DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

[redacted]

BCMR Docket No. 2013-039

FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case after receiving the applicant's completed application and military records on December 17, 2012, and assigned it to staff member [redacted] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated September 12, 2013, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUESTS

The applicant, who was discharged under other than honorable (OTH) conditions[1] on February 6, 2012, for "Unacceptable Conduct," asked the Board to void his discharge and reinstate him on active duty. He alleged that the Board should grant this relief because his waiver of his right to an administrative discharge board (ADB) was an unlawful condition of his pretrial agreement and improper.

The applicant also asked the Board for clemency on the sentence of his summary court-martial (SCM),[2] which included a reduction in rate and forfeiture. He alleged that clemency is warranted because the convening authority for the SCM took premature action on his case and

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

[2] There are three types of court-martial: A summary court-martial consists of a single commissioned officer as the trier of fact, the decision does not constitute a criminal conviction, and the sentence is limited and cannot include a punitive discharge; a special court-martial consists of a military judge as the trier of fact, the decision constitutes a criminal conviction, and the sentence is less limited and may include a BCD and up to a year of confinement; a general court-martial includes a judge and jury of military members, and the sentence may include a lengthy confinement, dishonorable discharge, and death. In all courts-martial, the convening authority retains the power to set aside findings of guilt and reduce any sentence.

even prematurely published the outcome and so clearly failed to properly consider the matters in mitigation submitted by the applicant's defense counsel.

In the alternative, the applicant asked the Board to make the following corrections to his record based on the infirmity of the criminal and administrative proceedings:

- Upgrade his discharge from OTH to Honorable;
- Upgrade his reentry code from RE-4 (ineligible to reenlist) to RE-1 (eligible); and
- Correct his narrative reason for separation from "Unacceptable Conduct" to "Convenience of the Government."

Finally, the applicant asked the Board to award him any back pay and allowances he is due as a result of the corrections or forgone veterans' benefits, such as educational benefits.

APPLICANT'S ALLEGATIONS

The applicant explained that on September 14, 2011, he was charged with attempted larceny, conspiracy to commit larceny, larceny, and failure to obey a lawful order in violation of the Uniform Code of Military Justice (UCMJ). At trial on December 8, 2011, the applicant pled guilty to numerous charges pursuant to a pretrial agreement, which also required him to request an OTH discharge for the good of the Service. Because he requested an OTH discharge in accordance with his pretrial agreement, he was later discharged without an ADB.[3] His adjudged sentence was restriction to base for two months, reduction in rate from E-5 to E-4, and a forfeiture of $1,550.60.

The applicant stated that on December 15, 2011, the seventh day after the trial, his CO took final action on the case. He alleged that this was premature action in violation of Rules 1105 and 1107 of the Rules for Courts-Martial (RCM) because his CO should have waited for the eighth day to act.[4] The applicant stated that the CO attempted to cure this error on the eighth day by issuing an amendment to his action claiming that the CO had considered the matters submitted by defense counsel. However, he argued, because the CO had already taken action on the seventh day, his action on the eighth day was a foregone conclusion and the CO never properly considered the character references and other material he submitted in mitigation of his offenses.

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[3] The Coast Guard may not award an OTH discharge without first affording the member the right to present his case to a ADB with the advice and assistance of counsel, but no ADB is required if the member requests discharge for the good of the Service or waives the right to an ADB in writing. Military Separations Manual, Article 1.B.23.a.(1).

[4] RCM Rule 1105 states that after a sentence is adjudged, the accused may submit to the convening authority "any matters that may reasonably tend to affect the convening authority's decision whether to disapprove any findings of guilty or to approve the sentence … within 7 days after the sentence is announced," and the convening authority may extend that period up to 20 days for good cause. Failure to submit matters within the prescribed time is deemed a waiver of the right to submit addition matters for the convening authority's consideration. MANUAL FOR COURTS-MARTIAL UNITED STATES (2012) (hereinafter "MCM"), p. II-148.

