DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2016-170

[redacted]

FINAL DECISION

This proceeding was conducted according to 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 completed application on July 21, 2016, and assigned it to staff attorney [redacted] to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated July 28, 2017, 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 [redacted] who was discharged under other than honorable (OTH) conditions[1] on November 20, 2012, pursuant to a pre-trial agreement, asked the Board to correct his record by voiding his discharge; reinstating him on active duty as an [redacted]/E-5 effective November 20, 2012; immediately advancing him to Petty Officer First Class as an [redacted]/E-6; awarding full back pay and allowances; removing a Summary Court-Martial (SCM)[2] conviction from his military record; and removing all references to the SCM from his record.

[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.

Applicant's Explanation of Events

The applicant, through counsel, argued that he was unjustly and erroneously discharged from the Coast Guard following an unjust SCM conviction. By way of background, the applicant first explained that he entered the Coast Guard in 2008 after two years of college. In October of 2011, the applicant was stationed overseas. On July 14, 2012, the applicant stated, he went out to a bar, and one of his shipmates told him that two girls wanted to leave with them. He stated that the "women appeared to take a liking to him and his shipmate, so he felt that this was an opportunity to have some fun." After he and his shipmate paired off and had sexual intercourse with the women, the applicant learned that the women were prostitutes. He and his shipmate took the women back to the bar where they had met. When the women got out of the car, the shipmate got out as well to move to the front seat and snatched the purse from one of the women "as they drove off." The applicant, "not wanting to get his shipmate apprehended for taking the purse," continued to drive away. The women reported the incident to the local police, who in turn reported the incident to their Commanding Officer (CO). An investigation was conducted, and on August 7, 2012, the applicant was charged with five violations of the Uniform Code of Military Justice (UCMJ). He was charged with violating UCMJ Article 78, accessory after the fact; UCMJ Article 81, conspiracy; UCMJ Article 92, disobeying a written order; UCMJ Article 122, robbery; and UCMJ Article 134, patronizing a prostitute.

The applicant stated that on October 12, 2012, he signed a pre-trial agreement wherein he accepted a trial by SCM, where he would not be represented by counsel, and the Coast Guard agreed to withdraw conspiracy and robbery. In exchange for the withdrawal of two charges, the applicant agreed to testify against his shipmate, who had pled not guilty. At the applicant's SCM, he pled guilty to the three remaining charges and received reduction in rate to E-4, forfeiture of $500 for one month, and restriction for 30 days. Since his discharge, the applicant stated, he has been gainfully employed and has had no "criminal or civil issues." He is now a father of a baby whom he jointly raises with his ex-girlfriend.

The applicant stated that in March 2013 he submitted an application to the Discharge Review Board (DRB) requesting an upgrade in discharge characterization. He explained that a majority of the board voted to upgrade his OTH discharge to a General discharge, but the Assistant Commandant overturned the board and held that his character of discharge on his DD 214 would stand as issued.

Applicant's Legal Arguments

The applicant made two overarching arguments as to why the Board should grant his request. The first is that he was "wrongfully and unjustly" found guilty by the SCM. The second is that his CO abused his discretion by erroneously and unjustly discharging the applicant.

Regarding the first argument, the applicant claimed that the Coast Guard would have been unable to prove every element in each of the three charges. In order to be found guilty under the UCMJ, each element of an offense must be proven beyond a reasonable doubt. Therefore, the applicant argued, he was unjustly found guilty of the offenses.

UCMJ Article 78 – Accessory After the Fact

The charge states, "In that [the applicant], USCG, on active duty, on or about 14 July 2012, knowing that [the shipmate], USCG, had committed an offense punishable by the UCMJ, to wit steal from [the victim], against her will, a purse and its contents of a value of approximately 80…in order to prevent the apprehension of [the shipmate], did assist him by driving the vehicle which transported [the shipmate] from the scene of the crime." In order to be found guilty of this offense, each of the following elements must be proven:

A) That an offense punishable by the code was committed by a certain person;
B) That the accused knew that this person had committed such offense;
C) That thereafter the accused received, comforted, or assisted the offender; and
D) That the accused did so for the purpose of hindering or preventing the apprehension, trial, or punishment of the offender.

