

**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. 2024-017**

  
BM1/E-6

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**FINAL DECISION**

This proceeding was conducted by the Board for Correction of Military Records of the Coast Guard (“Board”) according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Board’s Chair docketed the case after receiving the completed application on November 29, 2023, 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 February 27, 2025, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

**INTRODUCTION**

The applicant, a Boatswain’s Mate, First Class (BM1/E-6), was involuntarily separated from the Coast Guard Reserve on September 26, 2019. His separation followed a finding by an Administrative Separation Board (ASB) that comments he posted on Facebook had violated Uniform Code of Military Justice (UCMJ) Article 134—Indecent Language.

In his submission to the Board, the applicant requested that he be reinstated into the Coast Guard Reserve. In the alternative, he requested that the Board: (1) upgrade his discharge from General – Under Honorable Conditions to Honorable;<sup>1</sup> (2) change the separation authority from COMDTINST M1000.4,<sup>2</sup> Article 1.B.17. (“Misconduct”), to

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<sup>1</sup> There are five types of discharge: three administrative and two punitive. The three administrative discharges are honorable, general under honorable conditions, and under other than honorable (OTH) conditions. The two punitive discharges may be awarded only as part of the sentence of a conviction by a special or general court-martial. A special court-martial may award a bad conduct discharge (BCD), and a general court-martial may award a BCD or a dishonorable discharge.

<sup>2</sup> Military Separations Manual, COMDTINST M1000.4 (August 2018).

Secretarial Authority; (3) change his reenlistment code from RE-4 (ineligible) to RE-1 (eligible); and change his narrative reason for separation from Misconduct to Secretarial Authority.

Through counsel, the applicant argued that these corrections to his records were warranted because the ASB made certain procedural errors and violated Coast Guard policies. Specifically, the applicant contended that the ASB had incorrectly determined that each element of Article 134—Indecent Language was met and had improperly considered evidence that was outside the scope of the ASB.

## RECORD SUMMARY

### *Service and Page 7s*

The applicant served on active duty in the United States Coast Guard from August 2004 to August 2008 and from September 2011 to September 2015. He served additional periods in the Coast Guard Reserve, including from the end of the latter active-duty period to his September 2019 discharge.

The applicant received numerous awards and commendations during his Coast Guard career, as further discussed below. The record also shows, however, that he received multiple CG-3307 negative Administrative Remarks (“Page 7s”) relating to missing drills during his Reserve service. Specifically, the applicant’s Page 7s included the following:

- **January 24, 2017.** The applicant was counseled for failing to report for or timely notify command of an inability to attend two scheduled drills, one in November 2016 and the other in January 2017. The applicant was informed that his general deportment was unacceptable and needed drastic improvement if he intended to be recommended for advancement during the rating period.
- **February 2017.** The applicant was counseled for failing to report or timely notify command of an inability to attend a scheduled drill period from February 11-12, 2017. It was noted the applicant had requested an excused absence but had been advised he was obligated to report. His general deportment was noted to be unacceptable. He was informed he was being transferred to the Individual Ready Reserve (IRR) because he had failed to report for or request an excused absence from 12 consecutive drills and had failed to maintain medical readiness or respond to official correspondence in a timely manner.
- **June 16, 2017.** The applicant was issued a Page 7 to inform him that for the prior seven months his behavior and performance had been unsatisfactory when compared to that of his peers. He was informed he was being placed on a six-month probation which would run through December 17, 2017. The Page 7 explained the applicant was being placed on probation for failing to report to drill weekends in November 2016, January 2017, February 2017, March 2017,

and April 2017, without substantial effort to communicate absences to supervisors or to make other arrangements to complete the drills.

- **February 18, 2018.** The applicant received a Page 7 for failing to attend a drill the prior day. The remarks stated that despite numerous attempts by command to contact him regarding the drill weekend, the applicant had stated he could not comply with command because of child-care concerns. The remarks continued that the FY2018 drill dates had been sent to the applicant in September 2017, and noted the applicant had frequently utilized child-care as the reason for not being able to attend drills despite having ample time to plan accordingly. The Page 7 also stated the applicant's general department was mediocre and that the quality of his work was below expectations for his rank.
- **April 10, 2018.** The applicant was issued a Page 7 for failing to report for drills scheduled for March 24-25, 2018. It was noted that the applicant had stated he had informed Master Chief G. and Lieutenant S. of his absence, but that this was "outside the chain of command." The remarks stated that the applicant had been directed to route a formal memo through the proper chain of command regarding his requested changes to the FY2018 drill schedule and the reasons for the request, with supporting documents. It was then noted that on March 23, the day before the drill, the applicant was contacted and advised he had not submitted the required memo and supporting documents. As of March 25, however, no one in the applicant's chain of command had heard from him. The Page 7 stated that the applicant's general department was unacceptable for his rank, and that he had failed to report for or request excused absences for five scheduled drills during the current FY2018, since completing his performance probation.

### *Social Media Comments and Investigation*

On January 24, 2018, the applicant posted several comments on a "USCG Boatswains Mate" Facebook page as part of a discussion about the upcoming transfer season. When one member, J.D., posted the question, "What priority are yall?" the applicant responded, "7." When the initial poster replied that that was "awesome," the applicant responded, "It's [sic] get [sic] you an extra 4 points on the SWE and first pick at the new female BM3s." The applicant then added, "Any bets on how long it takes for someone to be offended?" Another member, N.P., made a comment, to which the applicant responded, "Imma troll dat butthole." When N.P. changed the topic by asking the applicant to return some gloves N.P. had lent him, the applicant responded, "No glove no love. You better start lubing that bootyhole now. Daddy is coming for it after work tomorrow." N.P. then responded, "Jesus man." The applicant replied with a picture, or "meme," of a celebrity with his crotch area blurred, with the caption "Come on, you like it!"

The applicant's posted comments were reported to his chain of command. In correspondence dated February 23, 2018, J.G. designated A.V. as the Preliminary Inquiry Officer (PIO) to investigate the applicant's inappropriate comments.

The PIO's Investigative Report (IR) dated March 23, 2018, shows that the applicant and seven other witnesses were interviewed during the investigation. During his interview with the PIO, the applicant acknowledged his comments had been highly inappropriate but explained he had not meant anything "negative." He stated that he had known the other participants in the online discussion for years and that was the way they normally spoke to each other. In a written statement emailed to the PIO the following day, the applicant stated that he felt "horrible about the entire incident." He also said he had been unaware of the Coast Guard's social media policy, or its ramifications, at the time. He went on to state that he thought he had been engaged in "harmless, locker room type banter." The applicant also asserted that he had learned from his mistake and would continue to grow and mature because of it. But, the applicant stated, although he took responsibility, he believed that the relevant Coast Guard policies only applied to reservists who were on orders, which he had not been at the time.

The PIO interviewed and took written statements from seven additional witnesses. The interview summaries and statements establish that the applicant's comments were reported by a female Coast Guard member who had been checking the Facebook page in question to see whether any orders had been issued. This individual's concern was "if this individual was willing to post things like that in an open forum, what is he saying to his subordinates or people he works with in private?" She and other witnesses described the applicant's comments as inappropriate and/or derogatory towards women. The witness statements also establish that the applicant's Facebook posts were visible to any Facebook user regardless of membership in the Boatswains Mates group.

Based on the PIO's investigation, the IR included the following Findings of Fact, Opinions, and Recommendations, in relevant part:

#### FINDINGS OF FACT

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2. Indecent language was made by [Applicant] on an "Unofficial Internet Post." There is a USCG Boatswains Mate Facebook page. On this page there was a discussion about the upcoming transfer season. When BM1 [Applicant] was talking about his priority he stated "It's [*sic*] get [*sic*] you an extra 4 points on the SWE and first pick at the new female BM3s." Other comments made in the discussion by BM1 [Applicant] were; "Imma troll dat butthole," "No glove no love. You better start lubing that bootyhole now. Daddy is coming for it after work tomorrow." (Exhibit 1)

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4. Reference (c) states: A member of the Reserve is subject to the UCMJ while performing Inactive Duty for Training (IDT), Active Duty for Training (ADT), or active duty. Accordingly, all offenses committed by a reservist while on active duty, IDT or ADT, may subject the reservist to discipline, including NJP. While we cannot take punitive or criminal action against the member when not on ADT or IDT the member is still accountable to administrative actions. (Ref (c))

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7. Elements required to constitute a violation of Article 134, UCMJ, Indecent Language are: (1) that the accused orally or in writing communicated to another person certain language; (2) That such language was indecent; and (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. (Ref d))

8. Explanation of "indecent" language is that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts. The language must violate community standards. (Ref (d))

### OPINIONS

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2. BM1 [Applicant] actions do meet the elements of Article 134 Indecent Language in that he in writing communicated to another person on an open social media forum. The language used was indecent, filthy, and gross. Under the circumstances his conduct on the tread was to the prejudice of good order and discipline in the armed forces and brings discredit upon the armed forces by sexist and filthy sexual comments.

