

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2021-076

██████████ ██████████ ██████████
FNIT (former)

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on May 4, 2021, 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 April 14, 2023, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT’S REQUEST AND ALLEGATIONS

The applicant, a former Information Technology Specialist (FNIT/E-3) who was honorably discharged on March 16, 2007, asked the Board to correct his record by providing him with a disability retirement with a 100% disability rating for schizoaffective disorder.¹ The applicant alleged that prior to his release in 2007, his Command learned that he had been sexually assaulted by his sister when he was six years old and again by a neighbor. According to the applicant, his Command inappropriately shared this information with his shipmates and superiors, who then began to ridicule and harass him. The applicant alleged that this created an adverse and hostile work environment, which in return caused him to experience numerous panic attacks. The

¹ Schizoaffective disorder” is a psychotic disorder that is characterized by the symptoms of schizophrenia, such as delusions, hallucinations, disorganized speech, and grossly disorganized or catatonic behavior, plus a major depressive and/or manic disorder. It is sometimes preceded by a schizoid, schizotypal, borderline, or paranoid personality disorder. American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION, TEXT REVISION (2000) (DSM-IV-TR), p. 319-21. Schizoaffective disorder is part of “schizophrenia spectrum,” along with schizotypal personality disorder. *Id.* at 309. The symptoms of schizoaffective disorder include those of schizophrenia (hallucinations, delusions, bizarre behavior, etc.) plus the symptoms of either major depression or bipolar disorder. Chapter 5.B.7. of the Medical Manual states that schizoaffective disorder is disqualifying for military service and that members with this condition should be evaluated by a medical board and processed for separation under the PDES.

applicant further alleged that when he expressed his concerns to his Command, his credibility was challenged.

The applicant explained that he never received treatment for the sexual assaults, and as a result, as a teenager, he rebelled and began using marijuana and making poor sexual choices. However, eventually he joined the Coast Guard where he had a great job and a great career. The applicant further explained that his first three duty stations were “perfect,” allowing him to excel and receive positive CG-3307s (“Page 7”) and positive feedback from his shipmates. However, eventually he was transferred to another unit where a more extensive background check was required. It was during this background check that his Command discovered that he had made some poor sexual choices. The applicant alleged that these revelations resulted in him being sexually harassed by his shipmates and high-ranking officials, which was so bad that he contemplated suicide. The applicant further alleged that he eventually got so tired of being called a “faggot” and “homosexual” that he decided to record his shipmates’ harassing him. The applicant explained that his attempt to record the conversations was discovered and he was awarded Non-Judicial Punishment (NJP) and ultimately discharged with an honorable discharge. After he received NJP at Captain’s Mast, the applicant thought the harassment would stop, but unfortunately it only got worse. The applicant claimed that he started having panic attacks and bad thoughts about the devil.

The applicant alleged that after his discharge he spent two years homeless and in 2010 he was evaluated by a Department of Veteran’s Affairs (VA) physician, who diagnosed the applicant with schizoaffective disorder, mixed type. According to the applicant, the VA physician stated that the applicant’s illness was service-related and was a direct result of workplace trauma. The applicant alleged that the VA physician’s diagnosis was consistent with the American Psychiatric Association’s description of the illness with symptoms occurring in a person’s 20s and that life stressors—hostile work environment—may play a role in the development of the illness. The applicant further alleged that the VA physician stated that the applicant’s illness was permanent and gave him a 100% disability rating. This is in addition to the Social Security Administration’s determination that the applicant is permanently unemployable, entitling him to Social Security Disability Income.

The applicant argued that under 10 U.S.C. § 1216a, when making a determination of unfitness, the Coast Guard, “[s]hall, to the extent feasible, utilize the schedule for rating disabilities in use by the Department of Veteran’s Affairs.” The applicant further argued that under Department of Defense Instruction (DoDI) 1332.38, an illness is presumed to be incurred in the line of duty if it is, “[d]iscovered after a service member enters active duty...”² The applicant

² DoDI 1332.28 states, “This Instruction applies to the Office of the Secretary of Defense (OSD), the Military Departments (including the Coast Guard when it is operating as a Military Service in the Navy), the Chairman of the Joint Chiefs of Staff, and the Combatant Commands (hereafter referred to collectively as “the DoD Components”). The term “Military Services,” as used herein, refers to the Army, the Navy, the Air Force and the Marine Corps.” By statute, Congress has to declare war for the Coast Guard to be considered operating as a Military Service in the Navy. Therefore, this instruction does not apply to the Coast Guard, or the Department of Homeland Security, which has its own liberal consideration policy, which can be found in DHS Office of the General Counsel, “Guidance to the Board for Correction of Military Records of the Coast Guard Regarding Requests by Veterans for Modification of their Discharges Based on Claims of Post-Traumatic Stress Disorder, Traumatic Brain Injury, Other Mental Health

alleged that he was never afforded a separation physical, and because he never received this physical, there is insufficient evidence to overcome the presumption of regularity. The applicant stated that he firmly believes that it is unjust and contrary to 10 U.S.C. for the Coast Guard to ignore the determination made by a VA physician, that his illness was service-connected and 100% disabling.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on September 30, 2003, where he trained as an Information Technology Specialist and advanced to IT3/E-4.

