DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2004-117

Xxxxxxxxxxxxx
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FINAL DECISION

[redacted]

This proceeding was conducted under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The application was docketed on May 13, 2004, upon the BCMR's receipt of the applicant's completed application and military records.

This final decision, dated February 24, 2005, is 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 asked the Board to correct his discharge form, DD 214, to reflect the rate and grade ([redacted], second class [redacted]; E-5) that he held prior to his court-martial in October 1996. He was honorably discharged on September 23, 1997, as a seaman (E-3), having completed more than 13 years of active service. He asked the Board to award him the back pay and allowances he would be due from the date of his court-martial to the date of his discharge if his rate had not been reduced. He also asked to be reinstated on active duty at the rank of warrant officer with orders to serve on a particular cutter "as an assistant to the science officers and the administration officers."

The applicant alleged that the proceedings of his court-martial contain "overwhelming evidence of unlawful command influence." He alleged that on May 29, 1996, CDR H, the Engineering Officer at his air station, ordered his supervisor, AM1 T, to sign a CG-4910 to charge him with unauthorized absence (UA). The applicant alleged that CDR H lied twice under oath by denying that he did so. He alleged that the lie is

proved by the fact that AM1 T stated several times under oath that CDR H ordered him to charge the applicant with UA.

The applicant also asked that all negative page 7s (CG-3307) entered in his record between February 6 and April 30, 1996, and his performance evaluation dated April 30, 1996, be removed from his record. He alleged that these page 7s were entered in his record by LT C, a pilot whom the applicant had reported for safety violations on January 16, 1996. The applicant stated that PO S testified that LT C had generated the page 7s and lowered the applicant's evaluation marks by 19 points in retribution for being reported by the applicant and that CDR H later "tried to barter with me over the page 7s … [but] I would not be swayed by [him] to change my tone about the safety incidents."

The applicant argued that it is in the interest of justice for the Board to waive the statute of limitations because he did not know about the BCMR and its authority to grant clemency and correct military records until recently. He alleged that his attorney never told him about the BCMR. The applicant also alleged that he discovered the errors in his record less than two years previously, when he found the conflicting testimony by comparing his 1996 day-planner with Coast Guard documents. In support of his application, he submitted ten character references. He also submitted handwritten notes, which he alleged were his attorney's notes about what witnesses said during interviews prior to the court-martial.

Applicant's Letter to Commandant

The applicant submitted a copy of a letter that he wrote to the Commandant on December 16, 2002. In the letter, he alleged that on January 13, 1996, four crewmembers of C-130 aircraft smelled alcohol on the breath of LT C while it was on a search and rescue (SAR) mission. He alleged that LT C abusively swore at the crewmembers, slammed his headset into the instrument panel, and put the aircraft "into marginal stall conditions … while the aircrew was preparing to drop a flare through the paratroop door." He also alleged that because of "long work/flight hours the day before," several crewmembers refused to show up for the SAR mission, believing that it would violate regulations. The applicant alleged that he reported the matter to the air station's Safety Officer on January 16, 1996. The next day, a superior petty officer told him that he should have "used the chain of command before going to safety," and a chief warrant officer (CWO P) told him, "We could have kept this in house." The applicant alleged that he later heard that LT C already had one "alcohol incident" in his record, so a second would have ended his career.

On January 22, 1996, the applicant alleged, he was accused of having cut his hair in the bathroom sinks and ordered to clean the sinks even though the hair in the sinks was not his color, another member had done it, and an outside contractor normally

cleaned the bathroom. The applicant stated that he was also ordered to get a haircut, which he did at the station barbershop, and the next day was ordered to get another haircut, which he did again.

In the letter to the Commandant, the applicant alleged that on January 23, 1996, the Operations Officer informed a crewmate, AE3 G, that LT C had "had a few drinks with dinner the night before" the SAR flight and that the Operations Officer repeated this information to the applicant himself on January 25, 1996. On February 5, 1996, he was ordered to get another haircut—his third within a two-week period. The applicant stated that he began to feel harassed because he had never before been ordered to get a haircut, and his hair length was within regulations.

