wrote, "[The applicant's] act of picking up the victim and carrying her to his bedroom without her consent was an assault consummated by a battery in violation of Article 128 of the UCMJ." Therefore, the District Commander added a brand new allegation to the discharge package that was reviewed by PSC, and the applicant was given no opportunity to respond to it. Therefore, he was wrongfully separated because he received no notice of the District Commander's claim that he had violated Article 128. The applicant noted that in *Rogers v. United States*, 124 Fed. Cl. 757 (2016), the United States Court of Federal Claims reviewed a case in which the plaintiff's commanding officer, in forwarding the proceedings of an Administrative Separation Board to PSC, had made claims about the applicant's conduct and adverse effect on subordinates that had not been presented to the plaintiff or the Administrative Separation Board. Because the Court was unable to assess the influence of the commanding officer's new claims on PSC's decision, the plaintiff's separation was set aside.

The applicant also stated that he had received good performance evaluations and that the DRB's majority found that the quality of his service was "compelling and persuasive." However, he argued, his chain of command and PSC failed to consider his entire military record, as they were obliged to do under Article 1.B.1.d. of the Military Separations Manual.[4]

The applicant also claimed that he should have qualified for the Second Chance Program

[4] Article 1.B.1.d. of the Military Separations Manual, COMDTINST M1000.4, states that when "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."

"because his service record was excellent and the record revealed that at most he made a youthful error of providing Mike's Hard Lemonade to someone who was under the age of 21." The applicant stated that although he submitted a request for consideration for the Second Chance Program, his chain of command failed to properly consider him for it.

Regarding the timing of his case, the applicant argued that it is timely because although he was aware of some of the errors when he was discharged, he discovered others when he received responses to his requests under the Freedom of Information Act (FOIA). The applicant also noted that although he applied to the DRB on January 30, 2018, the DRB did not issue its decision in his case until July 8, 2020.

SUMMARY OF THE RECORD

On December 2, 2014, at age 22, the applicant enlisted in the regular Coast Guard as a seaman recruit (E-1). On January 30, 2015, after completing recruit training, he advanced to seaman apprentice (E-2) and was assigned to a cutter. From October 23, 2015, to February 5, 2016, the applicant attended FS "A" School to train for the Food Service Specialist rating. After graduation, he advanced to FS3/E-4 and was transferred to a boat station on February 19, 2016.

Also in February 2016, a member who had lived with the applicant when he was assigned to the cutter underwent Sexual Assault Prevention and Response (SAPR) training and subsequently reported that he believed that the applicant might have committed a sexual assault on a civilian in the summer of 2015. The command referred the matter to the Coast Guard Investigative Service for criminal investigation.

CGIS Report of Investigation

CGIS reported on March 2, 2016, that the investigation was initiated in response to information that the applicant might have sexually assaulted a female civilian. The CGIS agent wrote that "initial interviews disclosed that [the applicant] purchased alcohol and provided it to [the alleged victim, AV] knowing she was under 21 years of age and that she may have been intoxicated and unable to consent to engaging in sexual intercourse with [the applicant]." CGIS interviewed witnesses, summarized the interviews, and gathered some sworn affidavits.

Affidavit of SN A: On March 1, 2016, the first witness, SN A (for privacy purposes, those involved are not identified by name or initials), wrote and signed a sworn affidavit for CGIS stating that on February 29, 2016, another member, SN B, told him that when SN A's girlfriend and her friend (the alleged victim, AV) were visiting SN A, AV had gone to his and the applicant's apartment, drunk alcohol, "appeared drunk," and fallen asleep on their couch. Then according to SN A, SN B told him that the applicant had picked AV up off the couch, carried her to his room, and closed and locked the door. About 20 to 30 minutes later, SN B heard what he believed was the applicant and AV having sex. According to SN A, SN B told him that after receiving the SAPR training, he thought that AV might have been sexually assaulted that night. After talking to SN B, SN A called AV and asked her what she remembered and how she felt. According to SN A, AV told him that she remembered stopping with the applicant at a gas station, being asked what she wanted to drink, telling him she did not want anything, but receiving "a Mike's Hard Lemonade." AV told

SN A that after they got to the applicant's and SN B's apartment, she did not want to drink because she had to wake up early the next morning but the applicant "began to push so she drank." AV told SN A that she had expected to catch a ride back to SN A's apartment with another member, SN C, but "ended up falling asleep on the couch." AV told SN A that she woke up in the applicant's bed and told him that she needed to leave to get up early, but he said "No." When she told him "We are not having sex," he began making promises about a lasting relationship and "somehow they ended up having sex. She made it clear that she never said yes." SN A then ended the call with AV and spoke to an advisor.

Affidavit of SN B, the applicant's apartment-mate: Also on March 1, 2016, the second witness, SN B, wrote and signed a sworn affidavit for CGIS stating that "on a weekend right around the 4th of July," after hanging out on his porch all day, smoking and using his laptop, he had entered his government-leased housing and seen the applicant and AV in the living room. AV was visiting their apartment that evening in order to give her friend and SN A some "alone time." The applicant, SN B, AV, and another member, SN C, had gotten pizza earlier that evening and then stopped at a gas station to buy beer. SN B said that he stayed in the car with AV while the applicant and SN C went inside because he was "underaged and [didn't] drink." AV told him that she was also underage. Then, "[t]hey came out with a big case of beer, tall cans." The four of them went back to the apartment and the three others (the applicant, AV, and SN C) started drinking the beer. After about two hours, the applicant and AV were sitting on the couch together with "no signs of affection other than his arm around her." AV was "at the very least buzzed." SN C asked AV if she wanted to go back to SN A's apartment to sleep, and AV said "yes, in a little bit," but then AV fell asleep on the couch. A bit later, the applicant came out of his bedroom, picked AV up off the couch, took her to his room, and closed the door. SN C left, and SN B went to bed. SN B woke up around 0100 to use the bathroom and "heard moans and sexual noises. I thought nothing of it, that she consented, and went to bed." SN B did not see anyone in the apartment when he left for work early the next morning. SN B also stated that he remembered the applicant saying to another member, SN D, in "a somewhat joking manner" about AV, "If you don't hit it, I will" after the applicant asked SN D if he had plans of "getting with her [AV]." SN B stated that after the incident, he spoke to the local Special Victims Advocate (SVA) and the civilian the SVA worked for about what happened "without naming names," but he did not file a report because "until recently I just thought it wasn't an issue." But he finally reported the matter "because it was bothering [him]."

Affidavit of SN D: SN D wrote and signed a sworn affidavit for CGIS stating that he could not recall a conversation in which the applicant stated, "If you don't hit that, I will." SN D also stated that he had not seen the applicant treat women disrespectfully and he did not see "anything unusual or out of the ordinary in regards towards [AV and the applicant]."