RCM Rule 1107 states that the convening authority may take action on the findings and sentence of a court-martial only after the 7-day period has expired or the accused has waived his right to submit matters under Rule 1105 and that the convening authority must consider any matters submitted by the accused pursuant to that rule. MCM, at II-151.

Moreover, the applicant stated, his command had published the Report of Results of Trial on December 9, 2011, the day after the trial. The applicant claimed that once an action is reported on a DD 2329, it is too late to modify it; the findings of guilt become irreversible under RCM 1107. The applicant cited no rule supporting this claim about a DD 2329 in particular but noted that under Rule 1107, the convening authority "shall state in writing and insert in the record of trial the convening authority's decision as to the sentence, whether any findings of guilty are disapproved, and orders as to further disposition." The applicant argued that the handwritten note on the DD 2329 referring to the CO's final action on December 15, 2011, shows that irreversible action was taken before the seven-day period for submitting matters in mitigation and extenuation had expired.

Regarding his pretrial agreement, the applicant argued that the provision requiring him to request an OTH discharge constituted a waiver of his right to an ADB and so was improper and contrary to law. The applicant alleged that in *United States v. Gansemer*, 38 M.J. 340 (C.M.A. 1993), the court ruled that a waiver of an ADB in a pretrial agreement violates RCM 705(c)(1) and "decided that it would strike the provision as null and void *ab initio* based on the reasoning that waiving due process in an administrative separation proceeding in a criminal case is improper." Therefore, the applicant argued, because he was entitled to an ADB, the provision of his pretrial agreement that required him to submit a request for an OTH discharge was improper and illegal.

Regarding the character of his discharge, the applicant stated that the Board "should find that the infirmity of the administrative proceedings and court-martial support increasing the discharge characterization to honorable for equity reasons as well as propriety reasons as argued above." He argued that the alleged due process violations constitute "evidence of arbitrary, capricious or discriminatory actions by individual in authority over the applicant" and his character references show that his OTH discharge was not justified.

Finally, the applicant alleged that the record of events reflects an unfair rush to judgment because the CO needed to get the cutter underway and so did not carefully consider the matters the applicant's counsel submitted in mitigation. He alleged that the charges against him were not properly served until December 6, 2011, just two days before the trial. His defense counsel advised him to plead guilty and did not discuss the evidence or the consequences with him or any negotiations or counter-offers. His CO decided to use an SCM and then "chapter [him] out under an agreement" just to expedite his case.

The applicant stated that he has volunteered at his church, attended school full time since his discharge, and maintained a grade point average of 3.5. In support of his allegations, the applicant submitted several documents concerning his SCM, which are included in the Summary of the Record below, and the following character references, dated in October, November, and December 2011, which his counsel submitted to the convening authority after the trial in the mitigation phase:

- A retired chief storekeeper stated that while assigned to his unit, the applicant "was always at work on time, organized, knowledgeable, and extremely helpful to others" and requests leniency. He states that he had also known the applicant personally through the

applicant's father for many years, and that the applicant would "be a valuable asset to any organization."

- A friend of the applicant stated that the applicant had not told him the charges against him but that the applicant was "an extremely loyal, generous, genuinely caring and thoughtful person."

- A retired master chief petty officer (MCPO) who served with and became friends with the applicant's father from 2003 to 2005, stated that the applicant's father would give "fellow shipmates advice on either a professional or personal level while always keeping in mind the Coast Guard core values of Honor, Respect, and Devotion to Duty." The MCPO met the applicant at his father's retirement party in 2009 and found him to be "an honorable, respectful, and valuable member of the Coast Guard and someone I would be proud to have served with during my 28 year Coast Guard career." The MCPO stated that the applicant "has made some mistakes" but would many times turn to his father for advice and receive professional advice designed to make him a better Coast Guardsman. The MCPO concluded that the applicant would be "a valuable asset to retain."

- Another retired MCPO and friend of the applicant's father stated that the applicant had served honorably in the Air Force and then decided to follow his father's footsteps in the Coast Guard. He stated that the applicant "is a fine young man with impeccable character … [and] likable, trustworthy, polite and respectful" and that he would "vouch for [the applicant's] fine character."