On February 6, 1996, the applicant alleged, he was called to a meeting with LCDR C, the assistant Engineering Officer, and three superior petty officers (ADCS D, ADC J, and ADCM C), and asked to sign a negative page 7 entry for his record. The applicant stated that he disagreed with the content and refused to sign it as he believed it was prepared in retaliation for his report to the Safety Officer. After the meeting, he felt very stressed, and CWO P granted him no-fly status. He also asked to see the air station's Executive Officer (XO) about the page 7. He later saw that this page 7 was signed by the CO and LCDR C and alleged that this was improper as neither witnessed the events of January 13, 1996.

On February 7, 1996, the applicant alleged, ADC J, his shop chief and direct supervisor, gave him another page 7 for having been told to get a haircut three times. He refused to sign it. On February 9, 1996, the applicant alleged, he got a copy of the page 7 dated February 6, 1996, and spoke to the XO about it. He had been told by the Safety Officer that the investigation of his report would be conducted by the Operations Officer and that there would be no safety investigation. The XO told him that he "shouldn't pursue the safety incidents and destroy [his] career."

On February 14, 1996, the applicant alleged, he went to the Legal Office to complain about the retaliation and was told to provide all possible documentation, but he did not do so for fear of further retaliation. He alleged that a crewmate, AT3 H, also went to the Legal Office to make a statement about the safety incident but ran into LCDR B, who advised him not to make any statement as "it would black mark his career in the same manner [the applicant was] doing to his career" and that "it would follow him around from station to station." The applicant alleged that LCDR B "quell[ed] other aircrew members from turning in statements about the pilot's actions and the safety incidents." AT3 H, went to his shop chief, ATC H, who met with the commanding officer (CO) "to find out why aircrew members were being harassed for reporting safety incidents."

On February 15, 1996, the applicant alleged, CDR H called him into his office and accused him of starting his own investigation. He told CDR H that he believed the safety issues "were being swept under the carpet and the pilot is being protected" and that the page 7 of February 6, 1996, had been prepared to "cover" the incidents on January 13, 1996. The applicant alleged that CDR H was trying "to keep [him] from attaining further statements from valuable witnesses."

On February 23, 1996, the applicant alleged, CDR H told him that he was going to get another page 7. On March 12, 1996, ADCM C gave him another page 7 about the incidents on January 13, 1996, which he signed "in protest." He alleged that CDR H prepared this page 7 to try to get him to keep his mouth shut. He was later told that this page 7 was destroyed.

At 8:00 on Saturday morning, May 25, 1996, the applicant alleged, after having just completed an overnight shift, he asked ADC L for time off on Monday night. He had tried to call ADCS D, but could not reach him. ADC L called him a "mother f[*****]" and told him to ask AM1 T. The applicant alleged that he spoke with AM1 T and got permission to take Monday night off. Therefore, he did not go to work on Monday. However, on Wednesday, May 29, 1996, CDR H gave AM1 T a form charging the applicant with UA and directed him to sign it. The applicant noted that at his court-martial, CDR H denied ordering AM1 T to charge him, but AM1 T said that CDR H did.

On May 30, 1996, the applicant alleged, AMC J gave him his performance evaluation, which was 19 points lower overall than his previous evaluation. He alleged that he asked to speak to his entire rating chain about the evaluation, but was never allowed to do so. Moreover, he alleged, five page 7s were with the performance evaluation, including the one dated March 12, 1996, which was supposed to have been destroyed. He complained that it was also signed by the CO, who did not witness the incident on January 13, 1996.

The applicant also complained that another page 7 in his record was dated Easter Sunday and that he was not at the air station on that day. He alleged that it might have been prepared by LT C, who was the "ready pilot" that day. In addition, he complained that a page 7 dated April 15, 1996, noted that he had received a low mark of 2 on his performance evaluation, even though he had not yet received the evaluation.

On June 4, 1996, the applicant alleged, he was called to see the Legal Officer, LT A, to make a statement because he had been placed on report. He saw that LT A had written "[Applicant] Mast" on his calendar on the block for June 18, 1996. He asked LT A if he was going to mast, but LT A would not answer him. The applicant stated that he gave LT A his statement on June 6, 1996, and was advised of his rights and signed a Miranda/Tempia warning on June 7, 1996. At mast on June 18, 1996, the applicant alleged, he refused the mast because he was afraid of further retaliation by his com-

mand and felt that he had nothing to lose. The same day, he asked ADCS D for a meeting with his rating chain, which also included LT C and CDR H, but he was never allowed this meeting.