Affidavit of AV: AV wrote and signed a sworn affidavit for CGIS stating that on the last night of her trip, she, the applicant, and other members got pizza and then stopped at a gas station to buy alcohol. The applicant asked her if she wanted anything to drink, and she said "No." But he came back with a Mike's Hard Lemonade and she "drank half of one bottle." At the applicant's apartment, he tried to kiss her several times. She pulled away and told him "no" many times but then "finally gave in and kissed him back once or twice." The applicant then started rubbing her feet, and she fell asleep on the couch. She thought that SN C would wake her up to give her a ride back to SN A's apartment when he left. Instead,

> [t]he next thing I know, I woke up in [the applicant's] bed. He was laying between me and the door. A few minutes after I woke up, [SN C] called to ask if I was going home. I told him I would be right there. I sat up and told [the applicant] I needed to leave, he said it was okay that I could stay a little longer. I told him no. We argued back and forth about me leaving. He would tell me I could just sleep there and I responded with no, [her friend and SN A] are expecting me home. We went back and forth with that for a while, then he switched strategies. He started kissing me again, telling me how much he liked me. He told me he would take care of fly[ing] me down to see him, make a long distance relationship work, etc. He told me I was stressed and said he wanted to rub my back. [The applicant] took off my shirt and undid my bra, started rubbing my back with a sugar scrub. When he was done, he told me I'd have to shower to get the sugar off of me. I told him really didn't want to have sex with him. … I was on my period … He said he didn't care. I told him no. He got offended. I told him that multiple people had told me how much he slept around. He was even more offended that I had said that. He told me he had a lot of friends but didn't sleep around. We went back and forth about having sex. I kept telling him no and he kept telling me some lie about having real feelings for me. I finally gave in out of vulnerability and just wanting to be able to go home. I was scared that if I didn't give in he might get physical, so we went to the shower together. He had me stand on the ledge around the tub, facing the wall. He held my arms up against the wall with his. He put his penis into my vagina. We would occasionally switch to a different wall but always in the same position. At one point, he stuck his finger into my butthole. I told him to stop. He said it was okay to leave it there. I said no. He finally took it out. … We finally got out of the shower. I went back into the bedroom and got dressed and I told him I needed to get back to [redacted]. He told me to stay for a little bit longer and lay down with him. I layed [sic] on the bed and fell back asleep for a little bit. I woke up, got out of bed, got my glasses and was walking out of the bedroom when he woke up. He got up and walked me to the front door where he told me "we need to keep this between us," to not tell [redacted] or anyone. He said he would contact me when I got back home and I have not heard from him since I left the apartment that night.

CGIS Interview Summaries

The CGIS Special Agent's summaries of the interviews of witnesses include the following additional claims:

- SN A stated that when he called AV, she told him that she "regretted doing what she did with [the applicant]. She did not want him to lose his job or the CG to be mad at him."
- SN B stated that he was not sure how much alcohol AV drank but she was "feeling the affects [sic] of alcohol" and her "speech may have been slurred."
- SN B stated that AV was asleep and did not say anything when the applicant picked her up off the couch.
- SN B stated that the applicant's bedroom had an attached private bathroom.
- SN B did not hear any objections when he heard sounds of sexual intercourse coming from the applicant's bedroom on his way to the bathroom.
- SN A's girlfriend stated that AV was "upset and embarrassed" about having had sex with the applicant.
- AV stated that when she took a shower to remove the sugar scrub, the applicant "joined her in the shower and did not force his way inside the shower."
- AV told the applicant "No" regarding sexual intercourse numerous times while they were in the shower together, but then he held her hands against the wall of the shower and "she felt she was not free to leave the shower."
- AV stated that she believed that to leave the applicant's apartment "she would have to

engage in sexual intercourse."

- AV stated that when the applicant put his finger in her anus she told him to remove his finger "numerous times" before he removed it.
- One witness stated that he and the applicant "would hang out together off duty" and when AV visited, he thought from her words and body language that she was looking for a boyfriend and interested in the applicant.

After advising the applicant of his rights, CGIS agents both recorded his interview and summarized it. According to the CGIS agent's summary of the interview, the applicant waived his rights and initially agreed to answer their questions without counsel present. Before stopping the interview midway and invoking his right to counsel, the applicant told the CGIS agents that—

- he did not remember AV's name;
- he did not remember what happened when AV was at his apartment;
- he did not provide alcohol to AV;
- he did not try to kiss AV when they were on the couch in his living room;
- he did not remember picking up AV and taking her to his bedroom;
- he had consensual sex with AV in his bedroom;
- he did not remember taking a shower with AV;
- alcohol was not involved when he was with AV; and
- AV was 19 years old.

Criminal Charges Against the Applicant

Following the CGIS investigation, on August 16, 2016, the applicant was charged with five specifications of violating Article 107 of the UCMJ (False official statements); two specifications of violating Article 120 of the UCMJ (Rape and sexual assault generally); and one specification of violating Article 134 (General article), as follows:

> **CHARGE I: VIOLATION OF ARTICLE 107, UCMJ**
> **SPECIFICATION 1:** In that Food Service Specialist Third Class [the applicant], U.S. Coast Guard, U.S. Coast Guard Station [unit redacted], on active duty, did, at or near [location redacted], on or about 22 March 2016, with intent to deceive, make to Special Agents [names redacted], Coast Guard Investigative Service, an official statement, to wit: that he did not say to [SN D], U.S. Coast Guard, "If you don't hit it, I will," or words to that effect, which statement was totally false, and was then known by the said [the applicant] to be so false.
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> **SPECIFICATION 2:** In that Food Service Specialist Third Class [the applicant], U.S. Coast Guard, U.S. Coast Guard Station [unit redacted], on active duty, did, at or near [location redacted], on or about 22 March 2016, with intent to deceive, make to Special Agents [names redacted], Coast Guard Investigative Service, an official statement, to wit: that [the applicant] did not remember going to a gas station or convenience store to purchase alcohol, or words to that effect, which statement was totally false, and was then known by [the applicant] to be so false.
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> **SPECIFICATION 3:** In that Food Service Specialist Third Class [the applicant], U.S. Coast Guard, U.S. Coast Guard Station [unit redacted], on active duty, did, at or near [location redacted], on or about 22 March 2016, with intent to deceive, make to Special Agents [names redacted], Coast Guard Investigative Service, an official statement, to wit: that [the applicant] did not provide alcohol to [the alleged victim, AV] or words to that effect, which statement was totally false, and was then

known by [the applicant] to be so false.

