

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2024-045


FS2 (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 February 20, 2024, and assigned it to an attorney to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision dated December 12, 2024, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT’S REQUEST AND ALLEGATIONS

The applicant, a former Food Services Chief (FSC/E-7) who was demoted to Seaman (E-2) and received a less than honorable discharge, asked the Board to correct his record by upgrading the characterization of service from “Less Than Honorable Conditions” to “Honorable,” and upgrade his Pay Grade to “E7.”

The applicant, through counsel, asserts that he has service-connected post-traumatic stress disorder (PTSD) stemming from service-related traumas, diagnosed anxiety, depression, and a traumatic brain injury (TBI). He asserts that under current standards, he would have been medically discharged for PTSD rather than misconduct related to his assault of three (03) junior female service members. The applicant argues because his application is based on a mental health condition, that under liberal consideration guidance to the military services, to include the Coast Guard, the Board should waive all time limits that would preclude consideration of his application and grant relief.

The applicant shares mental health struggles and claims of anxiety, depression, TBI, and PTSD. In his affidavit he asserts that he grew up in an abusive household and ran away from home at the age of sixteen (16), enduring homelessness. He enlisted in July 1999 as a cook. In 2000, he was stationed aboard USCGC Hamilton and participated in the Alaskan Airlines flight 261 plane crash describing that while serving he struggled with fear of eminent danger while witnessing, processing, and handling dead bodies. While on the Hamilton the applicant advanced to E-3 and

in 2001 he advanced to E-4. The applicant frequently raised his hand volunteering to take on additional duties and cross train outside of his cook rating responsibilities.

In 2002, the applicant claims he received a medical diagnosis¹ of anxiety and was placed on medication after learning a friend from a different unit had committed suicide. In 2003, the applicant reports feeling better and being off all medications while stationed in Hawaii and promoted to E-5. He had received numerous awards throughout his career to this point.

In 2005, the applicant gained knowledge that his spouse had been unfaithful, and he decided to go back on his mental health medication. He struggled to meet Coast Guard weight standards at this time as well and was at risk of being kicked out. He lost 48 pounds in less than 2 months to ensure he could continue with his Coast Guard career.

In 2006, while stationed aboard the USCGC Midgett the applicant was awarded sailor of the quarter twice and sailor of the year once. He continued to volunteer for jobs outside his service rate that would place him in more tedious situations such as Damage Control Training Team. In 2007, the applicant applied to be the Command Drug and Alcohol Representative (CDAR) and received the position on, which required him to counsel others on the impacts of drugs and alcohol. In 2007, the applicant deployed to Japan to conduct fishing operations and vessel boardings. In 2008, the applicant deployed to Mexico to assist in drug interdictions and served as the Food Services Officer (FSO). In 2009, the applicant transferred to Martha's Vineyard to prepare food for President Obama and those assigned to the presidential detail. The applicant led a team of 20 other cooks and was promoted to E-7.

In 2011, the applicant participated in Menemsha's Search and Rescue Team coming upon an unresponsive male presumed dead. The applicant's understanding of protocol required him to take turns with others to perform CPR on the dead male until paramedics arrived. This caused the applicant deep distress. The applicant also experienced an injury while working out to include two slipped discs in his back and a tear in his right knee ACL. The applicant states, he was the only cook available at the time and was forced to work injured. The applicant changed medications based on doctor recommendations, which he then began to experience suicidal thoughts. He shared these suicidal thoughts with his command who referred the applicant to a flight surgeon. Upon meeting the flight surgeon, the applicant states he was told he would be "kicked out" of service if he did not stop taking mental health medication. Additionally, the applicant claims he contacted the suicide hotline to be told there were no resources in his area, and he should go to the ER, which he did not do at this time.

