

lated. While the investigation was pending, his ADOS tour was cut short. He was released from active duty on April 12, 2013, and returned to drilling in his Selected Reserve assignment.

The applicant stated that as a result of the investigation on November 26, 2013, he appeared before an Administrative Separation Board (ASB), and the ASB recommended his retention in the Reserve. However, when his commanding officer (CO) forwarded the ASB Report to the Final Reviewing Authority (FRA), the FRA disapproved the recommendation of the ASB and directed his separation from the Reserve with a general discharge and an RE-4, which was effected on March 6, 2015.

The applicant stated that he has served faithfully in the Coast Guard since 1999 and never neglected his duties or deliberately committed any illegal act. When he was told in September 2011 that his full-time active duty employment was ending, he was very stressed and focused on finding another job. When he reported to the Coast Guard personnel office, he was directed to sign and initial numerous documents. He was told that policy required that he sell back all of his unused leave. The applicant stated that he was not asked how much unused leave he had and did not tell them how much leave he had accumulated. Instead, he signed the form that the personnel office had prepared for his sale of leave, believing that the Coast Guard had maintained accurate records. The number of days of accumulated leave on this form was written by hand, and he stated that he did not write it.

The applicant stated that in October 2011, after his release from active duty, he received a single final payment comprising several entitlements, including the sale of leave. He noticed the direct deposit in his bank account but did not receive or review a Leave and Earning Statement. He was unaware that this payment included an overpayment for selling leave he had actually used before his release from active duty and he assumed the payment was accurate.

The applicant stated that pursuant to the investigation, he was shown documentation indicating that he had received payment for many more days of leave than he had actually accumulated. He agreed to repay the overpayment, and the Coast Guard began making deductions from his pay.

The applicant stated that during the ASB hearing, the Recorder who presented the case and evidence to the board members “failed to establish [his] guilt.” The applicant stated that he received the overpayment as a result of personnel errors and not because of any malfeasance by him. Instead, personnel had failed to process his leave requests in a timely manner and wrote the number of days of leave to be sold on the form for selling leave by hand. The applicant stated that he “had nothing to do with creating or making the error and never had any reason to suspect [he] had received extra money until the USCG told [him] about it.”

The applicant stated that the FRA’s decision to disapprove the ASB’s recommendation is the most unfair act he has witnessed during his 15 years in the Reserve. He alleged that the FRA “distort[ed] the record in a light more favorable to an agenda that was not presented to the [ASB].” In addition, he argued that the FRA ignored his service record, his willingness to repay the money, and the fact that he was never in a position to cause, prevent, or influence the over-

payment. The applicant stated that his only fault was in not scrutinizing the Coast Guard's determination of his final pay allotment.

The applicant argued that the FRA should not have disapproved the ASB's recommendation unless it was inconsistent or without merit. He argued that if one person can disapprove a board's decision, there is no reason to have a board or hearing, and he was entitled to one under the rules. The applicant noted that unlike the FRA, the ASB members "were able to assess the demeanor, conviction, and manner of the witnesses. As such, they were able to hear and see the stuttering, confused facial expressions, witness delays in responses, and many other aspects of live testimony that make up for the ... right to confront witnesses." In his case, the applicant stated, the ASB was able to compare the quality of his testimony with that of the numerous witnesses, who were "solely responsible for processing [his] pay, leave calculations, and discharge entitlements," and were "all trying to cover up their own laziness, incompetence, and errors." Based on the evidence, the ASB concluded that he "had done nothing to imply deception, fraud, or wrongdoing."

The applicant argued that separation with a general discharge is too harsh a punishment for his failure to scrutinize the work of the administrative personnel who caused the erroneous overpayment. He served honorably from 1999 through 2015, and the FRA's action will prevent him from earning a Reserve retirement even though all he did was to fail to check other people's work.