On October 7, 2005, the applicant received a negative Page 7 (CG-3307) and was counseled as follows:

PO [applicant] is being counseled this date, because of his inability to show up to work. As a Third Class Petty Officer, you are expected to show up to work on time and do the job you are assigned to do. You are also being counseled on being unreliable due to failure to pay debts. PO [applicant] has currently got most of his bills arranged through the Debt Management Association. PO [applicant] has gone through financial counseling at Consumer Credit Counseling Services on 25 Aug 2005. PO [applicant] is also instructed from this point on, he is to be reliable with his credit and not to risk financial disaster. Any future actions of this nature will result in disciplinary action according to the UCMJ.

On October 13, 2005, the applicant received another negative Page 7 for failing to show proper respect to a Chief Petty Officer and exhibiting behavior contrary to that of a Petty Officer. Specifically, the applicant was counseled as follows:

You are being counseled for failure to yield proper respect to a Chief Petty Officer and exhibiting behavior contrary to that of a Petty Officer. On 07OCT05 during a counseling session for another Page 7 your verbal communications and physical actions were disrespectful towards two [redacted] Chief Petty Officers. You are to conduct yourself as a Petty Officer should and always render respect to those you come in contact with here at [redacted], whether they are your superiors, subordinates, or your peers. Your verbal outbursts against this Command or others will not be tolerated. You are to keep your attitude in check. We expect that you will take the corrective action to prevent future incidents like this from happening. Keep in mind that you are to be an example as a Petty Officer that others can follow. Failure to show compliance with this entry will result in non-judicial punishment proceedings for your actions. You are to seek out and give a verbal apology to CPO [redacted] and CPO [redacted] whom you disrespected.

On May 15, 2006, CGIS received a verbal request from the applicant's Commanding Officer (CO) for CGIS assistance into allegations that the applicant secretly recorded conversations in a classified space while performing duties. The CO was concerned that classified information was compromised. CGIS was informed that the applicant allegedly made statements to coworkers that he recorded conversations while standing watch in a classified space. The applicant's security clearance and access to the classified information was revoked.

On May 16, 2006, the applicant received a negative Page 7 and was counseled as follows:

Conditions, Sexual Assault, or Sexual Harassment" (signed by the Principal Deputy General Counsel as the delegate of the Secretary, June 20, 2018).

You are being counseled for failure to follow a direct order. While on watch 13 May, you were given a direct order repeatedly to answer a trouble call from your supervisor IT2 [redacted], yet you refused to answer the trouble call. Your blatant disrespect towards your supervisor, and those appointed over you, will not be tolerated. This kind of behavior is not appropriate of a third class petty officer. Any future actions of this nature will result in disciplinary actions according to the UCMJ.

On May 17, 2006, the applicant was interviewed by CGIS investigators regarding the alleged recordings. The applicant was advised of his rights under Article 31(b) of the Uniform Code of Military Justice (UCMJ). The applicant provided the following responses to CGIS investigators:

a. On 13 May 2006, [applicant] had duty in the classified space of [redacted] with two coworkers, later identified as [redacted] and [redacted]. [Applicant] commented to his coworkers, he had recordings of them and other coworkers who were being verbally abusive toward him in the classified space. [Applicant] admitted he took a portable recorder into the classified space on several occasions to record his coworker's alleged verbal abuse toward him. He did not record classified radio communications and no member's voices were on any of the tapes surrendered. [Applicant] claimed 2 other tapes were damaged in his "overnight bag," which he subsequently threw away.

b. [Applicant] believed he had been verbally harassed, concerning his sexuality, by many of his coworkers and he had spoken with the local Equal Employment representative, [redacted] regarding his allegations.

c. [Applicant] surrendered two Panasonic MC-90 micro cassette tapes and one General Electric micro cassette recorder to CGIS. These were logged into CGIS [redacted] as evidence.

d. [Applicant] volunteered to take a polygraph examination and provided a sworn written affidavit.

4. On 18 May 2006, S/A [redacted] reviewed the two micro cassette tapes in their entirety. Several short, unintelligible (approximately 3-5 seconds) excerpts were heard, no evidence was discovered of any verbal words or radio communications.

On May 26, 2006, the applicant received a negative Page 7 and was counseled as follows:

IT3 [applicant] is being placed on performance probation for a period of 6 months. Your performance has been unsatisfactory compared to your peers in your pay grade. You must take stock of your actions that have caused this situation to develop and take corrective action. Your performance must improve over the next 6 months or you will be considered for discharge.

The reasons for being placed on performance probation are: Failure to follow a direct order; failure to yield proper respect to a Chief Petty Officer; exhibiting behavior contrary to that of a Petty Officer; inability to show up to work on time; unreliability to pay debts.

On June 15, 2006, the applicant underwent a polygraph examination. The applicant was asked whether he recorded, sold, or transferred any recordings of USCG classified radio traffic to any person or entity. [Applicant] answered "No" to all questions. The results of the exam showed no deception on the applicant's part.

On June 21, 2006, the applicant's Command was briefed on the results of the CGIS investigation.

On July 27, 2006, the applicant was brought before Captain's Mast regarding the results of the CGIS investigation. The applicant was charged with violating Article 92—Failure to Obey

Order or Regulation, of the UCMJ, for knowingly and intentionally entering a classified space with a personal recording device in violation of policy. The applicant was reduced in rate from IT3/E-4 to FNIT/E-3.