The applicant alleged that his command placed him on report and offered to take him to mast in retaliation for his decision to report the safety violations. However, he was afraid of further retribution and therefore demanded a court-martial. He alleged that CDR H had "spawned" the multiple negative page 7s for him after he reported the safety violations to try to shield LT C and that both CDR H and LT C had a hand in reducing his evaluation marks by 19 points.

On June 20, 1996, the applicant alleged, he asked AM1 T for six days of annual leave, from July 3 to July 10, 1996. AM1 T granted the leave, but was later told he had no authority to do so.

On July 17, 1996, the applicant stated, he was called in to see the CO and the Legal Officer and was told that he would be taken to special court-martial. In addition, he was told that there were two more charges against him. He was assigned counsel.

On August 20, 1996, the applicant alleged, he tore up a request chit in frustration while trying to find out if he had been administratively grounded or not, as CDR H had told AM1 T. AMCS T gave him a counseling sheet, and AMCM K asked that the applicant be referred to a psychiatrist. The applicant alleged that on August 23, 1996, he asked to be reassigned to avoid further conflict with his superiors, but his request was denied.

On September 5, 1996, the applicant alleged, he was called to the Legal Office, where LCDR B and the XO gave him additional charges, which were for "for [his] actions when tearing up the request chit" on August 20, 1996. He alleged that in September 1997, just before his discharge, AMCS T apologized to him about these extra charges and stated that CDR H, LCDR B, and AMCM K "trumped up the additional charges against [him]."

SUMMARY OF THE RECORD

On January 18, 1987, the applicant enlisted in the Coast Guard, having previously completed almost three years of active service in the Marine Corps.[1] He attended boot camp and [redacted] "A" School to become an [redacted] in 1988. In 1992, the applicant advanced to [redacted]

[1] A Statement of Creditable Service in the applicant's record indicates that he was absent without leave (AWOL) for three days approximately half-way through his three-year tour of duty.

On his semi-annual performance evaluation for the period ending October 31, 1995, the applicant received four marks of 6 (on a scale of 1 to 7, with 7 being best); eleven marks of 5; and seven marks of 4; and he was recommended for advancement. On October 8, 1995, LCDR C entered a page 7 in his record commending him for his "professionalism and attention to detail" on October 5, 1995, when after the aircraft commander's preflight check, the applicant had noticed blood on the engine inlet and discovered a bird in the engine that would have posed a significant hazard had the aircraft taken off.

The record contains a sworn affidavit by a crewmate, AE3 G, who wrote that on January 13, 1996, he smelled alcohol on the breath of LT C and reported it to the applicant before the flight. AE3 G stated that the applicant said he would "check it out." After the flight, the applicant confirmed that he had smelled alcohol on LT C's breath and that he would take "appropriate measures."

On February 6, 1996, a negative page 7 was prepared for the applicant's record with the following statement:[2]

> On Saturday, 13 January you were assigned to the duty section as the C-130 flight engineer. You were late arriving at the aircraft for a SAR launch. After the flight, when the C-130 aircraft commander indicated to you that he intended to submit a counseling sheet to document this incident, you vigorously objected and made the statement "Oh, [Mr. C], is that alcohol I small on your breath?"
>
> On Tuesday, 16 January you informed the Safety Officer that you suspected the duty C-130 aircraft commander on 13 January had alcohol on his breath prior to the SAR flight. You then went on a SAR case with this aircraft commander. Subsequent interviews of the other crewmembers proved your "suspicion" to be unfounded. Your credibility is seriously in question given the following: you went flying with this aircraft commander even through you "suspected" he had consumed alcohol. You did not inform anyone at the time of your "suspicions," and that none of this came to light until after the aircraft commander indicated that he intended to document your late arrival.
>
> It appears that your actions were nothing less than an ill-advised attempt to coerce or intimidate the aircraft commander into withdrawing the counseling sheet. This behavior cannot be tolerated. The next such incident will be dealt with severely.