3. Despite the fact that BM1 [Applicant] was not on ADT or IDT orders at the time he made the comments on Facebook, he did identify himself on social media as a Coast Guardsman and it was clear to others that read his comments that he was a member of the Coast Guard. As a result of these actions, BM1 [Applicant] can be held accountable administratively. (Finding 2)

4. The comments made by BM1 [Applicant] were considered indecent. Some of the comments have been removed by the social media administrator. They are sexist in nature talking about first pick at the female BM3s. They are vulgar and filthy in nature talking about lubing bootyholes and daddy is coming to get it. (Finding 2)

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### RECOMMENDATIONS

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2. I recommend that the charge of Article 134, UCMJ, Indecent Language be documented on a CG-3307 and be inputted into BM1 [Applicant] next evaluation. It does meet the elemental requirements contained in Finding 7. However, Finding 4 states the member must be on Active Duty, IDT, or ADT to give the Coast Guard jurisdiction to dispose of at Capt. Mast. (Opinion 2)

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### *Notice of Involuntary Separation*

On June 13, 2018, the applicant's Commanding Officer (CO), Captain (CAPT) L., a Sector Commander, issued a memorandum, "Notice to Respondent: Involuntary Separation," wherein the applicant was given formal notice of the Coast Guard's intent to involuntarily separate him. The basis for the applicant's proposed discharge was Misconduct, specifically Article 1.B.17.b.3. (Commission of a Serious Offense) of the Military Separations Manual, COMDTINST M1000.4. The conduct specified in the notice was as follows: "On or about 24 January 2018, you posted comments to the USCG

Boatswains Mate Facebook Page, during a discussion of different priorities for PCS transfers, you stated you were a priority 7 and ‘it’s get you an extra 4 points on the SWE and first pick at the new female BM3s.’ Your comments were degrading to female members of the Coast Guard.” The applicant was informed that his options included appearing before an ASB or waiving his right to do so. He was also notified that his rights at an ASB, should he choose to appear before one, were described in the Enlisted Personnel Administrative Boards Manual, PSCINST M1910.1. The applicant was encouraged to review these rights in detail.

On July 24, 2018, the applicant submitted an “Exercise of Rights” memorandum in which he elected to appear before an ASB and to be represented by a military lawyer.

On October 29, 2018, the Convening Authority issued a “Convening Order” to Lieutenant Commander H.P., who the order informed had been designated as the board president for the ASB. Two additional board members, B.D. and T.D., were assigned. Also identified were the ASB’s Recorder, Reporter, Respondent’s Counsel, and Legal Advisor. Enclosed with the Order was the June 13 notice provided to the applicant which explained the conduct that resulted in the ASB. For instructions on how to conduct the hearing, the Order directed H.P. to consult two sources: the Enlisted Personnel Administrative Boards Manual, PSCINST M1910.1 (series), and Military Separations, COMDTINST M1000.4 (series). Lastly, the Order went into some detail regarding what should be included in the ASB’s report, which was to be submitted at the close of the proceedings. Specifically, the report was to include findings of fact proven by a preponderance of the evidence, opinions based on the findings of fact and evidence, and any basis for separation authorized by Coast Guard policy. In addition, the report was to recommend whether to retain or separate the applicant, and if separated, the appropriate characterization of service and type of discharge. Finally, the report was to address whether the applicant should be placed on probation instead of being involuntarily separated. For information about the required findings, opinions, and recommendations, the Order directed the board members to specific provisions in the two referenced Coast Guard policy manuals.

In a letter dated November 20, 2018, the applicant was notified of the date, time, and location of the ASB hearing. The notice explained that the ASB’s purpose was to gather evidence and advise the discharge authority – Commander, Coast Guard Personnel Service Center (PSC) – as to whether there was a basis to separate the applicant from the Coast Guard, whether he should or should not be separated, and how his service should be characterized if he was separated.

#### *ASB Proceedings*

The ASB hearing was held on December 5, 2018. Eleven witnesses testified, including the applicant. The Board has summarized each witness’s testimony based on Witness Testimony Summary Sheets included with the ASB report. Each summary sheet

was certified as complete and accurate by the relevant ASB participants, including the lawyer who represented the applicant at the ASB.

1. **The applicant** testified that his comments posted on Facebook had been stupid and there was no good reason behind them. He stated that although it was a joke, it was not funny and was completely unprofessional. He stated further that he knew better as a leader and mentor, and that he was embarrassed and had no explanation for his actions. The applicant also discussed his Coast Guard career in detail, meeting his wife, and the disagreements about his career that eventually contributed to his divorce and custody disputes over his daughter. The applicant stated that around the time he was hired as a police officer in 2016, he missed some drills, which led to probation, but he was eventually taken off probation. The applicant testified that because of the investigation that led to the ASB, he thought he was not supposed to drill, and he recounted receiving advice from a Judge Advocate that he needed to drill, but also speaking with his superior officer about being uncomfortable doing so due to the investigation, and thinking he was excused. He recalled that he was struggling personally around this time and was reeling from his divorce and trying to be a full-time father while holding a full-time job. He described making significant efforts to reach an accommodation with his leadership, but explained that this was difficult because the individual in question was toxic, as demonstrated by the individual's subsequent removal from the leadership position.
2. **A.R.** testified that she recalled seeing the applicant's post on what she thought was an official Coast Guard website where she and others would ask work-related questions to other boatswain's mates. She recalled being taken aback, and thinking the post was inappropriate. She subsequently reported the post. A.R. further testified that in her opinion "that's how sexual harassment and sexual assault start." She also stated that she understood she was testifying at an ASB and that the applicant could be fired. On this point, she stated that she did not think the applicant should be fired for his Facebook posts.
3. **K.T.** testified that A.R. had reported the applicant's Facebook post to him, and that although he was not a member of the Boatswains Mates group on Facebook, he was able to access and view all of the posts in question. He interpreted the post as something that was unprofessional and concerning. The concern was that with something like that on an open forum, what else was being said? K.T. recalled the other comments posted by the applicant involving sexual acts, gloves, and lubricant, and took them as sexual and unprofessional. He recalled that A.R. seemed visibly upset over the comments and that as someone in the process of going to an "afloat unit," A.R. was disturbed. K.T. further stated his opinion that if the public saw the comments, that would be very concerning.

Finally, he asserted that those sorts of comments were not commonly accepted, in his experience.

4. **D.W.** testified that he had been the applicant's supervisor. He stated that the applicant had initially gotten qualified, but that after about eight months he started having child custody issues, at which point his qualifications lapsed and he was not able to stay qualified. D.W. recalled trying to get the applicant qualified again but that it did not work out. He stated that numerous attempts were made to get the applicant on a different drill schedule and that there had been some success, but the applicant stopped showing up again. D.W. stated that the applicant was then placed on performance probation, and was removed from probation in 2017. D.W. recalled a negative impact on the unit because other people had to pick up the slack since the applicant was not qualified, and this impacted morale. D.W. noted there was some flexibility to work with members and their drill schedule, and that absences excused by one's supervisor in advance could be made up, but unexcused absences could not be.
5. **W.B.** testified that he had known the applicant from the same sector boarding team division. He stated that the applicant had a knowledge base built on years of experience. He stated he had not seen the applicant a lot due to other personal issues going on. W.B. recalled becoming aware of the issue relating to the applicant's Facebook post, and stated that this issue made it difficult for the applicant to attend some drills. W.B. stated the impact limited the applicant from actively participating and being part of the team. He recalled that initially, D.W. and other chiefs had tried to reach out and engage the applicant to accommodate his issues, and response was "not always fair" and took a little "extra effort." W.B. stated that the "senior enlisted" came up with a plan, which was documented, and the applicant would be considered absent, unexcused, if he did not follow it. W.B. stated there was confusion on how to implement that, and that the applicant's status at the time of the hearing was "sitting waiting." He stated another individual said the applicant was not supposed to be drilling. W.B. stated that based on his 20 years of military service, he felt the applicant was "sincere in his acknowledgement" and was genuinely trying to turn himself around to become a better member.
6. **J.G.** testified that the first time he became involved with the applicant was in February 2017 when he had a meeting with D.W. and W.B. about the applicant not reporting to his inactive duty training (IDT) since some time late the previous year. J.G. stated the discussion led to the applicant being put on probation for six months. He recalled the applicant successfully completed and was removed from probation, and afterward, his command was able to adjust his schedule to account for his parental and work duties on weekends. Shortly after this time,

J.G. recalled, the applicant made comments on social media that resulted in an investigation.