In support of these allegations, the applicant submitted several official documents, which are included in the Summary of the Record below.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard in October 1999, became a food service specialist (FS), and performed more than eight years of active duty before he was honorably discharged from active duty in November 2007. Upon his discharge, the applicant enlisted in the Coast Guard Reserve, switched ratings to maritime enforcement specialist (ME), and was assigned a paid billet in the Selected Reserve.

On October 1, 2009, the applicant began serving on ADOS active duty orders. While on active duty, he earned 30 days of leave per year. Two years later, on September 30, 2011, he was released from active duty with an honorable character of service and returned to the Selected Reserve. Before his release, on September 19, 2011, the applicant and his supervisor signed a Career Intentions Worksheet (CIW) on which he indicated that he was selling "all" of his days of accumulated leave. The number 48 was entered by hand beside this line of the CIW. The applicant's DD 214, which he also signed, shows that he was being paid for 48.0 days of accrued leave.

Report of Investigation

On December 12, 2011, the applicant returned to active duty in the same office on ADOS orders. In November 2012, a new supervisor was assigned to the office, and she complained to

the command about the applicant's past and current use of leave. On December 3, 2012, the applicant's CO authorized a standard investigation of the applicant's use of leave and appointed an investigator.

On December 20, 2012, an officer submitted a report of an investigation (ROI) into the applicant's use of leave. The ROI states that the investigation was initiated after the applicant's new supervisor found that he was taking too much leave and was "absent from work more than what would have been allowed during this tenure" at that office. The ROI states that in FY 2010 and 2011, the applicant had approved leave requests for 57 days, had submitted by email requests for 32 of these days of leave, but had been charged with only 13 days of leave in Direct Access. Moreover, he had actually taken 89 days of approved and unapproved leave in FY 2010 and 2011, even though he had earned only 60 days. Then, upon his discharge at the end of FY 2011, he sold 47 days of leave, for which he was paid \$5000.27. Thus, he either used or was paid for 136 days of leave in FY 2010 and 2011, 76 of which were unearned.

The ROI states that after the applicant returned to ADOS in December 2012, his leave continued not to be properly charged to his account. In FY 2012, the applicant earned 25 days of leave (because he was not on active duty in October and November 2011), had approved leave chits for 28 days of leave, had actually used 37 days of approved and unapproved leave, but had been charged for only 12 days of leave.

The ROI states that all staff at the applicant's office are required to sign in on a daily report when they report for work and that the member's status would be entered on the daily report if he or she did not show up. The investigator stated that he had "checked this report and at no time was [the applicant] signed in to work in the office when it showed that he was in a leave status on the [office's] shared folder calendar."

The ROI states that in FY 2010, 2011, and 2012, the applicant had earned a total of 85 days of leave but taken 173 days of leave and that he had admitted that he had knowingly taken unauthorized leave. The ROI also states that he "admitted to selling back 47 days of leave to the Coast Guard at the end of Fy11 that he knew he shouldn't have had to sell."

The ROI states that the applicant and others had failed to properly process his leave and the applicant had failed to follow orders to submit all of his approved leave chits for processing. The applicant's civilian supervisors had approved 106 days of leave for him without ever checking to see if his leave had been properly processed, and the applicant had "knowingly placed himself in an "unapproved leave status." In addition, at the end of FY 2011, the applicant had not ensured that his leave balance was correct and "knowingly sold back to the Coast Guard 47 days of leave that he did not have in the sum of \$5000.27."

The investigator concluded that the applicant should be charged and punished at mast for being absent without leave (AWOL) in violation of Article 86 of the UCMJ; failing to obey an order or regulation in violation of Article 92; and larceny and wrongful appropriation in violation of Article 121. He also concluded that the overpayment should be recouped.