In 2012, the applicant states this was the downward spiral. He shares that he was assigned to be the Equal Opportunity Advisor (EOA) for two years and taught civil rights to more than 600 people, averaging one class a month and conducting climate surveys. In 2013, the applicant states he became aware his wife was unfaithful and he decided to begin divorce proceedings. He also began the process for a Med Board, due to injuries he alleges were sustained to his knees during his deployments. Shortly after, the applicant describes being overwhelmed by his wife's abandonment of the marriage that he checked himself into a local hospital for inpatient psychiatric

¹ The medical document is not provided to support this claim. The earliest medical document of record is from 2005.

treatment. The applicant remained under inpatient care for one (1) week and changed his medication. The applicant returned home dissatisfied with his personal and professional life. That same night he decided to go to a local bar in Anchorage, Alaska that many military members frequent. The applicant asserts that he had taken his mental health medication and began drinking alcohol causing him to not remember the events of the night.

Video surveillance depicts the applicant making unwanted advances towards three (03) junior female service members. The applicant states he cannot recall the events firsthand but believes the statements of the victims to be true and supported by the video surveillance and additional witnesses. Based on the video surveillance and witness statements, the applicant details the following information. The applicant describes that he kissed a female's cheek and lightly patted her buttocks while at the bar. The applicant describes he lightly touched another female's arm. It became apparent to the applicant that these actions were unwanted and other bar patrons were displeased with his conduct towards the females, so the applicant left the bar. The applicant drove home while intoxicated only to be pulled over and receive a BAC test resulting in 0.13 BAC. After being released from holding and retrieving his wallet he had left at the bar previously, the applicant states he went to the medical clinic to declare he was in a mental health crisis. The applicant asserts that the personnel at the medical clinic stated he should be transported by the military police to the hospital to be readmitted to the psychiatric ward. However, the military police transported the applicant to the US Coast Guard Investigative Services (USCGIC) headquarters instead to be interviewed regarding the assaults from the night prior.

The applicant expresses frustration in the treatment of his case in that he was not offered mental health support during his confinement and felt pressured to accept the plea deal and now regrets not going to trial. He states the events of the night were blown out of proportion and the accusations do not hold water.² The applicant expresses some remorse for his conduct the night at the bar resulting in an assault conviction, however he states the punishment was too extreme and disproportionate to his conduct.

In support of his application, the applicant submits copies of his awards achieved over his fifteen (15) year long career, DD-214, report of the Alaskan Airline crash, court martial transcripts, and medical reports.

SUMMARY OF THE RECORD

In 1999, the applicant enlisted in the U.S. Coast Guard. The applicant held a versatile fifteen (15) year long career with the Coast Guard serving a variety of capacities often at his request by volunteering for more challenging or risk driven duties numerous times throughout his career for assignments both domestic and overseas. He made clear to command he wanted to deploy and could handle the stressful situations of the assignment. The applicant received many awards for these duties including several positive page sevens, Letter of Appreciation, and the Meritorious Team Commendation.

² Applicant Statement, through counsel, on page 12 attached to Form 149; "The prosecution used these facts to paint a picture of assault that simply doesn't hold water."

In 2006, the applicant sought marriage counseling after learning of external marital affairs of his spouse. The applicant expressed in his written statement his experience with marital discord and workplace stress throughout his military career.

On October 5, 2007, a medical record states a physician's review of the applicant and describes the applicant as a logical thinker, excellent insight, neat, and calm. The physician notes there is no sign of depression or psychological concerns, but that anxiety appears present due to the applicant's desire to be home since he was currently deployed. The applicant was also found to be overweight and encouraged to lose ten (10) pounds. The physician prescribed Zoloft to assist the applicant with his stress at work and being away.

On February 1, 2011, the applicant followed up with a physician for mood disorder (anxiety). The applicant noted his excitement about his upcoming PCS and the added responsibility. No request for medication refills was made at this time.

On October 26, 2012, the applicant sought a medication refill for his anxiety. Physician noted that the applicant is encouraged to lose ten (10) pounds.

On February 25, 2013, the applicant sought a medication refill for his hypertension and anxiety. There were no concerns noted at this visit.

On April 18, 2014, the applicant completed a follow-up for acute reaction to stress. The applicant had discovered his wife had an affair. The applicant became tearful during the examination and requested a refill of his current medication for anxiety. The applicant continued attending weekly therapy sessions.

On May 20, 2014, the applicant was determined by a medical physician to be experiencing an "acute reaction to stress with disturbance of emotions" however the physician went on to state he believed this reaction to be appropriate given the personal struggles the applicant was enduring during this time period of concern for his two children and the deterioration of his marriage. Additionally, the report stated the applicant did not display evidence of self-harm, harm of others, or the mission of the Coast Guard. There was no diagnosis of PTSD or TBI at this time.

