

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2021-041


AMTC (Former)

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on August 17, 2022, and assigned the case to the staff attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision dated July 14, 2023, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant, a former Chief Aviation Maintenance Technician (AMTC/E-7), who received an Under Other than Honorable Conditions (OTH)¹ discharge on May 19, 2019, for misconduct, asked the Board to correct his record by overturning his separation for misconduct and granting him full retirement.

A summary of the applicant's allegations is provided below the Summary of the Record.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on September 13, 1994. He continued serving on active duty and on January 15, 2008, he signed an indefinite reenlistment contract, which means

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

that he could remain on active duty without reenlisting until he completed 30 years of active service.²

On September 13, 2014, the applicant completed 20 years of active duty service and was eligible for retirement. However, he continued serving on active duty on his indefinite reenlistment contract.

On September 12, 2018, the applicant was indicted by civil authorities on three counts of offenses related to his possession of child pornography. The indictment alleged that between December 8, 2015, and approximately January 9, 2017, the applicant did knowingly receive and attempt to receive a visual depiction involving a minor engaging in sexually explicit conduct in violation of 18 U.S.C. § 2252(a)(2) and (b)(1). This violation accounted for two of the three counts. The indictment further alleged that the applicant had knowingly possessed on his laptop an image that contained a visual depiction of a child engaging in sexually explicit conduct and the depiction involved a prepubescent minor and/or a minor who had not attained the age of 12 years of age in violation of 18 U.S.C. § 2252(a)(4)(B) and (b)(2). This violation resulted in the third count against the applicant.

On September 14, 2018, the applicant's Commanding Officer (CO) issued a memorandum, "Notice to Respondent – Involuntary Separation," wherein he notified the applicant that he was initiating administrative separation proceedings against the applicant for misconduct pursuant to Article 1.B.17.b.3. – Commission of a Serious Offense – of the Military Separations Manual, COMDTINST M1000.4, as a result of the applicant's child pornography charges. The applicant was informed that if separated, the discharge authority, Commander of the Coast Guard Personnel Service Center (PSC), would determine the appropriate type of discharge and characterization of service provided to the applicant upon his separation. The applicant was further informed that the least favorable characterization of service the applicant could receive was an OTH characterization.

On September 14, 2018, the applicant acknowledged receipt of his CO's memorandum. The applicant elected to consult with an attorney and waived his right to submit a personal statement at that time but preserved his right to submit a statement at a later date.

On October 2, 2018, the applicant submitted a memorandum, "Exercise of Rights – Involuntary Separation," wherein he informed his CO that he had consulted with an attorney and that he understood the rights he was about to exercise. The applicant initialed the following section:

I have 18 or more years of creditable active service, and I am eligible to request retirement in accordance with Article 1.C.11.a.2.a of reference (c);³ or, I have completed 20 or more years of satisfactory federal

² Article 1.E.5.a. of the Enlistments, Evaluations, and Advancements Manual, COMDTINST M1000.2B, "General. Indefinite reenlistment contracts were authorized in 2001 for enlisted members with over ten years of active duty service. Once an indefinite reenlistment contract was affected, the member was authorized to serve on active duty up to the last day of the month in which they completed 30 years of active service. As of 1 December 2011, enlisted members are no longer authorized to enter into an indefinite reenlistment contract."

³ Military Separations Manual, COMDTINST M1000.4.

service, and I am eligible to request retirement in accordance with capital Article 8.R. of reference (d).⁴ I have read and understand the notice and warnings in reference (a).⁵ I understand my rights as they are established in references (b),⁶ including Article 2.E.3.d. concerning conditional waivers, and *I waive my right to appear before an administrative board on condition that I am permitted to voluntary retire*. I have attached my retirement request to this memo, and I understand that if my conditional waiver request is disapproved, my retirement request will remain valid for consideration by CG PSC when reviewing the report of the administrative board, unless I sooner rescind the retirement request. [Emphasis added.]

On October 2, 2018, in accordance with Article 1.C.11.a of the Military Separations Manual, COMDTINST M1000.4, the applicant submitted a memorandum, “Request for Voluntary Retirement.” The applicant requested that his retirement take effect on October 15, 2018, or as soon as possible thereafter.

On October 3, 2018, the applicant’s CO issued a “First Endorsement” memorandum wherein he recommended the applicant’s request for voluntary retirement be disapproved.

On October 11, 2018, the District Commander issued a “Second Endorsement” memorandum wherein he strongly recommended disapproval of the applicant’s request for voluntary retirement.

On October 23, 2018, Commander, PSC notified the applicant that his request had been carefully considered but was disapproved. Commander, PSC stated that the disapproval applied only to the board waiver request, and not to the voluntary retirement. The Commander stated that the applicant’s voluntary retirement request would remain valid for PSC to consider when reviewing and taking final agency action on the administrative board report, unless the requirement request was rescinded sooner by the applicant.

On January 7, 2019, the applicant accepted a plea agreement with civil authorities wherein the applicant pled guilty to count one but counts two and three were dismissed.

On January 28, 2019, the Commander of Coast Guard Defense Services issued a memorandum wherein he appointed counsel for the applicant.

On January 31, 2019, the applicant’s CO issued a Convening Order wherein he directed that an Administrative Separation Board (ASB) be convened to address the applicant’s misconduct and separation.

On March 7, 2019, the ASB issued its “Board Report” wherein it provided its “Findings of Fact,” “Opinions,” and “Recommendations.” The ASB stated that based on a preponderance of the evidence gathered during the hearing, the ASB found that the following facts were supported by the exhibits presented:

⁴ Reserve Policy Manual, COMDTINST M1001.28.

⁵ September 14, 2018, “Notice to Respondent – Involuntary Separation” memorandum.

⁶ Enlisted Personnel Administrative Boards Manual, PSCINST M1910.1.

Finding No.	FINDINGS OF FACT	Exhibits that support this Finding of Fact:
1.	Respondent pled guilty to count one of the receipt of child pornography 18 U.S.C. §2252(a)(2) and (b)(1). Respondent certified that the respondent does admit to the facts set forth in his plea agreement. Such facts include that he knowingly received and attempted to receive one or more matters that contain visual depictions of a minor engaged in sexually explicit conduct.	Exhibit 14, Page 1
2.	The elements of Article 120c include indecent viewing, visual recording or broadcasting. Any person subject to this chapter who, without legal justification or lawful authorization; knowingly and wrongfully views the private area of another person, without that other person's consent and under circumstances in which that other person has a reasonable expectation of privacy.	Exhibit 6, Page 1
3.	The elements of Article 134 include possessing, receiving, or viewing child pornography. That the accused knowingly and wrongfully possessed, received, or viewed child pornography; and 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.	Exhibit 7, Page 1
4.	A member subject to discharge because of conviction by a civil court may be processed for discharge even though an appeal of that conviction has been filed or intent to do so has been stated. Military Separations Manual, COMDTINST M1000.4 Article 1.B.17.b.	Exhibit 5, Page 1
5.	Police reports, CGIS reports of investigation, etc. may be used to make the determination that the member committed a serious offense. (a) Members may be separated based on the commission of a serious military or civilian offense when: The specific circumstances of the offense warrant separation.	Exhibit 5, Page 2
6.	[Redacted] County Sheriff's Office subpoenaed the Internet Service Provider, which identified [applicant] as the internet subscriber at the time the child pornography was uploaded.	Exhibit 9, Page 1
7.	A federal search warrant was obtained and served on [applicant's] Gmail account "[redacted]." The search warrant results revealed several emails containing child pornography were sent to/from the email account. The respondent admitted ownership of this email account in a consensual interview.	Exhibit 8, Page 1; Exhibit 14, Page 21
8.	A federal search warrant was also obtained and served on [applicant's] laptop computer, CGIS conducted a forensic analysis of the laptop and located numerous child pornography images. The images were submitted to the National Center for Missing and Exploited Children, who confirmed that 133 images were of known child victims.	Exhibit 8, Page 1
9.	Special Agent [redacted] conducted a forensic review of an image of the contents of the laptop. The review revealed 434 images were determined to be "age difficult" and 553 images were determined to be "child erotica."	Exhibit 8, Page 1; Exhibit 14, Pages 21-22
10.	The image of child pornography which triggered the cyber tip to the National Center for Missing and Exploited Children, along with the child pornography images returned from Google in the search warrant return were all located on the suspect image of the laptop computer.	Exhibit 8, Page 1
11.	Respondent requested voluntary retirement on October 2, 2018.	Exhibit 1, Page 13
12.	Respondent admitted that his internet activity indicated that he has been looking for child pornography online.	Exhibit 14, Page 22
13.	Respondent admitted that a search of his gmail account revealed that he attempted to send 4 emails containing child pornography images to himself. The respondent admitted that he knew at least one performer in these images was a minor engaged in sexually explicit conduct.	Exhibit 14, Page 22

14.	Over the course of 24 years in the service, the respondent received numerous positive documents of recognition through individual awards, team awards, and positive administrative remarks. Respondent's Employee Evaluation Reports (EER) never depicted a mark below 4.	Exhibit 30, Pages 16-106; Exhibit 31, Pages 1-27
15.	Based off three witness statement testimonies, the respondent is spoken highly of in regard to his character, devotion to the Coast Guard and hardworking demeanor.	Exhibit 36, Pages 1-3; Exhibit 37, Pages 1-3, and Exhibit 38, Pages 1-3.

Based on the preponderance of the evidence presented during the hearing, the ASB formed the following opinions:

Opinion No.	<u>OPINIONS</u>	Findings of Fact and/or Exhibits that support this Opinion
	Boards should draw reasonable inferences from those matters of record approved for consideration by the board president to answer the fundamental questions presented to the board. This may include analysis of the evidence and findings of fact and explanation of the board's deliberations on the issues that relate to the fundamental questions.	
1.	Respondent's actions were in violation of Manual for Courts-Martial (2019 ed). Article 120 (c, n, l) and 134(l).	FF: 1, 2, 3
2.	The respondent acts of viewing child pornography were not in the best interest of the Coast Guard and brought discredit upon the service.	FF: 1-10, 12, 13, and 16
3.	The respondent may have pled guilty to one count of viewing child pornography, but the investigation shows that the respondent viewed 553 photos and visited various child pornographic websites on 122 different occasions over the past 4 years.	FF: 8-10, and 12 Exhibit 14, Pages 21-22
4.	A member's overall military behavior and performance of duty included actions that occur while off duty. The respondent's actions were in direct conflict with the Coast Guard's values of honor, respect, and devotion to duty.	FF: 2, 3, 15, and 16
5.	Aside from his misconduct, it appears that the respondent completed 24 years of credible service and was recognized for his positive actions both on and off duty.	FF: 14 and 15
6.	Based on the evidence presented, the respondent committed a serious offense by viewing illegal child pornography.	FF: 1-3, 5, 7-10, and 12-13

Based on the Findings of Fact and Opinions derived from the ASB hearing, the ASB recommended that the applicant be separated from the Coast Guard pursuant to Article 1.B.17.b.1 – Civilian or Foreign Conviction, and Article 1.B.17.b.3 – Commission of a Serious Offense. The ASB further recommended that the applicant receive an OTH characterization of service and that the applicant not be awarded a retirement.

