

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

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2022-073**

██████ ██████  
ME2

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**FINAL DECISION**

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on October 25, 2022, and assigned the case to a staff attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated June 27, 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 Maritime Enforcement Specialist, Second Class (ME2/E-5), asked the Board to correct his record by restoring his rate to ME1/E-6, advancing him from E-6 to E-7, upgrading his characterization of service from General—Under Honorable Conditions to Honorable, and granting him 730 days of constructive active duty and the corresponding retirement benefits that will result from the 730 constructive days.

A summary of the applicant's allegations and arguments appears below the Summary of the Record.

**SUMMARY OF THE RECORD**

The applicant enlisted in the Coast Guard on June 16, 2000, where he trained as a Machinery Technician and advanced to First Class Petty Officer (E-6) before changing rates to become a Maritime Enforcement Specialist, where he continued to serve as a First Class Petty Officer.

Investigative Reports Indicate that on or about May 13, 2015, the applicant and a female Third Class Operations Support Specialist (OS3), OS3 P, went to a local brewery with other co-

workers, where they consumed alcohol. After some time at the brewery, the applicant and OS3 P left and went to another bar before returning to OS3 P's residence. While at OS3 P's residence, the applicant suggested the two of them engage in sexual intercourse and become "friends with benefits." OS3 P rejected the applicant's proposition but despite the rejection, the applicant continued to try and kiss OS3 P. OS3 P refused the applicant's advances and pushed him away. The applicant eventually fell asleep on OS3 P's couch and OS3 P went into her bedroom alone, and fell asleep. Later that evening OS3 P awoke to the applicant having pulled down her pajama shorts and underwear, exposing her buttocks. OS3 P immediately expressed her disapproval of the applicant's behavior by pulling up her pajama shorts and underwear, pulling her bedcovers over her body, and distancing herself from the applicant. After this, the applicant told OS3 P that he was leaving. OS3 P walked the applicant to the door and ensured that the door was locked after the applicant's departure.<sup>1</sup>

On June 1, 2015, the applicant and OS3 P were temporarily assigned to the same unit in a different state in order to obtain fishery training. While at this training, the applicant approached OS3 P and attempted to discuss their previous interaction that involved the applicant's unwanted sexual advances. The applicant suggested that OS3 reconsider his sexual advances, which OS3 P refused.

On June 12, 2015, the applicant's behavior was reported to Coast Guard Investigative Services (CGIS) and on June 13, 2015, an investigation was initiated regarding the applicant's behavior. The investigation revealed the same facts as presented in the second paragraph of the Summary of the Record.

In December 2015, the applicant placed above the cut off for advancement to E-7, however, at the time, the applicant was under investigation for his alleged misconduct against OS3 P and received a mark of "Not Recommended" for advancement on his regular Enlisted Performance Evaluation for the June 1, 2015, through November 30, 2015, rating period. Accordingly, the applicant's advancement was withheld pursuant to Article 3.A.6.a. of the Enlisted Accessions, Evaluations, and Advancements Manual, COMDTINST M1000.2A.<sup>2</sup>

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<sup>1</sup> These facts were gathered from CGIS's Investigative Report.

<sup>2</sup> Article 3.A.6.a. of COMDTINST M1000.2A, states the following:

(1) Members recommended for advancement to chief petty officer, senior chief petty officer, and master chief petty officer must be superior in leadership, military characteristics, technical knowledge, and performance of duty. They must be professionally qualified to fill any chief petty officer billet of their rating. Recommendations for participation in the chief, senior chief, and master chief petty officer competition should not be initiated solely on the request of the member.

(2) In addition to the **basic eligibility and advancement requirements** of Article 3.A.5. of this Manual, all members must meet the following requirements to be eligible to participate in the appropriate service wide exam:

a. For 24 months prior to the terminal eligibility date and for the entire period from recommendation to advancement, have no unsatisfactory conduct mark, court martial (CM) or civil convictions, non-judicial punishments (NJP), and maintain the commanding officer's advancement recommendation. See Article 3.A.13. of this Manual for additional guidance for members who lose their eligibility after participating in the service wide exam.

On May 11, 2016, a Special Court-Martial was convened and ultimately convicted the applicant of one specification of abusive sexual contact in violation of Article 120 of the Uniform Code of Military Justice (UCMJ).<sup>3</sup> The applicant was sentenced to a reduction in rate to E-1, confinement for 30 days, and a Bad Conduct Discharge.<sup>4</sup>

The applicant appealed his decision to the Coast Guard's Court of Criminal Appeals (CGCCA) arguing that the Coast Guard's specification of abusive sexual contact failed to state an offense because the specification did not allege a touching of a body part or the applicant's specific intent. The applicant argued that a second error had occurred in that the evidence was neither legally nor factually sufficient to support a finding of guilty that the appellant touched OS3 P when he knew or reasonably should have known that she was asleep because the evidence was not clear that she was asleep.