SPECIFICATION 4: In that Food Service Specialist Third Class [the applicant], U.S. Coast Guard, U.S. Coast Guard Station [unit redacted], on active duty, did, at or near [location redacted], on or about 22 March 2016, with intent to deceive, make to Special Agents [names redacted], Coast Guard Investigative Service, an official statement, to wit: that [the applicant] did not pick up [AV] and carry her to his room, or words to that effect, which statement was totally false, and was then known by [the applicant] to be so false.

SPECIFICATION 5: In that Food Service Specialist Third Class [the applicant], U.S. Coast Guard, U.S. Coast Guard Station [unit redacted], on active duty, did, at or near [location redacted], on or about 22 March 2016, with intent to deceive, make to Special Agents [names redacted], Coast Guard Investigative Service, an official statement, to wit: that [the applicant] did not remember being in the shower with [AV], or words to that effect, which statement was totally false, and was then known by [the applicant] to be so false.

CHARGE II: VIOLATION OF ARTICLE 120, UCMJ
SPECIFICATION 1: In that Food Service Third Class [the applicant], U.S. Coast Guard, U.S. Coast Guard Station [unit redacted], on active duty, did, at or near [location redacted], on or about 10 July 2015, commit a sexual act upon [AV], civilian, to wit: penetration of the vulva by the penis, by causing bodily harm to her, to wit: the Accused penetrating [AV's] vulva with his penis without her consent.

SPECIFICATION 2: In that Food Service Third Class [the applicant], U.S. Coast Guard, U.S. Coast Guard Station [unit redacted], on active duty, did, at or near [location redacted], on or about 10 July 2015, commit a sexual act upon [AV], civilian, to wit: penetration of the anus by the finger, by causing bodily to her, to wit: the Accused penetrating [AV's] anus with his finger without her consent.

CHARGE III: VIOLATION OF ARTICLE 134, UCMJ
SPECIFICATION: In that Food Service Specialist Third Class [the applicant], U.S. Coast Guard, U.S. Coast Guard Station [unit redacted], on active duty, did, at or near [location redacted], on or about 10 July 2015, furnish and give an alcoholic beverage to [AV], a civilian, who was at the time under twenty-one (21) years old when he provided the alcohol, in violation of [citation to state law redacted], a criminal statute of the State of [redacted] that prohibits any person from selling, furnishing, disposing of, or giving any alcoholic beverage to any person under the age of twenty-one (21) years, and that such conduct was to the prejudice of good order and discipline in the armed forces or of a nature to bring discredit upon the armed forces.

Article 32 Hearing

On August 29, 2016, the District Commander assigned a Lieutenant Commander to serve as a Preliminary Hearing Officer and hold an Article 32 hearing on the charges.[5] The Lieutenant Commander was directed to "conduct an impartial preliminary hearing which shall be limited to a determination of the following: (1) whether there is probable cause to believe the offenses set forth in the enclosure have been committed and whether the accused committed the offenses; (2) whether there is court-martial jurisdiction over the offenses and the accused; (3) consideration of

[5] According to the Manual for Courts-Martial, Rule 405, a preliminary hearing, known as an Article 32 hearing, is required before charges are referred to a general court-martial to examine "those issues necessary to determine whether there is probable cause to conclude that an offense or offenses have been committed and whether the accused committed it; to determine whether a court-martial would have jurisdiction over the offense(s) and the accused; to consider the form of the charge(s); and to recommend the disposition that should be made of the charge(s)." And the discussion notes that "[d]eterminations and recommendations of the preliminary hearing officer are advisory."

the form of the charges; and (4) your recommendation as to the disposition of the charges."

On September 12, 2016, the Preliminary Hearing Officer notified the applicant and his counsel of the Article 32 hearing and his associated rights.

On October 4, 2016, the Article 32 hearing was held. The only witness who testified was one of the CGIS agents who had interviewed the applicant and witnesses, but the Preliminary Hearing Officer also received other evidence, including witnesses' affidavits and CGIS's recordings of interviews of witnesses and the applicant.

On October 13, 2016, the Lieutenant Commander who served as the Preliminary Hearing Officer issued a report with findings and recommendations regarding the charges against the applicant to the District Commander, a Rear Admiral who was the officer exercising general court-martial jurisdiction over the applicant. The Preliminary Hearing Officer first summarized the evidence in the following quoted bullets:

- According to multiple witnesses, on or about July 10-11, 2015 [AV, the alleged victim] was visiting [location redacted] from her home in [redacted] with a [civilian] friend, [redacted], who was dating a Coast Guard member, [SN A], stationed in the area. On the last evening of their trip, [AV] went to the apartment of [the applicant and SN B]. Sometime between 1800 and 2000, [AV] went out to dinner with [the applicant, SN B, and SN C].

- According to [AV and SN B], after dinner on their way back to [the applicant's and SN B's] apartment, the group stopped at a gas station to purchase alcohol. [AV] says that [the applicant] offered to purchase her alcohol and she declined ([AV] was 18 or 19 years of age at the time), but [the applicant] purchased an unknown quantity of Mike's Hard Lemonade[[6]] for her anyway.

- According to multiple witnesses, while at the apartment the group hung out in the living room talking, watching T.V., and playing video games. [AV] says that she consumed half a bottle of Mike's Hard Lemonade over the course of the evening. [The applicant] says that he consumed a couple of beers over the course of the evening.

- According to multiple witnesses, throughout the evening [the applicant and AV] were sitting together and flirting. [AV] says that [the applicant] tried to kiss her on several occasions and eventually she kissed [the applicant] back a couple of times. According to [SN B] sometime between 2130 and 2200, [AV] fell asleep on the couch and at some point while she was asleep [the applicant] picked her up and took her to his bedroom.

- According to [AV] she awoke on [the applicant's] bed not knowing how she got there and told [the applicant] that she needed to return to [SN A's] apartment where she was staying, but [the applicant] persuaded her to stay. [AV] says that they talked for a while and [the applicant] was kissing her and telling her how much he liked her and wanted to have a relationship with her. While in the bedroom with [the applicant], [AV] says that she told him several times that she did not want to have sex with him that night.

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[6] According to the manufacturer's website, Mike's Hard Lemonade is 5% alcohol. *See* FAQs | Mike's Hard Lemonade (mikeshard.com) (last visited October 10, 2023). According to the National Institutes of Health, "regular beer" is also 5% alcohol. *See* What Is A Standard Drink? | National Institute on Alcohol Abuse and Alcoholism (NIAAA) (nih.gov) (last visited October 10, 2023).

- According to [AV], [the applicant] said that she was stressed out and needed a massage, after which he removed [AV's] shirt and bra and gave her a massage utilizing some sugar rub, all with [AV's] consent. [AV] then says that [the applicant] told her that she'd need to take a shower to get the sugar rub off of her body.