On March 22, 2019, the applicant's counsel submitted a memorandum, "Review, Comment, appeal, Letter of Deficiency," wherein he outlined his objections to the ASB proceedings. The contents of this memorandum are as follows:

1. This response to Encl. (1) was drafted in accordance with standard Navy letter format, and on behalf of Respondent, Chief [applicant]. An administrative separation board (ADSEP) was held on 6 March 2019 for commission of a serious offense. An audio recording of the board was collected. Encl. (1) details, in part, that the board elected to recommend a discharge characterization of Other Than Honorable, and to not recommend Chief [applicant] for retirement. Chief [applicant] has been on active duty in the USCG for 24 years.

2. Due to significant procedural and substantive error during the board proceedings, which resulted in material harm to Respondent, Respondent respectfully requests your intervention. Specifically, Respondent respectfully requests that his discharge be upgraded to a Characterization of Honorable, and that he receive a favorable endorsement for retirement.

3. Section 7.C.4 of reference (a) details the purpose and scope of Respondent's review and comment period for ADSEP boards. Specifically, the review and comment is for the Respondent to preserve objections made during or before the board was conducted, and to provide rebuttal comments to findings made in the board report. In reference to the board's findings of fact, opinions, and/or recommendations.

4. Preservation of Objections:

a. (Verbally Made at Board and Overruled) Timeliness of evidence production. The Recorder failed to comply with the plain meaning of section 4.H.I. of reference (a),⁷ which requires the Recorder to provide its evidence and witnesses to Respondent (15) days before the ADSEP hearing is conducted. This breach resulted in material harm to Respondent. Counsel for the Respondent objected during the hearing and asked that all of the Recorder's exhibits be excluded as evidence as they were not provided to Respondent in a timely fashion. In support of the objection Counsel for Respondent provided documentary evidence that clearly demonstrated that the exhibits the Recorder was seeking to admit into evidence were not accessible to Respondent until 23 February 2019, which was a Saturday. The deadline for submission to Respondent was...⁸

On April 19, 2019, in response to the applicant's objections to the ASB proceedings, a Staff Judge Advocate, issued a memorandum, "Legal Sufficiency Review of the Record of Proceedings of the Administrative Separation Board for AMTC [applicant], USCG," wherein he provided his findings as to whether or not the applicant's ASB had complied with Coast Guard policies and procedures. The contents of the review are as follows:

1. Pursuant to article 8.B.4 of reference (a),⁹ I have reviewed the record of the proceedings of the administrative separation board for AMTC [applicant], USCG. I conclude that the proceeding substantially complied with Coast Guard policy, the rights of the respondent (including the right to a full and fair hearing) were not materially prejudiced, and the recommended final action is supported by the evidence in the record of the proceeding as required by reference (b).¹⁰ The board found that AMTC [applicant] committed the following offences; 1) Knowingly violating 18 U.S.C. §2252(a)(2) by receiving any visual depiction of minors engaging in sexually explicit conduct; 2) Violating Article 120c of the Uniform Code of Military Justice (U.C.M.J.) by knowingly and wrongfully viewing the private area of another person through visual recording without that other person's consent and under the expectation that the other person had a reasonable expectation of privacy and; and 3) Violating Article 134 of the U.C.M.J. by receiving child pornography. The board found that this misconduct was a Commission of a Serious Offence and recommended that AMTC [applicant] be separated from the Coast Guard with an other than honorable characterization of service. AMTC [applicant] objects to the board proceedings and the board's recommendations.

2. AMTC [applicant] preserved the following objections:

a. AMTC [applicant], through counsel, argues that the board should have excluded all of the recorder's evidence since respondent's counsel was not able to access the recorder's proposed evidence and witness list within the time required by reference (a). Despite not having received the

⁷ Enlisted Personnel Administrative Boards Manual, PSCINST M1910.1.

⁸ The applicant only provided the first page of this document, however, his objections to the ASB proceedings are recorded in the Coast Guard's April 19, 2019, Legal Sufficiency Review provided in the Summary of the Record.

⁹ Enlisted Personnel Administrative Boards Manual, PSCINST M1910.1.

¹⁰ Article 1.B. of the Military Separations Manual, COMDTINST M1000.4.

evidence within the appropriate time, respondent's counsel fails to identify the material harm caused to AMTC [applicant].

Respondent's counsel argues that all of the recorder's evidence should be excluded because respondent's counsel was not able to access the evidence until 23 February 2019, eleven days before the board. Respondent's counsel cites paragraph 4.H.1. of reference (a) stating that the recorder shall disclose the evidence used at the hearing 15 days before the hearing. The recorder attempted to deliver his evidence through the ARL Secure Access File Exchange (SAFE) on 19 February 2019, sixteen days before the board, however, an error in the system prevented the delivery. Upon being notified of the failure, the recorder followed up and succeeded in delivering the files through SAFE on 23 February 2019.

Paragraph 4.H.1. of reference (a) also states that failure to disclose any of the material used in the hearing does not constitute error unless that failure causes material harm to the respondent. There is no evidence in the record or respondent counsel's response to the board's report that AMTC [applicant] experienced material harm by not receiving discovery within the required time frame. In fact, the record indicates that despite not receiving discovery within the required time, respondent's counsel was able to prepare for a zealous defense of AMTC [applicant]. Evidence gathered and submitted by respondent's counsel includes a summary of his awards, photos of AMTC [applicant] with friends and family, a summary of AMTC [applicant's] training, twenty civilian and military awards, and testimony from three witnesses.

b. AMTC [applicant] raises three issues with the replacement of the initially selected senior enlisted member. First, AMTC [applicant] argues that replacing a previously selected E-7 as a member of the board did not comply with Coast Guard policy. Second, he argues that the new senior enlisted member did not benefit from participating in the earlier part of the hearing. Finally, AMTC [applicant] argues that he had the right to waive having a member junior to the respondent sit as a board member.

The replacement of the initially selected senior enlisted member complied with reference (a) and did not cause material harm. After *voir dire* and admission of evidence, respondent's counsel raised the fact that the enlisted member of the panel was an E-7, violating paragraph 3.A.1. of reference (a). Reference (a) states that the senior enlisted board members shall be an E-8 or above and will be of equal or greater grade than the respondent. On 31 July 2018, Personnel Service Command promulgated guidance allowing E-7s or above to serve as board members, the requirement that the senior enlisted member be of equal or senior grade still applied. While trying to resolve whether an E-7 could sit on a board, it was discovered that AMTC [applicant's] date of rank was three years before the E-7 selected for the board. The board president determined that AMTC [applicant] was senior in grade to the selected member and replaced the individual with an E-8, meeting the senior enlisted member requirement stipulated in reference (a).

The respondent argues that replacing the senior enlisted member did not allow the new senior enlisted member to review the evidence in question or listen to objections to admitted evidence. Despite the fact that a new senior enlisted board member was chosen after admission of evidence, AMTC [applicant] was not materially harmed. Respondent's counsel concedes the fact that the board president provided the replacement member the opportunity to review the previously admitted evidence and rehear summarized arguments regarding the respondent's counsel's objections. Additionally, the change in the senior enlisted member was completed before opening statements, presentation of evidence, witness testimony, and closing arguments. The newly selected member in question was given the same opportunity to review the same evidence as the originally selected board members.

Respondent's counsel argues that AMTC [applicant] had the right to waive the senior enlisted board member requirement dictated in reference (a). During a board, a respondent is provided the right to question and challenge members of the board. Paragraph 4.H.1. of reference (a) and further guidance

promulgated by Personnel Service Center require that senior enlisted members of a board be of equal grade or rank. While respondents can challenge members and such challenges may be waived, the Coast Guard policy requiring senior enlisted members of equal or senior rank to the respondent cannot be waived as is plainly written in reference (a).

c. AMTC [applicant] Argues that the selected legal advisor did not provide impartial advice to the board regarding responsibilities authorities and other legal matters. While respondent's counsel argues that he did not have an opportunity to *voir dire* the legal advisor, CDR [C] was contacted multiple times by the board members with counsel present. During these phone calls, respondent's counsel never raised objections to the legal advisor's interactions with LT [L], or lack of impartiality. Respondent's counsel does not proffer any evidence on the legal advisor's involvement in the hearing, or any influence he allegedly tried to leverage over the board. Respondent's counsel also implies that the legal advisor was attempting to influence the members' decision without providing any specific evidence.

3. Respondent's counsel disputes the board's recommendation that AMTC [applicant's] characterization of service be other than honorable, claiming that the board based the recommendation on an improper standard. This assertion is incorrect. An active duty member's conduct while on an off-duty status may be considered in determining characterization of service due to the fact that the member is still subject to the Uniform Code of Military Justice. Reference (b) states that a discharge under other than honorable conditions may be warranted for misconduct. Reference (a) provides that a characterization of service is based solely on the member's current period of service. If the conduct that formed the basis for administrative separation represents a significant departure from the balance of the respondent's military record for the current rating period of service or is considered egregious to outweigh the record a less favorable characterization of service may be awarded. In this case, AMTC [applicant] is an active duty member of the Coast Guard with PCS orders to Air Station [redacted] who pleaded guilty to the possession of child pornography. The conduct to which AMTC [applicant] pleaded guilty is also in violation of Article 134 of the Uniform Code of Military Justice, Child Pornography. The maximum punishment that can be awarded for this violation is 10 years confinement and a dishonorable discharge. AMTC [applicant's] conduct while on active duty is a significant departure from the balance of his military record and is of an extremely egregious nature. Therefore an other than honorable discharge is warranted.