The applicant explained that under this offense, the accused does not help the offender commit the principal offense, but aids after the crime has been committed. He stated that the government must be able to prove that the accused had actual knowledge of the underlying criminal act prior to the alleged assistance. The applicant admitted that he was with his shipmate when he took the woman's purse, and that he drove them away from that location. However, he argued, he had no knowledge that his shipmate had taken the purse and therefore had no knowledge of a crime and no intent to hinder the apprehension of his shipmate. "CLEARLY and OVERWHELMINGLY, the element of KNOWLEDGE is not met by the Government." Because the government would have been unable to prove the element of knowledge, the applicant argued, he should not have been guilty of this charge.

UCMJ Article 92 – Failure to Obey Other Lawful Order

The charge states, "In that [the applicant], USCG, having knowledge of the lawful order issued by Captain [B], United States Coast Guard, to wit: paragraph 7, Patrol Forces…Instruction 1050.2, dated 2 February 2011, an order which was his duty to obey did, on active duty…fail to obey the same by wrongfully operating a vehicle after consuming some amount of alcohol." In order to be found guilty of this offense, each of the following elements must be proven:

A) That a member of the armed forces issued a certain lawful order;
B) That the accused had knowledge of the order;
C) That the accused had a duty to obey the order; and
D) That the accused failed to obey the order.

The applicant argued that the government would have been unable to prove that there was a lawful order or that he had actual knowledge of the order. He explained that the order must relate to a military duty, and it may not conflict with a statutory or constitutional right of the member. The order must also have a valid military purpose that is clear, specific, and narrowly drawn.[3] The applicant argued that an order not to consume alcohol must have a reasonable connection to the

[3] *United States v. Moore*, 58 M.J. 466 (C.A.A.F. 2003).

needs of the military.[4] The applicant was charged with violating a Patrol Forces Southwest Asia Instruction that prohibits operating a motor vehicle after consuming any amount of alcohol. He argued that this is not a valid and lawful order because it is overly broad and is more restrictive on a member's personal affairs than its UCMJ counterpart, which merely prohibits operating a motor vehicle when a member's blood alcohol content is greater than a specified amount.[5] The applicant argued this Patrol Forces Instruction infringes on an otherwise lawful behavior and has no valid military purpose. The applicant further argued that there are "no facts or evidence that support that the [applicant] had any knowledge of this order."

In addition, the applicant stated that there was no proof that he had violated the order by driving after drinking alcohol. He was not detained and there was no blood alcohol test administered. The Patrol Forces Instruction also does not contain a time limitation, so he argued that anyone who drank alcohol in that country and drove at any point thereafter would be guilty of violating this instruction. However, the applicant claimed that the government would not have been able to factually prove that he had had alcohol prior to driving the vehicle that night or that he had actual knowledge of the Patrol Forces Instruction he allegedly disobeyed. Therefore, the applicant stated, the SCM abused his discretion in finding the applicant guilty of this charge.

UCMJ Article 134 – Patronizing a Prostitute

The charge states "In that [the applicant], USCG, on active duty, did…wrongfully procure [the woman], a person not his spouse, to engage in an act of sexual intercourse with the accused in exchange for money, which conduct was to the prejudice of good order and discipline and was of a nature to bring discredit upon the armed forces." In order to be found guilty of this offense, each of the following elements must be proven:

A) That the accused had sexual intercourse with another person not the accused's spouse;
B) That the accused compelled, induced, enticed, or procured such person to engage in an act of sexual intercourse in exchange for money or other compensation;
C) That this act was wrongful; and
D) That, under the circumstances, the conduct of the accused was to the prejudice of the good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

The applicant admitted that he had sexual intercourse with the prostitute. However, he argued that knowledge is an essential element of this charge, and he claimed he found out she was a prostitute after the fact. He stated any enticing or procuring was done by his shipmate, as he had arranged everything by talking to the women and then coming to the applicant and asking him to join them. The applicant vehemently claimed he had no knowledge that the women were prostitutes until after the sexual intercourse.

The applicant therefore argued that all three charges were legally insufficient because the government would have been unable to prove all of the elements of each one. Based on the "legal

[4] *United States v. Stewart*, 33 M.J. 519 (A.F.C.M.R. 1991).
[5] *See* UCMJ Article 111.

insufficiency of the evidence," he asked that the Board grant his request and remove the SCM conviction and related documentation from his record.