On May 28, 2014, the applicant had right knee surgery and was released from the hospital on June 4, 2014.

On June 6, 2014, the applicant had a follow-up appointment from his knee surgery. The applicant shared discomfort from the surgery and suicidal thoughts. The applicant saw a counselor because he could no longer handle the work and home stress.

On June 19, 2014, the applicant reported for a check up to medical after a six (6) day stay in the psychiatric ward of Providence hospital. The applicant stated he felt better. The applicant stated he suffered from anxiety his entire life, predating his enlistment into the Coast Guard. He received counseling and took his anxiety medication, which he reported to be helpful. The applicant shared he felt hopeful.

On June 23, 2014, the applicant went in for psychiatric evaluation and the medical clinic identified inability to manage chronic stress with a diagnosis of anxiety. The report reviewed the

patients concerns of anxiety, depression, and “possible PTSD” but no clinical diagnosis of this disorder at this time. In fact, the medical impression listed on this report states under Axis I: “anxiety disorder not otherwise specified with features of generalized anxiety and PTSD.” The medical phrase “not otherwise specified” is used when symptoms meet the criteria for a more general diagnosis, but not for a more specific one such as PTSD. The applicant was found to have anxiety, but not PTSD. The report found the applicant not fit for duty due to his inability to manage stress and recommends medical discharge.

On July 1, 2014, the applicant was given a report that reduced his duty and suggested he be reviewed by the medical board due to his stress, knee injuries, and failure to maintain the weight³ program.

On July 10, 2014, the applicant was reviewed for anxiety, PTSD, and depression. The report explained diagnosing the applicant as challenging as the applicant gave background of an abusive childhood and having to run away at a young age. When questioned about PTSD triggers the applicant stated his father put a gun to his mother’s head in front of him when he was twelve (12) years old, and he also saw a man get his hand chopped off for stealing while deployed to the Philippines. The applicant asserts that the smell of gasoline and the presence of people of Asian descent, or similar appearance, bring back the memory of the hand chopping incident. The applicant shared during this exam the previous desire to self-harm and commit suicide but that those feelings have passed. The report indicated the applicant did not present or demonstrate a concern for continued observation. The report stated the applicant demonstrated a normal thought process and “there was no evidence of a thought disorder.”

On July 11, 2014, the applicant went to a local bar with the intent to drink while he was on anxiety medication. The applicant drank in excess and approached three (03) junior female service members. The applicant spoke sexual comments to the females and attempted to touch their bodies. The applicant forced one of the females against his body locking his arms around her and putting his mouth on her face to kiss her cheek. The bar tender forced the applicant to leave the bar and several other patrons intervened to assist the women away from the applicant. The applicant drove home while intoxicated only to be pulled over and receive a breathalyzer test resulting in 0.13 Blood Alcohol Content (BAC). The applicant committed the offense of assault, drunk and disorderly conduct, and driving while intoxicated. The applicant was placed by the command in military pretrial confinement.

On July 15, 2014, while in pretrial confinement the applicant received a referral to complete a patient substance use questionnaire in response to the DUI obtained from the night before.

³ In 2005, 2011, and 2013 the applicant received written warnings that his weigh exceeded the CG weight standards thus placing him on a probationary status.

Prior to undergoing court martial the applicant underwent a Rules for Court-Martial (RCM) 706 Board⁴ (sanity examination) to determine his mental state and capability for culpability. The applicant stated to the military judge:

“I believe I was guilty because I’ve read the statements and viewed the video that night. I do not remember that time, but I do believe that they would not lie or do anything of that nature, so I do believe that they would be telling the truth, so I do believe I did it. And I did use an open hand to grab her butt that night.”