7. **A.L.** was called as a witness by the applicant and testified in person (most of the other witnesses testified by telephone). He stated he felt it was important to support the applicant with a personal appearance, as he had known him since 2006, and they were great friends. He stated that the applicant was an honest person, and he had not seen the applicant be inappropriate towards women. A.L. stated he was aware of the applicant's Facebook comments, and that there were many inappropriate posts on the site in general that he classified as "locker room talk." He explained that what the applicant had said was not out of the ordinary as compared with other posts. He acknowledged that some level of discipline would be warranted in similar circumstances, such as admonishing the member and emphasizing the Coast Guard's social media policy, and possibly issuing a Page 7. However, A.L. testified, the applicant should not be getting kicked out of the Coast Guard, as there was far worse being done. A.L. thought the comment was "crude humor" and unprofessional talk, but stated that he felt the ASB was "a little excessive for some Facebook comments." A.L. also stated it was his understanding that the applicant had missed some drills because of a custody dispute involving his daughter, and he stated that someone was sent to the applicant's house to have him sign a Page 7 on Father's Day. Finally, A.L. stated that the Boatswains Mate page on Facebook was completely separate from the Coast Guard itself.
8. **S.B.** was called by the applicant and testified in person. He stated he had known the applicant for 20 years since they were childhood friends. He asserted that the applicant was one of the reasons he had enlisted in the Coast Guard, and that the applicant was an outstanding leader. S.B. stated that although he had not worked with the applicant professionally, and the Facebook comments were unprofessional – "guys being guys in a locker room environment" – he did not think the applicant should be separated, because the comments did not reflect him as a person.
9. **L.P.** was called by the applicant and testified in person. He categorized the applicant's Facebook comments as inappropriate and said he would not condone them, but he stated the applicant should not be fired from the Coast Guard. L.P. recalled working with the applicant in 2013 and developing a relationship outside of work. He stated that the applicant was a "work horse" as a Coast Guardsman, always underway doing boardings, completing many "Boating Under the Influence" cases. L.P. stated the applicant knew his job and spent off time working. He further stated that regarding absences, one person's absence would not impact his own station's functioning.

10. **E.M.** was called by the applicant. She described the applicant as a mentor and close friend who took his job seriously and had all the knowledge to get the job done. She recalled the applicant as a little abrasive, to show he took the job seriously, but stated she never felt uncomfortable around him as a woman. She acknowledged the applicant's Facebook comments and said they were unprofessional and similar to others she'd seen throughout her career. She stated that the applicant learned from his mistake and should not be fired from the Coast Guard for his comments because he was a great leader both in the Coast Guard and out.
11. **K.W.** testified for the applicant. She stated she had been stationed with the applicant and described him as a professional, stand-up guy who was knowledgeable. She stated she and the applicant shared a sense of humor and were too honest. K.W. asserted that the applicant's Facebook comments were inappropriate and unprofessional, but that he should not be separated, and that she supported him.

Three character reference letters were also submitted to the ASB. In a letter dated November 29, 2018, K.M. stated that the applicant had been his direct supervisor when he entered the Coast Guard, and that his leadership made the transition easier. He described the applicant as a true mentor and one of the most honest and loyal people he knew. He described the applicant's personality as one of selflessness and duty, and stated the applicant was one of the best leaders he had come across in the Coast Guard. Regarding the Facebook comments, K.M. stated that he was shocked the applicant would have such a lapse in judgment, and that knowing the applicant, he did like to stir the pot but usually it was in good fun. K.M. expressed shock at the "level he was being charged" and stated an ASB was excessive.

In a letter dated November 30, 2018, J.W. stated he had worked with the applicant from 2012 to 2014, and also spent time outside of work with him. He described the applicant as a mentor who kept their crew safe for all missions and had a passion for law enforcement that was contagious. J.W. stated that he had yet to see any officer who exemplified loyalty like the applicant, and that the applicant was "rough around the edges" and "unfiltered." He argued, however, that a career full of achievements should not outweigh one mistake, and the applicant deserved to remain in service.

In a statement dated December 3, 2018, E.M. stated she considered the applicant a friend and mentor. She stated that he did have a tendency to joke around a lot but had never put her in a situation where she, as a woman, felt uncomfortable. She described the applicant as reliable and trustworthy with a big heart and strong values. E.M. further stated that she knew the applicant was sorry for what he had said because he would never want to be a poor example for his daughter. She went on to state that inappropriate comments had been made by many Coast Guard members, and that the applicant was aware of his

mistakes and sorry for them, and should be forgiven and allowed to remain in the Coast Guard.

On December 12, 2018, the ASB released its “Board Report.” The report included the following Findings of Fact and Opinions:

#	Findings of Fact	Exhibits that support this Finding of Fact:
1.	Respondent, as a member of a U.S. Coast Guard Boatswain’s Mate Facebook group, made a post on Facebook stating that a Priority 7 gets you 4 extra points on the Service Wide Exam and the first pick at the new female BM3s.	(5)
2.	Respondent, in addition to comments about receiving first pick of female BM3s, also made comments about trolling and lubricating another member’s anus.	(5)
3.	Respondent, as a Reservist, received participation drill schedules for FY2016, FY2017, and FY2018.	(6)
4.	Respondent has received Not Recommended for advancement on the last two Enlisted Evaluation Reports.	(7), (11)
5.	Respondent has missed several reserve drill sessions, with most absences being classified as unexcused.	(7), (8)
6.	Respondent is currently in a child custody situation with respondent’s ex-spouse.	(12), (19)
7.	Respondent was placed on performance probation in 2017 and was removed from probation in Dec 2017 after completing all requirements.	(8), (19), (20), (21), (22)
8.	The United States Coast Guard Boatswain’s Mate Facebook group at the time was an open group that all Facebook users had access to view content.	(5)
9.	Every witness brought before the board, both for the respondent and for the recorder, stated that [the applicant]’s post was inappropriate and unprofessional.	(17), (18), (19), (20), (21), (22), (23), (24), (25), (26), (27)
10.	Two witnesses stated that the comments posted by [the applicant] were sexually oriented and can lead to the beginning of an atmosphere where sexual harassment is acceptable.	(17), (18)

#	Opinions	Findings of Fact and/or Exhibits that support this Opinion
1.	The Board finds that there is a basis for separation.	Findings (1) and (2). Exhibit (5)
2.	The Facebook group that the Respondent’s comments were posted on is affiliated with the Coast Guard and contents located within that group, at the time prior to the disclaimer that was recently added, would indicate to the over 2 billion users on Facebook that the Coast Guard sanctions this type of content.	Findings (8), (9), and (10). Exhibit (5).
3.	Members of the Coast Guard believed that the US Coast Guard Boatswain’s Mate group on Facebook was a Coast Guard affiliated group, meant for those rated as Boatswain's Mates.	Exhibits (5) and (17)
4.	Respondent has significant issues in his personal life that have contributed to a significant decline in work performance.	Findings (4), (5), (6), and (7).

		Exhibits (7), (8), (11), (12), and (19)
5.	Respondent's comments, whether intentional or not, can reasonably be construed as sexual in nature, which could create a hostile work environment based on sexual harassment.	Findings (1) and (10). Exhibits (5) and (17)
6.	Respondent's probation period has not corrected his deficient work performance, therefore additional periods of probation will not improve his performance.	Finding # 4, 5, 7. Exhibits # 5, 8
7.	Respondent's personal situation has not improved in terms of still being embroiled in a custody battle, which will facilitate his continued absence during his reserve drills.	Finding # 4, 5, 6, 7. Exhibit # 19
8.	Respondent would not be recommended for separation from the Coast Guard solely due to his comments, however, when taking into account his record of poor performance and performance probation, he has not lived up to the expectations that have been made for members of the Coast Guard.	Finding # 1, 2, 4, 5, 7. Exhibits # 5, 7, 8, 11

The ASB Report’s “Recommendations” section included the following:

Recommendations: The board consulted Chapter 7 of reference (a) and Article 1.B.1.d of reference (b) and the following recommendations are made in compliance with Coast Guard policy.