- A retired chief warrant officer (CWO) who met the applicant through his father described the applicant as knowledgeable, professional, respectful, and hard-working.

- Another retired CWO who met the applicant through his father described the applicant as "extremely affable, respectful and polite," … "a stoic person who wants to forge ahead" and "continue his career" in the Coast Guard. He wrote that the applicant's "personality and character in general are what constitutes a great sailor that I'd be proud to serve with."

- A third CWO who met the applicant through his father stated that the applicant is "a young man of great integrity, is extremely dedicated to his work, is conscientious and is entirely peace-loving. He has always been trustworthy, reliable and dependable." The CWO stated that "[w]hile [the applicant] may have made a mistake, this would certainly not warrant the destruction of his life or his military career."

- A retired lieutenant colonel of the Army stated that he fully trusts and respects the applicant, whose conduct had always been exemplary in both personal and professional situations.

- A Life Group Pastor stated that the applicant had "always displayed a high degree of integrity, responsibility, and ambition."

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on January 4, 2007, after having served in the Air Force from July 23, 2002, through July 22, 2006. He advanced to SK2/E-5 while serving aboard two cutters. In March 2011, the applicant was removed from his cutter and assigned to a shore unit pursuant to an investigation into allegations of larceny.

On September 14, 2011, numerous charges of violations of the UCMJ were preferred against the applicant. On September 15, 2011, the CO of his cutter, who served as the convening authority, referred the charges for trial by special court-martial.[5]

On December 5, 2012, the applicant and his assigned Navy counsel signed a pretrial agreement. Part I of the agreement includes numerous terms regarding the trial, including the applicant's agreement to plead guilty to certain charges and the convening authority's agreement to "withdraw and dismiss without prejudice the Charges and Specifications that were referred to a Special Court-Martial on 15 September 2011 and prefer and refer the charges contained in this agreement for which I [the applicant] have agreed to plead guilty to a Summary Court-Martial."[6] Part I also includes the following contested provision:

> I agree to request a discharge under other than honorable [OTH] conditions for the good of the service prior to the Summary Court-Martial. I understand if this request is approved I will receive a discharge under other than honorable conditions, which may deprive me of virtually all veterans' benefits based on my current period of active service, and I may expect to encounter substantial prejudice in civilian life in situations in which the type of service rendered in any Armed Forces branch or the character of discharge received therefrom may have a bearing.

Part II of the pretrial agreement states that the maximum sentence that would be awarded was two months' restriction to base, forfeiture of 2/3 of one month's pay, reduction in rank to the next inferior pay grade, and reprimand.

The applicant and his counsel also signed a stipulation agreement on December 5, 2011. It includes his admission that between November 2009 and March 2011, he used his position as a storekeeper "to steal various items procured with unit funds" aboard the cutter. He was authorized to use the cutter's credit card to purchase items for the unit, but "knew the supervision of my purchases through these systems was very poor and … believed I could take advantage of that fact." The applicant admitted that his father, a retired storekeeper, told him how he could steal, and he stole or attempted to steal on behalf of himself or his father many items costing hundreds of dollars, including a dive watch, telescope, hand grenade, automatic pistol, pistol holster ballis-

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[5] Under RCM Rule 201, a special court-martial is composed of a military judge, who may award any authorized punishment except death, dishonorable discharge, dismissal, confinement for more than a year, hard labor for more than 3 months, and forfeiture of more two-thirds of pay per month or any forfeiture for more than a year. Therefore, maximum punishments generally include a BCD, confinement for less than a year, and lesser forfeitures. MCM, at II-9.