On October 2, 2014, the applicant was found guilty in accordance with his pleas by a Special Court-Martial of four specifications of UCMJ, Article 128 (Assault Consummated by a Battery) and one specification of UCMJ, Article 134 (Drunk and Disorderly) for having unlawfully struck the buttocks of a YN3 with his open hand while at the bar, used his mouth to kiss the YN3 on the cheek, wrapped his arms around the YN3’s torso to press against her, and unlawfully placed his hand on the arm of an HS2, and unlawfully placed his hand on the lower back of a YN2. All the applicant’s actions were unsolicited and unwanted advances as confirmed by all three junior female service members reporting the incident and review of video surveillance from the bar security footage. The bartender demanded the applicant leave the bar and other patrons were equally disturbed by the applicant’s behavior towards the group of women. Lewd comments such as, “Is your body hair the same color all over?” “I want to have sex with you,” “I like the way you look when you smoke a cigarette”, and “Show me your boobs.” were also reported in the court transcript depicting the conduct of the applicant but those charges were dismissed as part of the plea agreement.

The applicant was sentenced to seven (7) months confinement and reduction in pay grade to that of an E-2. Pursuant to his pre-trial agreement (PTA), only five (5) months of the adjudged confinement was approved. His PTA also included a provision where he waived his appearance before a discharge board, even in the event that he was recommended for separation with an other than honorable discharge.

The YN3 the applicant struck on the buttocks and kissed on the cheek was transferred from Anchorage due to the size of the duty station and her embarrassment of the situation, which caused her additional frustration as this removed her from her friends and boyfriend who all remained in Anchorage, Alaska.

Following his court-martial, the applicant was administratively discharged with an other than honorable characterization of service. Pursuant to his PTA, he did not receive a discharge board. His separation was initiated on October 2 (the date of his trial), and was approved on October 20, 2014.

On October 23, 2014, the medical in-take screening of the applicant was performed at Madigan Army Medical Center Department of Behavioral Health in preparation of the applicant’s

⁴ 18 Aug 2014, Prosecution submitted a motion to compel a sanity board. The motion was granted and the 706 board convened with the results being the applicant was fit to stand trial and held no legal defenses regarding mental state of mind for the night of the incident or presently.

confinement. The medical report stated the applicant had a history of depression, and the medication Effexor had been effective in easing the applicant's depression. The applicant denied any thoughts of suicide or self-harm and the medical staff did not observe a danger to the patient himself or others. Under "past medical history" the applicant denied any head trauma. The applicant confirmed to the medical staff he has not had any prior TBI and has never been knocked unconscious, suffered a concussion, nor does he experience seizures. Additionally, the evaluation found the applicant of sound judgement seeing he voluntarily self-referred to the clinic for mental health support. The report stated the applicant's behavior was calm and appearance neat with no visible signs of distress. The applicant described his mood, "ok- maybe depressed" and shared his alcohol use and depression are to blame for his conduct that led to his current confinement. At the conclusion of the exam, the applicant was released from the medical center to return to confinement.

On July 19, 2023, the applicant participated in a TBI evaluation using a virtual tele health interview. The applicant stated, contradicting his previous statements made to medical screeners in 2014 described above, that he had a serious head trauma in January of 2007 and lost consciousness as well as experienced mental confusion, memory loss, and a concussion. The applicant told the doctor that while cooking aboard a ship he hit his head on the bulkhead coming out of the freezer. The applicant claimed he lost consciousness and had a hematoma on his forehead. He claimed to be evaluated by the onboard medic who cleared the applicant to return to duty. The applicant claimed to suffer headaches since this incident. This incident, or any head trauma, was not documented in any previous medical history. Although the applicant sought medical attention numerous times, this incident was never presented to previous medical professionals.⁵ Based on the sole testimony of the applicant, no medical exams or tests were conducted, the tele health doctor diagnosed the applicant with a TBI and behavioral health conditions.

VIEWS OF THE COAST GUARD

On September 18, 2024, a Judge Advocate (JA) for the Coast Guard submitted an advisory opinion in which it recommended that the Board deny relief in this case.

The JA argued the Coast Guard did not commit error separating the applicant with a Less than Honorable Discharge. Furthermore, the JA found that the mental health condition of anxiety and depression diagnosed to the applicant at the time of the misconduct were not contributing conditions with a connected result of the misconduct for which the applicant was separated. As a result, the JA stated liberal consideration does not apply.