- a. Basis for Discharge: You directed the board, in the convening order, to identify any reason(s) for separation supported by a preponderance of the evidence gathered at the board’s hearing. Based on the board’s review and consideration of the record of the hearing, as well as the findings of fact and opinions stated above, the board recommends:

**No basis for discharge** was proven by a preponderance of the evidence presented at the hearing

**The following basis or bases** for separation are supported by a preponderance of the evidence presented at the hearing:

Unsatisfactory performer [ref (b)]

1.B.9. Unsatisfactory Performer

Unsuitability [ref (b)]

1.B.15.b.(1) Inaptitude

1.B.15.b.(2) Personality Disorders

1.B.15.b.(3) Apathy, Defective Attitudes, Adjustment Disorders

1.B.15.b.(4) Unsanitary Habits

1.B.15.b.(5) Alcohol Abuse

1.B.15.b.(6) Financial Irresponsibility

Misconduct [ref (b)]

1.B.17.b.(1) Civilian or Foreign Conviction

1.B.17.b.(2) Pattern of Misconduct

1.B.17.b.(3) Commission of a Serious Offense

1.B.17.b.(4) Drugs

1.B.17.b.(5) Fraudulent Enlistment

Other (Identify)

The exhibits, findings of fact, and/or opinions that support this recommendation are as follows:

Based on the preponderance of evidence, having reviewed all elements of the charge of Article 134, Indecent Language, the board found that the respondent, [the applicant] meets the criteria outlined in Chapter 1. B. 17.b.(3) of reference (b) for a commission of a serious offense based on the following:

- (1) [The applicant] admitted to posting those comments, findings (1) and (2), opinion (5), and Exhibits (5) and (19).
- (2) The comments that were posted had a sexual connotation associated with sexual harassment, hostile work environment, finding (1), opinion (5), and exhibit (5).
- (3) The comments were made on an open Facebook group that was titled Coast Guard Boatswain Mates, open to over 2 billion monthly users worldwide. These users would Associated [sic] these comments to the Coast Guard, therefore bringing discredit to the Coast Guard and prejudicing the good order and discipline, findings (1) and (8), opinions (2) and (3), and exhibit (5).

- b. Separate/Retain: You directed the board to recommend either that the respondent be retained in, or separated from, the Coast Guard. Based on the board's review and consideration of the record of the hearing as well as the findings of fact, opinions, and recommendations stated above, the board recommends:

The respondent should be **retained** in the Coast Guard

The respondent should be **separated** from the Coast Guard

The exhibits, findings of fact, and/or opinions that support this recommendation are as follows:

- (1) The respondent initiated sexualized comments on Facebook, detailed in Exhibit (5). The adverse impacts that these comments have to workplace morale and welfare are supported by Exhibits (17) and (18).
- (2) The respondent was placed on performance probation based on excessive unexcused drill absences, supported by Exhibit (8), Finding (7), and Opinion (6). The respondent completed all requirements and was removed from performance probation prior to the Jan 2018 incident, supported by Exhibit (8).

- c. Characterization of Service and Type of Discharge: You directed the board to recommend an appropriate characterization of the respondent's service, and corresponding type of discharge the respondent would receive, in accordance with guidance set out at Article 1.B.2. of reference (b).

The Board has consulted Article 1.B.2. of reference (b) as well as the appropriate parts of the respondent's Personnel Data Record (PDR). Based on Coast Guard policy and the board's review and consultation of the record of the hearing and the findings of fact, opinions, and recommendations stated above, if the respondent is separated from the Coast Guard, the respondent's service should be characterized as:

Honorable (Honorable discharge)

Under honorable conditions (General discharge)

\_\_\_ Under other than honorable conditions (OTH discharge)

The exhibits, findings of fact, and/or opinions that support this recommendation are as follows:

The respondent's record of military service is well documented, exhibits (7), (8), (10), and (11). Written character statements contained in Exhibit (12) were corroborated during in person and/or telephonic testimony during the hearing. A total of five (05) witnesses testified on behalf of the respondent and discussed work-ethic, enthusiasm, leadership, and other personal and professional factors. The respondent has also received several Coast Guard and community awards for his service, exhibit (10). In reviewing the respondent's current enlistment period, which is a reserve enlistment, the board noted that the member had several missed drill periods, many of which were unexcused, exhibits (6) and (8). The board weighed the respondent's character statements, the unexcused absences, and an understanding of the respondent's personal situation, the board concluded that the respondent's service did not meet the threshold of less than honorable or bad conduct, and that it did not meet the requirements of Honorable. The Board determined that the respondent's service to the Coast Guard was Under Honorable Conditions.

d. Probation: You further directed the board to recommend whether the respondent should be placed on probation in lieu of immediate involuntary separation if CG PSC determines that the respondent should be administratively separated. Based on the board's review and consideration of the record of the hearing as well as the findings of fact, opinions, and recommendations stated above, the board recommends:

X The respondent **should not be placed on probation**, and should be immediately involuntarily separated if CG PSC determines that the respondent should be administratively separated.

\_\_\_ The respondent **should be placed on probation** in lieu of immediate involuntary separation, if CG PSC determines that the respondent should be administratively separated. The Board recommends the following conditions of probation be imposed:

The exhibits, findings of fact, and/or opinions that support this recommendation are as follows:

The Board has determined that the respondent should not be placed on probation if CG PSC determines that the respondent should be administratively separated due to the misconduct, commission of a serious offense, finding (7), opinion (6), and exhibits (7), (8), and (19) through (22).

### *Applicant's Response to ASB Report*

On December 12, 2018, the ASB president issued a Memorandum, "Right to Review Administrative Board Report," to the applicant, wherein he notified the applicant of his right to review and comment on the report. The applicant was informed that the purpose of the review period was to "preserve objections, submit rebuttal comments, and submit a statement of no objection."

On December 28, 2018, the applicant, through his assigned counsel, submitted a memorandum wherein he documented his objections to certain portions of the hearing,

arguing there had been “egregious errors” of policy and procedure. The applicant made a number of arguments.

First, the applicant noted that the October 2018 convening order notified the applicant that the basis for the administrative action was Commission of a Serious Offense based on his social media comments. He argued that because he was never notified of an “unsatisfactory performance” charge, the introduction and consideration of evidence related to his missed drills and performance had been improper. The applicant stated that he had objected to this evidence during the ASB, and the objection was sustained by the senior board member, but that the decision was then reversed based on “erroneous legal advice” from the board’s legal advisor.

Second, the applicant argued that a violation of UCMJ Article 134—Indecent Language had not been proven, and that the ASB’s decision that it had was arbitrary and capricious. He argued that the bar to remove language from First Amendment protection was a high one, and it had not been met in this case. Regarding Article 134, the applicant also argued that while the ASB report stated that the applicant’s comments could create a hostile work environment based on sexual harassment, these were not elements of Article 134 and the applicant was never charged with a sexual harassment offense. The applicant noted that when one witness, A.R., testified that she believed the applicant’s Facebook posts may have led to sexual harassment or assault, the applicant objected, and this objection was sustained and the reporter was directed to strike the testimony. According to the applicant, however, this was not done, as can be seen in the opinions and basis for discharge sections of the ASB report.

Third, the applicant argued that the board members had ignored evidence about his drilling status. While they relied on evidence about his having missed drills, he argued, they had failed to consider the testimony of W.B. that the applicant was ordered not to drill at a certain point in the process. He argued that this fact, testified to by two witnesses, and his completion of performance probation, at the very least should have been included in the findings of fact in the board’s report.

Fourth, the applicant argued that the board ignored the witnesses’ recommendations that he be retained in the Coast Guard. Specifically, the applicant noted that A.R., who initially reported the Facebook posts and had been most impacted, testified that the applicant should not be fired for his comments. He noted that W.B., who was one of his supervisors, also testified that he should not be fired.

Fifth, the applicant argued that contrary to the ASB report, he was no longer in a custody battle, and this may have been misconstrued from his testimony where he mentioned eventually wanting to petition for more custody.

In conclusion, the applicant argued that a General—Under Honorable Conditions discharge was too harsh, given the facts and witness testimony. He stated that an Honorable discharge was more appropriate given his length of service and the testimony recommending retention.

*Endorsement of the ASB Report and Discharge*

On May 6, 2019, the applicant's Sector Commanding Officer (CO) issued a First Endorsement wherein he concurred with the ASB's findings and recommendation that the applicant be separated from the Coast Guard and that his characterization of service should be General—Under Honorable Conditions. The endorsement stated as follows:

1. I have reviewed the summarized record, findings of fact, opinions, recommendations, and legal sufficiency review in the administrative separation board for [the applicant]. I concur with the recommendation that [the applicant]'s conduct meets the criteria for separation under Article 1.B.17.b.(3) of reference (a), commission of a serious offense. I further concur that the circumstances warrant a discharge characterization of General.
2. The Board found that [the applicant] acknowledged posting the comments in question on the U.S. Coast Guard Boatswain's Mate (USCG BM) Facebook group, and that these comments had a sexual connotation sufficient to satisfy the second element of Article 134, indecent language, UCMJ. The Board also found that at the time the comment was made, the USCG BM Facebook group was an open forum that was accessible by all Facebook users, leading users to associate these comments with the Coast Guard, ultimately bringing discredit to the service.
3. I cannot emphasize enough, the impact, whether potential or real, that [the applicant]'s comments had. Our service supports survivors of sexual harassment and sexual assault, many of whom are still serving. Any one of these members could have easily seen these comments. While they do not meet the strict criteria of sexual harassment or assault, his words were unquestionably inappropriate and were disrespectful to women everywhere. Additionally, a public forum allows viewing of these outrageous comments by the public, whom we serve. As a First Class Petty Officer with over 13 years of service, not only did [the applicant] know better, he had a responsibility to be a role model, and to prevent others from violating Coast Guard policy. [The applicant] failed to uphold our Core Values, and his comments encouraged others to engage inappropriately in a public forum.