[6] Under RCM Rule 1301, an SCM is composed of a single commissioned officer. MCM, at II-179. For members in pay grades E-5 and above, the maximum punishment includes forfeiture of two-thirds of pay for a month, restriction to base for 2 months, and reduction to the next lowest pay grade. Military Justice Manual (hereinafter "MJM"), Article 2.F.1.b. A finding of guilt by an SCM does not constitute a criminal conviction. MJM, Art. 2.F.2.j. A member has a right to counsel when deciding whether to accept trial by SCM but does not have a right to representation by an attorney during an SCM. MJM, Art. 2.D.

tic goggles, television monitor, off-road survival kit, fire rescue tool kit, machete, sniper rifle cover, policeman's clubs, expandable batons, hunting knife, marine knife, tactical knives, switch-blade knife, OC pepper spray, various tool sets, etc. He had intended to intercept the items in the cutter's mail, but some of them were discovered. The applicant also admitted to failing to obey orders by possessing a personal firearm with ammunition aboard the cutter and failing to follow procurement policies and procedures. The applicant acknowledged knowing that the stipulation agreement would be used in determining his guilt and sentence and that it constituted "the strongest form of proof against me known to law."

Also on December 5, 2011, the applicant submitted a request for an administrative discharge under other than honorable (OTH) conditions "for the Good of the Service." In this memorandum, he stated that he had consulted counsel, with whom he was "completely satisfied" and who "fully advised me of the implications of such a request." The basis for his request was his "misconduct contained in the court-martial charges preferred against me in enclosure (1)." He acknowledged that an OTH discharge would deprive him of virtually all veterans' benefits for that period of service and that he might encounter prejudice in civilian life because of the OTH. He stated that he was making the request "voluntarily, free from any duress" in conjunction with the pretrial agreement "in which the convening authority has conditionally agreed to refer the charges to a summary court-martial."

On December 8, 2011, the applicant was tried by SCM. The next day, December 9th, the officer who served as the SCM sent a DD Form 2329, "Record of Trial by Summary Court-Martial," and a memorandum titled "Report of Results of Trial" to the applicant's CO. The report states that the applicant was found guilty of all but one of the charges[7] and was sentenced to restriction to base for two months, reduction in rate to E-4, and forfeiture of $1,550.60 in pay. The report indicates that the officer showed and explained Part I of the pretrial agreement to the accused, who stated that he understood the terms and agreed with them. He also showed the stipulation agreement to the accused, who verified that he had been represented by and consulted with counsel before signing it. The officer discussed the facts of the case with the accused before accepting his guilty pleas, finding him guilty, and advising him of his right to present evidence in extenuation and mitigation. The officer advised the CO that he could "not act on the sentence for seven days from the date of the Summary Court-Martial."

On December 13, 2011, the applicant's CO endorsed his request for an OTH discharge and forwarded it to the Area Commander. He noted that the applicant's request was made pursuant to a pretrial agreement in which the CO had agreed to allow the charges to be disposed of at an SCM instead of a special court-martial. The CO attached the report of the investigation to his endorsement and stated that the applicant had been placed in a position of trust as a storekeeper and had egregiously violated that trust.

On December 15, 2011, the CO signed a memorandum titled "Action of the Convening Authority" in which he approved the adjudged sentence. The CO also signed the DD 2329 that day and added a handwritten note referring to the memorandum.

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[7] The charge of failing to obey an order by failing to seek approval for storing a personal firearm with ammunition aboard the cutter was dismissed although the applicant was found guilty of failing to obey an order by possessing the personal firearm and other weapons and ammunition aboard the cutter.

On December 16, 2011, the CO signed a memorandum titled "Amendment #1: Action of the Convening Authority Action" (sic), which states that the CO had received a request for clemency from the applicant's counsel. Although the request was dated December 15, 2011, it was received by email from the applicant's counsel on December 16, 2011. The CO wrote that "[a]fter careful consideration of the clemency request the sentence is approved as adjudged and will be executed."

Also on December 16, 2011, the Area Commander endorsed the applicant's request for an OTH discharge, recommended approval, and forwarded it to Commander, Personnel Service Center.

On January 5, 2012, the Personnel Service Center issued orders for the applicant to receive an OTH discharge due to "Unacceptable Conduct" with an RE-4 reentry code.

On February 6, 2012, the applicant received an OTH discharge for "Unacceptable Conduct" with an RE-4 reentry code.

VIEWS OF THE COAST GUARD

On May 3, 2013, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the applicant's requests.