The ROI includes the applicant's leave records and the unit's daily reports and calendar, showing when staff members had signed in or were on leave. The ROI also includes a letter his new supervisor sent to the investigator dated December 18, 2012. She wrote that on November 14, 2012, she sent an email to the command asking about leave approval procedures. The office staff had complained to her that the applicant "came and went as he pleased," and she had noticed such conduct herself. Her letter states that when she reviewed the office calendar, she found a pattern of absences and began tallying all of the days he had been out of the office. She found that he had taken many more days of leave than he was entitled to. In addition, in Direct Access, she found that the applicant had only been charged with 28 days over the three-year period. Then she learned that he had sold leave at the end of FY 2011. She stated that she was outraged that the applicant "had taken advantage of the system since he was the only person in uniform in the office. The staff trusted he was doing the right thing." The supervisor wrote that in a meeting with the applicant on November 15, 2012, she discussed her concerns about his absences and told him that his absences did not match his leave account. She set standards for him and also sent him a follow-up email detailing the counseling she had provided. She also reported the problem of his uncharged leave to the District.

An undated but signed Miranda/Tempia rights acknowledgement in the ROI shows that the applicant was advised of the allegations against him and of his rights. The applicant indicated that he did not desire to consult a lawyer and desired to answer questions and to make a statement. The form notes that any statement he submitted should begin with this phrase: "With full understanding of my rights, I make the following statement freely, voluntarily, and without any promises or threats made to me."

On December 20, 2012, the applicant wrote and signed the following statement for the investigation:

With full understanding of my rights, I make the following statement freely, voluntarily, and without any promises or threats made to me.

I, [applicant's name and service number] would like to accept full responsibility for any leave discrepancies that may have taken place from fiscal year 2010 to present. While assigned to [his unit] I fully acknowledge that I knew what was required of me pertaining to the Coast Guard and [the unit's] leave policies. I also acknowledge the sale of leave that should have been charged for during fiscal years 2010 and 2011. I would first like to apologize to the Coast Guard for my lack of integrity in this matter. I know I did not exhibit the Coast Guard's core values in executing the actions stated above. I wish to repay at the conclusion of this investigation any money that is determined I may owe due to the sale of leave at the end of fiscal year 2011. I will continue to cooperate fully with any further inquiry regarding this investigation. My only objective now is to resolve this matter as quickly as possible so all members involved can get back to our Coast Guard jobs. I again would like to apologize for my actions regarding my leave. I have been in the Coast Guard for over thirteen years and know that the member is ultimately responsible to account for his or her leave.

On January 28, 2013, the applicant was counseled on a CG-3307 (“Page 7”) about “disappearing for long periods of time from the office without notifying other staff members of his whereabouts.” The applicant refused to acknowledge this Page 7 by signature.

On March 13, 2013, the applicant was counseled on a Page 7 that the results of an administrative investigation had shown that he had taken leave but not been charged for it. Specifically, during FY 2010 through FY 2012, he had earned 85 days of leave but used 121 and was only charged for 25. The Page 7 also notes that he had “sold 47 [sic] days at the end of FY11.” The Page 7 lists the dates of 96 days of leave that the applicant took from November 2009 through June 2012 but that were not charged against his leave balance, and it advises him that his leave account would be adjusted. Of the 96 dates of authorized leave that were not charged to his account, 72 occurred before his release from active duty on September 30, 2011. The applicant refused to acknowledge this Page 7 by signature.

On March 26, 2013, the applicant’s command advised him on a Page 7 that pursuant to COMDTINST 1330.1D, the Coast Guard could terminate ADOS orders at any time “due to failure of the reservist to adequately perform the requirements of the duty,” such as misconduct. The Page 7 notes that an investigation had shown that the applicant had made a false official statement on his Career Intentions Worksheet by indicating that he would sell all of his days of leave while knowing that his leave balance was not accurate. In addition, the Page 7 states that the investigation had shown that he committed theft by false pretenses by accepting about \$5,000 in pay for the sale of leave that he knew he was not entitled to. The Page 7 also notes that the investigation had shown that the applicant had “requested many additional days of leave you had not earned and failed to ensure you were being properly charged for them.” Therefore, his ADOS orders would be terminated based on his misconduct, which would lead to a disciplinary and/or administrative proceeding, and by policy he would be returned to his billet in the Selected Reserve. The applicant refused to acknowledge this Page 7 by signature.