- According to [AV], she and [the applicant] got into the shower together. She says that she then "gave in" and had sexual intercourse with [the applicant], in part because she felt like she had to in order to leave and she was nervous about him being physical with her if she refused. According to [AV], however, [the applicant] never threatened or physically kept her from departing or forced her in any way to have sexual intercourse. (Note: There is a discrepancy with where the sexual intercourse took place. [AV] believes it was in the shower, but [the applicant] recalls it occurring in his bed although he acknowledged during his interview with the CGIS Special Agents (S/A) that it is possible that it could have occurred in the shower. In addition, [SN B] remembers hearing noises that sounded like sexual activity coming from [the applicant's] bedroom.)

- According to [AV], during the course of the sexual intercourse [the applicant] put his finger into her anus. [AV] says that she immediately told him to stop and he told her it was o.k. to leave it in. [AV] says that she then told him "no" a couple of times and [the applicant] removed his finger.

- According to [AV], after getting out of the shower she got dressed and [the applicant] asked her why she was doing so and she said that she had to get back to [SN A's] apartment. She says that [the applicant] then persuaded her to stay and they both fell asleep on [the applicant's] bed. According to [AV], sometime between 0100 and 0200 she woke up and started to leave and [the applicant] woke up as well and walked her to the front door. Since that evening [AV] and [the applicant] have had limited contact with each other on "Snapchat." (Note: No evidence of the content of their communications over "Snapchat" was presented.)

- According to [AV's civilian friend], on the return trip to [location redacted,] [AV] told her that she had had sexual intercourse with [the applicant] and indicated that they were going to have a relationship in the future. According to both [AV] and [the applicant], that relationship never materialized.

- In February 2016, [SN B and SN A] came to believe, after attending sexual assault response and prevention training, that [the applicant] may have sexually assaulted [AV] on the occasion in question and reported it to the Coast Guard. Among other details, [SN B] told CGIS [Special Agents] that he heard [the applicant] tell [SN D] sometime during [AV's] visit to [location redacted]: "If you don't hit it, I will," or words to that effect, supposedly in reference to having sexual intercourse with [AV]. [SN D], however, does not recall hearing that statement.

- CGIS initiated an investigation and ultimately [two Special Agents (S/As)] interviewed [the applicant] on March 22, 2016. During that interview [the applicant] repeatedly told the S/As that he did not remember the specific details of that evening, but recalled having consensual sexual intercourse with [AV]. When asked if he said to [SN D]: "If you don't hit it, I will," or words to that effect, [the applicant] told the S/As: "I never said that." When asked if he went to a gas station or convenience store to purchase alcohol, [the applicant] told the S/As: "No." After being told that he was accused of picking up [AV] and carrying her to his room, [the applicant] told the S/As: "I don't remember ever picking her up off a couch and carrying her to a bedroom." When asked if he took a shower with [AV], [the applicant] told the S/As: "Not that I can remember." [The applicant] never responded to a question from the S/As regarding whether or not he provided alcohol to [AV].

- [AV] has never said that she did not consent to having sexual intercourse with [the applicant] or that she was sexually assaulted by him.

Findings and Recommended Dispositions in the Report of the Article 32 Hearing

The Preliminary Hearing Officer included the following findings regarding probable cause and recommendations about the disposition of the charges and specifications in his report to the District Commander:

Charge I (Violation of Article 107, UCMJ – False official statements)

- **Specification 1:** ***Probable Cause Determination****:* There is sufficient evidence establishing probable cause to believe that the offense was committed and that [the applicant] committed it. However, my impression, from the context of the statement and watching [his] body language when he made it, is that his response was not intended to be as definitive as it was. He repeatedly told the S/As that he didn't remember the details of the evening in question and when responding to their question it is likely that he meant to say that he didn't remember saying: "If you don't hit it, I will," or words to that effect, not that he definitively did not say it. … ***Disposition Recommendation***: I recommend that the charge and specification be dismissed. In light of my recommendations related to Charge II and the likely hood [sic] that [the applicant] just misspoke when answering the S/As question, I don't believe that this charge and specification should be pursued further. Additionally, [SN D] does not recall that [the applicant] said the phrase to him such that it is unlikely that the offense could be proven beyond a reasonable doubt.

- **Specification 2:** ***Probable Cause Determination***: There is not sufficient evidence establishing probable cause to believe that the offense was committed and that [the applicant] committed it. No evidence was presented that [the applicant] told the S/As that he did not remember going to a gas station or convenience store to purchase alcohol, or words to that effect. When asked by the S/As if he went to a gas station of convenience store to purchase alcohol, [the applicant] said: "No." <u>As such, there is probable cause to believe that he made a false official statement by saying: "No" in response to their question.</u> [Emphasis added.] However, my impression, from the context of the statement and watching [the applicant's] body language when he made it, is that his response was not intended to be as definitive as it was. He repeatedly told the S/As that he didn't remember the details of the evening in question and when responding to their question it is likely that he meant to say that he didn't remember going to a gas station or convenience store to purchase alcohol not that he definitively did not do so. … ***Disposition Recommendation*****:** I recommend that the charge and specification be dismissed in its current form and that no charge and specification be pursued for responding "No" to the question from the S/As about whether or not [the applicant] went to a gas station of convenience store to purchase alcohol, or words to that effect. In light of my recommendations related to Charge II and the likely hood [sic] that [the applicant] just misspoke when answering the S/As question I don't believe that such a charge and specification should be pursued further.

- **Specification 3:** ***Probable Cause Determination***: There is not sufficient evidence establishing probable cause to believe that the offense was committed and that [the applicant] committed it. No evidence was presented that [the applicant] made any statement about whether or not he provided alcohol to [AV]. … ***Disposition Recommendation:*** I recommend that the charge and specification be dismissed.

- **Specification 4:** ***Probable Cause Determination:*** There is not sufficient evidence establishing probable cause to believe that the offense was committed and that [the applicant] committed it. [The applicant] told the S/As that he did not remember picking up [AV] and carrying her to his room, or words to that effect, not that he definitively did not do so. In addition, no evidence was presented that [the applicant] actually remembered picking up [AV] and carrying her to his room when he said that he did not remember doing so. … ***Disposition Recommendation:*** I

recommend that the charge and specification be dismissed and that no charge and specification be pursued for responding to the S/As that he did not remember picking up [AV] and carrying her to his room, or words to that effect.

- **Specification 5:** ***Probable Cause Determination:*** There is not sufficient evidence establishing probable cause to believe that the offense was committed and that [the applicant] committed it. No evidence was presented that [the applicant] actually remembered being in the shower with [AV] when he said that he did not remember doing so. … ***Disposition Recommendation:*** I recommend that the charge and specification be dismissed.