Also on February 6, 1996, AMC J prepared a counseling sheet noting that the applicant had been told three times in one week to get a haircut. AMC J wrote that, after the first time, he "trim[med] the long hair around [his] ears"; that after the second time, his hair was cut but not in accordance with regulations; and that upon the third

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[2] Two versions of this page 7, which look different but have the same text, were submitted by the applicant. Both are signed by the CO, but the first bears the notation by LCDR C that the applicant refused to sign, whereas the second was signed by the applicant "in protest" on March 12, 1996. Prior to this entry, the most recent adverse entry in the applicant's record was a 1990 page 7 about his handling of his finances.

occasion, he argued with his supervisor and showed a lack of respect. AMC J noted that the applicant's behavior might be the result of stress and advised him to get counseling.

On the applicant's semi-annual performance evaluation for the period ending April 30, 1996, he received four marks of 5; twelve marks of 4; four marks of 3; and two marks of 2 for "Responsibility" and "Integrity"; and he was marked as "progressing" instead of being recommended for advancement. The page 7 prepared to document the mark of "progressing," which is dated April 15, 1996, states that the applicant had "failed to exhibit the leadership and responsibility expected of a First Class Petty Officer" and notes that his performance was being monitored. The page 7 that documents the mark of 2 for "Responsibility" is dated April 7, 1996, and notes that even after the applicant had been told to get his hair cut three times and then received a direct order to do so, he asked both the "leading chief" and the CO for their opinion as to whether he needed a haircut and each time was told that his hair was not in compliance with regulation. The page 7 that documents the mark of 2 for "Integrity" is dated April 30, 1996, and states that the applicant "[m]ade serious, unsubstantiated derogatory remark to Aircraft Commander when threatened with a counseling sheet for being late for SAR launch." The applicant refused to sign this page 7.

On Wednesday, May 29, 1996, the applicant was charged with violating Article 86 of the Uniform Code of Military Justice (UCMJ) by being AWOL from 11:00 p.m. on Monday, May 27th until 7:00 a.m. Tuesday, May 28th and from 1:00 a.m. until 7:00 a.m. on Wednesday, May 29th. The witnesses to the first incident are listed as CWO P, ADCS D, ADC L, and AM1 T. Only AM1 T is listed as a witness to the second incident. A first class petty officer was appointed to represent the applicant at mast. The Legal Officer, LT A, who conducted the investigation, interviewed CWO P, ADCS D, ADC L, AM1 T, AMC J, ATC S, and AE1 H and determined that the applicant had falsely told AM1 T on Sunday, May 26th, that his request to take Monday night off had been approved by more senior supervisors. He also determined that the applicant did not have AM1 T's permission not to return to work at 1:00 a.m. on Wednesday, May 29th. He recommended that the case be disposed of at mast.

CWO P, ADCS D, ADC L, and AM1 T provided written statements regarding the charges. ADCS D's statement indicates that on Friday, May 24, 1996, the applicant asked him if he could take June 1st off to attend a wedding. ADCS D agreed and reworked the schedule but told the applicant that he would have to work on Monday night, May 27, 1996, and the applicant agreed. ADCS D stated that ADC L called him on Saturday morning to say that the applicant was asking for Monday night off. ADCS D wrote that he believed that after a heated discussion, ADC L told the applicant that he had to work Monday night and made an entry in the log book to that effect. ADCS D stated that on Tuesday morning, AM1 T reported that the applicant had told him that ADC L had said he could have Monday night off if AM1 T okayed it. Therefore, AM1 T

had allowed it. When ADCS D called the applicant, he was told that the applicant had spoken with ADC L later on Saturday and that ADC L had told him to check with AM1 T. ADCS D asked the applicant whether he remembered their own conversation on Friday during which ADCS D had told the applicant he had to work Monday night. The applicant told him that he did remember the conversation but that at the time he had forgotten that it was a holiday weekend.