The JAG stated that the RCM Rule 705(c)[8] provides the limitations on the terms and conditions of a pretrial agreement and "does not preclude an agreement to waive rights that may be waived in collateral or unrelated proceedings," citing *United States v. Tate*, 64 M.J. 269 (C.A.A.F. 2007), and *United States v. Gansemer*, 38 M.J. 340, 342 (C.M.A. 1993). The JAG noted that, contrary to the applicant's arguments, the *Gansemer* decision actually held that a pretrial agreement may include a provision wherein the accused waives his right to an ADB. In this regard, the JAG noted that Article 1.B.20.a. of the Military Separations Manual expressly states that "a member may request a discharge for the good of the Service as part of a pretrial agreement in which the convening authority agrees to dispose of charges at non-judicial punishment, refer the charges to a summary court-martial, disapprove an adjudged punitive discharge, or other appropriate consideration." In this case, the JAG stated, the convening authority agreed to refer the charges to an SCM, instead of a special court-martial, in exchange for the applicant's agreement to voluntarily request an OTH discharge for the good of the Service. The JAG states that no statute, regulation, policy, or case law prohibited this provision of the pretrial agreement.

Regarding the applicant's claim that the convening authority, his CO, prematurely approved his sentence without considering his submissions in mitigation on December 15, 2011, the seventh day after his trial on December 8th, the JAG stated that RCM Rule 1105 requires the submission of matters in mitigation or extenuation to occur within seven days of the trial, and the applicant's counsel did not submit such matters until December 16, 2011, which was eight days

[8] RCM Rule 705(c) states that the terms and conditions of a pretrial agreement must be voluntary and that a term or condition may not be enforced if it deprives the accused of the right to counsel, to due process, to challenge the jurisdiction of the court-martial, to a speedy trial, to complete sentencing proceedings, or to exercise post-trial or appellate rights. MCM, at II-68.

after the applicant's trial. Therefore, the JAG argued, the CO was not even required to take the applicant's submissions into consideration. However, after taking initial action on the seventh day, the CO "reopened the case once the clemency matters were received even though he was not required to do so."

Regarding the applicant's claim that once the DD 2329 was signed on December 15, 2011, it was too late for the CO to change his mind, the JAG pointed out that RCM Rule 1107(f)(2) states the following:

> The convening authority may recall and modify any action taken by that convening authority at any time before it has been published or before the accused has been officially notified. The convening authority may also recall and modify any action at any time prior to forwarding the record for review, as long as the modification does not result in action less favorable to the accused than the earlier action. … The convening authority shall personally sign any supplementary or corrective action.

The JAG admitted that the applicant had already been notified of the CO's action on December 15, 2011, but stated that the record had not yet been forwarded for review. Therefore, he could modify his action under Rule 1107(f)(2). The JAG concluded that the CO, as convening authority, "acted within the boundaries of the rules in providing his final action memo. In an abundance of caution, the convening authority reopened his review after receiving the clemency materials."

The JAG noted that if the applicant is claiming that the seven-day period for submitting matters in mitigation began after the Report of Results of Trial was issued on December 9, 2011, he is mistaken because RCM Rule 1105 states that such matters must be submitted within seven days of the date the sentence "is announced," and the applicant's sentence was announced at trial on December 8th. The report constituted an authentication of the results of the trial, not the announcement of the sentence.

Regarding the applicant's allegation that the timing shows that the CO did not carefully consider the character references he submitted, the JAG noted that the CO's Amendment #1 states that he carefully considered the applicant's submissions before again deciding to approve the sentence as adjudged. The JAG noted that absent evidence to the contrary, the CO is presumed to have carried out this duty "correctly, lawfully, and in good faith," citing *Quinton v. United States*, 64 Fed. Cl. 118, 124 (2005), and other cases. The JAG alleged that there is no evidence that overcomes this presumption, and that the preponderance of the evidence shows that the CO "went over and above his required obligation and considered clemency matters that were presented outside of the seven-day requirement."