The JA persisted that even if the applicant's mental health conditions did play a role, these conditions did not excuse the type of misconduct for which he was separated. The applicant stipulated at his Special Court-Martial under oath, and with the advice of counsel, "that he was

⁵ The applicant sought medical help from 2005 to 2014 at least four times, but never reported this new claim of a 2007 TBI. He confirmed on a medical document in 2014 having never lost consciousness or suffered a concussion in his lifetime.

fully mentally responsible; that is, able to appreciate the nature of his misconduct at the time of each offense.”

The JA discussed concern with the applicant’s timeliness as this request comes nearly ten (10) years after his separation. The JA argued that the applicant cannot claim he recently discovered the errors or injustices he claims to have endured because he signed multiple documents accepting a plea deal, which stipulated the facts of the misconduct. Additionally, the JA notes that the applicant stated that his delay in protesting his record sooner was due to the focus he needed to give on his family and his struggle to find gainful employment. However, the applicant noted within a year of his separation he started working as the director of food services in an assisted living home, which is directly in line with the Food Specialist skills he acquired in the Coast Guard. The JA urged the Board not to grant a waiver because such a waiver does not serve the interests of justice.

The JA recommends to the Board to deny relief to the applicant.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 18, 2024, the Chair sent the applicant a copy of the Coast Guard’s views and invited him to respond within thirty (30) days.

On October 29, 2024, the applicant, through counsel, responded to the views of the advisory opinion offered by the Coast Guard. The applicant maintains that he is eligible through liberal consideration for an upgrade in his pay grade and discharge type.

The applicant restates many of the same statements regarding timeliness being waived in pursuit of justice and a call for clemency to fully restore the applicant’s pay grade and upgrade to an honorable discharge characterization because of the applicants recent tele health diagnosis of PTSD and a TBI. Due to these conditions, the applicant claims he cannot be held accountable for his conduct when liberal consideration is properly applied.

The applicant reiterates that the punishment did not fit the misconduct and he received an unjust outcome given his fifteen years of service. He requests the Board to waive timeliness and grant his request to restore his paygrade to E-7 and change his separation description to Honorable.

APPLICABLE LAW AND POLICY

Pursuant to 10 U.S.C. § 1552(h), if an applicant’s claim for review of a discharge or dismissal is based in whole or in part on matters relating to PTSD as supporting rationale and whose PTSD is related to combat trauma, the Board (1) shall review medical evidence of the VA or a civilian health care provider that is presented by the applicant; and (2) review the claim with liberal consideration to the applicant that PTSD potentially contributed to the circumstances resulting in the discharge or dismissal or to the original characterization of the applicant’s discharge or dismissal.

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 Discharge Based on Claims of Post-Traumatic Stress Disorder, Traumatic Brain Injury, Other Mental Health

Conditions, Sexual Assault, or Sexual Harassment” (June 20, 2018) (DHS Liberal Consideration Guidance) provides, in most relevant part, that:

- Unless otherwise specified, the term “mental health condition” in this guidance refers to both diagnosed and undiagnosed mental health conditions, including PTSD and TBI.
- The Board shall waive the statute of limitations (if applicable) and liberally consider and reconsider veterans’ requests for discharge modifications based in whole or in part on claims that a mental health condition, sexual assault, or sexual harassment either excuses the conduct or poor performance that adversely affected the discharge or otherwise warrants modifying the discharge.
- Requests for discharge modifications should not be denied based solely on the absence of a pre-separation diagnosis of the asserted mental health condition or the lack of a pre-separation report of sexual assault or sexual harassment.
- An honorable discharge does not require flawless military service. Many veterans who have committed some minor misconduct are separated with an honorable discharge.
- Liberal consideration does not mandate an upgrade. Relief may be appropriate, however, in cases of minor misconduct or other conduct or performance problems commonly associated with mental health conditions, sexual assault, or sexual harassment, and even in some cases of significant misconduct if it is sufficiently justified or outweighed by the facts and circumstances.
- Absent clear evidence to the contrary, a diagnosis rendered by a licensed psychiatrist or psychologist is evidence that the veteran has or had the diagnosed mental health condition.
- A diagnosis made by a licensed psychiatrist or psychologist indicating that a mental health condition existed during military service shall be liberally considered along with other evidence.
- A determination made by the VA that a veteran’s mental health condition, sexual assault, or sexual harassment is “service connected” is not binding on the Board but shall be considered persuasive evidence that the condition existed, or the experience occurred during military service.
- The Board shall liberally consider whether the conduct or poor performance that adversely affected a veteran’s discharge should be considered excused by a mental health condition or experience of sexual assault or sexual harassment that the Board believes to have existed at the time of that conduct or poor performance.
- The Board shall liberally consider whether a mental health condition or experience of sexual assault or sexual harassment that the Board finds to have existed at the time of separation outweighs the conduct or poor performance that adversely affected the veteran’s discharge or otherwise warrants modifying the discharge.