On April 12, 2013, the applicant was released from active duty with an honorable character of service and returned to the Selected Reserve.

Discharge Notification

Before his release from active duty, the applicant was informed by his CO in a memorandum dated March 28, 2013, that his CO was initiating his discharge from the Reserve for misconduct due to his commission of a serious offense—

in that you made a false official statement and committed theft of government property by false pretenses. On or about 19 September 2011, you signed a Career Intentions Worksheet, wherein you planned to sell “all” your days of leave, knowing that your accrued leave balance was not accurate and that you should have had a smaller accrued leave balance than what was recorded. You then received an amount of pay from the selling of leave (approximately \$5,000) for which you knew you were not entitled, and kept said pay, thereby committing a theft. Furthermore, you requested many more days of leave you had not earned and you failed to ensure you were being properly charged for them.

The CO informed the applicant that he was recommending that the applicant receive an administrative discharge under other than honorable (OTH) conditions but that the type of discharge the applicant received “rests solely with the Coast Guard’s separation authority.” The CO advised the applicant of the major consequences of an OTH or general discharge. He also advised the applicant that he had a right to consult an attorney, to submit a statement on his own behalf, and to present his case with legal representation before an ASB.¹

On April 3, 2013, the applicant acknowledged the CO’s notification of separation. He acknowledged consulting counsel, waived his right to submit a statement, and requested an ASB, which he was entitled to because he had more than eight years of active service.

On May 3, 2013, the applicant’s CO submitted to the Personnel Service Center his recommendation that the applicant receive an OTH discharge for misconduct due to commission of a serious offense. The CO stated that the applicant had made a false official statement by signing the CIW, indicating that he was selling “all” of his remaining leave even though he knew his leave balance was inaccurate, and that he had accepted a payment of about \$5,000 for the sale of leave that he knew he was not entitled to. The CO stated that the applicant had made a statement admitting that he had known that his leave balance was inaccurate after he was advised of his Miranda/Tempia rights. The CO noted that the applicant had made no attempt to ensure that his leave balance was corrected when it was time to sell his leave and no attempt “to reconcile the obvious overpayment.” Moreover, the CO stated, the applicant “continued to take leave without that leave being properly charged against his pay account. While he submitted 30 days of leave to the SPO for entry into Direct Access ..., he continued to take leave, both charged and not charged, for a total of 121 days. Including the 47 days of leave sold, [his] total leave taken/sold for the approximately three years that were audited is 168 days. His total leave accumulated for this time period was 85 days.”

On May 6, 2013, the District command forwarded the CO’s recommendation for discharge to the Personnel Service Center and recommended that the applicant be discharged for misconduct. He stated that the evidence “clearly documents the commission of a serious offense and illuminates the gravity of [the applicant’s] actions. [His] conduct does not align with the Coast Guard’s core values of Honor, Respect, and Devotion to duty.”

¹ Article 1.B.1. of the ASB Manual, COMDTINST M1910.2, states the following regarding the purpose of an ASB:

Coast Guard discharge and retention decisions are driven by the needs of the Coast Guard overall, not by the needs of individual members or individual commands. Members do not have a right to remain on active duty in the Coast Guard, regardless of the length of their service or the hardship their separation might cause. Nevertheless, a member’s military career often represents a considerable investment, both by the member and by the service. In addition, when a member is discharged, the Coast Guard’s characterization of that service – as honorable, general under honorable conditions, or other than honorable – and occasionally other determinations surrounding that decision, can have a profound impact on the member’s future. Sound personnel management, as well as fairness, dictate that the decision to separate such a member be carefully considered, and that the member be provided an opportunity to be heard and to present and challenge evidence to be considered by the separation authority.