ADC L provided a statement to the Legal Officer which indicates that on Saturday morning, May 25, 1996, the applicant told him that he felt he was entitled to take Monday night off to have three-day weekend because he had just ended his shift. ADC L pointed out that the applicant would have all day Saturday, Sunday, and Monday off and did not have to report to work until 11:00 p.m. on Monday "but that if he felt he was owed time to call and work it out with [AM1 T]." The applicant repeated his concerns and request several times, and each time ADC L told him to work it out with AM1 T. Finally, ADC L took the applicant in to CWO P's office to "show him on the calendar why I felt he did not deserve any more time off. … I succeeded in convincing him that he was only shorted 8 hours of liberty and he would have to work that out with [AM1 T]." However, the applicant again insisted that he should get Monday night off, said that he did not want to argue, started to leave, and said "this conversation is over." ADC L admitted that at this point he said, "This conversation is over and you can leave when I tell you you can, mother f[*****]." ADC L then told the applicant to show up for work on Monday night and not to ask AM1 T about it. ADC L told him that he would note it down for AM1 T. ADC L stated that he called ADCS D and told him that the applicant had tried to intimidate him into giving him Monday night off. ADC L stated that on Saturday evening, the applicant called him and they exchanged apologies for the conversation and that the applicant said that he would be at work on Monday night.

The applicant submitted a written statement to the Legal Officer dated June 6, 1996. He wrote that on Saturday morning, May 25, 1996, as he was coming off duty, he asked ADC L if he could be off Monday night so that he would have a three-day weekend. ADC L told him several times to check with his mid-shift supervisor but then called him into CWO P's office to look at a calendar and said that he did not have Monday night off. The conversation became heated and ADC L called him a "mother f[*****]" and accused the applicant of trying to twist his arm. The applicant said that he would ask his mid-shift supervisor as ADC L had first suggested, but ADC L said that the applicant had better show up on Monday night. The applicant wrote that he called ADC L on Saturday night and apologized. ADC L apologized for his language and said that the applicant should speak to his mid-shift supervisor about getting Monday night off. Therefore, the applicant stated, on Sunday afternoon, he spoke with AM1 T, who told him he could take Monday night off. However, on Tuesday morning, ADCS D called and asked why he had not been at work on Monday night, since ADC L "had logged a statement in the Mids-Pass-Down Log Book for [the applicant] to report to duty on Monday." The applicant told ADCS D what had transpired and that AM1 T

had allowed him the night off. ADCS D stated that ADC L had told him something different. Soon after he reported for duty on Tuesday night, a crewmate, AD2 W, told the applicant that he had heard ADCS D tell AM1 T that the applicant was "not to be given any slack or favors." The applicant asked AM1 T for permission to make a brief trip home to retrieve papers and received it. However, because the applicant believed his superiors' attitudes and actions were retribution for the safety report he had made in January, he "allowed these thoughts to affect [his] attitude towards work" and called AM1 T to tell him that he would not be returning to work that night and would consult the chaplain in the morning. The applicant stated that the next morning he consulted the chaplain.

On June 7, 1996, the applicant consulted counsel and was advised of his rights. He opted to accept non-judicial punishment (NJP). However, at mast on June 18, 1996, he rejected NJP. The CO therefore referred the matter to a special court-martial.

On June 11, 1996, a private clinical psychologist wrote on the applicant's behalf that he had been treating him since April 16, 1996; that he had diagnosed the applicant with an adjustment disorder with depressed mood; and that during flare-ups of the applicant's Epstein-Barr Syndrome, he suffered from severe fatigue, irritability, concentration loss, edginess, and depression.

On July 29, 1996, the applicant was evaluated by a psychologist, who diagnosed him with an adjustment disorder with depressed mood. On August 12, 1996, a doctor noted that the applicant had been medically grounded for 25 days due to fatigue because he had the Epstein-Barr Virus. On August 14, 1996, the doctor noted that the applicant was fit for full duty.

On August 20, 1996, ADCS T prepared a counseling sheet about the applicant's failure to use the chain of command. ADCS T stated that the applicant had completed and given him a chit to find out whether he was administratively grounded. ADCS T told the applicant that he would take care of it. Within thirty minutes, ADCS T discovered that the applicant had prepared a duplicate chit and given it to AMCM K to process. When ADCS T asked the applicant about it, the applicant told him that he did not trust ADCS T to process requests for him. The applicant refused to sign the counseling sheet. AMCM K disapproved the applicant's chit with a notation indicating that the applicant had been medically grounded. Apparently later that day, upon learning that the applicant was no longer medically grounded, AMCM K suspended the applicant's flight status. On August 22, 1996, the new CO signed a letter to inform the applicant that his flying status had been suspended indefinitely as of August 20, 1996.