On October 31, 2006, the applicant received a negative Page 7 and was counseled as follows:

On October 27, 2006, you failed to show up for work. Liberty was granted for personnel that attended a Command function. You chose not to attend. During this counseling session you were notified as to the consequences of not reporting to work in the future. By not showing up for work you have disrupted the daily routine in the Public Works Department. Your shipmates had to work that much harder. Your absence is unacceptable and will not be tolerated. Future failure to follow the unit's instruction on a daily routine will result in further disciplinary action. You are reminded that your actions reflect not only on yourself but on the entire Public Works Department.

On December 7, 2006, the applicant's CO issued a memorandum, "Discharge from Coast Guard," wherein he informed the applicant that he had initiated discharge proceedings against the applicant. The CO stated that the reason for initiating discharge proceedings was the applicant's failure to show up for work, pay his debts, and yield proper respect to superior officers.

On January 8, 2007, the applicant's CO issued a memorandum, "Discharge Recommendation for FNIT [applicant]," wherein he recommended the applicant be administratively discharged. The CO cited the applicant's many infractions, including his recent NJP to support his request. The CO stated that the applicant had been given multiple opportunities to correct his behavior, but a clear pattern had emerged showing that the applicant was simply unwilling to take responsibility for his actions. The CO did support the applicant receiving an Honorable discharge.

On January 8, 2007, the applicant submitted a "First Endorsement" wherein he acknowledged his CO's notification but objected to his discharge and attached a statement in his defense. The applicant's statement reads as follows:

I arrived at [redacted] on July of 2005 as a 3rd class petty officer out of "A" school in [redacted]. Since then and now, I have managed to lose my security clearance, encountered numerous amounts of page sevens, and was recently masted on charges of espionage. The first page seven was obtained on 07 OCT 05, in regard to the inability to show up to work and failure to pay debts. It was my understanding at my last unit that as long as the debts were not in regard to gambling, then if I were a I could pursue the rate of an "IT." These debts were also debts that I had acquired before entering the Coast Guard. I told my recruiter that I had a lot of debt and asked if it would have any effect on me entering the Coast Guard. Obviously the answer was no because I was not only allowed to enter the Coast Guard but I also obtained a security clearance and was able to work as an IT. The second part of this page 7 states that I was late for work on this particular day. It was raining really hard and as I came down [redacted] my car slid off the road and ran into the ditch. I had to have a tow truck to escort me out of the ditch as well as the [redacted] Police Department and then notified [redacted] of my whereabouts and told him I would be at work as soon as possible. Once I got to work I was told that I needed to see at that time Chief [redacted]. When I arrived at the office I was given this page seven which at that time I felt was unfair because of the fact I had been trying to clean up my credit sense being on the [redacted] and I had also never had a negative page seven. On the day I received that page seven I lost my temper and received another page seven for disrespecting a Chief [redacted] that is when the real trouble had begun for me. For months I felt as if I were being harassed for being a homosexual. I took a tape recorder on to the deck to have proof that I was being harassed and was going to take it to Senior Chief [redacted] of MLC. On the 14th of May I was at the point where I had enough so I began to argue with people on the deck, at that time the phone rang and my supervisor asked me to pick up the phone, I did not and also stated that I

had been recording them for months. At that point I was sent home and charged with articles c. d. and e. I did not realize the severity of what I did was wrong and told CG I did not have the tape recorder on the deck. I later told the truth and was punished under articles 92 and 107.

Through all of this I have taken on a second job, been involved in debt management and I have learned to trust my shipmates more and have respect for rank.

Before arriving to this unit, I was sure that I knew everything that one needed to know about life. Fresh out of A School, I was sure that I was ready to fill my duties as a petty officer in the United States the Coast Guard. Apparently I was sadly mistaken. In a matter of a year, I've gone from wearing my uniform with [pride] to feeling like I don't even deserve to wear this uniform. And seemingly through all of this some of my shipmates have decided to stick by my side. This command has only tried to help me physically, financially, and mentally, and through this process I have consistently maintained a resistance to what is right. I am at a loss for words in regard to why it even took this long to determine its time for me to separate from the United States Coast Guard. This command has only tried to teach me to think outward while I only persistently maintained to think inward. I consistently bit the hand that tried to feed me, and in [sum] I rightfully deserve what comes to me. I would like to thank the following individuals who tried to help me through all of the ups and downs:

[List Redacted]

I could use the fact that we have been in a time of war since September 11, 2001, and the military does not need individuals that think inward and can only force [the] organization to collapse from within. I now understand the situation that I went through and why it was essential for me to go through. I have made an effort to change my way of thinking by making positive steps to improve myself. For instance, I have taken on a part time job at the Navy Exchange. I am enrolled in college which I am currently working on my degree as an IT. I am making an effort to get to know my shipmates after work hours by engaging in positive outdoors activities. The US Coast Guard has taught me lessons that my family hasn't even taught me. Everything I've gone through has only been to make me a better person, and at this point I feel that I've finally know what [redacted] was trying to teach me. I would like to also thank the USCGC [redacted] for attempting to shape an individual that really had a lot of growing up to do. I am very detrimental to the lessons that CAMSLANT has tried to teach me. It's a shame that I caught on too late. I would like to apologize to all of the individuals that tried to help me, this command and the entire organization. When I'm asked about the US Coast Guard there is nothing bad that I can say, but I always tell individuals inquiring about how the careers of US Coast Guard [that] it will change you for the better. If I am given a second chance through the second chance program I will make the best of this opportunity to regain the trust of my shipmates. Make a conscious effort to learn and enforce my life with the core values of honor, respect, devotion to duty.