Administrative Separation Board

On November 26, 2013, an ASB convened to consider whether the applicant should be retained in the Reserve.² The applicant was represented by counsel. In the ASB's report, dated February 27, 2014, the ASB made several findings of fact, including the following:

- Emails show that the Deputy Chief of the applicant's office, which was staffed by civilians except for the applicant, was instructed by email to send approved leave to the Sector administrative office by email for processing.
- That a new supervisor, whose complaint had initiated the investigation, had only been in the office for one month and had "admitted that her remarks stated in her letter [to the investigator] were exaggerated and not full based on facts: 'In three years, the member has not worked a full week'. This objective statement is based on opinion and [she] agreed it was difficult to prove because she had only been his supervisor for one month."
- The applicant had sent 24 emails to the Sector administrative office "to enter 32 days of approved leave requests" and that office "failed to enter 24 of those days of leave requests into Direct Access."
- On September 19, 2011, the applicant and his supervisor signed a Career Intentions Worksheet (CIW). On the CIW, the number 48 was written in red ink next to the "Sell all days of leave" block.
- Under the Pay Manual, administrative personnel are responsible for making accurate entries in the Direct Access and JUMPS databases to ensure that all personnel records are correct, and two administrative personnel should be reprimanded "for not following Coast Guard policy which allowed [the applicant] the opportunity to violate the UCMJ."
- The Miranda/Tempia rights form signed by the applicant and the investigator was not dated by the investigator.
- The investigator had recommended NJP, not discharge.

The ASB also reached several conclusions, including the following:

- The evidence showed that there was a basis to consider separating the applicant for the commission of a serious offense.
- Not all of the elements for a "false official statement" violating Article 107 of the UCMJ were met and the basis of the charge was not proven by a preponderance of the evidence

² Article I.C.1. of the ASB Manual states the following regarding the scope of an ASB's inquiry:

An ASB documents the facts relating to the Respondent's conduct, competency, background, character and attitudes, so that the separation authority may properly determine whether the member should be retained or separated, the reason for separation, and the proper characterization of the member's service that should be reflected in any separation documents. In its deliberations regarding separation, the Board's foremost consideration is whether separation or retention is in the best interest of the Coast Guard. Available statements from superiors and peers, and available records bearing upon Respondent's suitability for retention, are among the types of evidence to be considered by the Board.

because the applicant's supervisor had had no concerns about the applicant's conduct or performance in 2011 and his marks had been favorable; because the CIW is a worksheet, not an affidavit; because administrative personnel would be expected to reconcile a member's leave total with other records; and because someone other than the applicant might have written the number 48 on the form.

- In charging the applicant with larceny or wrongful appropriation, in violation of Article 121 of the UCMJ, the Coast Guard had relied on the applicant's own written statement, dated December 20, 2012, which might have been written before the applicant was informed of his Miranda/Tempia rights, since that form was not properly dated. The ASB found that the lack of a date on the rights advisory form had led to speculation about whether the applicant's statement was submitted voluntarily or coerced.
- The charge of wrongful appropriation was supported by the fact that the applicant had been paid for leave he had used, but "there was no malice or intent to deprive the government of funds."
- The applicant "did use leave, and the temporary intent to deprive is an appropriate charge based on the preponderance of the evidence." However, a charge of larceny or permanent intent to deprive was not supported by the evidence.
- As a prior food service specialist with a government credit card, the applicant "was credited with reporting excess galley funds; a situation that could have presented an opportunity for larceny. [He] has integrity and did not desire to permanently deprive the government of value."
- "The leave request/approval system was not functioning properly and the respondent was not adequately set up for success." The ASB found a lack of training and proper oversight of the applicant's use of leave.
- There were inaccuracies and inconsistencies in some of the evidence, such as whether the number of days of leave sold was 47 or 48, and the accuracy of all 96 dates listed on the Page 7 dated March 13, 2013, had not been confirmed. (Two of the 96 dates were questioned by the applicant's counsel: the Friday after Thanksgiving in 2010, which he claimed was a day of liberty granted by the President, and the date June 12, 2012, which should have been June 13, 2012.)
- The applicant's own, known entries on the CIW were correct.