Charge II (Violation of Article 120, UCMJ – Rape and sexual assault generally)

- **Specification 1:** ***Probable Cause Determination:*** There is not sufficient evidence establishing probable cause to believe that the offense was committed or that [the applicant] committed it. The penetration of [AV's] vulva by [the applicant] was consensual. Although [the applicant] may have pressured [AV] into having sexual intercourse by telling her he liked her and would have a relationship with her, his actions were not criminal and she consented to engage in sexual intercourse with him. In addition, the fact that at some point earlier in the evening [AV] told [the applicant] that she did not want to have sexual intercourse with him that night is irrelevant since she says that she ultimately "gave in" and engaged in sexual intercourse with him. … ***Disposition Recommendation:*** I recommend that the charge and specification be dismissed.

- **Specification 2:** ***Probable Cause Determination:*** There is sufficient evidence establishing probable cause to believe that the offense was committed and that [the applicant] committed it. However, the sexual act took place while [AV] and [the applicant] were engaged in consensual sexual intercourse and [the applicant] stopped after being told to do so by [AV]. As such, I do not believe [the applicant's] conduct was criminal and, if anything, he was simply mistaken as to [AV's] consent regarding an ancillary sexual act to their consensual sexual intercourse. … ***Disposition Recommendation:*** I recommend that the charge and specification be dismissed. Although [the applicant's] action was ill advised, in my opinion it was not criminal in light of the facts in this case, namely that [AV] and [the applicant] were engaged in consensual sexual intercourse at the time of the sexual act and he stopped after being told to do so by [AV]. In addition, [the applicant] has a strong argument of mistake of fact regarding her consent to the sexual act since it was undertaken during their consensual sexual intercourse.

Charge III (Violation of Article 134, UCMJ – General article)

- **Sole Specification:** ***Probable Cause Determination*****:** There is sufficient evidence establishing probable cause to believe that the offense was committed and that [the applicant] committed it. Although Defense Counsel raised the issue that this charge and specification were not proper under clause 3 of Article 134, UCMJ, they appear to be proper under clause 1 of Article, UCMJ as conduct "of a nature to bring discredit upon the armed forces." … ***Disposition Recommendation:*** I recommend that the charge and specification be disposed of at Non-Judicial Punishment.

Thus, the Preliminary Hearing Officer recommended dismissal of Charges I and II (all specifications) and Non-Judicial Punishment (NJP) for Charge III. However, the District Commander and Staff Judge Advocate did not immediately dismiss all of the charges or convene a Captain's Mast to impose NJP. Instead, they scheduled a court-martial for the week of April 17 to 21, 2017, and AV was expected to testify. In the interim, the assigned JAG officer tried unsuccessfully to reach a Pre-Trial Agreement (PTA) with the applicant and his counsel.

On April 4, 2017, a Special Victim's Counsel assigned to AV advised the JAG that AV would not testify at a trial:

> I was able to speak to my client [AV] regarding her wishes now that [the applicant] has refused to accept all reasonable PTA offers.
>
> During our conversation she indicated that she is NOT in a position to testify during the scheduled trial dates (week of April 17-21), and that doing so would be deleterious to what little peace she still has in her life. She has come to the difficult conclusion that appearing in person to re-live the events of that night would make matters worse. She understands that the Coast Guard can't continue with a trial without her, but she would support the option of dismissing the charges and pursuing an administrative separation action against [the applicant], which could include an other-than-honorable discharge. After we discussed that possibility, she indicated that she would be satisfied with that course of action. She understands that even if she is in a better state later, the opportunity to send him to trial for his bad acts will have passed. She regrets the situation but indicated that she would be comfortable with anything that could be done without her personal presence. Please share her sentiments with anyone you deem necessary to pursue your best remedy under these unfortunate circumstances.

On April 5, 2017, the charges were withdrawn by the Coast Guard and dismissed without prejudice by the military judge.

Notification of Intent to Discharge

On April 14, 2017, the Sector Commander notified the applicant in a memorandum that he had initiated the applicant's discharge for commission of a serious offense pursuant to Article 1.B.17.b.(3) of the Military Separations Manual, COMDTINST M1000.41[7] The Sector Commander advised the applicant of his rights to object to the proposed discharge, to submit a statement, and to consult military counsel. The Sector Commander explained his action as follows:

> You were accused of sexual assault by a civilian from an incident in July 2015. The following additional information was disclosed during the subsequent CGIS investigation. On 10 July 2015, you provided alcohol to the alleged victim, who at the time was under 21 years old in violation of [State law citation redacted for privacy], which is a violation of Article 134 of the UCMJ. When interviewed by CGIS, you made several false official statements regarding purchasing alcohol for

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[7] Article 1.B.17.b.(3) of the Military Separations Manual, COMDTINST M1000.4, states the following in pertinent part:

> 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.
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> (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 alcohol incidents 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). …

> the alleged victim, picking up and carrying the alleged victim to a bedroom, and his [sic] involvement in the sexual activity with the alleged victim. These false statements violate Article 107 of the UCMJ, and carry a maximum punishment of a punitive discharge. Your conduct is in direct conflict with the Coast Guard's Core Values.

Applicant's Response to Discharge Notification

On April 24, 2017, the applicant acknowledged the Sector Commander's Notification of Intent to Discharge, objected to the proposed discharge, requested consideration under the Commandant's Second Chance Program, and attached a memorandum from his civilian attorney and a statement he signed. The applicant's attorney stated that the discharge was unwarranted because—

> there is absolutely no evidence of any of these allegations, and in fact the only legal finding that exists determined that **there was not probable cause to believe the vast majority of these offenses occurred, and even those where there was probable cause found, the preliminary hearing officer explained that he did not believe [the applicant] should be court-martialed or that he had even committed a crime** (Attachment 1) [emphasis in original]. The standard of proof of a preponderance of the evidence, which is required for an administrative separation, is not satisfied in this case. As such, this action must be terminated and [the applicant] allowed to continue his career.
>
> 2. As you may be aware, this case resulted from a CGIS investigation that was initiated by two males who attended a SAPR briefing then independently decided a female with whom they had attended a party several months prior had been sexually assaulted because she had been consuming alcohol before engaging in sexual acts with [the applicant]. As outrageous as this sounds, it is sadly how this case actually transpired, an extreme iteration of the sexual assault hysteria that has infiltrated the military in recent years. Fortunately, after the case went to an initial Article 32 hearing, the officer reviewing the evidence recognized this case for what it was - entirely baseless. As such, he found that there was no probable cause that most of these offenses had even occurred, and that the remaining ones barely met that low threshold. Thus, he aptly recommended that this case not proceed to court-martial. Sadly, this recommendation was ignored going forward.
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> 3. The term "probable cause" is a very low legal standard that essentially requires a finding that a crime *may* have occurred and it is the Accused who *may* have committed it based upon the evidence presented. It does not mean that the Accused would necessarily be found guilty a trial by any means, but it is the minimum threshold that is required to take someone to trial in the military justice system. Here, again, the preliminary hearing officer at the Article 32 found that not even probable cause existed that the vast majority of these crimes occurred.
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> 4. The probable cause standard is important here because administrative separations have their own burden of proof that must be satisfied before an individual may be administratively separated. The burden of proof for an administrative separation is even higher than at an Article 32. The Enlisted Personnel Administrative Boards Manual provides: "7.B.2. Standard of Proof – Preponderance of the Evidence. In an administrative board hearing, the findings of fact need to be supported by a preponderance of the evidence presented at the hearing. That is, findings of fact should be based on evidence that, after considering all evidence approved for consideration, points to a particular conclusion that is more likely than not the correct conclusion." [A diagram of a scale of standards of proof is omitted. The diagram shows a scale ranging from a scintilla, to air of reality, to reasonable suspicion, to probable cause, to preponderance of the evidence, to clear and convincing evidence, to beyond a reasonable doubt, to beyond a shadow of a doubt.]
>
> 5. The continuum, above, clearly demonstrates the amount of evidence that is required to satisfy each legal standard of proof. As we already know, the evidence here couldn't even satisfy the *probable cause* standard. Here, you must find that it meets the *preponderance of the evidence.* Clearly,