On February 12, 2007, the applicant's Sector Commander endorsed the applicant's administrative discharge and forwarded the package to Commander, Personnel Command for action.

The applicant was honorably discharged on March 16, 2007, due to unsuitability.

Medical records submitted with the applicant's prior applications to the Board show that from 2014 through 2017, the applicant was being treated for "schizoaffective disorder, depressive type" with "auditory hallucinations" and an unspecified anxiety disorder.

On January 3, 2018, the applicant, being represented by counsel, applied to this Board and requested that his record be changed to reflect a medical/disability retirement with a 100 percent disability rating. The docket number assigned to this case was 2018-065. The applicant alleged that he was suffering from delusional thoughts and confusion in the Coast Guard as a result of his subsequent schizoaffective disorder diagnosis. According to the applicant, these thought processes

and difficulties began to affect his work, his performance, and his conduct, which ultimately resulted in him receiving numerous personnel infractions. The applicant's attorney stated that the applicant was diagnosed in 2008 and that his mental condition is what prevented him from applying for relief sooner. On April 23, 2018, the applicant voluntarily withdrew his application for relief.

On November 17, 2018, the applicant, being once again represented by counsel, contacted the Board and asked that his previous application be reinstated along with his previous arguments and evidence. The applicant was issued a second docket number, 2019-032. In addition to his original requests for relief, the applicant requested combat-related special pay and submitted over 500 pages of medical evidence. On September 23, 2020, the applicant voluntarily withdrew this application as well.

VIEWS OF THE COAST GUARD

On November 28, 2021, a judge advocate (JAG) of the Coast Guard submitted a memorandum in which he recommended the Board deny relief and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

The JAG argued that the applicant failed to submit a timely application and failed to show why it is in the interest of justice to excuse his delay in applying for relief. Pursuant to 33 C.F.R. § 52.33 (2002) when determining if it is in the interest of justice to waive the statute of limitations, the Board must consider "the reasons for the delay and the plaintiff's potential for success on the merits, based on a cursory review..."

The JAG explained that in section 15 of the applicant's application for relief, the applicant stated that his alleged error/injustice was discovered on March 14, 2020. However, according to the JAG, this date is inaccurate because the applicant's implied error/injustice is that he should have been medically retired at 100 percent disability in 2007, instead of discharged for unsuitability, because that is when he reasonably should have discovered the alleged error.

The JAG stated that to support his claims, the applicant submitted a letter from the VA, dated September 2020, but the applicant clearly stated in his application for relief that he was diagnosed and rated with service-connected schizoaffective disorder in 2010. To further support the fact that the applicant knew of the alleged error prior to September 2020, the JAG highlighted the applicant's two previous applications to the Board. Accordingly, the JAG argued that 2010 should be the date used to calculate the statute of limitations. The JAG explained that this would make the applicant's application approximately seven years past the statutory timeline. In addition, the JAG argued that the applicant should not be allowed to circumvent the timeliness statute by applying and withdrawing his applications for relief. The JAG stated that the applicant has also failed to provide a reason for his delay.

Regarding the review of the merits, the JAG explained that the applicant failed to provide any documentation proving he had a mental health condition while he served on active duty that would entitle him to relief. Although the applicant did submit various letters and documentation from the VA showing the applicant was given a 100 percent disability rating, the JAG argued that

these diagnosis and ratings are not binding on the Coast Guard. Therefore, the JAG argued that the applicant has not provided good cause for his failure to timely file, and it is not in the interest of justice to waive the statute of limitations.

The JAG further argued that even if the Board finds that there is good cause to waive the statute of limitations, the applicant has still failed to meet his required burden of proving an error. The JAG claimed that clear and convincing evidence establishes that the applicant was mentally competent and fit for duty at the time of his discharge. Although the applicant submitted letters from the VA to try to establish that he was mentally incompetent at the time of his discharge, the JAG stated that the applicant failed to provide any medical documentation from the Coast Guard that supports the applicant's claim that he was entitled to a medical retirement instead of the unsuitability discharge he received. The JAG explained that while the VA may have listed the applicant's schizoaffective disorder as service-connected, a psychiatrist U.S. Public Health Service, who independently reviewed the applicant's records in accordance with 10 U.S.C. § 1552(g), disagreed with the applicant's claim. The JAG noted that the psychiatrist stated that there was no direct connection between the applicant's service and his VA diagnosis of schizophrenia. The psychiatrist's assessment, dated June 6, 2019, is from a U.S. PHS Captain, who submitted a medical opinion regarding whether the applicant likely suffered from schizoaffective disorder while serving on active duty. The psychiatrist provided the following opinion:

After reviewing the reports on case 2019-032 ([applicant]) and considering the Liberal Consideration guidance, in my opinion, there is not enough evidence to believe his actions while on active duty were related to his later diagnosis of schizoaffective disorder.

Schizoaffective disorder is typically a long-term progressive disease with no good "starting point." While his behavioral problems may be due to a thought disorder like schizoaffective, in this case I don't believe so. Schizoaffective and schizophrenia are primarily considered a thought disorder. This means patients have difficulty organizing thoughts, determining what is real or not, and abnormal behaviors because of the thought disturbance.

In reading the VA medical notes, his behavior is very consistent with someone with a severe mental illness like schizoaffective. Some of the behaviors mentioned in the CG reports could be similar as well. However, the rebuttal letter he wrote for the second chance program was very well thought out, gave plausible explanations for his behaviors and organized/articulated well. This leads me to the conclusion that he likely did not suffer from a formal thought disorder at that time.