On October 19, 2017, the CGCCA found in favor of the applicant and ruled that the applicant's guilty verdict of the charge and specification of abusive sexual contact were to be set aside and the charges of abusive sexual contact were dismissed.<sup>5</sup>

On April 27, 2018, the applicant's second Special Court-Martial was convened and the applicant was charged with one count of maltreatment in violation of Article 93 of the UCMJ and one count of assault consummated by a battery in violation of Article 128 of the UCMJ.<sup>6</sup> A panel of officers and enlisted members acquitted the applicant of assault, but convicted him, contrary to his pleas, of maltreatment in violation of Article 93 of the UCMJ. The panel of members sentenced the applicant to reduction from E-6 to E-5 and restriction for fifteen days. The convening authority approved the panel's conviction that same day.<sup>7</sup>

On April 27, 2018, the applicant underwent a reenlistment interview. The applicant's Commanding Officer (CO) issued a memorandum informing the applicant that it was determined

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<sup>3</sup> Article 120(d) of the UCMJ defines abusive sexual contact as, "Any person subject to this chapter who commits or causes sexual contact upon or by another person, if to do so would violate subsection (b) (sexual assault) had the sexual contact been a sexual act, is guilty of abusive sexual contact and shall be punished as a court-martial may direct."

<sup>4</sup> There are five types of discharge: three administrative and two punitive. The three administrative discharges are honorable, general under honorable conditions, and under other than honorable (OTH) conditions. The two punitive discharges may be awarded only as part of the sentence of a conviction by a special or general court-martial. A special court-martial may award a bad conduct discharge (BCD), and a general court-martial may award a BCD or a dishonorable discharge.

<sup>5</sup> *United States v. Leal*, 76 M.J. 862 (C.G. Ct. Crim. App. 2017).

<sup>6</sup> Article 93 of the UCMJ defines maltreatment as, "Any person subject to this chapter who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct." Article 128 of the UCMJ defines assault as, "(a) Assault.-Any person subject to this chapter who, unlawfully and with force or violence-

- (1) attempts to do bodily harm to another person;
- (2) offers to do bodily harm to another person; or
- (3) does bodily harm to another person;

is guilty of assault and shall be punished as a court-martial may direct.

<sup>7</sup> *United States v. Leal*, 81 M.J. 613 (C.G. Ct. Crim. App. 2021).

that he did not meet reenlistment eligibility requirements.<sup>8</sup> In addition, the CO stated that the applicant had failed to receive his recommendation for reenlistment due to his conviction.

On April 27, 2018, the applicant's CO issued a memorandum wherein he notified the applicant of his intent to discharge the applicant with a General discharge. The CO stated that the reason for his action was the applicant having been found to have committed a serious offense. The applicant was informed that because he was being considered for a General discharge, he had the right to consult with an attorney. The CO recited the applicant's misconduct as outlined in the CGIS investigation and stated that the applicant's misconduct rendered him ineligible to reenlist.

On April 30, 2018, the applicant signed a First Endorsement wherein he acknowledged the notification of his CO's intent to discharge and elected to submit a statement on his own behalf. The applicant further acknowledged that if given a General discharge, he may encounter prejudice in civilian life and that he had been given the opportunity to consult with an attorney. Finally, the applicant stated that he did not object to being discharged. The personal statement submitted by the applicant reads as follows:

Sir/Ma'am,

With regards to my proposed discharge, I ask that you consider my service record. I have never even received a negative page 7 in my entire career. I do not object to being discharged but I do object to being discharged with a general under honorable conditions discharge. I believe I have received more than enough punishment regarding this incident. While I have taken full responsibility for my actions I feel the punishment has been excessive. I have suffered wage loss, my freedom taken away from me, removed from the advancement list, reduced in rank and now my ability to request a review for reenlistment.

Though I understand that I have lost the trust of the Const Guard and losing my career is enough but don't define my career because of my lapse in judgment, which led to the biggest mistake of my career. A general discharge under honorable conditions erases my otherwise stellar career. I ask that you consider an honorable discharge with RE-4 (not recommended for reenlistment) reenlistment code. In doing so I would avoid encountering prejudice in civilian life. In any case I appreciate the opportunity to be heard and it has been an honor and a privilege to have served in the United States Coast Guard. Semper Paratus.

On June 15, 2018, the applicant was separated from the Coast Guard with a General—Under Honorable Conditions characterization of service, a narrative reason for separation of “Expiration of Enlistment,” and a RE-4 reenlistment code.