On September 5, 1996, LCDR B completed the final charge sheet in preparation for the special court-martial. The applicant was charged with two counts of violating Article 86 of the UCMJ for being AWOL from 11:00 p.m. on Monday, May 27, 1996,

until 7:00 a.m. the next morning and from 1:00 a.m. to 7:00 a.m. on Wednesday, May 29, 1996. He was also charged with four counts of violating Article 91 through insubordinate conduct toward a petty officer. The first was for disobeying ADC L's order on Saturday, May 25, 1996, not to call AM1 T about getting Monday night off. The second was for disobeying an order by AM1 T on July 3, 1996, to perform a preflight check. The third was for failing to return a chit to AMCS T's in-box, as ordered, on August 20, 1996. The fourth was for being disrespectful to AMCS T by taking the chit out of his in-box and tearing it to pieces after AMCS T had told him to return the chit to the in-box.

The applicant's attorney moved to dismiss the charges based on unlawful command influence. The United States opposed the motion, arguing that there "is no allegation by the accused that either officer preferring charges in this case was coerced into swearing to charges that they do not believe are true. [Citation omitted.] The government proffers that both officers will testify that they were not coerced into preferring charges and that they believed the charges to be true and supported by probable cause when they preferred them."

At trial on October 7 and 8, 1996, the trial judge denied the applicant's motion to dismiss. The applicant's allegations about the command retaliating for the applicant's report to the Safety Officer were not mentioned at trial. The applicant submitted a copy of a motion *in limine* by the prosecution to exclude testimony regarding the safety incident, which motion was apparently granted.

At trial, AM1 T testified that when the applicant called him on Sunday, May 26, 1996, he gave AM1 T the impression that another supervisor had already authorized the applicant to take Monday night off. AM1 T further testified that after the applicant called him at about 1:00 a.m. on Wednesday, May 29, 1996, he did not order the applicant to return to work. He also testified that when the applicant told him on July 3, 1996, that he was too stressed to perform a preflight check, AM1 T did not order him to do it. AM1 T said that he did report the applicant's actions on July 3, 1996, to his superior, but he did not bring the charge of disobeying an order of his own volition, although he did sign the booking chit when it was given to him. CDR H testified that although AM1 T may have been in the room when the charges were discussed, CDR H could not recall discussing with AM1 T whether to bring charges against the applicant.

The trial judge found the applicant guilty of being AWOL on Monday night, May 27, 1996, but not guilty of being AWOL on Wednesday morning. The trial judge also found the applicant guilty of having been disrespectful to AMCS T on August 20, 1996, but not guilty of the other alleged violations under Article 91 of the UCMJ. The trial judge sentenced the applicant to 100 days of confinement, reduction to pay grade E-2, and forfeiture of $500 per month for six months. The applicant began serving his confinement on October 10, 1996. On December 17, 1996, the Convening Authority (the

applicant's new CO) released the applicant from confinement as of December 20, 1996, in a *sua sponte* act of clemency.

On appeal to the convening authority, the applicant's counsel argued that the evidence was insufficient to prove beyond a reasonable doubt that the applicant had been AWOL or disrespectful. The applicant's counsel also argued that the sentence was disproportionate to the offenses of which he was convicted. However, on January 7, 1996, the convening authority approved the trial judge's sentence, with the exception of the grant of clemency for the remainder of the confinement. Thereafter, the case was reviewed by a judge advocate and by the Chief Judge of the Coast Guard Court of Criminal Appeals, who found no basis for modifying the findings or sentence.

Following his release from confinement, the applicant continued to serve at the same air station. On September 23, 1997, he was honorably discharged at pay grade E-3 due to "maximum service or time in grade." His reentry code is RE-3R (eligible to reenlist except for the disqualifying factor of "unsuccessful in obtaining professional growth objective").

VIEWS OF THE COAST GUARD

On September 24, 2004, the Judge Advocate General (JAG) submitted an advisory opinion in which he recommended that the Board deny relief in this case.