On May 24, 2019, a Rear Admiral from the applicant's district issued a Second Endorsement, wherein he also concurred with the ASB findings and recommendations, namely that the applicant be administratively separated and that his character of service should be General.

On September 10, 2019, the Final Reviewing Authority (FRA) issued a Final Action memorandum wherein he approved the findings and recommendations of the ASB and ordered that the applicant be separated for Commission of a Serious Offense and be given a General characterization of service.

On September 18, 2019, the applicant was discharged for misconduct with a General – Under Honorable Conditions discharge and a RE-4 reenlistment code.

## APPLICATION TO THE BOARD

The applicant's submission to the Board was received on November 29, 2023. The applicant first argued that the Coast Guard made an error of fact in determining the applicant had committed a serious offense. Specifically, the applicant claimed that in order for someone to be guilty of a violation of UCMJ Article 134—Indecent Language, all three elements must be met, specifically: (1) The accused orally or in writing communicated to another person certain language; (2) That such language was indecent;<sup>3</sup> and (3) That under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.<sup>4</sup>

The applicant stated that the first element was undisputed, but he argued that the final two elements were not met. For instance, he stated, all witnesses had considered his Facebook posts “unprofessional,” but none described them as “grossly offensive.” The applicant further argued that the comment did not single out specific women, and there was no evidence of an “uncomfortable environment.” He then stated that the lack of specificity and vulgarity indicated that his comment was “an unrefined joke gone awry,” as compared to a comment meant to incite “libidinous thoughts.” Furthermore, the applicant argued, the ASB had erred when they discussed possible sexual harassment or a hostile work environment, as these offenses had not been charged.

The applicant continued by claiming that the ASB had misconstrued the requirement that the applicant's conduct have brought “discredit” on the service. He argued that it was he, and not the Coast Guard, who had posted the joke, and that if the Coast Guard took the position it had, it would have to separate every person that has posted “raunchy jokes” or inappropriate “memes,” which would result in a swift decline in membership. He stated further that his post was an unprofessional joke made off-duty that never affected the Coast Guard's reputation or functionality.

The applicant next argued that the ASB's legal advisor had provided incorrect advice during the ASB proceedings, which resulted in evidence related to his performance being considered when the only basis for separation he was put on notice for involved his social media comments. The applicant argued that the consideration of “unsatisfactory performance” evidence deprived him of the due process intended to be provided service members by the rules that restrict ASB proceedings to the basis or bases detailed in the notice provide to the member by the Convening Authority.

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<sup>3</sup> The applicant defined “Indecent” language as that which is grossly offensive to modesty, decency or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought; language is indecent if it is reasonable to corrupt morals or incite libidinous thoughts.

<sup>4</sup> Manual for Court-Martials, Part IV, Paragraph 104.

The applicant next asserted that a member of the ASB had fallen asleep during his testimony, which he stated was patently offensive. He contended that the lack of attentiveness and inability to articulate a proper basis for separation was demonstrated in the report.

Continuing, the applicant noted that the ASB had reasoned that the applicant would not have been recommended for separation due solely to his social media comments, but accounting for his record of poor performance and performance probation, he had not lived up to the proper standards. The applicant reiterated that he had direct permission to miss drills until the investigation was resolved. Despite the evidence clearing him of wrongdoing related to poor performance or attendance, he argued, the ASB report still relied on a record of poor performance to justify its recommendation.

The applicant concluded by stating that during his Coast Guard career, he had proven to be a valuable asset and was consistently awarded for his commitment to service. He recounted that he had been suffering through a troubling custody dispute and had received permission to miss drills, but had since resolved the custody situation. He lamented that the ASB report prioritized this short period in which he was dealing with familial troubles, and argued this should not outweigh his 14 years of honorable service to his country. The applicant pointed to multiple letters submitted on his behalf to support his claims of his exemplary performance while in the Coast Guard. He also pointed to his civilian career as a respected firefighter, police officer, and detective as evidence of his good character.

The applicant enclosed a separate character statement written on his own behalf in which he recalled his history with the military and Coast Guard beginning with membership in the U.S. Naval League Cadets at the age of 11 and proceeding through his career to the present day. He again discussed the marital and custody issues that conflicted with his drilling obligations and for which he contended he had been excused from drilling. He lamented that at his ASB hearing, the negative things that had occurred over the prior four years while fighting to spend time with his daughter had been the focus, while the great things he had done over the previous 10 years were ignored.

The applicant submitted seven additional character reference letters authored by friends and fellow Coast Guard members A.L., S.B., R.R., E.M., J.C., D.B., and W.B. These letters were dated between June 2022 and August 2023. They attest to the applicant's significant accomplishments during his Coast Guard service and his positive traits, including trustworthiness, honesty, loyalty, leadership, long dedication to public service, support for others during difficult times, and dedication to family. Collectively, the letters urged that the applicant's claim for reenlistment into the Coast Guard Reserve should be granted, or at the least, his discharge characterization should be upgraded to Honorable. A.L. stated in his letter that he had personally witnessed a member of the ASB falling

asleep during his testimony at the hearing. W.B. stated that during the investigation of the applicant's Facebook comments, the command had advised him to tell the applicant not to drill. He also stated that he had observed one of the ASB members be asleep.

Finally, the applicant enclosed with his submission to the Board numerous awards he had received during his service, including:

- The 2013 Coast Guard Curtis Bay Officer of the Year award presented by The Northern Anne Arundel County Chamber of Commerce in recognition of meritorious service to the Community of Northern Anne Arundel County
- Coast Guard Achievement Medal for superior performance from January 2013 to December 2013 awarded by the Coast Guard on July 9, 2014
- Undated State of Maryland Natural Resources Police Certification of Appreciation in recognition of exceptional teamwork, working with members of the Maryland Natural Resources Police, participating in joint patrols targeting commercial fishing activity and boating safety on Maryland's waterways
- The Maryland General Assembly Official Citation in recognition of being honored at the 2013 Annual Community Safety Awards Dinner
- Executive Citation from The Citizens of Anne Arundel County, Maryland in recognition of selection as recipient of Officer of the Year award by the Coast Guard—Station Curtis Bay
- Coast Guard Achievement Medal for superior performance from June 2010 to September 2015 awarded on September 25, 2015

### **VIEWS OF THE COAST GUARD**

On October 31, 2024, a Judge Advocate (JA) for the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case. The opinion adopted the findings and analysis provided in a memorandum prepared by the PSC, which was enclosed.

The JA first asserted that all elements of Article 134—Indecent Language had been satisfied, and noted that command may direct discharge of a member for misconduct relating to a serious offense when the “specific circumstances of the offense warrant separation” and the maximum penalty for the offense under the UCMJ includes a punitive discharge. In this case, the JA argued, the ASB and PSC determined that the elements of the offense had been established by a preponderance of the evidence and the circumstances of the offense warranted separation.

The JA next argued that it had not been error for the ASB to consider the applicant's entire record. On this point, the JA noted that Coast Guard policy states that

characterization of service determinations are to be based on a member's entire military record.

The JA also addressed the applicant's claim that a member of the ASB had fallen asleep during his testimony. The JA noted that the "testimonial evidence" proving this occurred was a statement from the applicant's character witness, A.L., who stated that during his own testimony (not the applicant's) the member was "falling" asleep, not that he or she had "fallen" asleep. In any case, the JA argued, this evidence was not sufficient to establish that an injustice had occurred.

The JA then addressed the applicant's claim that the ASB improperly penalized him for missing drills he had been excused from by his supervisor. In this regard, the JA noted that the ASB had specifically cited to negative counseling for missed drills throughout the applicant's entire record, specifically spanning from January 2017 to April 2018, which includes periods outside those for which the applicant claimed he was excused.

Attached to the JA's opinion was a memorandum prepared by the Coast Guard PSC dated July 22, 2024. The PSC first asserted that the applicant's ASB had been conducted in accord with Coast Guard policy. Specifically, the PSC noted that relevant policy required the ASB to consider the applicant's entire military record to support its recommendations on whether to retain or separate him, and what his characterization of discharge should be. The PSC further noted that upon review of the ASB record, the Convening Authority and first Flag Officer endorsed the applicant's involuntary separation.