In approximately July 2018, a Chief Petty Officer (CPO) who served as one of the junior members of the applicant's second Special Court-Martial proceedings panel reported to a Coast Guard attorney that the senior member of the panel, a Captain, made comments during the

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<sup>8</sup> Article 1.E.2. of COMDTINST M1000.2B discusses the eligibility requirements a service member must meet in order to reenlist or extend their current enlistment, one of which is having “no documented offense for which the maximum penalty for the offense, or closely related offense under the UCMJ and Manual for Courts-Martial, includes a punitive discharge during the current period of enlistment.” The criteria used to determine if a service member has committed a serious offense are identified in Article 1.B.17.b.3. of the Military Separations Manual, COMDTINST M1000.4, which states, “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.”

deliberations that ignored the presumption of innocence afforded to the accused, in this case, the applicant. The CPO stated the comments made by the Captain made him feel uncomfortable, and that he believed “rank played a role” in the deliberations. According to the CPO, the enlisted personnel felt pressured to vote a certain way. For example, after the members voted to acquit the applicant of the first charge, but before the members could vote on the second charge, the Captain told the panel they had to find the applicant guilty of something.

In approximately October 2018, a post-trial Article 39(a)<sup>9</sup> session was held to investigate the CPO’s allegations involving Unlawful Command Influence (UCI) during the applicant’s second Special Court-Martial deliberations. After interviewing all panel members, the convening authority found that no prejudicial error had occurred and upheld the applicant’s conviction. However, on May 3, 2021, the CGCCA dismissed the applicant’s conviction with prejudice. The CGCCA found that the convening authority erred in three respects. First, the CGCCA found that the military judge “failed to address—either during the hearing or in her ruling—whether the defense met its initial burden, thus shifting it to the Government.” Second, the CGCCA held the military judge “failed to inquire adequately into whether deliberations were tainted by unlawful command influence.” Finally, the CGCCA found that the military judge “failed to properly apply the law regarding apparent unlawful influence.”<sup>10</sup> In addition, the CGCCA found that due to the significant nature of the 637 day post-trial delay the Coast Guard had violated the applicant’s due process rights and any attempt to have another post-trial hearing was now fruitless.<sup>11</sup> As a result, the CGCCA found that given the combined errors of insufficient inquiry into alleged unlawful command influence and the unreasonable post-trial delay, the applicant’s case warranted dismissal with prejudice.<sup>12</sup>

### APPLICANT’S ALLEGATIONS

Through counsel, the applicant argued that he was entitled to 730 days of constructive credit and corresponding retirement benefits because his command stated that the reason for his failure to meet eligibility requirements for reenlistment was his second Special Court-Martial conviction, which was dismissed with prejudice. The applicant admitted that the other reason given for his failure to meet reenlistment eligibility requirements was that he failed to garner his CO’s recommendation for reenlistment, however, the applicant claimed there is evidence that he would have received his CO’s recommendation had it not been for the faulty conviction. According to the applicant, his contentions are supported by the fact that he was recommended for advancement to E-7 prior to the sexual assault allegations. The applicant argued that regardless of the ambiguity, at a minimum, he would have been entitled to a Reenlistment Board under Article 1.E. of the Enlisted Accessions, Evaluations and Advancements Manual, COMDTINST M1000.2A, prior to his discharge, but he was denied even that due to the Coast Guard’s unlawful and now dismissed conviction. The applicant argued that constructive credit to service members is not unheard of as evidenced by the court in *Dilley v. Alexander*.<sup>13</sup>

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<sup>9</sup> Article 39 of the UCMJ empowers the military judge to convene a post-trial session to consider newly discovered evidence and to take whatever remedial action is necessary, if any.

<sup>10</sup> *Leal*, 81 M.J. at 621.

<sup>11</sup> *Id.* at 623-24.

<sup>12</sup> *Id.*

<sup>13</sup> *Dilley v. Alexander*, 627 F.2d 407 (D.C. Cir. 1980). In *Dilley*, two reserve officers were twice non-selected for promotion by an Army selection board. However, the court found that the Army’s selection board was improperly

The applicant alleged that he faced greater hardships than the service members in *Dilley*, including receiving a General discharge, removal from the E-7 advancement list, reduction in rank from E-6 to E-5, and lost compensation both on active duty and in the form of lost retirement benefits he would have otherwise enjoyed. The applicant claimed that the Coast Guard had numerous opportunities to remedy his situation, but failed to do so. The applicant pointed out that the Coast Guard was given two attempts at a Special Court-Martial and the opportunity to correct the UCI that plagued his proceedings, but failed on every front. The applicant argued that due to the Coast Guard's errors, he was discharged with over 18 years of service. The applicant stated that the injustice has gone on for far too long. The applicant argued that like the court in *Dilley*, Coast Guard Personnel Service Center (PSC) should not be reticent to give the applicant constructive service credit, backpay (including allowances and benefits), and the retirement pay he would and should have earned. The applicant further argued that he should not now have to wait for this Board to correct an obvious travesty of justice.

### VIEWS OF THE COAST GUARD

On March 14, 2023, a judge advocate (JAG) of the Coast Guard submitted a memorandum in which he adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC) and recommended that the Board grant partial relief in this case.