On May 6, 2019, the Chief of PSC's Personnel Services Division (PSD) issued a formal notice, "Action of Final Reviewing Authority," wherein he stated that the Findings of Fact, Opinions, and Recommendations of the ASB had been reviewed and approved. He stated that the basis for discharge could be found in the ASB's Recommendation 8.a., where two bases for separation due to misconduct were provided: Commission of a Serious Offense and Civilian or Foreign Conviction. He found that based on the record, Commission of a Serious Offense was the proper basis for separation because the Convening Authority had convened the ASB for misconduct due to the Commission of a Serious Offense. He also stated that the applicant would be separated from the Coast Guard in accordance with Article 1.B.17.b.3 of the Military Separations Manual, COMDTINST M1000.4, with an OTH discharge, instead of being retired.

On May 7, 2019, pursuant to his plea agreement, the applicant was sentenced to 5 years in a federal prison and 84 months of supervised released upon the completion of his five years of imprisonment.

On May 8, 2019, the applicant was discharged from the Coast Guard for misconduct due to the Commission of a Serious Offense with an OTH characterization of service and a separation code of GKQ.

APPLICANT'S ALLEGATIONS

The applicant, through counsel, alleged that the Coast Guard committed an error and injustice when it unlawfully, erroneously, and improperly denied him the ability to retire, not out of military necessity, but rather out of Commander, PSC's desire to strip the applicant of his retirement benefits. The applicant alleged that the actions of PSC were improper, erroneous and an abuse of discretion. According to the applicant, while Commander, PSC has the authority to separate a member for misconduct, PSC does not have the authority to do so once a servicemember has reached retirement eligibility. The applicant claimed that in order to deprive him of retirement for misconduct, chain of command was required to pursue a trial by court-martial, which they did not do.

The applicant argued that under 5 U.S.C. § 8312,¹¹ the United States has contemplated when to deny retirement annuity benefits to federal employees and specifically outlined those circumstances in which retirement benefits can be denied and has declared that in all other circumstances not covered, retirement benefits shall be granted.

The applicant argued that the issue before this Board is whether the Coast Guard had the authority to deny retirement and the corresponding retirement benefits when no misconduct was found to have occurred during a period of service that entitled the applicant to retire. The applicant further argued that the Coast Guard's decision to deny the applicant's retirement was improper and inequitable. According to the applicant, the Convening Authority should have executed only that portion of the ASB results that did not conflict with the applicant's entitlement to retirement benefits. According to the applicant, his case should have been referred to a different board to determine the applicant's retirement rank and the total years of honorable service credible toward retirement.¹²

The applicant argued that pursuant to 14 U.S.C. § 2306, "Any enlisted member who has completed twenty years of service may, upon his own application, in the discretion of the Commandant, be retired from active service." The applicant stated that although case law is sparse on this provision, the intent of the discretion conferred is not the discretion to deny retirement entirely, because that would conflict with other, more specific legislation from Congress outlining the specific instances in which retirement benefits can be denied. The applicant argued that instead, the intent of Congress was to confer discretion on the Commandant only with regards to the timing of the retirement to prevent a servicemember from electing to retire during a time in need. According to the applicant, Congress did not intend this provision to allow servicemembers remaining in the service to increase ultimate retirement benefits, only to leave the service in a time of need, and weaken the armed forces, specifically including the Coast Guard in its definition of

¹¹ 5 U.S.C. §8312. Conviction of Certain Offenses, is applicable to Government Organizations and Employees. Military members are not considered federal employees for the purposes of 5 U.S.C. § 8312 as outlined in 5 U.S.C. § 2105(a) because they are not appointed into the civil service. Retirement statutes specific to the Coast Guard are found in 14 U.S.C. § 2306. Accordingly, the inapplicable statutes relied on by the applicant will not be recorded here.

¹² The applicant made several arguments regarding the role and criteria for the Discharge Review Board (DRB) (33 C.F.R. Part 51). However, the BCMR is not the DRB and is guided by its own statutes and regulations. Accordingly, any arguments made regarding the DRB are not summarized here.

“armed forces.” The applicant claimed that the only other provision that he could find that authorizes the Coast Guard to deny retirement is in 14 U.S.C. § 2506, which states:

Under procedures prescribed by the Secretary, the Secretary may suspend the payment of the retired pay of a member or former member during periods in which the member willfully remains outside the United States to avoid criminal prosecution or civil liability. The procedures shall address the types of criminal offenses and civil proceedings for which the procedures may be used, including the offenses specified in section 8312 of title 5, and the manner by which a member, upon the return of the member to the United States, may obtain retired pay withheld during the member’s absence.

The applicant argued that his discharge was improper and inequitable because he was denied voluntary retirement. The applicant explained that on or about September 13, 2014, he became eligible to retire because he had reached his 20-year mark. The applicant argued that from that point forward he had no further obligated service and at that time, all prior military service would have been deemed honorable service, without question. The applicant stated that his plea agreement specifically states that his misconduct did not begin until December 2015, well after his retirement had vested.

The applicant claimed that each day he continued to work after he became retirement eligible began a new period of voluntary service and he was working subject only to the “needs of the Coast Guard.” The applicant argued that this is a strong indication that the only discretion to deny a servicemember the right to retire was discretion on the timing of the retirement, not discretion as to whether to grant a servicemember’s retirement at all. Moreover, the applicant argued that 14 U.S.C. § 2312, which concerns extension contracts, demands that “No such extension shall operate to deprive the enlisted member concerned, upon discharge at the termination thereof, of any right, privilege, or benefit to which he would have been entitled if his term of enlistment had not been so extended.” Therefore, the applicant claimed that any misconduct he committed after completing 20 years of service cannot be used to deny him retirement or retirement benefits. The applicant further claimed that for any term of enlistment that is deemed “indefinite,” it is his position that once the 20-year threshold for retirement entitlement is met, any continued service would have worked a reenlistment by operation of law. Accordingly, the applicant argued that his request for retirement should have been granted, unless the Commandant had a special military need to keep him in the service longer.

The applicant further argued that following his request to retire, Commander, PSC specifically did not disapprove his retirement request, but stated, “this disapproval applies only to the board waiver request, and not to the voluntary retirement request.” The applicant stated that since the Coast Guard does not have the authority to deny the retirement benefit entirely, only to delay it, following the ASB hearing, his creditable service should have been sent to a retirement suitability determination board of some sort, to determine how much time was creditable to retirement and what rank he should have been retired at, which according to the applicant was 20 years with a rank of Chief. The applicant explained that he is largely unaware of the specific regulations surrounding determination of retired pay and benefits, so should the Board decide in his favor, he requests that the Board submit his case to the appropriate board or department for determination of time and grade credited toward his retirement. The applicant claimed that there is a process by which time credited toward retirement and retirement rank are determined precisely for cases like this, which only bolsters his case that his retirement should have been granted.

Regarding the propriety of his discharge, the applicant claimed that the Coast Guard's denial of his retirement was completely contrary to federal law. The applicant further claimed that all power and authority to deny a property interest, like a retirement annuity, ultimately flows from Congress in titles 10 and 14 of the United States Code. The applicant claimed that the statutes clearly show he was entitled to retirement, and they cannot be trumped by military regulation. Therefore, because his discharge resulted in the denial of retirement benefits after more than twenty years of service, his discharge was entirely improper. The applicant alleged that any process by which he was separated cannot be anything but "an error of fact, law, procedure or discretion associated with the discharge at the time of issuance," which has absolutely prejudiced him because he and his dependents have been denied his retirement benefits.

Regarding equity, the applicant claimed that had he been afforded the protections of clear federal law, superior to the Coast Guard's authority, his retirement would have been granted despite any adverse characterization associated with his last period of enlistment. According to the applicant, the clear federal law, without question, must be incorporated into policy and procedure currently in effect on service-wide discharges. Otherwise, discharges similar to his would be contrary to federal law. The applicant argued that such federal protections absolutely must amount to a substantial enhancement of rights afforded a party in such proceedings because it is the difference between members like him receiving a retirement likely valued in excess of one million dollars or not. The applicant alleged that there is the highest degree of doubt that he would have received the same discharge and denial of retirement benefits if federal laws had been properly applied during his discharge proceedings.

The applicant alleged that he was not merely separated from the Coast Guard because of the commission of a serious offense, he was fired. The applicant claimed that at no time was he disciplined or given notice of any punitive action being taken against him for the alleged misconduct. The applicant stated that while the Commandant does have discretion, it is completely arbitrary and capricious for the Coast Guard at any level to punish a member for alleged misconduct for which he was not prosecuted by the military. The applicant argued that without question, if he had been punitively discharged, he would not have had any entitlement to retirement benefits, but here, he was not punitively discharged by a court-martial.

The applicant claimed that a Commander in the armed forces does not have unilateral authority to punish, unless embarked on a vessel and even then, that authority is capped. The applicant alleged that the maximum punishment a commander could ever unilaterally impose on a servicemember embarked on a vessel is one-half month's pay for two months, or a reduction by one pay grade. For all other scenarios, the applicant alleged that defendants are entitled to request trial by court-martial where punitive discharge, which can result in a loss of retirement benefits even after they vest, can only be given by a judge after full due process rights have been given to the accused. Yet in this situation, the applicant alleged that either the Convening Authority or a higher officer made the unilateral decision to deny retirement for no proper reason, despite federal law to the contrary. The applicant explained that no final court decision ordered forfeiture of a retirement annuity, and he certainly did not consent to any such action. The applicant argued that there is simply no authority for anyone in the Coast Guard to deny retirement benefits in this case.

Specifically, the applicant argued that the Federal Court that convicted him did not include in its punishment forfeiture of his retirement benefits to which he was entitled, nor was the forfeiture of retirement benefits an administrative result of such conviction. The applicant noted that military administrative separation proceedings are administrative in nature and not punitive. The applicant alleged that the only way an administrative separation proceeding could result in loss of retirement benefits would be if the entitlement to such retirement benefits was impacted by a determination that some period of service forming the basis of the entitlement were deemed other than honorable and the applicant's board was specifically precluded from having this kind of impact. The applicant argued that administrative proceedings could only have had an impact on his current period of service, which began after his entitlement to retirement benefits had already vested. The applicant claimed that while the current period of service is able to increase one's retirement benefits, continued service could not decrease benefits already vested. According to the applicant, the administrative proceedings conducted in his case were prohibited by federal law from impacting benefits he was already entitled to prior to his misconduct and his previous enlistment period. Despite these administrative prohibitions by federal law, the applicant alleged he was separated arbitrarily and denied benefits in violation of federal law, without proper authority.