The ASB recommended that the applicant be retained in the Reserve and that other personnel be reprimanded for their own failures to follow proper procedures.³

On February 28, 2014, the senior member of the ASB forwarded the ASB Report to the applicant's CO noting that the ASB had found that there was no basis for a charge of larceny or false official statement; that there was a basis for finding that the applicant had committed wrongful appropriation in violation of Article 121; and that the applicant's retention in the Reserve was warranted.

³ The latter recommendation was disapproved because whether other personnel should be reprimanded was beyond the ASB's purpose and authority.

Response of Applicant's Counsel

In a memorandum dated April 1, 2014, the applicant's counsel objected to the finding that the applicant had violated Article 121 of the UCMJ for two reasons: First, he claimed that they were never notified that the applicant was being accused of wrongful appropriation, instead of larceny, under Article 121. The phrase "wrongful appropriation" was never mentioned during the hearing and was only considered by the ASB when it consulted counsel after the hearing. Therefore, he argued, the applicant was never notified of the basis for his discharge prior to the hearing, and his counsel did not know to present evidence or arguments on this charge. Second, the applicant's counsel noted that the ASB Report states in one place that the applicant had "no malice or intent to deprive the government of funds." He argued that because the ASB found that the applicant did not have the requisite intent, his conduct did not meet the elements for wrongful appropriation. Therefore, he argued, the FRA should disapprove the ASB's finding that the applicant had committed the serious offense of wrongful appropriation.

On August 26, 2014, the senior member of the ASB noted that the hearing had been delayed due to the government shutdown in 2013 because the Coast Guard could not fund the applicant's counsel's travel.

Recommendation for Separation by CO

On April 16, 2014, the applicant's CO forwarded the ASB Report to the District command and the FRA with a recommendation that the applicant be discharged, instead of retained. The CO noted that the report focuses on the CIW but that "other significant factors were also considered prior to submitting the recommendation for discharge." The CO noted that in addition to signing the CIW, the applicant had reviewed and signed his DD 214, which showed that he was selling 48 days of leave, but he never reported the error. The CO also noted that as a food service specialist, the applicant had been counseled for purchasing a soda with the galley's credit card. The CO stated that the report stated that others' failures had allowed the applicant to violate the UCMJ, but "any complicity they may have had in 'allowing [the applicant] the opportunity to violate the UCMJ' does not negate the fact that, by his own admission, [the applicant] knew he had violated the UCMJ by selling leave he had not earned."

Regarding the applicant's attorney's memorandum dated April 1, 2014, the CO stated that the applicant was on notice about the charge of wrongful appropriation because it is a lesser included offense under Article 121 and that the ASB had expressly found that the applicant had a "temporary intent to deprive" the government of the overpaid amount.

The CO stated, regarding the applicant's written statement for the investigation, that it showed that he understood what was required of him regarding his leave and had expressly apologized for his "lack of integrity in this matter." The CO stated that although the applicant's supervisors had failed to provide "the necessary oversight for the charging of leave," the applicant "is the sole bad actor that took advantage of this situation by not submitting leave requests and by not reporting that his accumulation of leave was well beyond what it should have been. He is a First Class Petty Officer who has been affiliated with the Coast Guard for over fourteen

years, not a non-rated member or a new employee who has not had the opportunity to become familiar with leave policy and procedures.”

The CO concluded that the applicant had taken “full advantage of a permissive environment until a senior military member arrived in the office; that he knowingly sold leave that he should have previously been charged for; and that he willingly chose not to report that his leave balance was well above what he should have accumulated.” The CO recommended that the applicant be discharged.