The JAG concluded that the applicant has failed to prove by a preponderance of the evidence that his discharge was erroneous or unjust or that his pretrial agreement was illegal. However, the JAG argued that even if the Board finds that the applicant's discharge was illegal, he is only entitled to recover back pay and allowances through the end of his last enlistment contract, which is December 10, 2013, and is not entitled to reinstatement on active duty. The JAG cited *Spehr v. United States*, 51 Fed. Cl. 69, 82 (2001), for this claim. The JAG noted that the case implicates "a significant issue of Coast Guard policy" and would require review under 33 C.F.R. § 52.64 if the Board granted relief.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 16, 2013, the Chair sent the applicant's attorney a copy of the Coast Guard's advisory opinion and invited him to submit a written response within 30 days pursuant to 33 C.F.R. § 52.42(d). No response was received.

APPLICABLE REGULATIONS

Article 1.B.20.a. of the Military Separations Manual, COMDTINST M1000.4, states the following:

> An enlisted member may request a discharge under other than honorable [OTH] conditions for the good of the Service. A discharge for the good of the Service is intended as an administrative substitute in situations where a member could potentially face a punitive discharge if convicted by a special or general court-martial. Members may request a discharge for the good of the Service if charges have been preferred against them and the maximum punishment, as described in the Manual for Courts-Martial, for the preferred charges includes a punitive discharge. … A member may request a discharge for the good of the Service as part of a pretrial agreement in which the convening authority agrees to dispose of the charges at non-judicial punishment, refer the charges to a summary court-martial, disapprove an adjudged punitive discharge, or other appropriate consideration.

Article 1.B.20.b. Military Separations Manual states that a member has a right to counsel in deciding whether to request an OTH discharge for the good of the service.

Article 2.G.2. of the Military Justice Manual (MJM), COMDTINST 5810.1E, states the following about post-trial matters following an SCM:

> a. The accused may submit matters per RCM 1105 within 7 days after the sentence is announced. The convening authority may extend this period by 20 days for good cause.
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> b. The convening authority shall take action on the record as per RCM 1107. Consultation with the servicing legal office is strongly advised, but not required, prior to taking SCM action. No action may be taken by the convening authority prior to the expiration of the time allowed for the accused to submit matters under RCM 1105. …

Article 2.H.1. of the MJM states that following the convening authority's action, the case is forwarded to the JAG for review and

> [i]f upon review the judge advocate determines that there is insufficient evidence to support an element of an offense, or if any other corrective action is required as a matter of law, the judge advocate shall inform the summary court officer and provide an opportunity for the ROT to be corrected pursuant to RCM 1104(d). This notice of the need for correction shall be made to the summary court officer prior to forwarding the ROT to the OEGCMJ for any corrective action required by RCM 1112(e).

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's military record and submissions, the Coast Guard's submission, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely filed within three years of the applicant's discharge.[9]

2. The applicant alleged that his sentence at SCM and his discharge on February 6, 2012, were erroneous and unjust because he was illegally required to waive his right to an ADB in his pretrial agreement, and the convening authority for his SCM took premature action and did not carefully consider the character references and other information he submitted in mitigation. When considering such allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in an applicant's military record is correct and fair, and the applicant bears the burden of proving by a preponderance of the evidence that the documents are erroneous or unjust.[10] Absent specific evidence to the contrary, the Board presumes that Coast Guard officers and other Government officials have carried out their duties "correctly, lawfully, and in good faith."[11]

3. In arguing that he was illegally deprived of an ADB by the inclusion in his pretrial agreement of a provision requiring him to request a voluntary OTH discharge for the good of the Service, the applicant relied on the minority opinion in *United States v. Gansemer*, 38 M.J. 340 (1993). The court actually ruled, 3 to 2, that a waiver of an ADB is a legal provision of a pretrial agreement under RCM Rule 705(c).[12] Considerable subsequent case law supports that decision, and nothing in RCM Rule 705(c) precludes it.[13] Therefore, the provision of his pretrial agreement that required him to request an OTH discharge for the good of the Service in consideration for having the charges tried by a summary instead of a special court-martial was legal. In fact, such a provision is expressly authorized under Article 1.B.20.a. of the Military Separations Manual. The applicant voluntarily agreed to the provision with the advice of counsel and submitted his request for an OTH discharge for the good of the Service on December 5, 2011. Therefore, his OTH discharge without a hearing before an ADB complied with Article 1.B.23.a.(1) of the Military Separations Manual and was neither erroneous nor unjust. The Board finds that the applicant has failed to prove by a preponderance of the evidence that his discharge without an ADB was either erroneous or unjust.