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

In his reply the applicant argued, through counsel, that his longstanding career in the Coast Guard had been ended due to factual and procedural due process violations. The applicant reiterated the argument that evidence related to his performance was improperly considered since the Convening Authority's notice addressed only the applicant's social media comments. He reiterated that the jokes posted, while questionable, did not rise to the level of "indecent," and were not prejudicial to good order and discipline, nor were they service discrediting. He also stated there was no reason that he or A.L. would lie about seeing a board member fall asleep. He went on to assert that the board erred in considering his missed drills he was excused from. On this point, he reiterated that W.B. testified he had advised applicant not to drill.

### **APPLICABLE LAW AND POLICY**

#### ***Board Proceedings***

The Board may correct errors or remove injustices in a service member's records pursuant to 10 U.S.C. § 1552(a). "Error" means a mistake of a significant fact or law and

includes a violation by the Coast Guard of its own regulations. *See Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976) (“‘Error’ means legal or factual error.”); *Ft. Stewart Schools v. Federal Labor Relations Authority*, 495 U.S. 641, 654 (1990) (“It is a familiar rule of administrative law that an agency must abide by its own regulations.”). Injustice, when not also error, is treatment by the military authorities that “shocks the sense of justice.” *Sawyer v. United States*, 18 Ct. Cl. 860, 868 (1989) citing *Reale v. United States*, 208 Ct. Cl. 1010, 1011, cert. denied, 429 U.S. 854, 50 L. Ed. 2d 129, 97 S. Ct. 148 (1976). The Board has authority to determine whether an injustice exists on a “case-by-case basis.” Docket No. 2002-040 (DOT BCMR, Decision of the Deputy General Counsel, Dec. 4, 2002).

“It is the responsibility of the Applicant to procure and submit with his or her application such evidence, including official records, as the Applicant desires to present in support of his or her case.” 33 C.F.R. § 52.24 (a). “The Board begins its consideration of each case presuming administrative regularity on the part of the Coast Guard and other Government officials. The Applicant has the burden of proving the existence of an error or injustice by the preponderance of the evidence.” 33 C.F.R. § 52.24 (b). 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.” *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

### ***Coast Guard Instructions & Policies***

#### ***Enlisted Personnel Administrative Boards Manual***

The Enlisted Personnel Administrative Boards Manual, PSCINST M1910.1 (June 2014) (hereinafter “Boards Manual”) includes the following relevant provisions:

##### **1.E.1. Guiding Principles.**

Boards shall be guided by the following principles when making recommendations to CG PSC.

- a. Coast Guard members do not have a right to remain in the Coast Guard, or retain their current rate, regardless of their length of service or the personal hardships the administrative action might cause.
- b. A board’s primary consideration is “What is in the best interests of the Coast Guard?” Boards should focus on the respondent’s fitness to serve and be a valuable asset to the Coast Guard. Boards should not be guided by consideration of the needs of individual commands or of the respondent.

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##### **1.F. THE BOARD’S SCOPE OF INQUIRY**

**1.F.1. Set By Convening Authority.**

The scope of the board's inquiry is established by the convening authority. Boards shall collect facts, law, and policy relevant to the allegations of unsatisfactory conduct or performance of duty described in the convening authority's notice of administrative action to the respondent and in the convening order to the board

**1.F.2. Narrow Focus.**

Timely review and final action of board reports is important. To minimize delay in the board's proceedings and subsequent reviews of the board report, boards should keep the scope of their inquiry narrowly focused on the conduct and performance of duty identified by the convening authority.

See MILSEP Article 1.B.1.d. for a discussion of the material a board is authorized to review when considering whether to recommend the retention or administrative separation of a member.

**1.F.3. Changing the Scope.**

- a. If, during the course of its proceedings, the board determines that the scope of its inquiry should be expanded or restricted, that the composition of the board should be altered, or that the board's convening order should be modified, the board shall recommend the changes to the convening authority.
- b. The convening authority may take such action on a board's recommendation for changes as he or she deems appropriate. Copies of any such communications and replies shall be appended to the record.

See Article 2.G.1. of this Manual about amending a convening order.

**1.G. FINDINGS / OPINIONS / RECOMMENDATIONS A BOARD MUST MAKE.****1.G.1. Administrative Separation Boards and Reenlistment Boards.**

Administrative separation boards and reenlistment boards shall answer four questions in all cases, and a fifth question when the respondent is eligible to request voluntary retirement.

- a. Basis? Is there a basis (or multiple bases) in Coast Guard policy for administratively separating or denying reenlistment to the respondent? This question shall be answered by every administrative separation and reenlistment board.
- b. Retain or Separate? Should the Coast Guard discharge / deny reenlistment to the respondent? This question shall be answered by every administrative separation and reenlistment board. The board shall provide a recommendation even when, in its opinion, a basis to administratively separate or deny reenlistment does not exist.
- c. Service Characterization / Type of Discharge? How should the respondent's service be characterized if he or she is discharged / denied reenlistment? This question shall be answered by every administrative separation and reenlistment board. The board shall provide a recommendation even when the board is recommending that the member be retained or allowed to reenlist.
- d. Probation? Should the respondent be placed on probation instead of being involuntarily administratively separated immediately or denied reenlistment? This question shall be answered by every administrative separation and reenlistment board.

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**7.B.6. Completing the Board Report.**

- a. The board shall prepare a report.

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- g. Required Findings of Fact, Opinions, and Recommendations.

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- (1) Administrative Separation Boards – An administrative separate board shall answer four questions . . . in its report.

i. Basis. Is there a basis for separating the respondent? This question shall be answered by every administrative separation board.

ii. Retention / Separation. Should CG PSC retain or separate the respondent? This question shall be answered by every administrative separation board.

iii. Service Characterization / Type of Discharge. How should the respondent's service be characterized if he/she is separated from the service? This question shall be answered by every administrative separation board.

Warning – Before making its recommendation on characterization of service, the board shall review MILSEP Articles 1.B.2.e. and 1.B.2.f., which explain the process for characterizing a member's service.

iv. Probation. Should the respondent be placed on probation in lieu of immediate separation? This question shall be answered by every administrative separation board. A recommendation for probation shall include terms and conditions applicable to the probationary period for CG PSC's consideration.

See MILSEP Article 1.B.24. and Article 1.G.1.d. of this Manual.

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*Military Separations Manual*

The version of the Military Separations Manual, COMDTINST M1000.4 (August 2018) applicable during the relevant period provides the following:

**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****1.B.17a. 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:

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(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....

**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. If a command contemplates discharging a member for reasons contained in this Paragraph, the command shall initiate a formal probation or treatment period of at least six months. Additionally, the command shall make an appropriate Administrative Remarks, Form CG-3307, entry in the member's PDR stating the command will initiate administrative discharge processing unless the member shows significant improvement in overcoming the deficiency during the probationary period. The member must acknowledge the entry in writing. For Reservists who are shirking, a letter via Certified Mail, return receipt requested (Restricted Delivery to addressee only), stating the probationary period has begun may substitute for the Administrative Remarks, Form CG-3307, entry. Commanding officers are authorized to recommend discharge at any time during the probation if the member is not making an effort to overcome the deficiency. Submit copies of all Administrative Remarks, Form CG-3307, entries as an enclosure to the discharge recommendation submitted to Commander (CG PSC-EPM-1).

...

**1.B.17.d. Discharging Members with More than Eight Years Service for Misconduct.** Commanding officers shall process all cases in which they contemplate a discharge under other than honorable conditions for misconduct as [the section detailing Administrative Separation Board procedures] of this Manual prescribes. In addition, they shall follow that Article's procedures if considering discharging any member with eight or more years of total active and inactive military service for misconduct, even if contemplating an honorable or general discharge.

*Manual for Courts-Martial*

The Manual for Courts-Martial United States (2016 Edition) (hereinafter “MCM”) provides the following with respect to Article 134—(Indecent language):

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b. *Elements.*

- (1) That the accused orally or in writing communicated to another person certain language;
- (2) That such language was indecent; and
- (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

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c. *Explanation.* “Indecent” language is that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts. The language must violate community standards.

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e. *Maximum punishment.* Indecent or insulting language.

- (1) *Communicated to any child under the age of 16 years.* Dishonorable Discharge, forfeiture of all pay and allowances, and confinement for 2 years.
- (2) *Other cases.* Bad-conduct discharge; forfeiture of all pay and allowances, and confinement for 6 months.

## 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:

### *Preliminary Issues*

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552.
2. The application is untimely. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice.<sup>5</sup> In this case, the applicant was discharged in September 2019 and submitted his application to the Board approximately four years later, in November 2023. The Board may excuse untimeliness if it is in the interest of justice to do so.<sup>6</sup> In this case, the evidence suggests that the applicant

<sup>5</sup> 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.