The above opinion is based on the records provided. There was a substantial time frame that records was not [sic] provided that may change my opinion.

However, the JAG argued that even if the applicant was able to produce medical evidence showing that he suffered from a service-connected mental health issue, he has still failed to show that he would have been entitled to a medical retirement. According to the JAG, the applicant was still able to perform the duties of his rank and rate. The JAG explained that in his First Endorsement, the applicant admits fault for behaviors that were contrary to the Coast Guard's Core Values and these behaviors were what led to his administrative separation. In addition, the JAG argued that because the applicant was being administratively separated due to misconduct, which included NJP, the MEB would have been suspended until the administrative separation process concluded.

Regarding the applicant's allegations that he was sexually harassed, which is what led to his misconduct, the JAG argued that the applicant submitted no evidence to support his claims that he was being harassed. In addition, the JAG stated that it was not just the applicant's NJP that led to his separation but a pattern of misconduct. Therefore, the JAG argued that the applicant has failed to overcome the presumption of regularity afforded to the Coast Guard or to prove that the Coast Guard committed an error or injustice when he was separated for unsuitability.

The JAG argued that the findings of the VA have no bearing on the Coast Guard or the Physical Disability Evaluation System (PDES). Accordingly, the JAG claimed that the applicant's contentions that the Coast Guard erred when they failed to medically retire him with a 100 percent disability rating are without merit. The JAG argued that the law that provides for physical disability retirement or separation is designed to compensate members whose military service is terminated due to a service-connected disability and to prevent the arbitrary separation of individuals who incur disabling injuries.³ As previously discussed, the JAG argued that the applicant has provided no persuasive evidence to show that he had any condition, while on active duty, that would have entitled him to enter the PDES process and be recommended for medical retirement. The JAG further argued that the VA's rating awarded to the applicant is not determinative of the same issues the Coast Guard uses to assess physical disability. The JAG explained that the procedures and presumptions applicable to the VA evaluation process are fundamentally different from those applied under the PDES. According to the JAG, the sole standard for physical disability determination in the Coast Guard is unfitness to perform one's duties, and the applicant has failed to prove that he had a mental or physical disability that rendered him unable to perform his duties.

The JAG also argued that the BCMR is not a medical board and is not empowered to grant the relief requested by the applicant because the BCMR is not well positioned to assess whether the applicant's mental health conditions rendered him unfit for duty prior to his separation or to determine the degree to which he was disabled by these conditions. The JAG also stated that even if the applicant would have been referred to the PDES, the proceedings would have been suspended, pending the applicant administrative separation proceedings. Therefore, the JAG argued that, without a medical board to review the applicant and his service records, it would be error for the BCMR to now order the applicant to be placed on the Temporary Disability Retirement List (TDRL) or the Permanent Disability Retirement List (PDRL).

Finally, the JAG argued that the relief requested by the applicant does not fall within the liberal consideration guidelines. The JAG claimed that the BCMR is limited in what it may award due to an alleged error or injustice related to misconduct of a member suffering from a mental health condition and/or victim of sexual assault. Specifically, the JAG stated that when a member "requests an upgraded discharge," the BCMR is empowered to change the character of service, narrative reason for separation, separation code, and reenlistment code. The JAG explained that the applicant's separation was for misconduct, but now he seeks a medical retirement, but this kind of relief is not the kind of relief that has been granted under the BCMR's liberal consideration guidance, and it would be erroneous for the BCMR to award the relief the applicant seeks.

³ Article 1.A. of the Physical Disability Evaluation System Manual, COMDTINST M1850.2B.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 26, 2021, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. The Chair received the applicant's response on January 19, 2022. The applicant, being represented by counsel, alleged that he was seriously injured during his military service and should have been medically evaluated and separated with a service-connected disability and found unfit for duty. The applicant further alleged that he was wrongfully separated from the Coast Guard without being properly evaluated by the PDES, which resulted in no medical retirement, temporary disability retirement, or permanent retirement or the benefits they confer. According to the applicant's counsel, the applicant had not previously filed an application with this Board, and he submitted his application as soon as he became aware of his injury. However, the applicant stated that given that a preponderance of the evidence shows that an error or injustice was committed, even if his application is untimely, it would be inequitable for this Board not to review his discharge.

The applicant stated that on September 3, 2014, the Secretary of Defense issued a memorandum providing guidance to the Board for Correction of Coast Guard Records (Secretary Hagel Memo) as it considers petitions brought by service members claiming Post Traumatic Stress Disorder (PTSD) with other than honorable characterizations of discharge. This includes a comprehensive review of all materials and evidence provided by the service member. The applicant further stated that a second memorandum, providing further clarifying guidance, was issued on August 25, 2017, by the Undersecretary of Defense for Personnel and Readiness (USD P&R Memo).⁴ This policy guidance is intended to ease the application process for service members who are seeking redress and assists the Board in reaching fair and consistent results in these cases. According to the applicant, the memorandums' guidance also mandates liberal waivers of time limits, ensures timely consideration of petitions, and allows for increased involvement of medical personnel in Board determinations. (These memoranda have not been adopted by the Coast Guard, which follows its own guidance about discharges and liberal consideration.)