> this is a legal and factual impossibility given the standing of preponderance of the evidence as a higher standard on the continuum.
>
> 6. The decision to initiate discharge in a case where the complaining witness affirmatively decides to not show up and testify under penalty of perjury is a true miscarriage of justice and showcases that the evidence comes nowhere close to meeting the threshold of a preponderance of the evidence. [The applicant] was ready and willing to fight to clear his name at trial of these same allegations - something we have little doubt would have been accomplished. Instead, he was unilaterally stripped of his opportunity to do so but this woman's sudden decision to not participate in the criminal process, yet he is he now facing career-ending action with no proof whatsoever of the bases cited for separation.
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> 7. The most egregious aspect of this process is that while the complaining witness was still "cooperating," the Government offered to [the applicant] that, if he agreed to go to a summary court-martial and admit to minor misconduct, he would receive an Honorable discharge. Now that she has backed out and we are in this forum with no admission or other finding of guilt, [the applicant] is suddenly facing a less than Honorable discharge. I sincerely hope that a review of this action at the highest level will bring to light the fundamental unfairness that it represents. Anyone can make an allegation against any other person at any time - but there must be some semblance of the truth of it before action can be taken. If this is not the bare minimum that the Coast Guard expects, anyone's career could be ruined without an ounce of due process or fairness. This is not the intention of the regulations or the spirit that underlies all actions in military justice. I genuinely ask that you see the impropriety in moving forward here where no crime has been proven at even the lowest level, and even more than that, where fairness and due process clearly indicate that [the applicant] deserves to continue his career and put this unfortunate and unfair legal nightmare behind him once and for all.

In addition, the applicant submitted an unsworn statement in which he denied making false official statements and providing alcohol to a minor and asked to be retained in the Coast Guard. He stated that the shocking allegations against him had caused him and his family stress and trauma, and he was relieved to "hear that this individual who made false claims finally did the right thing and told prosecutors she would not cooperate in the prosecution." But he was "disheartened that even though this person essentially admitted that these allegations are untrue, I am still facing a potential separation from the service for acts that never occurred."

Administrative Discharge Recommendation

On May 15, 2017, the Sector Commander recommended to the Personnel Service Center, through the District Commander, that the applicant receive an administrative general discharge for misconduct due to his alleged commission of a serious offense. The Sector Commander attached to his memorandum the Notification of Intent to Discharge; the applicant's attorney's response, objecting to the discharge; a summary of the applicant's performance marks; the Report of the Article 32 preliminary hearing; and witness statements from the CGIS Report of Investigation. The Sector Commander explained his recommendation as follows to the District Commander and Coast Guard PSC:

> [The applicant] was accused of sexual assault by a civilian from an incident in July 2015. The alleged victim reported [the applicant] coerced her into having sexual intercourse and digitally penetrated her anus despite her repeatedly stating this activity was not wanted. The subsequent CGIS investigation revealed that [the applicant] provided alcohol to the alleged victim on the night of the reported sexual assault and also made several false official statements to CGIS in the course of their investigation. Court-martial charges were preferred against [the applicant] and referred to a general court-martial. Prior to the trial, the alleged victim notified the Convening Authority that she was unwilling

> to testify at the trial. In light of this, the charges were withdrawn and dismissed. Despite the lack of a judicial conviction, the investigation established sufficient evidence to demonstrate [the applicant] violated Article 107 and Article 134 of the UCMJ and of which the violation of Article 107 carries a maximum punishment of a punitive discharge. [The applicant]'s conduct is in direct conflict with the Coast Guard's Core Values.

On June 12, 2017, the District Commander endorsed the Sector Commander's recommendation for discharge and strongly recommended approval, which he explained as follows:

> 2. I was the General Court Martial Convening Authority in the prosecution of UCMJ charges against [the applicant]. The case was set for a contested trial; however, the victim in the case notified my legal office that she no longer wished to be involved in the prosecution for personal reasons. I honored her request, but this left no choice but to dismiss the UCMJ charges against [the applicant]. That said, there is significant evidence that [the applicant] committed serious misconduct which warrants separation from the Coast Guard with a General Under Honorable Condition characterization of service. The below are some of the highlights of that evidence:
>
> a. First, this case was reported to the Coast Guard by fellow shipmates of [the applicant] after they received SAPR [Sexual Assault Prevention and Response] training. The victim did not make any statement until she was approached by CGIS. As a result, her statement to CGIS should be considered in the light of someone who did not have a motive to fabricate or exaggerate facts.
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> b. The victim's statement details that [the applicant] purchased and provide her with alcohol when he knew she was under the age of 21. [The applicant] admitted that he knew she was under the age of 21. [The applicant]'s act of purchasing alcohol was in violation of state law and was contrary to good order and discipline and of a nature to bring discredit upon the Armed Forces in violation of Article 134 of the UCMJ.
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> c. After returning to [the applicant]'s apartment, the victim eventually fell asleep on the couch. The accused knew the victim intended to return to the apartment where her friend was staying. Despite this knowledge and without the consent of the victim, the accused picked her up off the couch and carried her into his bedroom and put her on his bed. When the victim woke up, she did not know where she was or how she got there. [The applicant]'s act of picking up the victim and carrying her to his bedroom without her consent was an assault consummated by a battery in violation of Article 128 of the UCMJ.
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> d. After repeated[ly] attempting to dissuade [the applicant]'s sexual advances by telling him "no" (at the time of this incident the victim was 19 years old, from a small town in [redacted for privacy], weighed less than 90 lbs and was less than five feet tall. Conversely, [the applicant] was over six feet tall and almost double her weight.) and feeling like she had no other choice, the victim acceded to [the applicant]'s demands to engage in sexual activity. At some point the victim and [the applicant] entered the shower, and [the applicant] penetrated her vagina with his penis. During this time, [the applicant] digitally penetrated the victim's anus with his finger. She told *him* "Stop" and he responded "It was okay to leave it there." The victim said "No" and [the applicant] eventually removed his finger from her anus. [The applicant]'s act of penetrating the victim's anus with his finger was a sexual assault in violation of Article 120 of the UCMJ.