<sup>6</sup> See *Allen v. Card*, 799 F. Supp. 158 (D.D.C. 1992).

and his attorney experienced difficulties and delays in obtaining his service records. Under these circumstances, the Board finds it is in the interest of justice to excuse the untimeliness of the application.

3. The applicant declined a hearing before the Board and requested his application be considered based on the records and evidence submitted.

4. 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, and the applicant bears the burden of proving, by a preponderance of the evidence, that the disputed information is erroneous or unjust.<sup>7</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>8</sup>

5. The applicant was in the Coast Guard Reserve and was not performing Inactive Duty for Training (IDT) or Active Duty for Training (ACT) when he posted the Facebook comments discussed above on January 24, 2018. Normally, reservists are subject to the UCMJ only while performing inactive or active duty.<sup>9</sup> However, the Coast Guard may impose administrative measures on reservists, regardless of reserve status, for discrediting acts or behavior identified through civilian law enforcement or through other evidence.<sup>10</sup> While the administrative finding of the Commission of a Serious Offense in this case relied incidentally on a finding that UCMJ Article 134—Indecent Language was violated, the applicant has not suggested, and the Board finds no support for a position that this would convert an administrative action to a criminal or punitive one such that the applicant has been made "subject to" the UCMJ.<sup>11</sup> Under these circumstances, the Board finds that the Coast Guard's initiation of an administrative action based on the applicant's off-duty social media posts was not an error or injustice.

#### *Commission of a Serious Offense*

6. The Board turns initially to the applicant's contention that his social media comments did not violate UCMJ Article 134—Indecent Language. The applicant first argues that the comments, while inappropriate, do not rise to the level of "indecent" language. Second, he argues that the comments were not to the prejudice of good order and discipline or of a nature to bring discredit upon the armed forces. In addressing these issues, the Board emphasizes that its role is not to re-weigh all of the evidence, or to engage in a

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<sup>7</sup> 33 C.F.R. § 52.24(b).

<sup>8</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).

<sup>9</sup> Discipline and Conduct Manual, COMDTINST M1600.2 § 1.B.4.a.(2). (September 2011).

<sup>10</sup> *Id.*

<sup>11</sup> See also Boards Manual, PSCINST M1910.1, Appendix 2-1 § II.A. (June 2014) (explaining that convening authorities and commands should not confuse administrative action with military justice, and that administrative action, including involuntary separation, is not "punitive" or "punishment").

lengthy analysis of each witness's statements and motives. The question before the Board, instead, is whether a factual or legal error occurred, or the Coast Guard's treatment of the applicant shocks the sense of justice. Again, it is the applicant's burden to prove that such an error or injustice occurred.

7. The Coast Guard's Courts-Martial Manual explains indecent language as that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought.<sup>12</sup> The same section states that language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts. The section further explains that the language must violate community standards.

8. The June 2018 notice from the convening authority cited generally to the applicant's social media comments posted on January 24, 2018, and went into detail regarding one of those comments. The December 2018 ASB report's findings detailed multiple statements made by the applicant. Specifically, Finding of Fact 1 related to the applicant's statement that a Priority 7 "gets you first pick at the new female BM3s." Finding of Fact 2 was that the applicant also made comments about "trolling and lubricating another member's anus." Witnesses at the ASB described the applicant's Facebook comments as inappropriate and unprofessional. A.R. testified that she was concerned that such comments are "how sexual harassment and sexual assault start." K.T. noted that part of A.R.'s concern had been about what the applicant might be saying to other Coast Guard members in private, given what he stated on a webpage open to all Facebook users. K.T. also noted that A.R. was disturbed because she was in the process of joining a new "afloat unit." K.T. further testified that comments like the applicant's were not commonly accepted in the Coast Guard, in his experience.

9. Although the applicant may have considered his statements to be jokes among friends, they included vulgar, explicit references to sex acts. These statements followed the initial comment, which implied a perception of lower-ranked female members as subjects for romantic pursuit rather than simply colleagues. Such statements observed by members or potential members would tend to undermine any expectation of a professional and respectful environment in which to pursue a career in the Coast Guard.

10. The concerns expressed by the witnesses illustrate the potential harm, prejudice to good order, and discredit to the Coast Guard that likely resulted from the applicant's comments. Female members, or potential members of the Coast Guard who viewed the comments may reasonably have questioned whether male colleagues, particularly those higher in their chain of command whom they would need to rely on, were likely to view them in these terms. Consistent with A.R.'s testimony, the comments could cause reasonable concern that the Coast Guard or its members maintained a culture that

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<sup>12</sup> MCM p. 437, 89.c.

was permissive of sexually explicit language and jokes about its female members, which had the potential to coincide with or lead to an environment that was dismissiveness of complaints involving sexual harassment and/or sexual assault.

11. It is unknown how many Coast Guard members and potential members may have seen the applicant's comments and been disturbed by them. While the comments were not posted on an official Coast Guard page, they were posted on a page that affiliated itself with the Coast Guard by catering to Boatswains Mates, who the evidence showed use the page to learn about orders and other news related to their professional responsibilities. As a discussion that was viewable by all Facebook users, it is also unknown how members of the public who did not know the applicant, and could not access his intentions or character, may have seen the comments and were developed a negative view of the Coast Guard and/or its members.

12. As was explained in the May 6, 2019, endorsement of the ASB findings and recommendations by the applicant's CO, "[the Coast Guard] supports survivors of sexual harassment and sexual assault, many of whom are still serving. Any one of these members could have easily seen these comments. While they do not meet the strict criteria of sexual harassment or assault, his words were unquestionably inappropriate and were disrespectful to women everywhere. Additionally, a public forum allows viewing of these outrageous comments by the public, whom we serve. As a First Class Petty Officer with over 13 years of service, not only did [the applicant] know better, he had a responsibility to be a role model, and to prevent others from violating Coast Guard policy. [The applicant] failed to uphold our Core Values, and his comments encouraged others to engage inappropriately in a public forum."<sup>13</sup>

13. Under these circumstances, the Board finds there was ample evidence presented to the ASB for that body, the endorsing officials, and the discharging official to reasonably conclude that the applicant's comments constituted indecent language. The Board finds the conclusion that the comments were prejudicial of good order and discipline and brought discredit upon the armed forces to also be supported by ample evidence. Although the applicant has contended his comments do not rise to the level of indecency, and are protected by the First Amendment, the Board finds, for the reasons discussed, that he has not met his burden to show by a preponderance of the evidence that the Coast Guard's finding of Commission of a Serious Offense constituted an error or injustice.

### *Separation Recommendation*

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<sup>13</sup> The applicant has contended that evidence related to sexual assault and sexual harassment was improperly considered since he was not notified of those charges as bases for separation. As discussed, showing prejudice to good order or discredit to the Coast Guard is a required element of an indecent language offense. The evidence suggesting that statements like the applicant's could eventually lead to sexual harassment or assault, thus discrediting the Coast Guard and prejudicing good order, bears directly on whether the language is considered indecent. Thus, the Board does not find the Coast Guard's consideration of sexual harassment and assault, as concepts, to be improper.

14. The applicant next argues that the ASB's consideration of evidence of poor performance, including his having missed drills, was improper. This is because, he argues, the notice provided to him of the proposed administrative action addressed only his social media comments. Because it did not identify "unsatisfactory conduct" as a basis for separation, he states, consideration of evidence beyond the scope of his social media comments was a procedural error. The applicant notes that an objection on this basis was initially sustained at the ASB hearing before being reversed by the senior member based on guidance provided by the legal advisor. In support of his argument, the applicant cites provisions from the Boards Manual providing that an ASB should narrowly focus on the conduct identified by the convening authority, and that any change in the scope of the ASB should be approved by the convening authority.<sup>14</sup>

15. But the applicant ignores other important provisions from § 1.G. and § 7.B. of the same manual.<sup>15</sup> Specifically, administrative separation boards are *required* to answer four questions *in all cases*.<sup>16</sup> First, whether there is a basis in Coast Guard policy for administratively separating the respondent. In this case, the ASB answered in the affirmative by finding the applicant had committed a serious offense. The second question an ASB is required to answer is whether the Coast Guard should retain or separate the respondent. The third question is how the respondent's service should be characterized if he or she is separated. Fourth is whether the respondent should be placed on probation instead of being involuntarily administratively separated immediately.

16. Importantly, the Boards Manual specifically directs that Article 1.B.1.d. of the Military Separations Manual should be reviewed for a discussion of the material a board is authorized to review when considering whether to recommend the retention or administrative separation of a member.<sup>17</sup> That section, in turn, provides the following:

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.