The applicant explained that the Coast Guard BCMR presumes regularity on the part of the Coast Guard, but this is a rebuttal presumption that can be rebutted by both an applicant's testimony and by reviewing the applicant's record. The applicant alleged that in his case, his records note a clear presence of behavioral health issues prior to his discharge. The applicant claimed that his medical records noted that he had been experiencing behavioral health issues since his teens. The applicant stated that in his narrative to the Board, he talked about experiencing the military sexual trauma and PTSD while he was in the Coast Guard and since that time, he has been diagnosed with behavioral health issues that were diagnosed and found to be part of his medical service.

The applicant alleged that the Coast Guard's advisory opinion does not take into account the stress of the type of service that he went through during the time leading up to his discharge. The applicant alleged his difficulties with civil authorities and misconduct can be seen as part of an overall diagnosis of behavioral health issues. The applicant further alleged that his subsequent

⁴ Although the applicant references DOD memoranda, the Coast Guard is not bound by the guidance from the DOD. In addition, he did not provide the referenced memoranda for review.

behavior after his discharge showed a continuing condition which had developed while he was in the Coast Guard.

The applicant explained that the negative Page 7s were given to him for being late for work or not showing up for work at all, but the cause of his tardiness or failure to show up was anxiety and the panic attacks he encountered. The applicant alleged that was having “bad thoughts” and he did not know what was going on with him. The applicant claimed that these attacks started at the same time he was getting harassed. According to the applicant, he was also mismanaging his pay from the Coast Guard which resulted in him being written up. The applicant stated that he did not know that his mismanagement of money was a part of his disability until the VA assigned him a fiduciary to manage his money. The applicant explained that he did not want to go to work because of the “bad thoughts” he was experiencing about a new world order and a government he so often feels like he cannot trust. The applicant alleged that the harassment got to be so bad that he tried to commit suicide by getting into multiple car accidents. The applicant further alleged that he spoke to his Master Chief about the sexual harassment, but the Master Chief did not believe the applicant and sent the applicant back to his post. After that, the applicant claimed his shipmates continued sexually harassing him. As an example of the severity of the harassment he endured, the applicant detailed a time when his shipmates brought a pornographic film on dock stack and tried to make him watch it.

The applicant alleged that the reason he did not apply for disability sooner was because he did not know about his disability until he was informed by the VA that he should have been medically retired. The applicant stated that he did not know what schizoaffective disorder was and thought it would just go away like his panic attacks did when he was younger. The applicant claimed that the harassment was so bad that it made him not want to trust anyone, which only exacerbated his disability. The applicant explained that he believed taking his medical care into his own hands would be the best way to solve his problems, which is why he brought the recorder onto the operations deck. The applicant alleged that CGIS investigators assisted him in writing his statement and that they made it sound like nothing was wrong with him. The applicant further alleged that the CGIS investigators made the applicant cross out the allegations that his shipmates brought pornography to work and tried to force him to watch it. He was also allegedly forced to initial these redactions.

APPLICABLE LAW AND POLICY

Article 12.B.12. of the Coast Guard Personnel Manual (2007) provides the following guidance on separations for unsuitability:

Article 12.B.16.b. states that Commander, CGPC may discharge members for “Unsuitability” due to the following reasons:

- 1. Inaptitude.** Applies to members best described as unfit due to lack of general adaptability, want or readiness of skill, clumsiness, or inability to learn.
- 2. Personality Disorders.** As determined by medical authority, personality behavior disorders and disorders of intelligence listed in the Medical Manual, COMDTINST M6000.1 (series), Chapter 5.

3. Apathy, defective attitudes, adjustment disorders as listed in the Medical Manual, COMDTINST M6000.1 (series), Chapter 5, inability to expend effort constructively, or other observable defect for which a separation designator code (SPD code) exists that renders a member unsuitable for further military service.

4. Unsanitary Habits.

5. Alcohol Abuse. See Article 20.B.2. for guidelines on alcohol abuse cases.

6. Financial Irresponsibility.

Article 12.B.16.c. states that before initiating a discharge for unsuitability, the member should be placed on probation for a six-month period. However, “Commanding officers are authorized to recommend discharge at any time during probation if the member is not attempting to overcome the deficiency.”

Article 12.B.16.d. states that a member being discharged due to Unsuitability who has less than 8 years of service is entitled to notification of the reason for discharge, may object to the discharge, and may submit a written statement concerning the discharge.

Chapter 3.F.1.c. of the Medical Manual in effect in 2001 states the following about fitness for duty:

Fitness for Duty. Members are ordinarily considered fit for duty unless they have a physical impairment (or impairments) that interferes with the performance of the duties of their grade or rating. A determination of fitness or unfitness depends upon the individual’s ability to reasonably perform those duties. Active duty or selected reserves on extended active duty considered permanently unfit for duty shall be referred to an Initial Medical Board for appropriate disposition [through the PDES].

The Physical Disability Evaluation System (PDES) Manual, COMDTINST M1850.2D, Article 2.A.38. defines “physical disability” as “[a]ny manifest or latent physical impairment or impairments due to disease, injury, or aggravation by service of an existing condition, regardless of the degree, that separately makes or in combination make a member unfit for continued duty.” Article 2.C.2. states the following:

Fit for Duty/Unfit for Continued Duty. The following policies relate to fitness for duty:

a. The sole standard in making determinations of physical disability as a basis for retirement or separation shall be unfitness to perform the duties of office, grade, rank or rating because of disease or injury incurred or aggravated through military service. Each case is to be considered by relating the nature and degree of physical disability of the evaluatee concerned to the requirements and duties that a member may reasonably be expected to perform in his or her office, grade, rank or rating. In addition, before separation or permanent retirement may be ordered:

(1) There must be findings that the disability:

(a) is of a permanent nature and stable, and

(b) was not the result of intentional misconduct or willful neglect and was not incurred during a period of unauthorized absence.