The applicant argued that the only authority Commander, PSC has in the administrative process is to decide to separate or retain, and to characterize only the period of service within the current period of enlistment, consistent with the ASB's decisions. He claimed that Commander, PSC cannot deviate from the ASB's decision, adversely to the servicemember. The applicant claimed there is no discretion to impose a punishment of forfeiture of retirement pay and benefits. The applicant further claimed that Commander, PSC, in separation proceedings, specifically lacks the authority to punish. According to the applicant, the denial of his retirement benefits, which were vested prior to his final period of enlistment, is tantamount to unlawful punishment without due process in violation of the United States Constitution. The applicant claimed that if Commander, PSC wanted to deny him his retirement benefits, rather than just delay the timing of retirement as contemplated in 14 U.S.C. § 2306, he would have had to refer the applicant to a court-martial, where only a judge could have ordered a punitive discharge that could include loss of retirement benefits.

The applicant alleged that his denial of retirement benefits was unlawful because his defense counsel was retaliated against for his zealous representation of the applicant. The applicant further alleged that the Coast Guard created a conflict of interest between himself and his defense counsel and that conflict made it impossible for the defense counsel to do the right thing for the applicant because the defense counsel's own job was on the line. The applicant argued that such an attack on his counsel was also an attack on him. The applicant alleged that because his defense counsel's job was on the line, he withheld information from the applicant and failed to identify legal issues. Because of these facts, the applicant alleged that it is impossible for the Coast Guard to prove, beyond a reasonable doubt, that unlawful command influence did not impact the proceedings. The applicant argued that unlawful command influence demands a new ASB hearing. The applicant alleged that as it stands, the ASB was already plagued by a host of other issues and that these issues were not raised because his defense counsel was conflicted, denying the applicant the ability to obtain a new ASB, free from government abuse.

The applicant argued that the denial of his retirement benefits was improper and inequitable because the denial deprived his wife and children of benefits to which they are entitled, without due process. The applicant further argued that the courts have long held that “Clearly, that portion of the husband’s future military pension which accrued during the marriage is a marital asset” subject to distribution upon divorce.¹³ The applicant claimed that this means that that once a military retirement is vested at 20 years, it is a property. The applicant further claimed that 10 U.S.C. § 1408, also known as the Uniformed Services Former Spouses Protection Act, provides for the division and distribution of future retirement pay and treatment of the vested (at 20 years) retirement benefit as a marital asset. The applicant stated that pursuant to the Fifth Amendment of the United States Constitution, “No person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” The applicant claimed that even if the Coast Guard had the authority to deny retirement benefits the applicant’s wife, or former wife, was an interested party with 14 years of marriage to the applicant while he served on active duty. Accordingly, the applicant argued that his wife was entitled to due process, including notice and an opportunity to be heard before that portion of the retirement benefits could be denied. The applicant claimed that as a property entitlement, government funding for that entitlement could not be taken from the applicant or his spouse and children for public use without just compensation. The applicant claimed that no such notice was provided which is a violation of her constitutional rights to due process. The applicant argued that even if it is determined that the applicant is not entitled to receive his retirement benefits, the applicant’s wife is entitled to just compensation for the taking of her portion of those benefits.

The applicant alleged that the proceedings of the involuntary separation were improper and inequitable pursuant to the preserved objections made by defense counsel. The applicant stated that he incorporates by reference, all facts and arguments outlined by the applicant’s ASB counsel’s memorandum dated March 22, 2019. The applicant alleged that based on that memorandum, it is clear that the proceedings were far from proper and equitable. The applicant further alleged that at the time of its issuance, his discharge was and continues to be, completely inconsistent with standards of discipline in the Coast Guard. The applicant again argued that the ASB is not allowed to punish him because it is administrative in nature and is meant to determine if the servicemember can continue to serve and to characterize his service for the “current” period of service only and not for misconduct that took place off duty.

The applicant argued that any denial of his retirement benefits as a result of his civilian conviction was a breach of the federal government’s pretrial agreement with the applicant and constitutes double jeopardy. The applicant claimed that his January 7, 2019, plea agreement with the United States Government specifically cut off any right the Coast Guard had to take punitive action against him. The applicant stated that for the Department of Homeland Security, a different government agency of the same federal government, to impose a punishment of forfeiture of or denial of his vested retirement, without due process and without such forfeiture or denial being listed in the pretrial agreement, is a breach of the pretrial agreement by the United States.

¹³ *Pastore v. Pastore*, 497 So.2d 635 (Fla. 1986); *Diffenderfer v. Diffenderfer*, 491 So.2d 265 (Fla. 1986).

VIEWS OF THE COAST GUARD

On October 12, 2022, a judge advocate (JAG) for the Coast Guard submitted a memorandum prepared by the Personnel Service Center (PSC) and asked the Board to accept PSC's findings and analysis as the Coast Guard advisory opinion. In accordance with PSC's recommendation, the JAG recommended the Board deny relief in this case.

PSC explained that the applicant's contentions that 14 U.S.C. § 2306 establishes that the Coast Guard has an absolute duty to retire a member after completion of 20 years of service is misplaced and erroneous. According to PSC, the words "may ... in the discretion of the Commandant, be retired from active service" clearly establish the Commandant's voluntary discretion to either grant or deny a member's request to retire after 20 years of service. PSC argued that this position is further reflected in Article 1.C.1.e.2. of the Enlisted Personnel Administrative Boards Manual, PSCINST M1910.1, which states, "[t]he right to request voluntary retirement does not create a safe harbor for a respondent. Members with *any amount of time in service* are subject to administrative processing pursuant to Coast Guard policy. A respondent has no right to be voluntarily retired in lieu of administrative discharge...*even if he or she has already...completed 20 or more years of creditable active service* or satisfactory federal service."

PSC stated that pursuant to Article 2.E.3.d.4. of PSCINST M1910.1, the Convening Authority, the First Flag Officer in the applicant's chain of command, or PSC may disapprove a respondent's conditional waiver. In the applicant's case, PSC explained, both the CO, who was the Convening Authority, and First Flag Officer disapproved the applicant's request for a conditional ASB waiver.

PSC explained that after the applicant's ASB proceedings closed on March 6, 2019, the board concluded that there was evidence submitted at the applicant's hearing that proved, by a preponderance of the evidence, that the applicant could be discharged under two bases found in the Military Separations Manual, COMDTINST M1000.4, and those bases were Civilian or Foreign Conviction (Article 1.B.17.b.1) and Commission of a Serious Offense (Article 1.B.17.b.3.). PSC noted that the ASB also recommended that the applicant be separated from the Coast Guard under other than honorable (OTH) conditions and that he not be permitted to retire from the Coast Guard in lieu of immediate separation. PSC stated that on May 9, 2019, after legal review and PSC's approval of the ASB recommendation, the applicant was administratively discharged with an OTH characterization of service as recommended by the ASB.

Regarding the applicant's citations and references to 33 C.F.R. § 51, 5 U.S.C. § 8312 and 14 U.S.C. § 2506, PSC argued that those statutes and regulations are not applicable here because 33 C.F.R. Part 51 applies to the Discharge Review Board, not the BCMR; 5 U.S.C. § 8312 applies to civilian federal employees, not military servicemembers; and 14 U.S.C. § 2506 applies to servicemembers avoiding prosecution overseas.

PSC argued that although the applicant is correct that the case law dealing with 10 U.S.C. § 2306 is sparse, there is ample case law on similar voluntary retirement statutes contained in Title 10 of the U.S.C. That case law describes circumstances under which enlisted members in other branches of the armed forces may be denied retirement after having served 20 years. PSC explained

that, in *Cedillo v. United States*,¹⁴ the Court of Federal Claims determined that, although the plaintiff had served on active duty for more than 20 years, he had no vested right to receive retirement benefits simply by securing 20 years of creditable service. In *Murphy v. United States*, the United States Court of Claims found that, as a matter of law, the Secretary of the Navy had acted properly by refusing to retire the plaintiff by transferring him to the Fleet Reserve and paying him retainer pay (retired pay) although the plaintiff had served more than 20 years of creditable service before he went AWOL for 10 years.¹⁵ Accordingly, PSC argued, the case law on Department of Defense (DoD) enlisted personnel demonstrates that in cases in which a member has been charged and/or convicted of certain offenses, the final action authority has the discretion to deny an enlisted member's 20-year retirement.

PSC further argued that the applicant's argument that his CO lacked the authority to forfeit his retired pay and benefits is misplaced. PSC explained that first, the Coast Guard did not and could not forfeit retirement pay and benefits that the applicant was never awarded or entitled. Second, PSC stated that the Coast Guard did not have a duty to retire the member, nor was he required to receive any pay and benefits. The Coast Guard had the discretion to deny the applicant's request for retirement, which it exercised in accordance with federal law and policy.

Regarding the applicant's claim that his discharge was improper and inequitable because his family needs the financial support, PSC stated that while the impact to the member's family is unfortunate, the family's benefits flow from the member, not from the Coast Guard. According to PSC, a member's family has no legal right to retirement income that by law is earned by and paid to an enlisted member. Accordingly, when the applicant lost his entitlement to those benefits, the Coast Guard could not redirect those benefits to the applicant's family.

PSC argued that the denial of retired pay is not a punishment and not a result of double-jeopardy. PSC argued that according to *United States v. Easton*, double jeopardy attaches only when the defendant is put on trial before a trier of facts—either a jury or a judge. PSC explained that the applicant was tried by a civilian court but was not tried by a court-martial, and an ASB is not a trier of fact to which double jeopardy attaches.

PSC further explained that the applicant's claim that he reenlisted by operation of law also fails. PSC stated that the applicant was serving on an indefinite reenlistment contract and so did not and could not reenlist by operation of law. According to PSC, the applicant's record reflects no new reenlistment contracts, which are required to be made in writing. PSC argued that simply because the member decided to continue serving past his 20-year mark does not mean he had reenlisted; nor does service for 20 years entitle him to retirement benefits as indicated in the Military Separations Manual, COMDTINST M1000.4. Furthermore, PSC claimed that 14 U.S.C. § 2312 only entitles a member to receive the benefits he would normally have been entitled to receive, and as explained above, the applicant was not entitled to automatic voluntary retirement by serving 20 years.

¹⁴ *Cedillo v. United States*, 37 Fed. Cl. 128 (Fed. Cl. 1997). This decision was affirmed in 124 F.3d 1266, and certiorari was denied in 118 S.Ct. 718.