17. Based on these provisions, far from being improper, the ASB's and Coast Guard's consideration of the applicant's entire record, including negative remarks for

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<sup>14</sup> Boards Manual § 1.F.2.-3.

<sup>15</sup> Specific sections are cited in the Applicable Law and Policy section above.

<sup>16</sup> Answers to additional questions are also required, including regarding voluntary retirement, but for purposes of this case, the four most relevant questions are discussed.

<sup>17</sup> Boards Manual § 1.F.2.

missed drills, was *required* by Coast Guard policy. This requirement applies to all cases, whether or not “unsatisfactory conduct” is noticed as a potential basis for separation by the convening authority. Stated differently, the applicant conflates two questions – whether there is a basis for separation and whether a respondent should be separated – with each other. In this case, the ASB addressed the first question by considering the applicant’s social media comments, and answered in the affirmative. Then, as required, the ASB proceeded to the second question, and in answering, considered the applicant’s entire record in accordance with Coast Guard policy.

18. Regarding the specific evidence, the applicant argues that the ASB improperly penalized him for missing drills he had been excused from. The evidence relating to whether and which drills the applicant was excused from, however, is unclear. The applicant’s official military personnel file (OMPF) shows he received Page 7s related to missing drills on multiple dates in November and December 2016; January, February, March, and April of 2017; and at least February and March of 2018. The applicant has contended, and W.B. testified at the ASB hearing, that the applicant was excused from some drills following the initiation of the investigation into his social media comments, and previously on some occasions due to child custody-related scheduling issues. This evidence does not establish, however, and the applicant does not contend, that he was excused from all of the drills he missed. The Page 7s summarized in the Record Summary section make clear that despite discussions about accommodating the applicant’s child care responsibilities and the investigation, the applicant missed numerous drills without being excused. In addition to missing the drills, he was counseled for failing to be responsive to command about missed or upcoming scheduled drills, or to submit supporting material for his accommodation requests, despite being directed to do so. The Board also notes that the ASB report references the applicant’s receipt of participation drill schedules for FY2016, FY2017, and FY2018, and it distinguishes drills the applicant was excused from, finding “most absences being classified as unexcused.” In a separate finding, the ASB noted that the applicant had received “Not Recommended” for advancement on his previous two Enlisted Evaluation Reports.

19. The statements by the applicant and witnesses include vague assertions of his being excused from certain drills, but not others. To address the unexcused absences, the applicant cites his marital and custody issues he was in the midst of at the time. The record is clear, however, that the applicant’s command made efforts to accommodate his schedule, and that nonetheless he continued to not only miss drills, but to be unresponsive to command’s efforts to communicate with him about the issue. The Board also notes that the applicant was afforded the opportunity to present these arguments to the ASB and the reviewing officials, who determined that the drills missed by the applicant, despite some being excused, and his “Not Recommended” evaluations, were an important factor in the decision to separate the applicant.

20. Under these circumstances, the Board does not find that the applicant has met his burden to demonstrate that the consideration of his missed drills, and entire record, by the ASB and Coast Guard, constituted an error or injustice.

21. The applicant takes further issue with the ASB report's opinion that the applicant "would not be recommended for separation from the Coast Guard solely due to his comments, however, when taking into account his record of poor performance and performance probation, he has not lived up to the expectations that have been made for members of the Coast Guard." As discussed, however, consideration of the applicant's entire record, including his social media comments and poor performance, as part of its decision to recommend separation, was not improper.

22. The ASB is given wide latitude by Coast Guard policy to recommend a member be separated or retained based on consideration of the entire record. In this case, the Board finds that determination, and its subsequent approval by reviewing authorities, was supported by ample evidence, and was reasonable. The Board further finds that the applicant has not met his burden to demonstrate that the ASB's recommendation of separation and the Coast Guard's approval of his discharge amounted to an error or injustice.

#### *Characterization of Service, Probation, and Reenlistment Code*

23. Regarding characterization of the applicant's service, the ASB recommended a General – Under Honorable Conditions characterization. In making this determination, the ASB noted that five witnesses had testified on behalf of the applicant as to his work ethic, enthusiasm, leadership, and other positive personal and professional qualities. The ASB also acknowledged the applicant's receipt of various awards from the Coast Guard and his community. The ASB compared these factors with the applicant's record for his current enlistment period, in which he missed several drills, many of which were unexcused, and in which he posted inappropriate comments on social media. The board members also weighed the applicant's difficult personal circumstances during the relevant time, along with character statements submitted by the applicant and others.

24. The ASB was authorized to recommend a Honorable discharge, a General – Under Honorable Conditions discharge, or an Under Other Than Honorable Conditions discharge. After weighing the evidence, the ASB determined that the applicant did not meet the requirements for a Honorable discharge, nor for an Under Other Than Honorable Conditions discharge. Although the applicant has argued generally that he is entitled to an upgrade of his discharge, the Board's review indicates that the ASB members fully considered all appropriate factors in reaching their recommendation. That recommendation was approved by endorsing officials and the discharge authority. There is no indication that the characterization of service assigned was a result of any factual or legal error, and the Board does not find that the characterization shocks the sense of justice, given the

applicant's history of missing drills for multiple years and the social media posts judged by the ASB and Coast Guard to be indecent and discrediting to the Coast Guard. Accordingly, the Board finds the applicant has not met his burden to demonstrate an error or injustice in the assignment of his characterization of service.

25. Regarding probation, the ASB recommended that the applicant not be placed on probation on the basis that he had been placed on probation from June 2017 to December 2017, and had completed it, but the probation had not corrected his deficient work performance. Again, the applicant has contended that he was excused from all drills during the investigation into his social media comments. The Page 7s discussed in the Record Summary section, however, make clear that despite discussions with individuals outside his chain of command, the applicant was considered to be unexcused from drills he missed in February and March of 2018, and to have been unresponsive to command's efforts to communicate with him, to include a request for materials in support of his accommodation requests. The Board also notes that probation "may" be recommended, and is not a requirement in these circumstances. Based on this evidence, the Board finds the ASB's recommendation not to place the applicant on probation, and the reviewing officials' approval of that recommendation, were reasonable. Accordingly, the Board finds the applicant has not met his burden to demonstrate that the failure to place him on probation in lieu of separation was an error or injustice.

26. Because the applicant's RE-4 reenlistment code was assigned as a result of his separation for misconduct, the Board finds, for the reasons already discussed, that the applicant has not demonstrated that the reenlistment code was assigned as a result of error or injustice.

#### *Allegation of Sleeping ASB Member*

27. Regarding the application's allegation that an unnamed member of the ASB fell, or was falling, asleep during testimony, there is some confusion on this point. While the applicant initially contended that a member had fallen asleep during his own testimony, a subsequent submission made clear that the allegation stemmed from ASB witness A.L. having observed what he thought was a member *falling* asleep during *his* testimony. A simple allegation with no additional support in the record is insufficient, in the Board's opinion, to overcome the presumption that Coast Guard records are correct and Coast Guard officials acted properly and in good faith. Even if the Board makes the leap to assume that a member did fall asleep during testimony, the applicant has not established he was harmed, particularly where witness summary sheets reviewed for accuracy by the applicant's assigned counsel were available to the board members. Under these circumstances, the applicant has not met his burden to demonstrate an error or injustice by a preponderance of the evidence.

*Conclusion*

28. In summary, the record shows that a full investigation was conducted, which incorporated witness interviews and written statements. The applicant then elected to appear at an ASB, represented by counsel, where he could again testify and present witnesses and evidence. The ASB, which had the ability to directly assess the credibility of witnesses, weighed the testimony and other evidence, and considered the applicant's entire record. Based on its review, the ASB found that Commission of a Serious Offense had occurred and recommended separation with a General discharge based on that offense and the applicant's record of poor performance, despite consideration of the significant positive qualities of the applicant and contributions he had made to the Coast Guard during his career. Upon review of the ASB proceedings and entire record, the convening authority and first Flag Officer each endorsed the ASB's recommendations. The final review action for separations, the Coast Guard PSC, then reviewed and concurred. At each stage of the adjudication process, despite consideration of the applicant's arguments and mitigating factors, it was determined that the applicant had committed a serious offense and should be separated with a General discharge and RE-4 reenlistment code.

29. Upon review, the Board finds that it was reasonable for the ASB and subsequent Coast Guard decision-makers to determine that a preponderance of the evidence supported the conclusions that they reached. The Board will not substitute its own judgment, absent a sufficient showing that an error or injustice has occurred, and in this case, the Board does not find such an error or injustice has been established by a preponderance of the evidence.

30. 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. He has not proven, by a preponderance of the evidence, that the Coast Guard committed an error or injustice.

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

**ORDER**

The application of former BM1 [REDACTED], USCG, for correction of his military record is denied.

February 27, 2025