...

b. The law that provides for disability retirement or separation (10 U.S.C. 61) is designed to compensate a member whose military service is terminated due to a physical disability that has rendered him or her unfit

for continued duty. That law and this disability evaluation system are not to be misused to bestow compensation benefits on those who are voluntarily or mandatorily retiring or separating and have theretofore drawn pay and allowances, received promotions, and continued on unlimited active-duty status while tolerating physical impairments that have not actually precluded Coast Guard service. The following policies apply:

(1) Continued performance of duty until a member is scheduled for separation or retirement for reasons other than physical disability creates a presumption of fitness for duty. This presumption may be overcome if it is established by a preponderance of the evidence that:

(a) the member, because of disability, was physically unable to perform adequately in his or her assigned duties; or

(b) acute, grave illness or injury, or other significant deterioration of the member's physical condition occurred immediately prior to or coincident with processing for separation or retirement for reasons other than physical disability which rendered him or her unfit for further duty.

(2) A member being processed for separation or retirement for reasons other than physical disability shall not be referred for disability evaluation unless the conditions in articles 2.C.2.b.(1)(a) or (b) are met.

(3) The determination of a grave or serious condition or significant deterioration must be made by a competent Coast Guard medical officer. Such medical authority will consult with the CGPC senior medical officer, as necessary, to ensure proper execution of this policy in light of the member's condition. The member's command may concurrently submit comment to the CGPC senior medical officer.

c. If a member being processed for separation or retirement for reasons other than physical disability adequately performed the duties of his or her office, grade, rank or rating, the member is deemed fit for duty even though medical evidence indicates he or she has impairments.

...

i. The existence of a physical defect or condition that is ratable under the standard schedule for rating disabilities in use by the Department of Veterans Affairs (DVA) does not of itself provide justification for, or entitlement to, separation or retirement from military service because of physical disability. Although a member may have physical impairments ratable in accordance with the VASRD, such impairments do not necessarily render him or her unfit for military duty. A member may have physical impairments that are not unfitting at the time of separation, but which could affect potential civilian employment. The effect on some civilian pursuits may be significant. Such a member should apply to the DVA for disability compensation after release from active duty.

The Military Separations Manual, COMDTINST M1000.4, Article 1.A.9.a., states:

"Not fit for duty" is a local medical term meaning the member is unable to perform the immediate duties to which assigned for a short period of time. A finding of "not fit for duty" does not qualify the member for processing in the Physical Disability Evaluation System (PDES), and does not mean the member is not qualified for separation. A member could be "not fit for duty" and still be separated if the existing impairment does not lead to a physical disability.

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 filed by the applicant was not timely. To be timely, an application for the correction of a military record must be submitted to the Board within three years after the alleged error or injustice was discovered.⁵ The applicant alleged in his application to the Board that he did not discover the error until March 14, 2020. However, the record shows that the applicant applied to the Board for the same relief on two previous occasions, once on January 3, 2018, and a second time on November 17, 2018. Although he ultimately withdrew those applications, they show that the applicant knew of the alleged error prior to March 14, 2020. Although the medical records submitted by the applicant showing his diagnosis of schizoaffective disorder, depressive type, are from 2014 through 2017, the applicant claimed that he received his first service-connected mental health diagnosis from the VA in October 2010. Therefore, the preponderance of the evidence shows that the applicant knew of the alleged error in his record—that he had been administratively discharged for unsuitability instead of medically retired due to a diagnosed mental health condition—possibly in October 2010 but no later than 2014. Because he did not submit his application to the Board until May 4, 2021, his application is untimely.

3. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.⁶ In *Allen v. Card*, 799 F. Supp. 158 (D.D.C. 1992), the court stated that the Board should not deny an application for untimeliness without “analyzing both the reasons for the delay and the potential merits of the claim based on a cursory review”⁷ to determine whether the interest of justice supports a waiver of the statute of limitations. The court noted that “the longer the delay has been and the weaker the reasons are for the delay, the more compelling the merits would need to be to justify a full review.”⁸ Although the record shows that the applicant long delayed his application to the Board, the record also shows that he has been diagnosed with schizoaffective disorder, which might well have interfered with his ability to submit his application. In light of his mental health condition, the Board will excuse the untimeliness of the application and consider the case on the merits.

4. In response to the advisory opinion, the applicant argued that his requests and allegations fall under the DoD's liberal consideration policy. However, as stated previously, the Coast Guard BCMR is not bound by the DoD's guidance and instead has its own liberal

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

⁶ 10 U.S.C. § 1552(b).

⁷ *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

⁸ *Id.* at 164, 165; see also *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

consideration guidance issued by the delegate of the Secretary of DHS.⁹ Under this guidance, liberal consideration applies to those applicants who are requesting upgrades to their discharges. This guidance defines the term “discharge” to mean “a veteran's character of service, narrative reason for separation, separation code, and reenlistment code.” The applicant is not requesting an upgrade of his “discharge” as defined in the guidance, but a medical retirement, which would require the Board to correct his record with a disability rating or to direct the Coast Guard to convene medical boards to assign a disability rating. Therefore, his request for relief does not fall under DHS’s liberal consideration guidance. Accordingly, his request to have his case considered under DOD’s or DHS’s liberal consideration guidance must be denied.