The JAG argued that the thrust of the applicant's argument is that his separation was based on his court-martial conviction alone, and was therefore no longer a valid basis to deny him the right to reenlist once the conviction was overturned. However, the JAG argued that the applicant's position is incorrect. The JAG claimed that the applicant was separated at the end of his enlistment due to his failure to meet eligibility requirements and because he did not receive a recommendation for reenlistment from his CO. The JAG stated that although the applicant's CO mentioned that the applicant did not meet reenlistment eligibility based on the court-martial conviction, the CO also noted that the applicant was not eligible to reenlist due to "misconduct which meets the criteria for commission of a serious offense" as outlined in Article 1.B.17.b.3. of the Military Separations Manual, COMDTINST M1000.4 (April 2017). Furthermore, the JAG explained that the applicant's CO referred to the commission of a serious offense concurrently with the conviction, stating, "[t]he reason for my action is that you received [*sic*] were found to have committed a serious offense as a result of conviction at a Special Court-Martial."

The JAG argued that although the applicant's conviction was later overturned on appeal, policy specifically contemplates separations for misconduct even when the conduct at issue is adjudicated at a court-martial that results in acquittal. The JAG stated that the applicant's CO still had sufficient evidence of the applicant's misconduct from the CGIS Report on Investigation to arrive at a finding that the applicant was not eligible for reenlistment. The JAG explained that Article 1.B.17.b.3. of COMDTINST M1000.4 expressly states that it "does not require adjudication by nonjudicial punishment or judicial proceedings. An acquittal or finding of not guilty at a judicial proceeding...does not prohibit proceedings under this provision. However, the

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conducted and that the applicants were entitled to relief, including that they be retroactively reinstated to the positions they held on the dates of their terminations, with full active duty backpay, allowances and other benefits of the service, including active duty credits (based on constructive service) for retirement purposes.

offense must be established by a preponderance of the evidence.” According to the JAG, ineligibility based on the commission of a serious offense outlined in Article 1.E.2.e. of the Enlisted Accessions, Evaluations and Advancements Manual, COMDTINST M1000.2A, does not require criminal adjudication so long as the offense is established by a preponderance of the evidence. Accordingly, the JAG argued that while the conviction alone is no longer an appropriate basis for ineligibility to reenlist, commission of a serious offense is and remains a valid basis for the applicant’s discharge.

The JAG noted that when the applicant was notified that he would be discharged, he acknowledged his underlying misconduct and did not deny it. The JAG claimed that because of the applicant’s lack of denial the Board should view the overturning of the applicant’s conviction as insufficient evidence that the applicant’s discharge was erroneous and unjust. The JAG argued that the applicant’s overturned conviction is also insufficient to evidence that the applicant is entitled to 730 days of constructive credit and corresponding retirement benefits. The JAG explained that 14 U.S.C. § 2152 requires a service member to achieve 20 years of active duty service and the applicant only achieved 18 years of active duty service at the time of his separation.

Regarding the applicant’s request to be retroactively advanced to E-7, the JAG argued the applicant is not entitled to this relief because to remain eligible for advancement, the applicant must have maintained his CO’s positive recommendation for advancement from the time he took the Service Wide Exam, until he advanced. The JAG explained that because the applicant received a mark of “Not Recommended for Advancement” prior to advancing to E-7 that the applicant failed to satisfy the advancement requirements. However, the JAG stated that the applicant’s reduction from E-6 to E-5 was the result of the overturned conviction, so the applicant is entitled to have his rate restored and to be awarded an Honorable characterization of service.

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

On May 17, 2023, the Chair sent the applicant a copy of the Coast Guard’s views and invited him to respond within thirty days. On June 16, 2023, the applicant requested a 45-day extension, which the Chair granted. However, as of the date of this decision, no response has been received.

### **APPLICABLE LAW AND POLICY**

Article 1 of the Coast Guard’s Enlistments, Evaluations, and Advancements Manual, COMDTINST M1000.2B, provides the following guidance on reenlistment eligibility:

1.E. Eligibility for Reenlistment and/or Extension. The Coast Guard offers reenlistments and/or extensions only to those members who consistently demonstrate the capability and willingness to maintain high professional standards, moral character, and an adherence to the Coast Guard’s core values. ***To be eligible for reenlistment, or extension of enlistment, a member must receive a positive recommendation from their commanding officer in accordance with Article 1.E.1. of this Manual, and meet the eligibility criteria listed in Article 1.E.2. of this Manual.***..Members who have eight or more years of total active duty and/or reserve military service that meet the eligibility criteria, but are not recommended for reenlistment by their commanding officer, are entitled to a reenlistment board, as outlined in Reference (c), Military Separations, COMDTINST M1000.4 (series). However, ***members who do not meet the eligibility criteria are not entitled to a reenlistment board, even if they have eight or more years of total active and/or reserve military service.***

*The procedures in Article 1.E.4. of this Manual must be followed for members who do not meet the eligibility criteria.*

...