The JAG argued that the application should be denied for untimeliness because the applicant "has failed to show why it is in the interest of justice to excuse the delay." The JAG alleged that the applicant's statement that his attorney failed to tell him about the BCMR did not constitute "good cause for his failure to timely file" and that a cursory review of the record "reveals that Applicant was properly convicted by a court-martial" and that he "is unlikely to prevail on the merits."

The JAG argued that in reviewing the evidence, the Board should "recognize that only the court-martial had the opportunity to view the evidence, including the demeanor of the Applicant and the witnesses against him." The JAG alleged that at trial the applicant "was afforded all of his constitutional and statutory rights and was fully and aggressively represented throughout the proceedings by two fully qualified defense counsel, one military attorney provided by the government free of charge, and a civilian attorney selected and paid for by Applicant." The JAG argued that in his application to the Board, the applicant "attempts to re-litigate claims he either raised or should have raised during his criminal trial. He has failed to assert or prove *any* factual or legal error."

The JAG alleged that the applicant "has failed to present substantial reasons for granting clemency." Regarding the sentence, the JAG argued that the Board should be

particularly deferential "to the broad discretion of military authorities, which are best able to assess appropriate punishments in light of unit missions and the concomitant needs of good order and discipline at their units." The JAG argued that the "power of clemency, like the power of pardon, is intended to address extraordinary circumstances that normal legislative and judicial processes cannot effectively address." The JAG also argued that, "because of the appeal procedures established by statute and regulation within the military system, the Board should deem any issue not raised through this process to be waived, absent proof of compelling circumstances that prevented the Applicant from raising such issues within the military justice system."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 28, 2004, the Chair sent the applicant a copy of the advisory opinion and invited him to respond within 30 days. On October 20, 2005, the Board received the applicant's response.

The applicant argued that his application is not based solely upon the court-martial. He argued that it is also based on the reprisals against him, the "unlawful command influence," and perjury committed by CDR H. He argued that CDR H violated Article 37(a) of the UCMJ by using his "mantle of authority" to coerce AM1 T to bring charges against him.

Moreover, he argued, he was not allowed to raise the issue of retaliation at the court-martial because the trial judge excluded it. The applicant alleged that the record clearly shows that his career was not threatened until he reported that LT C's breath smelled of alcohol after the aircraft "almost perished into the Gulf of Mexico on January 13, 1996." He stated that the aircraft "almost cart-wheeled into the Gulf of Mexico … [and] would have done so had I not prevented a muscle movement by the pilot. Four members smell[ed] alcohol on the pilot's breath, two reportedly [sic]." He alleged that he should have been protected for reporting this incident by the Whistle-Blower Act and the harassment policy of the Department.

The applicant explained that at mast on June 18, 1996, he refused non-judicial punishment because his entire chain of command was present and he no longer trusted them to deal with the charges fairly because they had all shown bias against him since he had reported the smell of alcohol on LT C's breath to the Safety Officer. He stated that LT C, CDR H, and ADC L had all been stationed together in Hawaii prior to their assignment to the air station.

The applicant argued that after he completed his sentence and probationary period, his rank should have been restored. He alleged that the new CO told him that it was in his best interest to leave the Coast Guard because he had "made the boys in engineering look very bad when they took the stand during [his] court-martial." He

argued that the new CO, who served as the Convening Authority for the court-martial, was not at the air station when he reported LT C and so she did not witness or understand the retaliation against him. Therefore, the fact that she did not grant him more clemency should not prevent the Board from granting clemency.

The applicant argued that his punishment was disproportional to the offenses. He alleged that an AE2 who missed the flight on January 13, 1996, was placed on report by LT C and received only an adverse page 7 in his record, whereas he merely reported a safety problem and got harassment, adverse page 7s, lowered evaluation marks, criminal charges, and punishment by court-martial.

In support of his allegation that he only recently learned about the BCMR, the applicant submitted a letter from an Assistant Veteran Service Officer, who stated that in 2003 while discussing the applicant's experience in the Coast Guard, he suggested that the applicant apply to the BCMR. He stated that the applicant had never heard of the BCMR or the possibility of asking for relief.

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 section 1552 of title 10 of the United States Code. The application was timely.