Final Action by the FRA

On February 6, 2015, the FRA disapproved the ASB’s recommendation that the applicant be retained in the Reserve, instead of discharged. The FRA explained his decision as follows:

My review of the record indicates no mitigating circumstances or exceptional situation that would warrant consideration for retention of [the applicant] after he knowingly took full advantage of a permissive environment until a senior military member arrived and completed an audit of his leave status. The record clearly indicates that between FY2010-2012, [the applicant] knowingly used or sold 136 days of leave when only 60 days total was earned. [His] past conduct has not demonstrated that he is able to adhere to Coast Guard policies. By his own admission, [he] highlighted his lack of integrity while diverging from the Coast Guard’s Core Values. ...

As the Board failed to recommend a characterization of service in the event that separation be warranted it becomes the responsibility of the Final Reviewing Authority. Article 1.B.2.f.(2)(b) of the Military Separations Manual, COMDTINST M1000.4 (series), states a General discharge can be issued based on the individual’s overall military record or the severity of the incident(s) which results in discharge. The record provides by a preponderance of the evidence that [the applicant] committed a serious offense by wrongfully appropriating government funds by selling 47 days of leave that he was not entitled to sell. [He] materially benefited by the sale of this leave with no intent to return the \$5001.27 (Exhibit 6). At no point did [he] inform his supervisors, SPO or Administrative Office that he had received an overpayment.

[The applicant] shall be separated from the Coast Guard in accordance with Article 1.B.17 of the Military Separations Manual, COMDTINST M1000.4 (series), with a General Discharge for Misconduct – Commission of a Serious Offense.

I am hereby recommending that the Reserve Personnel Management Division, Reserve Component Management Branch (PSC-rpm-1), assign [the applicant] a reenlistment code of RE-4 [ineligible to reenlist].

On February 18, 2015, the Personnel Service Center issued orders discharging the applicant from the Reserve with a general discharge and an RE-4 reentry code as of March 6, 2015,

for commission of a serious offense, in accordance with Article 1.B.17. of the Military Separations Manual.

VIEWS OF THE COAST GUARD

On March 17, 2016, the Judge Advocate General (JAG) submitted an advisory opinion in which he adopted the findings and analysis of the case provided in an attached memorandum prepared by the Personnel Service Center (PSC) and recommended that the Board deny relief.

Based on the evidence of record, PSC recommended that the Board deny relief. PSC alleged that the applicant had not shown that the FRA's decision disapproving the ASB's recommendation was erroneous or unjust or that his general discharge with an RE-4 code was erroneous or unjust. PSC noted that the FRA had acted within his authority pursuant to Article 1.B.22.e. of the Military Separations Manual.

PSC also alleged that the applicant had demonstrated by his conduct that "he does not meet the standard for continued service in the Coast Guard." Citing prior infractions he committed while a member of the regular Coast Guard, as well as his misuse of leave while on ADOS orders, PSC alleged that the applicant "cannot follow the rules of good order and discipline within the Coast Guard." PSC stated that the applicant's claim that his only fault was in not scrutinizing the pay he received for his sale of leave "is baseless as he acknowledged in his statement that he had sold leave that should have been charged" to his account.

The JAG concluded that under Article 1.B.22. of the Military Separations Manual, the FRA had the authority to disapprove the recommendation of the ASB as long as the FRA's decision was supported by the evidence and included specific reasons. The FRA in this case "did not dispute the [ASB's] finding that the applicant violated Article 121 of the UCMJ, Wrongful Appropriation," and ordered his general discharge for misconduct. The JAG noted that the FRA had the authority to direct an honorable, general, or OTH discharge because the maximum punishment for wrongful appropriation under the UCMJ that could have been awarded by a court-martial includes a punitive, bad conduct discharge. Therefore, the JAG concluded, the discharge directed by the FRA "is within the acceptable range" allowed by Coast Guard policy based on the applicant's offense of wrongful appropriation.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 25, 2016, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond in writing within thirty days. No response was received.

APPLICABLE REGULATIONS

Article 1.B.17.b.(3) of the Military Separations Manual authorizes Commander, PSC to discharge a member for misconduct with an honorable, general, or OTH discharge "as warranted" due to the member's "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.