2. Eligibility Criteria. Each member must meet the basic eligibility requirements listed below during their current period of enlistment/reenlistment, including any extensions, unless an appeal is approved by Commander (CG PSC-EPM) or (CG PSC-RPM):

...

e. Have no documented offense for which the maximum penalty for the offense, or closely related offense under the UCMJ and Manual for Courts-Martial, includes a punitive discharge during the current period of enlistment. Use the following guidance to assist.

(1) This criteria is aimed at serious offenses, analogous to those warranting the "Commission of a Serious Offense" basis for discharge identified in Reference (c), Military Separations, COMDTINST M1000.4 (series). Commission of a serious offense does not require adjudication by non-judicial or judicial proceedings. In some circumstances, military justice action is precluded due to state or federal court proceedings, but a commanding officer may remain convinced that credible evidence establishes, by a preponderance of the evidence, that the member has committed a serious offense. In these circumstances, if warranted by the particular facts of the case, Commander (CG PSC-EPM) or (CG PSC-RPM), may determine that a serious offense has been committed, even without a judicial adjudication, and deny the member the opportunity to reenlist.

(2) An acquittal or finding of not guilty at a judicial proceeding or not holding nonjudicial punishment proceeding does not prohibit proceedings under this provision. However, the offense must be established by a preponderance of the evidence. Police reports, Coast Guard Investigative Service reports of investigation, etc., may be used to make the determination that a member committed a serious offense.

...

4. Members Not Eligible for Reenlistment.

...

b. Commands must also submit a memorandum to Commander (CG PSC-EPM) or (CG PSC-RPM) to discharge members who do not meet the eligibility criteria and are not recommended for reenlistment/extension by their commanding officer. The memorandum (with enclosures as required) must contain sufficient facts to establish, by a preponderance of the evidence, that the member does not meet the eligibility criteria. The member must be afforded the opportunity to submit a written statement for consideration by Commander (CG PSC-EPM-1) or Commander (CG PSC-RPM- 1).

c. Members who are discharged from the active or reserve component because they do not meet the eligibility criteria will be issued a RE-3 or RE-4 reentry code.

...

3.A.4.b. Commanding Officers/Officers in Charge. CO/OICs are responsible for the execution of the advancement program. Failure to properly discharge this responsibility reflects adversely on command performance. CO/OICs are responsible for the timely evaluation of assigned active duty, SELRES, and IRR members on active duty or approved for drill for points, submitting recommendations, and coordinating with

examining boards as necessary to ensure that every eligible and recommended candidate for advancement has an opportunity to compete. The following subparagraphs briefly outline these responsibilities' various elements, which are fully amplified elsewhere in this chapter and Article 3.B. of this Manual.

...

3. The Advancement Recommendation. The CO/OICs recommendation for advancement is the most important eligibility requirement in the Coast Guard advancement system. Although minimum performance factors have been prescribed to maintain overall consistency for participation in SWE, the CO/OIC will be personally satisfied that the member's overall performance in each factor has been sufficiently strong to earn the recommendation. Before providing an advancement recommendation, the CO/OIC will review the policy governing the advancement recommendation in Article 4.D.3. of this Manual which also provides guidance on when an advancement recommendation should be withdrawn.

Note: The commanding officers' recommendation or change in rating by participation in the SWE is valid only for a specific competition and must be renewed for each succeeding competition. To be valid for the SWE, the recommendation must be on an EER effective dated after the SED of the previous SWE cycle and on or before the SED of the current SWE cycle. The commanding Officer's recommendation for advancement must be maintained from the recommendation date up to the advancement date. Personnel failing to maintain the CO's recommendation for this period shall be invalidated from the Servicewide Exam(s) in which they participated. Personnel who have been invalidated must be recommended and qualify again through a new SWE competition.

...

Article 1.B. of the Military Separations Manual, COMDTINST M1000.4 (April 2017), provides the following guidance on the separating enlisted members with a General discharge:

1.B.2.b. Procedure. In determining a member's type of discharge and character of service under these conditions, if a commanding officer believes a member should be issued a higher or lower type of discharge, the commanding officer should so recommend to Commander (CG PSC-EPM-1) and should support such recommendation with pertinent parts of the member's PDR. When the member is transferring for discharge, the commanding officer should make such recommendation before transfer with a copy to the unit to which the member is transferring.

...

1.B.2.e. Characterization of Service. Except as indicated below, the sole criterion on which the Coast Guard characterizes service in the current enlistment or period of service is the member's military record during that enlistment, period of service, or any term extension the law or the Commandant prescribes or the member consents to. In characterizing service, the following shall not be considered:

- (1) Previous service activities, including among others records of court-martial conviction, non-judicial punishment, absence without leave, or commission of other offenses for which punishment was not imposed.
- (2) Pre-service activities, except misrepresentations including omitting facts which if known would have precluded, postponed or otherwise affected the member's eligibility for enlistment.
- (3) Activities occurring under the provisions of Article 1.B.19. of this Manual.