- The Board may find that a veteran's misconduct is so severe that it should not be excused because of a mental health condition, sexual assault, or sexual harassment.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of 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 is requesting an upgrade to his discharge type from "less than honorable" to Honorable and to restore his rank of E-7. The applicant is challenging his type of discharge based in part on an alleged experience of military mental health condition.⁶ DHS's liberal consideration guidance directs the Board to waive the statute of limitations in such situations. Accordingly, the request for review shall be considered by the Board.

3. The applicant alleged that his less than honorable discharge for misconduct due to his conviction for assault and drunk and disorderly conduct is erroneous and unjust because a mental health condition caused or contributed to the behavior that resulted in the discharge. The Board may correct any military record of the Coast Guard when necessary to correct an error or remove an injustice.⁷ Error means either legal or factual error.⁸ Injustice, when not also error, is treatment by the military authorities that shocks the sense of justice but is not technically illegal.⁹ 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 record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.¹⁰ 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."¹¹ Under DHS's "liberal consideration" guidance, when deciding whether to upgrade the discharge of a veteran based on an alleged military mental health condition, the Board must liberally consider the evidence, including the applicant's claims and VA records

⁶ 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 Discharge Based on Claims of Post-Traumatic Stress Disorder, Traumatic Brain Injury, Other Mental Health Conditions, Sexual Assault, or Sexual Harassment" (June 20, 2018) (DHS Liberal Consideration Guidance), § 8.

⁷ 10 U.S.C. § 1552(a); 33 C.F.R. § 52.2(a).

⁸ *Sawyer v. United States*, 18 Cl.Ct. 860, 868 (1989), *rev'd on other grounds*, 930 F.2d 1577 (Fed.Cir.1991).

⁹ *Id.*

¹⁰ 33 C.F.R. § 52.24(b).

¹¹ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanden v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

and decide whether by the preponderance of the evidence shows that the veteran had an experience of mental health condition(s) while in the Service that could excuse the applicant's misconduct; whether the experience of mental health condition(s) actually excused the misconduct that adversely affected the discharge; and, if not, whether the experience of the mental health conditions outweigh the misconduct or otherwise warrants upgrading the applicant's discharge.¹²

4. The applicant has not submitted a pre-separation diagnosis of the asserted mental health condition, but consistent with DHS Liberal Consideration Guidance the Board does not dismiss the applicant's request on that basis.¹³

5. DHS Liberal Consideration Guidance provides that "[a] determination made by the VA that a veteran's mental health condition, sexual assault, or sexual harassment is 'service connected' is not binding on the Board but shall be considered persuasive evidence that the condition existed or the experience occurred during military service."¹⁴ The Guidance further provides that "[a]bsent clear evidence to the contrary, a diagnosis rendered by a licensed psychiatrist or psychologist is evidence that the veteran has or had the diagnosed mental health condition." In addition, "[a] diagnosis made by a licensed psychiatrist or psychologist indicating that a mental health condition existed during military service shall be liberally considered along with other evidence."¹⁵ The applicant during service denied having a TBI and was never concluded to have PTSD. The applicant never served in a combat zone as confirmed in the medical report presented by a virtual tele health doctor that nearly ten years post service determined over a video interview that the applicant suffered a TBI and PTSD. Due to the contradictions of the applicant's former medical statements while in service and length of time in pursuing these mental conditions by the applicant (nearly ten years after released from service) the Board is not inclined to accept the new diagnosis of the applicant having PTSD and TBI as a reasonable excuse for his conduct of assault of a sexual nature and drunk and disorderly behavior that created the consequence that the applicant is seeking relief from.