Under Article 121 of the UCMJ, to commit the offense of “wrongful appropriation,” which is a lesser included offense to larceny, it must be found that the accused wrongfully took, obtained, or withheld property of value from the possession of the owner of the property “with the intent temporarily to deprive or defraud [the owner] of the use and benefit of the property or temporarily to appropriate the property for the use of the accused” The maximum penalty for the offense of wrongful appropriation of property worth more than \$500 includes a punitive, dishonorable discharge, while if the property is worth \$500 or less, the maximum penalty includes a punitive, bad conduct discharge.

Under Article 1.B.17.d. of the Military Separations Manual, before initiating the discharge of a member with more than eight years of military service for misconduct, the member’s CO must afford the member the opportunity to show cause for retention in the Service before an ASB.

Under Article 1.B.22.e. of the Military Separations Manual, Commander, the FRA for ASBs may approve or disapprove the findings, opinions, and/or recommendations of an ASB.

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 submissions, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely filed within three years of the applicant’s discharge.

2. The applicant alleged that his general discharge from the Reserve with an RE-4 was erroneous and unjust. In considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant’s military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of

the evidence that the disputed information is erroneous or unjust.⁴ 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.”⁵

3. The Board finds that the applicant has not proven by a preponderance of the evidence that the ASB and the FRA erred in concluding that the preponderance of the evidence shows that he committed the offense of wrongful appropriation. The record shows that in FY 2010, 2011, and 2012, the applicant earned 85 days of leave but used 121 days of leave. Thus, he took advantage of his civilian supervisors’ ignorance and laxity to take 36 days of “leave” he knew or should have known he had not earned. As a member who had served on active duty for more than 8 years, the applicant knew or should have known how much leave he was earning per year and so knew or should have known that he was taking leave he had not earned. If the applicant had taken only a day or two of unearned leave, the discrepancy could have been attributed to mere negligence, but because the applicant took 36 days of unearned leave—more than he would earn in a year—the Board cannot conclude that the ASB and the FRA erred in finding, by a preponderance of the evidence, that the applicant had committed the offense.

4. Moreover, because the applicant had used unearned leave in FY 2010 and 2011, he knew or should have known in September 2011 that he had a negative leave balance and had no leave to sell. However, in October 2011, he knowingly received and accepted more than \$5,000 for selling accumulated leave after having already received his final pay. The applicant alleged that he simply failed to scrutinize this payment and thought this money was for some other entitlement, which he did not name. However, the Board finds that the applicant has not proven by a preponderance of the evidence that the ASB and the FRA erred in concluding that the applicant knowingly took more than \$5,000 belonging to the government with the intention of at least temporarily depriving the government of the use that money.

5. Under Article 121 of the UCMJ, the maximum penalty for wrongful appropriation includes a punitive discharge. Therefore, the applicant was subject to separation processing for his commission of a serious offense pursuant to Article 1.B.17. of the Military Separations Manual. With more than eight years of service, he was entitled to a hearing before an ASB, which could make a recommendation to the FRA regarding his separation or retention. The record shows that the applicant received all due process with regards to his separation processing and was recommended for retention by the ASB. However, his CO recommended separation based on the extent and seriousness of his offense, and the FRA exercised his discretion by disapproving the recommendation for retention, ordering the applicant’s separation with a general discharge, and recommending that he receive an RE-4 reentry code. The FRA did not act arbitrarily but explained his decision in a memorandum, and his decision is strongly supported by substantial evidence.

6. Based on the evidence of record, the Board finds that the applicant has not proven by a preponderance of the evidence that his discharge from the Reserve was erroneous or unjust. Nor, in light of his misconduct, does the Board find that the characterization of his discharge as

⁴ 33 C.F.R. § 52.24(b).

⁵ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

general under honorable conditions was erroneous or unjust or that his RE-4 reentry code should be upgraded.

7. Accordingly, the applicant's request should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

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

October 28, 2016