...

Article 1.B.2.f. Standards for Discharge.

1.a. The member is eligible for discharge for one of these reasons:

[1] Enlistment expires.

[2] Service obligation fulfilled.

...

[7] Misconduct (except involvement with illegal drugs or obstructing drug urinalysis testing by tampering).

[8] The Commandant so directs.

2. General Discharge. The member's commanding officer or higher authority may effect a separation with a general discharge if the member is subject to discharge and a general discharge is warranted under the standards prescribed in this paragraph. When a general discharge is issued for one of the reasons listed in Article 1.B.2.f.(1)(a) of this Manual, the specific reason shall be stated in an entry on an Administrative Remarks, Form CG-3307, entry in the member's PDR. A general discharge applies in these situations:

...

(b) The member is eligible for discharge for one of the reasons listed in Article 1.B.2.f.(1)(a) of this Manual and:

[1] The member's final average marks are less than those shown in Article 1.B.2.f.(1)(c). and Article 1.B.2.f.(1)(d) of this Manual for the respective periods, or

[2] When based on the individual's overall military record or the severity of the incident(s) which results in discharge, Commander (CG PSC-EPM-1) directs issuing a general discharge.

...

1.B.11.l. Type of Discharge. A member discharged for enlistment expiration shall be given an honorable or general discharge as appropriate under Article 1.B.2.f. of this Manual.

...

1.B.17.b.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.

## 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 application was 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).

3. The applicant alleged that due to his overturned conviction, he is entitled to 730 days of constructive active duty credit and all corresponding retirement benefits, restoration to his previously held rank of E-6, and retroactive advancement to E-7. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in the military record, and the applicant bears the burden of proving, by a preponderance of the evidence, that the disputed information is erroneous or unjust.<sup>14</sup> Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."<sup>15</sup>

4. Administrative Separation. The record shows that unlike the first Special Court-Martial wherein part of the sentence approved by the convening authority was a bad conduct discharge, the applicant's second Special Court-Martial did not adjudge a punitive discharge. However, after the applicant's second Special Court-Martial, he was administratively separated for failing to meet reenlistment eligibility requirements. Specifically, the applicant's CO stated, "In that Maritime Enforcement Specialist First Class Petty Officer [Applicant], U.S. Coast Guard, on active duty, did, at or near [multiple locations redacted] on divers occasions between on or about 14 May 2015 and June 2015 maltreat Operational Specialist Third Class [OS3 P], a person subject to his orders by kissing her and using deliberate and repeated offensive comments of a sexual nature." The record further shows that the applicant was given notice of his CO's intent to discharge him, access to counsel, and the right to submit a statement on his own behalf. In his First Endorsement wherein he acknowledged receipt of his CO's intent to separate him, the applicant specifically stated that he did not object to his discharge. The only objection the applicant had was being issued a General discharge in lieu of an Honorable one.

The heart of the applicant's allegations is that because his sentence was dismissed with prejudice, his separation was therefore improper. However, Article 1.B.17.b.3 of the Military

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<sup>14</sup> 33 C.F.R. § 52.24(b).

<sup>15</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

Separations Manual, COMDTINST M10004, states “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.” The same position can be found in Article 1.E.2.e.1. of the Enlisted Accessions, Evaluations and Advancements Manual, COMDTINST M1000.2, which states, “Commission of a serious offense does not require adjudication by non-judicial or judicial proceedings. In some circumstances, military justice action is precluded due to state or federal court proceedings, but a commanding officer may remain convinced that credible evidence establishes, by a preponderance of the evidence, that the member has committed a serious offense. In these circumstances, if warranted by the particular facts of the case, Commander (CG PSC-EPM) or (CG PSC-RPM), may determine that a serious offense has been committed, even without a judicial adjudication, and deny the member the opportunity to reenlist.”

Here, the preponderance of the evidence shows that the applicant made inappropriate sexual advances toward a subordinate, OS3 P, offenses that the applicant acknowledged and apologized for in his personal statement to the separation authority. Specifically, the applicant stated, “[d]on’t define my career because of my lapse in judgment, which led to the biggest mistake of my life.” Therefore the Board finds that the applicant’s misconduct rendered him ineligible to reenlist and his command and PSC were authorized under Coast Guard policy to administratively separate the applicant due to the commission of a serious offense. The applicant has failed to allege any error committed by the Coast Guard in regard to his administrative separation and the Board could find none.