On July 11, 2017, PSC approved the Sector Commander's recommendation and issued separation orders for the applicant to receive a general, Under Honorable Conditions, discharge for Misconduct due to his commission of a serious offense with an RE-4 reentry code (not eligible to reenlist) as of August 15, 2017. The applicant was discharged from the Coast Guard in accordance with these orders on August 15, 2017. He had served 2 years, 8 months, and 15 days on active duty and received good performance evaluations.

Decision of the DRB

Following his discharge, the applicant asked the DRB to upgrade his character of discharge, his narrative reason for discharge, his separation code, and his reentry code. In a split decision dated September 27, 2018, the DRB issued recommendations from both the majority and the dissent. The majority (four of five members) found that the applicant's discharge was proper but not equitable. They noted that AV had flirted with the applicant and allowed him to massage her and remove her shirt, and they concluded that both the applicant and AV believed their sexual activity to be consensual. They found that once the right to trial and the "ability to clear his name" was removed by AV's refusal to testify, "he was processed for discharge without any evidence of committing a serious offense nor misconduct." The majority thought that "mitigating issues related to the applicant's investigation and trial contributed to the excessive discharge that he received." The majority further found that discharging the applicant for misconduct was "undeserved since there were no charges carried out against [the applicant]." The majority concluded that an "error of discretion" had occurred and that relief should be granted because the applicant's "quality of service for almost 3 years and capability to serve in the Coast Guard are compelling and persuasive."

The dissent (one member) recommended denying the applicant's request after finding that the Coast Guard had followed proper procedures and acted correctly in accordance with Article 1.B.17. of the Military Separations Manual when discharging the applicant. The dissent stated that "[a]t a minimum, the applicant's conduct (Article 107 - False Official Statements) represents a serious breach in the Coast Guard's core values and makes the applicant eligible to be processed for a discharge that would make him ineligible for further military service." The minority stated that the DRB should not be "pass[ing] judgement on perceived heavy handedness of a Commanding Officer" and that as long as a Commanding Officer properly executes the governing policy, the DRB should not grant relief based on a perception that the applicant got a "raw deal." The dissent noted that even if the claims of sexual assault were false, "the applicant deliberately made false statements for personal gain."

The Assistant Commandant for Human Resources approved the majority recommendation for relief and changed the applicant's DD-214 to show that he received an honorable discharge for "Miscellaneous/General Reasons" with a JND separation code and an RE-3 reentry code (eligible to reenlist with waiver).

APPLICABLE LAW AND POLICY

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

Article 1.B.17. of the Military Separations Manual in effect in 2017, COMDTINST M1000.4, states the following in pertinent part:

> **1.B.17.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.) ...

1.B.17.b. Reasons to Discharge for Misconduct
Commander (CG PSC) may direct discharging a member for misconduct in any of these cases:

(1) Civilian or Foreign Conviction. Conviction by foreign or domestic civil authorities ...
(2) Pattern of Misconduct. Members may be separated when they have:
  (a) Two or more non-judicial punishments, courts-martial, or civilian convictions or a combination thereof within a 2-year period,
  (b) Three or more unauthorized absences, each is at least three or more days, within a 2-year period, …

(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. …

(4) Drugs. …

(5) Fraudulent enlistment. ...

1.B.17.c. Probation
Commanding officers must afford a member a reasonable probationary period to overcome deficiencies before initiating administrative discharge action in cases of a pattern of failure to contribute adequate support to dependents (See Article 2.E. of reference (e), Discipline and Conduct, COMDTINST M1600.2 (series).), a pattern of failure to pay just debts, or shirking. ...

1.B.17.d Discharging Members with More than Eight Years' Service for Misconduct ...

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: …

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions based on the applicant's military record and submissions, the Coast Guard's submissions, and applicable law and policy:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. As the case was remanded to the Board by the U.S. Court of Federal Claims, the Board will waive the statute of limitations.[8]

2. The applicant alleged that his discharge from the Coast Guard was illegal and unjust and must be set aside. In considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.[9] Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."[10]

3. The applicant stated that his administrative discharge was erroneous and unjust because his chain of command ignored the findings and recommendations of the Preliminary Hearing Officer who conducted the Article 32 hearing and reached different conclusions about what the preponderance of the evidence shows. However, according to the Rule 405 in the Manual for Courts-Martial, the determinations and recommendations of the Preliminary Hearing Officer are "advisory" only. The record shows that the applicant's chain of command based their decisions on essentially the same underlying evidence that the Preliminary Hearing Officer reviewed. The fact that they reached some different conclusions about the preponderance of the evidence than the Preliminary Hearing Officer is not evidence of error or injustice. Moreover, the record shows that in recommending the applicant's discharge, the Sector Commander provided PSC with not only his own views of the evidence but also the Preliminary Hearing Officer's report with the contrary views. The Board is not persuaded that the chain of command's refusal to adopt and rely on all of the Preliminary Hearing Officer's findings and recommendations renders the applicant's discharge erroneous or unjust.

Nor does the fact that the charges were withdrawn by the Coast Guard and dismissed <u>without prejudice</u> by the military judge persuade the Board that the applicant's chain of command erred in relying on the same underlying evidence when administratively discharging the applicant

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[8] 10 U.S.C. § 1552(b) (requiring applications to be submitted within three years of the discovery of the alleged error or injustice).
[9] 33 C.F.R. § 52.24(b).
[10] *Arens v. United States,* 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United Stares,* 594 F.2d 804, 813 (Ct. Cl. 1979).

for misconduct. The charges were withdrawn because AV refused to testify, and so they realized the charges could not be proven by the standard at court-martial—beyond a reasonable doubt. But the fact that the charges could not be proven beyond a reasonable doubt to warrant punishment by court-martial does not mean they were not supported by a preponderance of the evidence, warranting an administrative discharge for misconduct.