¹⁵ *Murphy v. U.S.*, 165 Ct. Cl. 156 (1964).

Finally, PSC stated that the applicant failed to provide any evidence to support his claim that the Coast Guard's denial of his retirement benefits was a breach of his plea agreement with the federal government. PSC argued it is unlikely that a federal court would have approved a plea agreement purporting to constrain an administrative proceeding outside the jurisdiction of that court. PSC further argued that the applicant's contention that his plea agreement restricted his punishment to those terms enumerated in his plea agreement is misleading because the applicant's denial of benefits was administrative in nature and not punitive. PSC explained that the applicant's discharge was not "punishment" issued by a court or the Coast Guard, but was an administrative decision made through the ASB to separate the applicant for misconduct. For the reasons outlined above, PSC recommended the Board deny relief in this case.

APPLICANT'S RESPONSE TO VIEWS OF THE COAST GUARD

On March 30, 2023, the Chair received the applicant's response to the views of the Coast Guard. The applicant argued that while his conditional ASB waiver was considered and denied by the appropriate authority, his request for a voluntary retirement, which was part of the same request, was never considered, and so was never approved or denied. The applicant claimed that the Coast Guard disapproved only the conditional waiver, not the request for voluntary retirement. The applicant stated that he never rescinded his request to voluntarily retire so his voluntary retirement request remained without review by the proper authority. The applicant explained his request should have specifically been reviewed by PSC when the ASB report was received but alleged that that did not happen. The applicant alleged that while the ASB report contemplates applicant's retirement and recommended denial, such action was never reviewed and approved by a competent authority.

The applicant also included a new allegation that his discharge was erroneous because the Chief of PSC's Personnel Services Division signed it "by direction." Authority was vested in the Chief of PSC's Personnel Services Division (PSD), especially after PSC had previously reserved such authority for separation action and review of the voluntary retirement request for Commander, PSC upon receipt and review of the board report. The applicant further claimed that authority "by direction" must be specifically authorized in writing as to the limits of that authority. The applicant stated that while he believes that the Chief of PSD had "by direction" authority for standard approval of ASB proceedings for other service members, likely conferred in a more general written authority, it is unlikely that such specific "by direction" authority was granted to the Chief of PSD in this case. The applicant stated this is especially true because Commander, PSC had reserved the authority to act on the applicant's retirement for himself.

The applicant argued that pursuant to the Military Separations Manual, COMDTINST M1000.4, by authority of the Commandant of the Coast Guard, "An enlisted member's non-disability retirement occurs at the discretion of Commander (CG-PSC-EPM) and Commander (CG PSC-RPM)." The applicant alleged that none of this discretion was conferred to the Chief of PSD, after Commander, CG-PSC-EPM-1, specifically reserved that discretion, in this case for himself in his disapproval of the applicant's conditional waiver request. Therefore, the applicant claimed that the Final Reviewing Authority's decision to separate the applicant was erroneous. The applicant alleged that any assumed or implied final decision on the matter of the applicant's voluntary retirement was erroneous, unless it came from CG-PSC-EPM.

The applicant also claimed that he recently had a mental health assessment by a civilian mental health provider, which revealed that the applicant had service-connected post-traumatic stress disorder (PTSD) and a porn addiction that resulted from his traumatic experiences and working conditions in the Coast Guard. The applicant stated that the civilian mental health provider believes that the applicant's experiences in the Coast Guard caused or contributed to the underlying misconduct leading to his separation from service. Given this new information, the applicant requested that his discharge be upgraded to honorable because his service to the Coast Guard caused or contributed to the mental health conditions that led to his separation. To support his argument, the applicant cited to the DoD's liberal consideration guidance.¹⁶

The applicant claimed that his PTSD aggravated his pornography addiction, which should excuse or mitigate the offense for which he was discharged. The applicant further claimed that his condition existed throughout his long Coast Guard career, and this condition caused or aggravated his pornography addiction. The applicant alleged that but for his military service, he would not have been lonely and depressed and he would not have had such extensive amounts of time to allow the porn addiction to develop into an unhealthy condition. The applicant explained that while he does think his actions were wrong, he has taken responsibility for his actions and has served his time in confinement. The applicant admitted that he had images that were unlawful but stated that it was because of his service-connected mental health condition. He also claimed that he harmed no one but himself and that he is the victim of his circumstances. The applicant stated that with an OTH characterization of discharge, disability benefits for a service-connected injury are frequently denied, which could cause a further degradation of his mental health issues. He claimed that denying relief in his case will subject him to an overly harsh penalty that is unjust in comparison to the great sacrifices he has made for this country, especially when he has already been appropriately punished by the judicial system. The applicant further claimed that his condition outweighs his discharge because he was damaged by his military service. The applicant stated that while everyone is responsible for their actions, the Service bears some responsibility for his situation.

The applicant stated that he worked a full career in the military and became entitled to a retirement, among other benefits for honorable service, before he ever committed misconduct. The applicant argued that denying an earned retirement when the military bears some of the responsibility for the injury that caused the misconduct may ultimately have a cumulative effect of degrading the integrity of the military retirement system as a whole. The applicant further argued that his military traumas, the working conditions that caused his PTSD and resulting misconduct, the need to maintain the integrity of the military retirement system, and the social responsibility to take care of veterans with service-connected conditions outweigh the discharge characterization in this case. According to the applicant, in the face of the massive and growing epidemic of mental health injuries and homelessness of veterans, this Board does not have the luxury to say "someone has to do something about this." The applicant stated that the call to protect the characterization of service of others who are not before this board would be misplaced for the duties expected of this Board. He stated that this Board cannot look at the growing homeless population of mentally

¹⁶ DoD's liberal consideration guidance is inapplicable to the Coast Guard BCMR, which has its own liberal consideration guidance.

unhealthy veterans and point to Congress or the President to take action. The applicant argued that it is up to this Board to make a positive impact on a growing problem in America by exercising discretion in cases like this one, over and over.

APPLICABLE LAW AND POLICY

Title 14 U.S.C. § 2306 states, “Voluntary retirement after twenty years’ service. Any enlisted member who has completed twenty years' service may, upon his own application, in the discretion of the Commandant, be retired from active service.”

Coast Guard Manuals & Instructions

The Manual for Courts-Martial (2016) provides the following guidance on Articles 120c and 134—Child Pornography of the UCMJ:

Article 120c—Other Sexual Misconduct.

(a) Indecent Viewing, Visual Recording, or Broadcasting. Any person subject to this chapter who, without legal justification or lawful authorization—

- (1) knowingly and wrongfully views the private area of another person, without that other person’s consent and under circumstances in which that other person has a reasonable expectation of privacy;
- (2) knowingly photographs, videotapes, films, or records by any means the private area of another person, without that other person's consent and under circumstances in which that other person has a reasonable expectation of privacy; or
- (3) knowingly broadcasts or distributes any such recording that the person knew or reasonably should have known was made under the circumstances proscribed in paragraphs (1) and (2); is guilty of an offense under this section and shall be punished as a court-martial may direct.

Article 134—Child Pornography.

b. *Elements.*

(1) *Possessing, receiving, or viewing child pornography.*

- (a) That the accused knowingly and wrongfully possessed, received, or viewed child pornography; and
- (b) 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.

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

1.B.2.f. Standards of Discharge.

...

- (3) Discharge Under Other Than Honorable Conditions. The Service may issue a discharge under other than honorable conditions for misconduct, security reasons or good of the Service if an administrative discharge board approves a recommendation for such a discharge or the member

waives his or her right to board action. Such a discharge will be issued in lieu of trial by court-martial only if the Commandant determines an administrative discharge will best serve the interests of both the Service and the member. (See Article 1.B.23. of this Manual.)

...

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

(1) Civilian or Foreign Conviction. Conviction by foreign or domestic civil authorities or action taken tantamount to a finding of guilty, e.g., adjudication withheld; deferred prosecution; entry in adult/juvenile pretrial intervention programs, or any similar disposition of charges which includes imposition of fines, probation, community service, etc., of any offense which could warrant a punitive discharge if prosecuted under the Uniform Code of Military Justice (UCMJ). Whether a civilian offense could warrant a punitive discharge shall be determined by examining the maximum authorized punishment for the same or the most closely related offense under the UCMJ and the Manual for Courts-Martial (including Rule for Courts-Martial 1003(d)). A member subject to discharge because of conviction by civil court may be processed for discharge even though an appeal of that conviction has been filed or intent to do so has been stated.

...

(3) Commission of a Serious Offense. Commission of a serious offense does not require adjudication by non-judicial or judicial proceedings. An acquittal or finding of not guilty at a judicial proceeding or not holding non-judicial punishment proceeding does not prohibit proceedings under this provision. However, the offense must be established by a preponderance of the evidence. Police reports, CGIS reports of investigation, etc. may be used to make the determination that a member committed a serious offense.

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

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

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

...

1.B.22.a. Definition

An administrative discharge board is a body appointed to provide findings of fact, opinions, and recommendations to assist the discharge authority in making informed decisions. In all cases, the board identifies any bases for discharge, recommends either retention in the Service or discharge, and recommends the type of discharge to be issued in the event the final action of the discharge authority is to direct separation of the member.

1.B.22.d. Discharge Authority

Except as appropriate articles in this Manual otherwise specify, the Coast Guard Personnel Service Center is the discharge authority in all cases of administrative separations. Send the administrative discharge board report through the chain of command for review and endorsement in accordance with procedures promulgated by Commander (CG PSC). When Commander (CG PSC) receives the record of administrative discharge proceedings, he or she will review the board record and approve or disapprove the board's findings of fact, opinions, and recommendations in whole or in part. Commander (CG PSC) may disapprove findings and opinions if they were made based on

incomplete evidence, contrary to the evidence the board considered or to law or regulation, a misunderstanding or misapplication of written policy, or otherwise clearly in error. ...

1.B.23. Procedure for Discharge Under Other than Honorable Conditions.

a. Right to Counsel. Both the Government and respondent are entitled to legal representation before administrative discharge boards convened and constituted under Article 1.B.22. of this Manual. The respondent is entitled to the appointment of military counsel qualified under Article 27 (b), UCMJ or may obtain civilian counsel at his or her own expense. The cognizant Staff Judge Advocate will provide the commanding officer legal counsel.