Further, the Board finds no injustice relative to the applicant’s administrative separation. Regardless of the outcome of the courts-martial, a preponderance of evidence reflects the applicant committed a serious offense and acknowledged as much in his statement during the separation process. Accordingly, the Board finds that the applicant has failed to prove, by a preponderance of the evidence, that the Coast Guard’s decision to administratively separate him for failure to meet reenlistment eligibility requirements due to the commission of a serious offense was in error or unjust.

5. Constructive Active Duty Credit. The applicant has alleged that pursuant to the *Dilley v. Alexander* case, he is entitled to 730 days of constructive active duty and all retirement benefits that would flow from those constructive days, because that is the amount of time he would have served before becoming retirement eligible, but for the denial of his request to reenlist based on the now-overturned conviction. In *Dilley*, the service members had been twice passed over for selection by boards that were not convened in accordance with policy. Because the service members involved were reservists, the board was required to include senior reserve officers during the selection process, but the selection board was absent of any senior reserve members. Accordingly, the *Dilley* court found that the Army had prejudiced the service members and that because the selection process that resulted in the service members being twice passed over and ultimately separated was erroneously convened, the service members were entitled to be reinstated and given constructive credit for the time they missed. While granting constructive service credit is within the scope of this Board’s authority, the Board finds such relief is not warranted in this case. Because the Board has already found in finding 4 that the applicant’s separation was supported by both the evidence of record and policy, and was not otherwise unjust, the Board also

finds that the applicant has failed to demonstrate by a preponderance of evidence that he should be awarded constructive service credit in order to reach retirement eligibility or the benefits that would have flowed from his retirement.

6. Reenlistment Board. The applicant alleged that but for the erroneous Special Court-Martial he would have at a minimum been entitled to a reenlistment Board. However, this allegation is not supported by the other evidence of record. The Board's review of the record shows that the applicant was accused of making inappropriate sexual advances toward a subordinate, including pulling down her shorts and underwear while she was sleeping, which led to the exposure of her buttocks. The applicant's misconduct led to him being subjected to two Special Court-Martials and though both contained errors and were subsequently dismissed, the applicant was ultimately administratively separated at the conclusion of the second Special Court-Martial. At the time of the applicant's discharge he had over 18 years of creditable service. Finally, the record shows that the offenses the applicant was accused of were in violation of Articles 93—Maltreatment and 128—Assault Committed by a Battery of the UCMJ. Article 93 in the Manual for Courts-Martial (MCM) provides that the maximum punishment for a service member guilty of violating Article 93 is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for two years. The MCM further states that the maximum punishment for violating Article 128 of the UCMJ is a bad conduct discharge, forfeiture of all pay and allowances, and confinement for three years. Article 1.E. of the Enlisted Accessions, Evaluations and Advancements Manual, COMDTINST M1000.2B, states that for a service member to be eligible for reenlistment, the member must receive a positive recommendation from their CO, in addition to meeting the eligibility requirements enumerated in Article 1.E.2. of the same manual. Article 1.E.2.e of COMDTINST states that for a member to be eligible for reenlistment, he can have no documented offense for which the maximum penalty for the offense, or closely related offense under the UCMJ or Manual for Courts-Martial, includes a punitive discharge.

In the applicant's case, not only did the applicant fail to secure his CO's recommendation for reenlistment, but he also failed to meet reenlistment eligibility requirements as outlined in Article 1.E.2.e. of COMDTINST M1000.2. Article 1.E. of COMDTINST M1000.2 states:

Members who have eight or more years of total active duty and/or reserve military service that meet the eligibility criteria, but are not recommended for reenlistment by their commanding officer, are entitled to a reenlistment board, as outlined in Reference (c), Military Separations, COMDTINST M1000.4 (series). *However, members who do not meet the eligibility criteria are not entitled to a reenlistment board, even if they have eight or more years of total active and/or reserve military service.*

Therefore, because the applicant not only failed to get a positive recommendation from his CO, but also failed to meet the eligibility requirements because the offenses for which he was accused carried a maximum punishment of a punitive discharge, the applicant was not entitled to a reenlistment board at the time of his separation, regardless of how many years he had served.

7. Reinstatement to E-6. The applicant has alleged, and the Coast Guard has agreed, that because his conviction was dismissed with prejudice, the punishments that flowed from that conviction are now void, including his reduction from E-6 to E-5. The Board agrees. Unlike the applicant's administrative separation, which is supported by Coast Guard policy and evidence in the record, the applicant's reduction in rate could not have occurred without some kind of formal adjudication such as a Court-Martial or Non-Judicial Punishment. Accordingly, the Board finds

that the applicant has proven, by a preponderance of the evidence, that he is entitled to the reinstatement of his previously held rate of E-6 and any and all backpay that flows from that reinstatement.