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[9] 10 U.S.C. § 1552(b).

[10] 33 C.F.R. § 52.24(b) ("The Board begins its consideration of each case presuming administrative regularity on the part of Coast Guard and other Government officials. The applicant has the burden of proving the existence of an error or injustice by the preponderance of the evidence.").

[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).

[12] *United States v. Gansemer*, 38 M.J. 340, 342 (C.M.A. 1993).

[13] *See, e.g., United States v. Mezzanatto*, 513 U.S. 196, 201 (1995) ("absent some affirmative indication of Congress' intent to preclude waiver, we have presumed that statutory provisions are subject to waiver by voluntary agreement of the parties"); *United States v. Tate*, 64 M.J. 269, 271 (C.A.A.F. 2007); *United States v. Edwards*, 58 M.J. 49, 52 (C.A.A.F. 2003); and *United States v. McFadyen*, 51 M.J. 289 (C.A.A.F. 1999); *see* note 8 above (text of RCM Rule 705(c)).

4. The applicant alleged that his sentence, which included a reduction in grade and forfeiture, was erroneous and unjust because the convening authority, his CO, acted prematurely in approving the adjudged sentence on December 15, 2011, and then did not carefully consider the information in mitigation that the applicant's counsel submitted on December 16, 2011, before repeating the approval in a written amendment to his premature action. The applicant alleged that the amendment his CO signed failed to cure the error and prejudice caused by the premature action he took the day before. Therefore, the applicant argued, the Board should grant clemency on his sentence.

5. A convening authority may not take action on an SCM "prior to the expiration of the time allowed for the accused to submit matters under RCM 1105."[14] Rule 1105 allows an accused seven days from the announcement of sentence to submit matters in mitigation to the convening authority. The applicant's sentence was announced at trial on December 8, 2011, and he should have submitted his evidence within seven days—by midnight on December 15, 2011.[15] Therefore, the CO should have waited until after midnight on December 15, 2011, to sign the action memorandum. By signing it and the DD 2329 sometime during the day on December 15, 2011, the CO erred. The CO's error, however, did not actually prejudice the applicant because the applicant's counsel did not submit any information in mitigation before midnight on December 15, 2011. Since no new information was submitted to the CO between the time he acted and the applicant's deadline for submitting information at midnight on December 15th, the CO's slightly premature action was harmless error because it did not prevent him from taking into consideration any evidence he was legally required to consider.[16]

6. A convening authority *may* extend the accused's seven-day period "for good cause."[17] On December 16, 2011, the CO signed an amendment to his December 15th action memorandum noting that he had accepted the applicant's late-submitted information, carefully considered it, and still approved the findings and sentence as adjudged. Whether the CO realized on December 16th that his action on December 15th had been premature is unclear. Assuming that the CO realized his action on December 15th had been premature, the CO could have cured his error on December 16th even without accepting and considering the applicant's late submission if he decided there was no "good cause" for the lateness. However, the amendment shows that the CO did accept and consider the applicant's late submission before reaching his final decision.

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[14] MJM, Article 2.G.2.b.

[15] MJM, Article 2.G.2.a.; MCM, at II-148 (RCM Rule 1105).

[16] *See* FED. R. CIV. P. 61 ("Harmless Error: … At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."); *Texas v. Lesage*, 528 U.S. 18, 21 (1999) ("[W]here a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting relief"); *Quinton v. United States*, 64 Fed. Cl. 118, 125 (2005) (finding that harmlessness requires that there be "no substantial nexus or connection" between the proven error and the prejudicial record that the applicant wants the Board to remove or correct); *Engels v. United States*, 678 F.2d 173, 175 (Ct. Cl. 1982) (finding that an error in an officer's military record is harmless unless the error is "causally linked with" the record the officer wants corrected); *Hary v. United States*, 618 F.2d 704, 707-09 (Ct. Cl. 1980) (finding that the plaintiff had to show that the proven error "substantially affected the decision to separate him" because "harmless error … will not warrant judicial relief.").