5. The applicant alleged that his administrative discharge and the Coast Guard’s failure to diagnose him with a mental disability and medically retire him in 2007 were erroneous and unjust. 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.¹⁰ Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties “correctly, lawfully, and in good faith.”¹¹

6. The Board’s review of the records shows that prior to his discharge in 2007, the applicant received several negative Page 7s in 2005 and 2006 documenting his repeated tardiness, failure to show superior officers respect, and failure to pay his personal debts. He also brought a recording device into a secure area for classified materials several times, for which misconduct the applicant received NJP and lost his security clearance. The loss of his security clearance would have greatly limited his eligibility to work as an IT specialist for the Coast Guard, but not his physical or mental ability to do IT work. Nothing in the record shows that the applicant’s command, the CGIS agents who interviewed him, or the Coast Guard medical staff had any concern about his mental health. Instead, they found his attitude defective. On May 26, 2006, the applicant was placed on six months’ probation for these issues, but a Page 7 dated October 31, 2006, shows that his work ethic had not improved and so in December 2006, after the probationary period ended, his CO initiated his administrative discharge. The records further show that the applicant received all due process under the Personnel Manual, as he received probation, notification of the reasons for his discharge, and the opportunity to object and submit a written statement, which he did. The causes of his administrative discharge—a defective attitude and financial irresponsibility—fall squarely within the authorized reasons for an unsuitability discharge listed in Article 12.B.16.b. of the Personnel Manual then in effect. The Board finds that the preponderance of the evidence shows that the applicant’s administrative discharge for unsuitability due to his financial irresponsibility and defective attitude, resulting in repeated tardiness and disrespect, was not erroneous or unjust.

⁹ DHS Office of the General Counsel, “Guidance to the Board for Correction of Military Records of the Coast Guard Regarding Requests by Veterans for Modification of their Discharges Based on Claims of Post-Traumatic Stress Disorder, Traumatic Brain Injury, Other Mental Health Conditions, Sexual Assault, or Sexual Harassment” (signed by the Principal Deputy General Counsel as the delegate of the Secretary, June 20, 2018).

¹⁰ 33 C.F.R. § 52.24(b).

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

7. With respect to the applicant's claim that he was entitled to PDES processing and a medical retirement, the Board notes that under Article 2.C.2.b.2. of the Physical Disability Evaluation System (PDES) Manual, COMDTINST M1850.2D, "A member being processed for separation or retirement for reasons other than physical disability shall not be referred for disability evaluation unless the conditions in articles 2.C.2.b.(1)(a) or (b) are met." Article 2.C.2.c. states, "If a member being processed for separation or retirement for reasons other than physical disability adequately performed the duties of his or her office, grade, rank or rating, the member is deemed fit for duty even though medical evidence indicates he or she has impairments." The record shows that the applicant was adequately able to perform his duties as an IT specialist before he lost his security clearance, even though he was sometimes tardy and disrespectful and had debts he did not pay on time. There is insufficient evidence to support the applicant's claim that he was unfit for duty in that he could not perform his IT work or other duties because of a mental disability prior to his discharge. Therefore, Coast Guard policy would not have permitted him to be processed through the PDES.

8. The applicant argued that the fact that he was diagnosed with schizoaffective disorder a few years after his discharge proves that he already had schizoaffective disorder while he was in the Coast Guard and that the schizoaffective disorder caused the problems that led to his discharge. The Board disagrees. Even though the VA found that the applicant's schizoaffective disorder was "service-connected," that is not evidence that the applicant actually had the disorder before his discharge from the Service or that he was unfit for duty because of a disabling mental health condition prior to his discharge. As the U.S. PHS psychiatrist noted, schizoaffective disorder is a "progressive disease with no good 'starting point'" and the applicant's written statement objecting to his discharge, "was very well thought out, gave plausible explanations for his behaviors and organized/articulated well. This leads me to the conclusion that he likely did not suffer from a formal thought disorder at that time." Nor is there any evidence supporting the applicant's claim that the CGIS agents who interviewed him in May 2006 helped him write his statement objecting to his discharge in January 2007, as he claimed in his response to the advisory opinion. In his written statement, the applicant took accountability for his actions stating, "This command has only tried to help me physically, financially, and mentally, and through this process I have consistently maintained a resistance to what is right." In the applicant's own words, he had "a lot of growing up to do" and he had been resistant to doing "what was right"—i.e., resistant to following military orders and protocol and to paying his debts responsibly. The applicant's contemporaneous personal statement is quite coherent, makes no mention of any mental or physical complaints, hallucinations, or depression, and reasonably describes the attitude and circumstances that caused his various infractions. For instance, regarding his failure to show up for work on time one day, the applicant explained that it had been raining really hard, which caused him to drive into a ditch, and he had lost his temper when his Chief gave him his first negative Page 7.

9. The applicant made numerous allegations with respect to the actions and attitudes of himself and various officers in his office. Those allegations not specifically addressed above are considered to be unsupported by substantial evidence sufficient to overcome the presumption of regularity and are not dispositive of the case.¹²

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

10. The applicant has not proven by a preponderance of the evidence that his administrative discharge for unsuitability was erroneous or unjust or that he should have been processed under the PDES for a medical retirement. Accordingly, his request for relief should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

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

April 14, 2023

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