8. Retroactive Advancement to E-7. The applicant alleged that but for his erroneous Special Court-Martial he would have received his CO's positive recommendation for advancement. However, the Board is not persuaded. The record shows that prior to the conclusion of his second Special Court-Martial on April 27, 2018, the applicant received his regular evaluation for the June 1, 2015, through November 30, 2015, rating period, wherein he failed to secure his CO's recommendation for advancement. Specifically, the CO stated, "ME1 [Applicant] is not capable of satisfactorily performing the duties and responsibilities of the next higher paygrade." The Board's review of the record shows that at the time of the applicant's evaluation, November 30, 2015, the applicant's CO believed that the preponderance of the evidence supported a finding that the applicant had made inappropriate sexual advances toward his subordinate, including pulling down her shorts and underwear while she slept, and therefore was undeserving of a recommendation for advancement. The Board notes that at no point in his application has the applicant disputed these allegations and in his letter to the convening authority he admitted to a "lapse of judgment" that was the "biggest mistake" of his life.

Article 4.D.3 of COMDTINST M1000.2 states, "While the rating chain must consider past performance, it must also consider and base the advancement recommendation on the member's potential to perform satisfactorily the duties and responsibilities of the next higher pay grade, qualities of leadership, personal integrity, and adherence to the Service's core values," and "The Commanding Officer's recommendation for advancement *must be maintained* from the recommendation date up to the advancement date. Personnel failing to maintain the CO's recommendation of ready for this period must be invalidated from the Servicewide Exam(s) in which they participated." As already stated, the applicant failed to secure his CO's recommendation for advancement and was therefore ineligible for advancement to E-7 at the time of the 2015 promotion cycle. Therefore, the Board finds that the applicant has failed to prove, by a preponderance of the evidence, that he is entitled to retroactive advancement to E-7.

9. Honorable Characterization of Service. The applicant requested that his characterization of service be upgraded from General to Honorable. The Coast Guard has stipulated to the applicant's request, and recommended that the applicant's characterization of service be upgraded from General to Honorable but provided no cognizable supporting arguments other than "an honorable characterization of service may be awarded even for discharges based on misconduct." The Board is not persuaded by the applicant's or the Coast Guard's position that the applicant is entitled to an upgrade in his characterization of service. First, just as the policy states that a service member "may" be awarded an honorable characterization of service even for discharges based on misconduct, policy equally allows for General discharges when the circumstances surrounding the separation are severe enough to warrant a General characterization. Article 1.B.2.f.b.2. of the Military Separations Manual, COMDTINST M1000.4 (April 2017), states:

The member's commanding officer or higher authority may effect a separation with a general discharge if the member is subject to discharge and a general discharge is warranted under the standards prescribed in this paragraph. When a general discharge is issued for one of the reasons listed in Article 1.B.2.f.(1)(a) of

this Manual, the specific reason shall be stated in an entry on an Administrative Remarks, Form CG-3307, entry in the member's PDR. A general discharge applies in these situations:

...

(b) The member is eligible for discharge for one of the reasons listed in Article 1.B.2.f.(1)(a) of this Manual and:

...

[2] When based on the individual's overall military record or the severity of the incident(s) which results in discharge, Commander (CG PSC-EPM-1) directs issuing a general discharge.

As referenced above, the applicant's commanding officer or higher authority had the authority to direct that the applicant receive a General discharge, so long as the applicant was subject to discharge and a general discharge was warranted under the standards prescribed in policy. Specifically, policy states that the applicant was eligible for a General discharge based on the severity of the incidents that resulted in his separation. Here, the record shows that the applicant committed serious misconduct when he made unwanted sexual advances toward one of his subordinates, not once but twice, including entering her bedroom uninvited, removing her blankets, and pulling down her shorts and underwear while she slept. The applicant disputed none of these allegations in his application to this Board and stipulated to his misconduct in a personal statement he made to the separation authority. It was within his Command's authority and discretion to effect a General discharge based on the applicant's misconduct. The Board finds that the applicant's misconduct was severe and his General discharge was supported by facts and policy. Finally, in his April 27, 2018, memorandum, "Notification of Intent to Discharge," the applicant's Commanding Officer outlined the misconduct that led to the applicant's separation and subsequent General discharge, as required by policy. 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 it issued him a General characterization of service instead of an Honorable characterization of service. His request for an upgraded characterization of service should be denied.

10. For the reasons outlined above, the applicant has not met his burden, as required by 33 C.F.R. § 52.24(b), to overcome the presumption of regularity afforded the Coast Guard that its administrators acted correctly, lawfully, and in good faith.<sup>16</sup> He has not proven, by a preponderance of the evidence, that his administrative separation was erroneous or unjust warranting 730 days of constructive active duty service, retroactive advancement to the rank of E-7, or an upgraded characterization of service. Therefore, his request as it pertains to those issues is denied. However, he has met his burden as to the reinstatement of his rank of E-6.

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

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<sup>16</sup> *Muse v. United States*, 21 Cl. Ct. 592, 600 (1990) (internal citations omitted).