[17] MJM, Article 2.G.2.a.

7. The applicant alleged that the CO's premature action on December 15th predetermined his decision after reviewing the applicant's late information in mitigation on December 16th, but the Board disagrees. The CO was not required to accept the late submission at all, and the fact that he did shows that he was open to the possibility that the applicant's submission could change his mind. The applicant also alleged that the CO could not have carefully considered his information in mitigation because the CO was rushing the process to get underway. The CO did sign the amendment the same day that the applicant submitted his information in mitigation, but the Board sees nothing in the applicant's submission that the CO could not have read and carefully considered within an hour or two. The fact that the character references—largely from family friends who were apparently unaware of the charges against the applicant—did not change the CO's decision does not persuade the Board that he did not review them carefully. In this regard the Board notes that character references expounding on the integrity and trustworthiness of the applicant are quite unconvincing in light of his admitted long-term criminal activity.

8. The Board finds that the December 16th amendment did cure the CO's premature action on December 15th. Such corrections before or after the record of trial is forwarded for review by the JAG are clearly contemplated and allowed under RCM Rule 1107(f)(2),[18] Rule 1306(b)(4),[19] and Article 2.H.1. of the Military Justice Manual. Even assuming *arguendo* that the amendment on December 16th failed to cure the CO's premature action, however, the Board finds the error in the CO's timing to be harmless because it did not prevent the CO from carefully considering that applicant's information in mitigation before issuing his final decision.[20] Had the CO been persuaded by the applicant's information on December 16th, nothing prevented him from changing the decision he had initially made on December 15th.

9. The applicant alleged that he was denied due process because his trial and the convening authority's decision were rushed because his CO wanted to get the cutter underway. As evidence of undue haste, he alleges that he was not served with the charges against him until December 6, 2011, just two days before the SCM on December 8th. This allegation is disingenuous and misleading. The record shows that the applicant was initially charged on September 14, 2011, and the charges were referred for trial by special court-martial on September 15th. The dates that the applicant was assigned counsel and shown the charges are not in the record before this Board, but the applicant had clearly begun gathering character references by October 2011. On December 5, 2011, pursuant to the pretrial agreement, the convening authority agreed to withdraw the charges from the special court-martial—a military judge—and submit them anew to an SCM. These were the charges that the applicant agreed to plead guilty to on December 5th with the assistance of counsel and was therefore served for the purposes of the SCM on December 6th. The Board is not persuaded that the applicant or his counsel was unaware of the charges against him, that the applicant was deprived of due process, or that the convening authority unduly rushed the trial or failed to carefully consider his final action on the proceedings.

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[18] *See* MCM, at II-151 (RCM Rule 1107(f)(2), quoted on page 8, above).
[19] MCM, at II-183 (RCM Rule 1306(b)(4) ("Any action taken on a summary court-martial after the initial action by the convening authority shall be in writing …")).
[20] *See* note 17 above.

10. The applicant made numerous allegations with respect to the actions and attitudes of the convening authority and SCM. Those allegations not specifically addressed above are considered to be unsupported in the record and/or not dispositive of the case.[21]

11. The applicant has failed to prove by a preponderance of the evidence that his sentence or OTH discharge for "Unacceptable Performance" and reentry code are erroneous or unjust. The Board finds no error or injustice that warrants voiding the discharge, reinstating him on active duty, reducing his sentence, or upgrading his character of discharge, reason for discharge, or reentry code on his DD 214. His sentence at SCM and the Coast Guard's administrative decision to award him, at his request, an OTH discharge with an RE-4 are strongly supported by his long record of larceny and gross abuse of his position of trust as a storekeeper. Accordingly, his requests for relief should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

[21] *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").

ORDER

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

[redacted]