(1) The Service will not discharge any member under other than honorable conditions without first affording him or her the right to present the case to an administrative discharge board with the advice and assistance of counsel and unless approved board findings and an approved recommendation for discharge under other than honorable conditions support such discharge. However, if appropriate, the Service may issue such discharge without board action if the member is beyond military control for prolonged unauthorized absence, requests discharge for the good of the Service, or waives the right to board action in writing.

(2) The discharge authority may direct issuing the type of discharge recommended by an administrative discharge board or a more favorable discharge but not a less favorable discharge than that recommended.

(3) Even if an administrative discharge board recommends retention, the discharge authority may direct separation if the circumstances of a particular case warrant. In this event, the separation must be effected as either an honorable discharge or a general (under honorable conditions) discharge.

(4) The Service will not administratively discharge any member with a discharge under other than honorable conditions if the grounds for that discharge are based wholly or partly on acts or omissions for which a court-martial resulting in acquittal or having the same effect previously tried the member, except if such acquittal or equivalent disposition was based on a legal technicality not according to the merits.

b. Discharge Procedure. Use the procedures described in Reference (q), Enlisted Personnel Administrative Boards Manual, PSCINST M1910.1 (series), for members being considered for a discharge under other than honorable conditions.

(1) The member may waive his or her right to an administrative discharge board conditionally or unconditionally in writing; however, no member will be permitted to do so until legal counsel has fully advised him or her on this matter.

...

(3) If a member submits a conditional waiver request, on approving it Commander (CG PSC-EPM-1) shall direct separation, specifying either an honorable or general (under honorable conditions) discharge. If disapproving a conditional waiver, Commander (CG PSC-EPM-1) will return the case for further processing under this Article.

1.C.11.a. Requests for Voluntary Retirement.

(1) An enlisted member's non-disability retirement occurs at the discretion of Commander (CG PSC-EPM) and Commander (CG PSC-RPM). Therefore, an enlisted member's request will be considered on the basis of overall Service needs and the merits of each individual case. As a general rule, the provisions listed here govern; however, an enlisted member does not automatically accrue

a vested right to retire when he or she chooses independently of Service needs merely by completing 20 years of active service.

Article 1 of the Enlisted Personnel Administrative Boards Manual, PSCINST M1910.1, provides the following guidance on enlisted members going before an ASB:

1.C.1. Before Board Hearing. A respondent identified in Article 1.B. of this Manual shall be notified of the following information and afforded the following rights before a board is convened:

- a. Reason for Administrative Action. The facts that caused the convening authority to believe the respondent should be considered for administrative action.
- b. Administrative Board. That the respondent is entitled to a board.
- c. Military Lawyer. That the respondent may consult with a military lawyer before deciding whether to exercise or waive his or her right to go before a board.
- d. Civilian Lawyer. That the respondent may elect to consult with a civilian lawyer at his or her own expense. However, if the respondent elects to consult with a civilian lawyer, then he or she is not entitled to also consult with a military lawyer at the Coast Guard's expense.
- e. Voluntary Retirement. That a respondent with 18 or more years of creditable active service (or 20 or more years of satisfactory federal service for a Reserve respondent) may waive his or her right to appear before a board conditioned on being permitted to voluntarily retire. See Article 2.E.3.d.(2) of this Manual.

(1) Policy on Requesting Voluntary Retirement. In accordance with MILSEP Article 1.C.11.a.(2), a Coast Guard enlisted member may submit a request for voluntary 20-year retirement if he or she has completed 18 or more years of creditable active service. In accordance with Article 8.R. of the Reserve Policy Manual, COMDTINST M1001.28 (series), the RPM, a Reserve member may request voluntary retirement after being notified of the completion of 20 years of satisfactory federal service.

(2) No Right to Voluntary Retirement.

The right to request voluntary retirement does not create a safe harbor for a respondent.

Members with any amount of time in service are subject to administrative processing pursuant to Coast Guard policy. A respondent has no right to be voluntarily retired in lieu of administrative discharge, denial of reenlistment, or reduction in rate for incompetence, even if he or she has already been approved for voluntary retirement or has already completed 20 or more years of creditable active service or satisfactory federal service.

Members who are eligible to request voluntary retirement, and wish to do so, are encouraged to exercise their right to submit a conditional board waiver request, which will be considered pursuant to Coast Guard policy on a case-by-case basis.

(3) Conditional board waivers may be denied. See Article 2.E.3.d.(4) of this Manual for more details.

...

1.G.1.e. Voluntary Retirement? If the respondent has 18 or more years of creditable active service (or 20 or more years of satisfactory federal service for a Reserve respondent), should he or she be permitted to voluntarily retire instead of being involuntarily administratively separated or denied reenlistment? The board might not be aware that the respondent either has or has not requested voluntary retirement, and the respondent might not desire to request voluntary retirement. Nevertheless, this question shall be answered by every administrative separation and reenlistment board **if** the respondent has 18 or more years of creditable active service or 20 or more years of satisfactory federal service.

(1) Policy on Requesting Voluntary Retirement. In accordance with MILSEP Article 1.C.11.a.(2), a Coast Guard enlisted member may submit a request for voluntary 20-year retirement if he or she has completed 18 or more years of creditable active service. In accordance with Article 8.R. of the RPM, a Reserve member may request voluntary retirement after being notified of the completion of 20 years of satisfactory federal service.

(2) No Right to Voluntary Retirement.

The right to request voluntary retirement does not create a safe harbor for a respondent.

Members with any amount of time in service are subject to administrative processing pursuant to Coast Guard policy. A respondent has no right to be voluntarily retired in lieu of administrative discharge or denial of reenlistment, even if he or she has already been approved for voluntary retirement or has already completed 20 or more years of creditable active service or satisfactory federal service.

Administrative separation boards and reenlistment boards should base their recommendation regarding voluntary retirement on the respondent's performance of duty and conduct as detailed in the evidence presented and considered in the case, and upon consideration of the respondent's military record. See also Article 1.E.1. for a discussion of the board's guiding principles.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction over this matter under 10 U.S.C. § 1552(a) because the applicant is requesting correction of an alleged error or injustice in his Coast Guard military record. The Board finds that the applicant has exhausted his administrative remedies, as required by 33 C.F.R. § 52.13(b), because there is no other currently available forum or procedure provided by the Coast Guard for correcting the alleged error or injustice that the applicant has not already pursued.

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.¹⁷

¹⁷ *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

3. The application is timely because it was filed within three years of the applicant's discovery of the alleged error or injustice in the record, as required by 10 U.S.C. § 1552(b).

4. The applicant made the following allegations: (a) The Coast Guard erroneously discharged him for misconduct that occurred after he had reached his 20 years of creditable service; (b) The Coast Guard erroneously denied him retired pay and benefits after he attained 20 years of creditable service; (c) The Coast Guard did not have the authority to deny him retirement, but only delay it; (d) The ASB was specifically precluded from affecting whether or not the applicant should be allowed to retire; and (d) He suffered from service-connected PTSD at the time of his discharge which substantially contributed to his misconduct and therefore he should receive relief pursuant to the liberal consideration guidance. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in the military record, and the applicant bears the burden of proving, by a preponderance of the evidence, that the disputed information is erroneous or unjust.¹⁸ 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."¹⁹

5. Misconduct. The Board's review of the record shows that the applicant's CO notified him on September 14, 2018, that the CO was initiating involuntary separation proceedings against him for Commission of a Serious Offense under Article 1.B.17.b.3. of COMDTINST M1000.4. The record further shows that on January 7, 2019, the applicant pled guilty in federal court to having violated 18 U.S.C. § 2252(a)(2) and (b)(1), between December 8, 2015, and January 9, 2017, when he knowingly received and attempted to receive a visual depiction of a minor engaging in sexually explicit conduct. The applicant's conduct was also a violation of Article 134—Child Pornography of the UCMJ and subjected him to involuntary separation under Articles 1.B.17.b.1—Civilian or Foreign Conviction and 1.B.17.b.3—Commission of a Serious Offense of the Military Separations Manual, COMDTINST M1000.4. Finally, the preponderance of the evidence shows that although the applicant only pled guilty to one count, he also possessed hundreds of images of "child erotica," including images of a prepubescent child engaging in sexually explicit conduct, in violation of 18 U.S.C. § 2252(a)(4)(B).

6. No Vested Retirement. The applicant alleged that the Coast Guard erred in denying him retirement benefits because he had already attained 20 years of honorable, creditable service and therefore had a vested right to retirement. In so arguing, the applicant relied on inapplicable statutes concerning civil servants, divorces, and military members who remain overseas to avoid prosecutions. The applicable statute, 14 U.S.C. § 2306, states, "Any enlisted member who has completed twenty years of service *may*, upon his own application, *in the discretion of the Commandant*, be retired from active service." (Emphasis added.) For the following reasons, the Board finds that the applicant had no vested right to retirement:

- a. Although the applicant claimed that the Commandant's discretion extends only to the timing of the retirement, the Board rejects that argument as unfounded. There is no

¹⁸ 33 C.F.R. § 52.24(b).

¹⁹ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

such limitation in the statute, and courts have ruled that under similar statutes, military members with more than 20 years of service may be discharged without retirement if they commit significant misconduct, as the applicant did. For example, in *Cedillo v. United States*,²⁰ the plaintiff, an enlisted member of the United States Air Force, who had attained 20 years of active duty service and had an approved retirement request pending, was ultimately administratively discharged and denied retirement after he was convicted for attempted murder, involuntary manslaughter, and evading law enforcement officials. The Court of Federal Claims determined that notwithstanding the fact that the plaintiff had served for more than 20 years, he had no vested right to receive retirement benefits simply by securing 20 years of creditable service. The Court reasoned that “The trouble with [the plaintiff’s] claim here is that the relevant statutory provision, 10 U.S.C. § 8914, did not guarantee him a right to retirement pay...”²¹ The federal courts have dealt with similar arguments from enlisted members of the Navy and have concluded in all cases that the members were not entitled to retired pay simply because they had attained 20 years of creditable service.

b. The applicant has not cited any statute or regulation, and the Board could find none, that states that the Coast Guard does not have the authority to deny a member’s retirement simply because the member has attained 20 years of creditable service. On the contrary, Article 1.C.1.e.2 of the Enlisted Personnel Administrative Boards manual, PSCINST M1910.1, states:

No Right to Voluntary Retirement. The right to request voluntary retirement does not create a safe harbor for a respondent.

Members with any amount of time in service are subject to administrative processing pursuant to Coast Guard policy. A respondent has no right to be voluntarily retired in lieu of administrative discharge, denial of reenlistment, or reduction in rate for incompetence, even if he or she has already been approved for voluntary retirement or has already completed 20 or more years of creditable active service or satisfactory federal service.