6. DHS Liberal Consideration Guidance provides that "[t]he Board shall liberally consider whether the conduct...that adversely affected a veteran's discharge should be considered excused by a mental health condition...that the Board believes to have existed at the time of that conduct..."¹⁶ The applicant's personal statement, which the Board must "carefully consider,"¹⁷ provides that after experiencing service-related mental health conditions (diagnosed anxiety requiring medication, PTSD, and TBI) and the stress of not making weight as well as marital stress of an unfaithful spouse he became depressed and started drinking while taking his anxiety medications. However, the misconduct related to the applicant's discharge is not similar to symptoms diagnosed to service-related PTSD or TBI. The applicant frequently had the mental capacity to seek help and did so throughout his career with medical reports describing the applicant

¹² DHS Liberal Consideration Guidance, at § 8-9.

¹³ *Id.*, at § 7.b. ("Requests for discharge modifications should not be denied based solely on the absence of a pre-separation diagnosis of the asserted mental health condition...")

¹⁴ *Id.*, at § 20.

¹⁵ *Id.*, at § 13.

¹⁶ *Id.*, at § 22.

¹⁷ *Id.*, at § 10. ("The Board shall carefully consider the veteran's own testimony, oral or written, and may find that it is sufficient by itself to establish a basis for relief.")

as calm, neat in appearance, and clear in speech. The stress of being potentially medical boarded out of service and having an unfaithful spouse, as the applicant states in his affidavit,¹⁸ appear to be the true reason the applicant made the deliberate and conscious decision to go drinking the night he assaulted in a sexual manner three (03) junior female officers and drove drunk from the bar to later be detained by local police. Therefore, applying the DHS Liberal Consideration Guidance, the applicant has failed to show by a preponderance of the evidence that the misconduct that led to his discharge should be excused by a mental health condition.

7. Notwithstanding the above, the Board finds that some relief in this case is warranted. While the Board does not find that error occurred, it must also review the applicant's request based on injustice. In this case, the applicant entered into a PTA to limit his potential sentence in exchange for pleading guilty to some of the charged offenses at his court-martial. Notably, the military judge did not sentence the applicant to a punitive discharge. However, as a part of this PTA, the applicant agreed to waive his right to an administrative discharge board and potentially receive an other than honorable discharge. The judge had the opportunity to assign a punitive discharge to the applicant at the time of sentencing and elected not to do so. The command assigned a other than honorable discharge, and while this is within the commands authority and does not amount to an error, it does strike the Board as a shock to the sense of justice. Had the applicant gone before a discharge board, he could have presented his case for a more favorable discharge. Presumably, the military judge considered the applicant's service as part of the totality of the record when determining not to adjudge a punitive discharge, which is the only type of discharge a judge is empowered to award. The Board reviews the totality of an applicant's record, noting the applicant's mental state at the time of the PTA, the documented mental instability the applicant faced due to his pre-service anxiety that continued throughout service, and the punishment already faced by the applicant assigned by the judge for the applicant's misconduct. The applicant was properly punished by a qualified judge in reduction of rank and now seeks appropriate relief as his current discharge type potentially continues to cause barriers in moving forward with VA benefits. Given all these considerations taken together, the Board finds the result of the applicant's discharge characterization unjust. The totality of the applicant's service history, surrounding mental health assertions, and the punishment issued by the judge leaving out a punitive discharge move the Board to do the same. As a result, the applicant's discharge should be upgraded to General - Under Honorable Conditions.

(ORDER AND SIGNATURES ON NEXT PAGE)

¹⁸ The Affidavit of Joseph Walker, line 45, "I decided that I need to get out of the house, because I did not think it was wise to stay there with my wife, who was actively seeing other men from the base, essentially right in front of me. So, I decided to go to Bernie's, which is a local bar in town."

ORDER

The application of former E-2 [REDACTED], USCG, for correction of his military record is granted partial relief with an upgrade in characterization of service to General – Under Honorable Conditions. The applicant's request for reinstatement of rank is denied.

December 12, 2024