4. As the applicant pointed out, the Preliminary Hearing Officer and the majority of the DRB drew significantly more favorable conclusions about what had happened and the applicant's conduct than did the applicant's chain of command. From the evidence of record, it is certainly possible to reach contradictory conclusions about the nature of the sexual acts between the applicant and AV and the propriety of the applicant's conduct that night depending on which evidence one focuses on and finds persuasive. AV expressed regrets for "doing what she did with [the applicant]," claimed that she only drank half of the can of Mike's Hard Lemonade that night, admitted that she "gave in" to the applicant's requests for sexual intercourse, and did not report him for sexual assault, which could indicate that the sex was consensual. But SN B stated that AV had been drinking alcohol, was "at the very least buzzed," and was asleep and did not respond when the applicant carried her to his bedroom, which casts some doubt on her ability to consent. In addition, AV stated that after she woke up in the applicant's bed, he repeatedly overrode her requests to leave and to not have sexual intercourse, and so she believed he would not let her leave until she had sex with him and she was scared he would get "physical" with her if she continued to refuse to have sex with him. AV also stated that when she told him to remove his finger from her anus, instead of doing so immediately, he told her that it was "okay" for him to leave his finger there, and he did not remove it until she had told him to remove it "numerous times." The record indicates that the District Commander found the evidence weighing against AV's having consented to this sexual contact more persuasive than the evidence supporting consent, and the Board is not persuaded that he was wrong.

5. The applicant was not discharged because of the alleged sexual assault, however, but because he made false official statements to the CGIS agents during his interview. Under Article 1.B.17. of the Military Separations Manual, to be discharged for a single instance of misconduct, the member must have committed a "serious offense." Making false official statements to CGIS agents in violation of Article 107 constitutes a "serious offense" under the UCMJ because the maximum punishment for violating Article 107 includes a punitive discharge.[11] Although the applicant claimed that he did not intentionally lie to the CGIS agents and simply could not remember the details, and although the Preliminary Hearing Officer opined that the applicant probably did not intend his denials to be "definitive," the Board finds that the applicant has not proven by a preponderance of the evidence that his chain of command erroneously concluded that the applicant had intentionally lied to the CGIS agents during their interview. The Special Agent's summary of the applicant's interview shows that before invoking his right to counsel, the applicant told the CGIS agents that he did not remember AV's name; he did not remember what happened when AV was at his apartment; he did not remember picking up AV and taking her to his bedroom; and he did not remember taking a shower with AV. But he was able to tell the CGIS agents that AV was 19 years old. The Board finds it improbable that the applicant could remember so little of what happened but could remember AV's exact age. The fact that the applicant remembered AV's age is

[11] Article 1.B.17.b.(3), Military Separations Manual, COMDTINST M1000.4; Manual for Courts-Martial United States (2016) Appendix 12, Maximum Punishment Chart

substantial evidence that he was not telling the truth when he told the CGIS agents that he could not remember other, more memorable facts.

Likewise, although the applicant denied having supplied AV with alcohol during his CGIS interview and denied any involvement of alcohol in the situation, both AV and SN B related similar details about how the applicant provided AV with alcohol and encouraged her to drink despite knowing that she was underage. Therefore, the applicant has not proven by a preponderance of the evidence that his discharge was erroneous and should be set aside because his chain of command concluded that he had made false official statements to CGIS agents in violation of Article 107 of the UCMJ.

6. The applicant argued that because, in endorsing the Sector Commander's discharge recommendation, the District Commander included a comment that the applicant's "act of picking up the victim and carrying her to his bedroom without her consent was an assault consummated by a battery in violation of Article 128 of the UCMJ," and his discharge notification does not mention Article 128, he did not receive adequate notice of the basis for his discharge, as required by Article 1.B.17.e. of the Military Separations Manual, so he could not rebut it, he was denied due process, and his discharge was illegal. The applicant noted that in *Rogers v. United States*, 124 Fed. Cl. 757 (2016), the United States Court of Federal Claims set aside the plaintiff's discharge when, in forwarding the proceedings of an Administrative Separation Board to PSC, his commanding officer had made claims about the applicant's conduct and its adverse effect on subordinates that had not been presented to the plaintiff or the Administrative Separation Board. Because the Court was unable to assess the influence of the commanding officer's new evidence on PSC's decision, the plaintiff's separation was set aside.

In this case, however, the District Commander did not insert new evidence into the record but his own opinion about facts that were already in the record and expressly cited in the Notification of Intent to Discharge that the Sector Commander sent the applicant on April 14, 2017. That notification informed the applicant that he was believed to have made a false official statement when he told the CGIS agents that he had not picked AV up off the couch and carried her to his bedroom. Therefore, the only new thing the District Commander added to the record was his opinion of what the existing evidence showed, which he was allowed to do. Therefore, the Board is not persuaded that the decision in *Rogers v. United States*, 124 Fed. Cl. 757 (2016), requires the Board to set aside or void the applicant's discharge in this case. He has not shown that the District Commander's mention of Article 128 in his endorsement of the discharge recommendation denied the applicant adequate notice of the reasons for his discharge and due process.

7. The applicant alleged that in authorizing his discharge, the Coast Guard failed to take into account his entire record of performance, as required by Coast Guard policy. However, nothing in the record proves that the discharge authorities ignored the applicant's performance record in processing his discharge, and the Sector Commander forwarded a summary of the applicant's performance marks with the discharge recommendation. In addition, nothing in Article 1.B.17.b. states or implies that the discharge authorities must consider the quality of a member's entire record before deciding to discharge him for misconduct, and Article 1.B.17.b.(3) expressly authorizes an administrative discharge for commission of a single "serious offense." Many members with strong performance records have been discharged for committing a single serious offense. Moreover, the

policy cited by the applicant, Article 1.B.1.d. of the Military Separations Manual, COMDTINST M1000.4, states that when "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." (Emphasis added.) Therefore, the applicant has not proven by a preponderance of the evidence, that his discharge was erroneous or unjust because of the alleged failure to consider the quality of his entire military record.

8. The applicant argued that after making the "youthful mistake" of giving AV a can of Mike's Hard Lemonade with 5% alcohol content, he should have been given a second chance under the Second Chance Program. However, the incident happened within a few days of the applicant's 23rd birthday. He was not a teenager when he gave the alcohol to a teenager; continued encouraging her to drink alcohol; carried her to his bed while she was asleep; would not accept "no" for an answer and so continued pressing her to engage in sex despite her repeated refusals and told her it was "okay" for him to leave his finger in her anus even after she told him to take it out. Nor was he a teenager when he made the false official statements for which he was discharged.

9. The applicant made numerous allegations with respect to the actions and attitudes of various members involved in his discharge. Those allegations not specifically addressed above are considered to be unsupported by substantial evidence sufficient to overcome the presumption or regularity and/or not dispositive of the case.[12]

10. Because the applicant has not proven by a preponderance of the evidence that his discharge was erroneous or unjust, his requests for relief should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

[12] 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").

ORDER

The application of former FS3 [redacted] (USCG) for correction of his military record is denied.

October 11, 2023

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