Members who are eligible to request voluntary retirement, and wish to do so, are encouraged to exercise their right to submit a conditional board waiver request, which will be considered pursuant to Coast Guard policy on a case-by-case basis.

As stated in both Articles 1.C.1.E.2 and 2.E.3.d.2 of PSCINST M1910.1, his completion of 20 years of active duty and his right to *request* voluntary retirement did not create a vested right to retired pay or safe harbor for the applicant, as he argued, because members with any amount of time in the service are subject to administrative proceedings pursuant

²⁰ *Cedillo v. United States*, 37 Fed. Cl. 128 (Fed. Cl. 1997) (stating that the plaintiff “does not have a statutory right to retirement pay, and the decision to rescind his initial retirement orders did not violate any provision of law,” and that his “expectation of a retirement...was no more than that. It was composed of two phenomena, neither of which gave him an unfettered right to demand retirement: 1) the right to ask for a twenty year retirement; and 2) the Secretary’s granting of that request.” This decision was affirmed in 124 F.3d 1266, and certiorari was denied in 118 S.Ct. 718.)

²¹ The Air Force’s statutory authority, 10 U.S.C. § 8914, was very similar to the Coast Guard’s current statutory authority, 14 U.S.C. § 2306, regarding voluntary retirement for enlisted members.

to Coast Guard policy. Finally, Article 1.C.11.a of the Military Separations Manual, COMDTINST M1000.4, states that an enlisted member does not automatically accrue a vested right to retire whenever he or she chooses independently of Service needs merely by completing 20 years of active service. Therefore, the Board finds that the applicant has failed to prove, by a preponderance of the evidence, that he had gained a vested right to retirement benefits by attaining 20 years of honorable, creditable service.

7. No Constitutionally Protected Property Right. The applicant alleged that the Coast Guard's denial of his retirement amounted to a "taking" under the Fifth Amendment. The applicant noted that under the Fifth Amendment of the Constitution of the United States, "No person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." However, as the applicant had no vested right to retirement, he had no constitutionally protected property right to retirement. He had a right to submit a request for retirement, but any right to retirement benefits was contingent upon the discretionary approval of his request by the Commandant pursuant to 14 U.S.C. § 2306. The fact that a military pension is often considered a marital asset during divorce proceedings in state courts²² does not alter the analysis. The applicant has not proven by a preponderance of the evidence that the denial of his retirement request constituted an illegal taking under the Fifth Amendment.

8. Due Process in ASB Proceedings. The applicant alleged that the denial of retirement benefits was erroneous and unjust because he was denied due process in his discharge proceedings. For the following reasons, the Board disagrees:

a. The record shows that upon learning of the applicant's egregious misconduct, the applicant's CO initiated involuntary separation proceedings against the applicant. In a memorandum dated September 14, 2018, the CO informed the applicant that he had initiated involuntary separation proceedings against him because of the misconduct and advised him of his rights regarding those proceedings. This memorandum notified the applicant of his right to appear before an ASB, the right to be represented by counsel at the ASB, the right to unconditionally waive his right to appear before the ASB, and the right to submit a conditional waiver in order to obtain a more favorable discharge or to be permitted to retire. The applicant signed and acknowledged these rights on September 14, 2018, and he elected to submit a conditional waiver in hopes of being permitted to retire. However, on October 23, 2018, the applicant's CO exercised his authority to disapprove the applicant's conditional waiver request. In so doing, the CO noted that he was only disapproving the waiver request and that the request for retirement submitted by the applicant would be retained and addressed later. As a result, on January 31, 2019, the applicant's CO issued a Convening Order wherein he directed an ASB convene pursuant to Article 1.B.23.a.1. of COMDTINST M1000.4 to allow the applicant to "show cause" for retention in the Service. The applicant was represented by counsel and was afforded the opportunity to present a full defense throughout the ASB proceedings. Following the hearing, the ASB issued a report recommending that the applicant receive an OTH

²² *Pastore v. Pastore*, 497 So.2d 635 (Fla.1986); *Diffenderfer v. Diffenderfer*, 491 So.2d 265 (Fla.1986).

discharge for Commission of a Serious Offense and not be allowed to retire. The ASB's report was reviewed by PSC and the recommendations were approved, including the recommendation to deny the applicant a retirement. Therefore, the Board finds that the applicant has failed to prove, by a preponderance of the evidence, that the Coast Guard failed to provide him with due process when they discharged him for misconduct.

b. The applicant also adopted the objections to the proceedings made by the applicant's ASB counsel in the memorandum dated March 22, 2019. In the memorandum, the applicant's counsel raised objections to the Recorder's exhibits being allowed into evidence because they were untimely, to the replacement of the senior enlisted member after the hearing had convened, and to an alleged lack of impartiality in the advice the ASB members received from their own legal counsel. The record further shows that on April 19, 2019, the Staff Judge Advocate issued a "Legal Sufficiency Review" wherein he found that the ASB proceedings had substantially complied with Coast Guard policy and provided a strong rebuttal of each of the applicant's objections. To summarize, the JAG's review states that the Recorder's original submission of the evidence to counsel had been thwarted by a technical glitch and that the delay in delivery had not harmed the applicant's defense; that the change in the senior member was required by policy and the new senior member had received the same opportunity to review and hear the evidence and to participate in the hearing as the other members; and that the applicant's counsel had been present when the ASB members consulted legal counsel, had not raised any objections to the advice received at the time, and had not submitted any evidence of the alleged lack of impartiality. For the reasons stated in the Legal Sufficiency Review, the Board is not persuaded that the applicant was deprived of due process in the ASB proceedings. The Board finds that the applicant has not proven by a preponderance of the evidence that the ASB proceedings were erroneous or unjust.²³

9. ASB's Recommendation About Retirement. The applicant alleged that the ASB was specifically precluded from having an impact on whether the applicant was allowed to retire. He noted that the ASB is required to make a recommendation regarding the applicant's character of service, if discharged pursuant to the ASB, and that the character of service can only be based on conduct and performance during the current enlistment period. He suggested that his enlistment contract must have expired once he passed the 20-year mark, and so his misconduct did not occur during his enlistment. However, throughout the proceedings and up to the day of his discharge, the applicant was still serving on the indefinite reenlistment contract that he had signed on January 15, 2008. Therefore, the character of service recommendation was to be made based on his service since 2008 and the term of his enlistment did not preclude the ASB from making a recommendation regarding his retirement.

Moreover, Article 1.G.1. of the Enlisted Personnel Administrative Boards Manual, PSCINST M1910.1, states, "Administrative separation boards and reenlistment boards shall answer four questions in all cases, and a fifth question when the respondent is eligible to request

²³ The applicant also made repeated allegations that his defense counsel was later retaliated against for his zealous representation of the applicant but submitted no evidence to support this claim.

voluntary retirement.” Those five questions are (a) Is there a basis (or multiple bases) in Coast Guard policy for administratively separating or denying reenlistment to the respondent? (b) Should the Coast Guard discharge/deny reenlistment to the respondent? (c) How should the respondent’s service be characterized if he or she is discharged/denied reenlistment? (d) Should the respondent be placed on probation instead of being involuntarily administratively separated immediately or denied reenlistment? and (e):

Voluntary Retirement? If the respondent has 18 or more years of creditable active service (or 20 or more years of satisfactory federal service for a Reserve respondent), should he or she be permitted to voluntarily retire instead of being involuntarily administratively separated or denied reenlistment? The board might not be aware that the respondent either has or has not requested voluntary retirement, and the respondent might not desire to request voluntary retirement. Nevertheless, this question shall be answered by every administrative separation and reenlistment board **if** the respondent has 18 or more years of creditable active service or 20 or more years of satisfactory federal service.

Therefore, Coast Guard policy requires that “every” ASB consider and make a recommendation regarding whether or not a servicemember with 18 or more years of creditable service should be permitted to voluntarily retire in lieu of administrative separation, even if the member did not make such a request. Accordingly, pursuant to Coast Guard policy, the ASB did have the authority to recommend that the applicant be denied retirement, regardless of the applicant having attained 20 years of service.

The applicant also argued that whether he was retired should have been determined by a separate board after the decision was made to separate him, instead of the ASB. The Board finds, however, that Article 1.G.1. of the Enlisted Personnel Administrative Boards Manual, PSCINST M1910.1, clearly assigns the task of making a recommendation regarding retirement to the ASB, and the applicant has not shown how that assignment prejudiced him or deprived him of due process. Although the applicant alleged that there was undue influence by the Convening Authority or some other commander, the ASB was composed of three members who had no direct knowledge of the facts and matters to be considered.²⁴ It was the ASB—and not one individual commander, as alleged by the applicant—that made the recommendation to separate the applicant for misconduct and not permit him to retire.

The Board finds that the preponderance of the evidence shows that the ASB properly exercised the authority granted to it in Article 1.B.22. of COMDTINST M1000.4 and Article 1.A.1. of PSC M1910.1 when the ASB recommended that the applicant receive an OTH discharge for misconduct and not a retirement.

10. Action of the Final Reviewing Authority. The record further shows that only after the ASB issued its report and recommendations did the Final Reviewing Authority approve the ASB’s recommendations and direct that the applicant be discharged for misconduct, instead of retired. Article 1.B.22. of COMDTINST M1000.4 states that the ASB is convened to provide findings of facts, opinions, and recommendations in order to *assist* PSC—the Final Reviewing Authority—in making informed decisions. The Military Separations Manual, COMDTINST

²⁴ Article 3.A.4 of the Enlisted Personnel Administrative Boards Manual, PSCINST M1910.1.

M1000.4, states throughout that Commander, PSC is the final discharge authority in all cases involving administrative separations and has the authority to approve or disapprove the ASB's findings, opinions, and recommendations. Although the applicant complained that the Chief of PSD, a division of PSC, signed the final action memorandum on behalf of Commander, PSC "by direction," he has not shown that the Chief of PSD lacked the authority to do so pursuant to Chapter 5.C. of the Coast Guard Correspondence Manual, COMDTINST M5216.4. Here, the record shows that the Final Reviewing Authority approved the ASB's findings, opinions, and recommendations and directed that they be executed, which included separating the applicant for misconduct and denying his request to retire. Accordingly, the Board finds that the applicant has failed to prove, by a preponderance of the evidence, that the Coast Guard committed an error or injustice when PSC, in response to the opinions and recommendations of the ASB, discharged the applicant for the Commission of a Serious Offense, in accordance with Article 1.B.17.b.3. of COMDTINST M1000.4 and disapproved his request to voluntarily retire.