2. The applicant requested an oral hearing before the Board and the presence of three admirals and CDR H (now CAPT H) at the hearing. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. An application to the Board must be filed within three years after the applicant discovers the alleged error in his record. 10 U.S.C. § 1552. The applicant argued that he did not know about the BCMR until 2003. However, he clearly knew about the alleged errors in his record upon his discharge in 1997. Therefore, his application was untimely.

4. Pursuant to 10 U.S.C. § 1552(b), the Board may waive the three-year statute of limitations if it is in the interest of justice to do so. To determine whether it is in the interest of justice to waive the statute of limitations, the Board should conduct a cursory review of the merits of the case and consider the reasons for the delay. *Dickson v. Sec'y of Defense*, 68 F.3d 1396 (D.D.C. 1995); *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992). The applicant explained that the delay was caused by the fact that he had never

heard about the Board even though he was represented by two attorneys at the time of his court-martial. The Board does not find the applicant's reason for delay to be compelling.

5. A cursory review of the merits of this case indicates that the applicant's discharge as an E-3 resulted from his having been sentenced to a reduction to E-2 by special court-martial on October 8, 1996. The applicant alleged that the charges were brought against him in retaliation for a report to a Safety Officer he made in January 1996 and that the trial judge unjustly prevented him from presenting evidence of the retaliation. However, the record indicates that the charges were brought against the applicant several months after his report to the Safety Officer. Moreover, except for the bare fact that LT C—the subject of his report—was in his chain of command, the applicant submitted no evidence to support his allegation that the charges were a matter of retaliation. The record contains substantial evidence that supports the charges. The fact that the applicant fell increasingly at odds with his chain of command after he made a report to the Safety Officer in January 1996 does not prove that he was the target of retaliation. The preponderance of the evidence in the record indicates that the applicant's own conduct caused the increasing disapproval of his chain of command and, ultimately, the charges against him. The Board notes that the applicant's counsel did not appeal the trial judge's decision to exclude the applicant's arguments about retaliation.

6. The applicant noted that CDR H testified at trial that he could not recall discussing whether to bring charges against the applicant with AM1 T, though he admitted AM1 T may have been in the room, whereas AM1 T indicated that he did not bring the charge of his own volition. However, the record indicates that the issue of unlawful command influence was raised by the applicant's attorneys prior to trial and that their motion to dismiss the charges on that basis was denied.

7. The applicant alleged that the adverse page 7s entered in his record in 1996 and the poor performance evaluation he received for the period ending April 30, 1996, were prepared in retaliation for his report to the Safety Officer. He submitted no evidence to support this allegation. The low marks in the poor performance evaluation are adequately supported by the page 7s. The applicant submitted no evidence to contradict the page 7 about his failure to maintain a haircut that complied with regulation, contrary to repeated orders, or the page 7 about the mark of 2 he received for "Responsibility." The only evidence in the record that can be considered to contradict the page 7 about his report to the Safety Officer and the page 7 about the mark of 2 for "Integrity" is an affidavit by AE3 G stating that he smelled alcohol on LT C's breath prior to the flight on January 13, 1996, and mentioned it to the applicant. The Board finds that AE3 G's statement is insufficient to prove that the page 7s, which were signed by the XO and CO, were erroneous or unjust.

8. The applicant alleged that his sentence was disproportionate to the offenses of which he was convicted. Apart from noting that a fellow aircrew member received only a page 7 for oversleeping and missing a flight, he submitted no evidence to support this allegation. The maximum sentence for violating Article 91 of the UCMJ by showing contempt or disrespect for a superior petty officer is a bad conduct discharge, forfeiture of all pay and allowances, and confinement for six months. The maximum sentence for violating Article 86 by being absent from one's place of duty for not more than three days is confinement for one month and forfeiture of two-thirds pay per month for one month. The applicant has not proved that the trial judge abused her discretion in awarding the applicant the sentence he received.

9. The Board's cursory review of the merits of the case indicates that the applicant has submitted almost no evidence that supports his many allegations and nothing that would justify a grant of clemency by this Board. Because the Board's review indicates that the applicant will not prevail on the merits, the Board finds that it is not in the interest of justice to waive the statute of limitations in this case.

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

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of former xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is denied.