11. Lack of Court-Martial. The applicant also argued that the denial of his retirement was an unlawful punishment that could not result from an administrative procedure, such as an ASB, and his discharge for misconduct was erroneous and unjust because at no time was he disciplined or given notice of any punitive action being taken against him for his alleged misconduct. For the following reasons, the Board disagrees:

a. Under 10 U.S.C. § 1169, an enlisted member may be discharged before his enlistment expires "(1) as prescribed by the Secretary concerned; (2) by sentence of a general or special court martial; or (3) as otherwise provided by law." In this case, the preponderance of the evidence shows that the applicant was discharged for misconduct (in lieu of being retired) as prescribed by the Secretary. As noted in the findings above, the record shows that his chain of command and PSC personnel carefully followed the policy in Articles 1.B.22. and 1.B.23. of the Military Separations Manual, and the applicant received all due process. Those policies expressly authorize a member who commits a serious offense to be administratively discharged for misconduct, with no retirement, regardless of the number of years of service the member has and regardless of whether the serious offense was tried in a court of law. Article 1.B.17.b.3. of the Military Separations Manual, COMDTINST M1000.4, Commission of a Serious Offense, states the following:

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.

Accordingly, Coast Guard policy does not require that disciplinary or judicial proceedings be convened before a servicemember can be discharged for misconduct. All that is required is that the offenses alleged be established by a preponderance of the evidence. Here, as outlined in Finding 5 above, the applicant pled guilty to one of the charges against him and the record shows that he possessed hundreds of images of child pornography, in violation of both 18 U.S.C. § 2252 and Articles 120c and 134 of the UCMJ. Because the preponderance of the evidence showed that the applicant had committed the offense, he could be administratively discharged for misconduct under Article 1.B.17. of

the Military Separations Manual pursuant to the recommendation of an ASB without any disciplinary or judicial proceedings.

12. Double Jeopardy. The applicant alleged that the Coast Guard's denial of his retirement was punishment barred by the rule against double jeopardy. However, the applicant's administrative discharge was not a result of judicial proceedings, presented before a trier of fact, but was administrative in nature. As stated in *United States v. Easton*, the Supreme Court has made clear that "jeopardy does not attach, and the constitutional prohibition can have no application, until the defendant is 'put to trial before the trier of facts, whether the trier be a judge or a jury.'"²⁵ In this case, the applicant was convicted in a federal court by civil authorities and so the Coast Guard could not subject him to court-martial on the same charges because that would have put him in double jeopardy. But under 14 U.S.C. § 2306, 10 U.S.C. § 1169, and Articles 1.B.17. and 1.B.22. of the Military Separations Manual, the applicant could, based on his guilty plea and the evidence, be administratively discharged for misconduct and denied retirement.

Moreover, Article 1.B.22.c. of COMDTINST M1000.4 states, "The Service will not subject any member to administrative discharge action based on conduct a previous administrative discharge board considered if the evidence before the subsequent board would be substantially the same as that before the previous board." Accordingly, in the matter of ASB proceedings, the only time double jeopardy attaches is when a previous ASB has already considered substantially the same conduct at issue. Here, the applicant's misconduct was not considered by a previous ASB, and therefore the ASB proceedings did not constitute double jeopardy. Therefore, the Board finds that the applicant has failed to prove, by a preponderance of the evidence, that the Coast Guard committed an error or injustice when it separated him for misconduct because the administrative proceedings were barred by double jeopardy.

13. Injustice. The applicant claimed throughout his application that the denial of retirement was an injustice because the misconduct occurred after he had served honorably for 20 years and because he did not view the child pornography while on duty. As explained above, however, a member does not gain a vested right or constitutionally protected property interest in retirement by completing 20 years of service. Moreover, the applicant knew that he remained subject to the UCMJ and Coast Guard policies while he remained on active duty even when he was at home and not on duty. He could have retired in 2014 or 2015 but chose instead to collect and view child pornography while serving as a representative of the Coast Guard subject to the UCMJ and Coast Guard policies. Therefore, the fact that the applicant could have retired earlier, before his misconduct was discovered, but opted not to does not persuade the Board that the denial of retirement benefits was an injustice.

²⁵ *United States v. Easton*, 71 M.J. 168, 172 (C.A.A.F. 2012) (quoting *United States v. Jorn*, 400 U.S. 470, 479, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971)).

14. Plea Agreement. The applicant argued that the Federal Court that convicted him did not include in his punishment the forfeiture of retirement benefits to which he was entitled and so the Coast Guard's denial of retirement benefits was a violation of the plea agreement, which makes no mention of Coast Guard retirement benefits. The Board disagrees because first, as explained above, the applicant did not have a vested right—he was not entitled—to retirement benefits. Second, Coast Guard retirement benefits could not have been a part of any plea agreement because the Federal Court that convicted him had no authority to grant or deny Coast Guard retirement benefits to the applicant, whether in a plea agreement or as part of his sentence. Third, as argued by PSC, it is extremely unlikely that the Federal Court that approved his plea agreement would have accepted it if it had purported to restrict the actions of the Coast Guard—a separate and distinct Government agency that was not a party to the plea agreement. The Federal Court had no jurisdiction to make negotiations or provisions regarding the applicant's Coast Guard retirement because that was a military matter, reserved by statute for the military authorities. Accordingly, the Board finds that the applicant's argument that his plea agreement prevented the Coast Guard from administratively discharging him for misconduct and denying him retirement is unpersuasive and unsupported by fact and law.

15. Liberal Consideration and PTSD. The applicant alleged that his misconduct was the result of PTSD and that his characterization of service should be upgraded from OTH to Honorable in light of the Department of Defense's (DoD) liberal consideration guidance because his mental health condition caused or contributed to his discharge.²⁶ According to the applicant, his pornography addiction was the result of trauma he encountered while serving in the Coast Guard. To support his claims, the applicant submitted a recent mental health evaluation by a civilian mental health provider that stated the applicant fully met the diagnostic criteria for PTSD, Panic Disorder, and Depression. According to the civilian provider, the applicant's pornography addiction was the result of multiple traumas and negative events that the applicant experienced during his career in the Coast Guard. The provider explained that research has shown a positive relationship between compulsive sexual behaviors and PTSD.

Although the mental health provider did not provide an opinion as to whether or not the applicant's PTSD excused his possession of child pornography, the applicant used this provider's evaluation, in addition to the DoD's liberal consideration guidance, to argue that his PTSD should excuse and/or mitigate the misconduct that led to his discharge. In his response to the advisory opinion, the applicant claimed that he had hurt no one but himself, had served his time in confinement, and only had the unlawful images because of his alleged service-connected mental health condition. The applicant further stated that denying him relief would subject him to an overly harsh penalty that is unjust in comparison to the great sacrifices that he made for his country, when he was already been appropriately punished by the justice system.

²⁶ Although the applicant references DoD memos the Coast Guard is not bound by the guidance from the DOD, but has its own liberal consideration guidance: DHS Office of the General Counsel, "Guidance to the Board for Correction of Military Records of the Coast Guard Regarding Requests by Veterans for Modification of their Discharges Based on Claims of Post-Traumatic Stress Disorder, Traumatic Brain Injury, Other Mental Health Conditions, Sexual Assault, or Sexual Harassment" (signed by the Principal Deputy General Counsel as the delegate of the Secretary, June 20, 2018).

Because the applicant is alleging that a mental health condition caused or contributed to the misconduct that resulted in his discharge, the Board's liberal consideration guidance applies to his request for an upgraded discharge.²⁷ Under this guidance, when deciding whether to upgrade the discharge of a veteran based on an alleged mental health condition, the Board must liberally consider the evidence, including the applicant's claims, and decide (a) whether the preponderance of the evidence shows that the veteran had a mental health condition while in the Service that could excuse the veteran's misconduct; (b) whether the mental health condition actually excused the misconduct that adversely affected the discharge; and, if not, (c) whether the mental health condition outweighs the misconduct or otherwise warrants upgrading the veteran's discharge. In this case, the applicant did not submit any military medical records showing that he was suffering from PTSD before his discharge. He submitted some evidence showing that he now has PTSD and that PTSD can cause or contribute to pornography usage, but he has submitted nothing to show that PTSD causes or contributes to the usage of child pornography. And even if he had, PTSD would not excuse or in any way mitigate the applicant's possession of hundreds of images of child pornography. Nor would it outweigh his misconduct or otherwise warrant upgrading his discharge. Therefore, the applicant's request for an upgraded discharge, including his OTH characterization of service, should be denied.

16. The applicant made numerous allegations and arguments about the authority and discretion exercised by various Coast Guard officers involved in his discharge proceedings. Those allegations and arguments not specifically addressed above are considered to be unsupported by substantial evidence sufficient to overcome the presumption of regularity and/or are not dispositive of the case.²⁸

17. Therefore, 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.²⁹ He has not proven, by a preponderance of the evidence, that his administrative discharge for misconduct and lack of retirement benefits was erroneous or unjust. Accordingly, the applicant's request should be denied.

²⁷ U.S. Department of Homeland Security, Office of the General Counsel, "Guidance to the Board for Correction of Military Records of the Coast Guard Regarding Requests by Veterans for Modification of their Discharges Based on Claims of Post-Traumatic Stress Disorder, Traumatic Brain Injury, Other Mental Health Conditions, Sexual Assault, or Sexual Harassment" (June 20, 2018).

²⁸ 33 C.F.R. § 52.24(b); *see Frizelle v. Slater*, 111 F.3d 172, 177 (D.C. Cir. 1997) (noting that the Board need not address arguments that "appear frivolous on their face and could [not] affect the Board's ultimate disposition").

²⁹ *Muse v. United States*, 21 Cl. Ct. 592, 600 (1990) (internal citations omitted).

ORDER

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

July 14, 2023

[REDACTED] [REDACTED] Digitally signed by [REDACTED] [REDACTED]
Date: 2023.07.17 10:17:01 -04'00'

[REDACTED] [REDACTED] Digitally signed by [REDACTED] [REDACTED]
Date: 2023.07.17 10:36:54 -04'00'

[REDACTED] [REDACTED] Digitally signed by [REDACTED] [REDACTED]
Date: 2023.07.17 12:55:52 -04'00'