Argument Regarding the Applicant's Discharge

The applicant's second overall argument is that his CO abused his discretion by administratively discharging him with an Other Than Honorable (OTH) discharge after the erroneous SCM conviction. The applicant was administratively separated under the authority of COMDTINST M1000.4, Chapter 1.B.20. for the Good of the Service. He argued that he was discharged based on the results of the SCM, in which he was found guilty based on legally insufficient evidence. As a result, the applicant reiterated under this argument that the Board should reinstate him to an E-5; immediately advance him to a Petty Officer First Class as an E-6; and award him full back pay and allowances from November 20, 2012. He stated that the purpose of this Board is to place the applicant in the same position he would have been in had the error or injustice not occurred.

The applicant argued that his discharge was based on circumstantial evidence because his Command merely took into account that the SCM had found him guilty of three charges. He claimed that the CO was looking for a harsher punishment for him in order to make an example to the rest of the members stationed at that Command. "The fact that the Command could not and did not meet the elements for any of the charges brought against the [applicant] prove [sic] that the Summary Court Martial was unjust and unlawful. The [applicant] MUST be reinstated." The applicant went on to claim that he was coerced into signing a pre-trial agreement, although he gave no other information regarding this claim. He stated this was an unfortunate story of being guilty by association, and not by facts. The applicant went on to note that this Board is required to consider all of the evidence. The Board may not fail to consider some evidence or an "important aspect of the problem." The applicant argued that, once the Board has considered all of the facts, it will be evident that he was unjustly and erroneously found guilty by SCM and thereafter discharged from the Coast Guard.

The applicant also noted that until this point, he had had a very good record. He had never received even a negative administrative entry in his record. He advanced quickly and gained several qualifications along the way. He stated that he made a mistake, but it was an isolated incident, and he learned from his mistake. He therefore asked that the Board consider his request, so that he could rejoin the Coast Guard and continue his career.

Documents Provided by Applicant

The applicant provided many documents surrounding the SCM, which are summarized below in the Summary of the Record. The applicant also provided three character references. The first letter is from the applicant's Operations Supervisor at his current place of work, which deals with nuclear waste. The supervisor stated that he had worked with the applicant for a year. He stated that the applicant has "strong leadership skills, has a knack for seeing 'the bigger picture,' and insists on safe and compliant production." The supervisor noted that the applicant is very competent at what he does and has a very strong work ethic.

The second letter is from a co-worker at the applicant's current place of work. He discussed some of the applicant's job duties and stated that he found the applicant to be "dependable, reliable, hard-working, conscientious, honest, and courteous." He also noted that the applicant always had a positive attitude and learned very quickly. He stated that the applicant had become an asset due to his hard work and emphasis on safely handling any project.

The third letter is from the applicant's current director. She stated that she was very impressed with his work ethic and his positive attitude. She stated that the applicant's leadership qualities are especially of note and that he is not afraid to challenge his co-workers and ensure that tasks are performed correctly. She also noted his ability to see the "bigger picture" and his apparent loyalty to his friends and family. The director stated that the applicant was well liked on the crew and was an asset to the work environment.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on February 5, 2008. Other than the incident at issue here, the applicant has no negative entries in his military record. On December 17, 2010, he became certified as Gangway Petty Officer of the Watch; on December 18, 2010, he completed training to be certified as a flight deck fire team hoseman; and on April 13, 2011, he passed Advanced Damage Control training. All of his evaluation marks were "standard" or better, and he always received a satisfactory conduct mark.

On June 29, 2012, the applicant received an administrative Page 7[6] documenting that he had received his indoctrination training for his overseas deployment. The Page 7 stated that he had also received a copy of the indoctrination materials. The applicant was instructed to initial next to each line item to acknowledge that he was briefed on each matter. The seventh item on the list states "Alcohol Use Policy. Ref: Responsible Use of Alcohol by…Personnel." The applicant initialed next to every line, including this one.

On July 14, 2012, the applicant was interviewed by two members of the Coast Guard Investigative Services (CGIS). The summary states that the interview was in reference to the robbery of a civilian woman. The applicant was advised of his rights and informed he was suspected of a robbery and engaging in prostitution. He acknowledged his rights verbally and in writing, where he also acknowledged that he chose to answer questions at this time without representation. During the interview, the applicant stated that he had voluntarily approached CGIS and requested to provide a statement. He stated that the two prostitutes wanted a certain amount, but he was only willing to pay less than that. The shipmate paid the remaining amount for the applicant's prostitute and paid for his own prostitute as well. The four of them stopped at the applicant's home "so that he could grab a condom," and they then went to the shipmate's home. The applicant stated that he had sexual intercourse with the prostitute at the shipmate's home. Afterwards, he and the shipmate drove the women to an apartment. The woman he had paid was in the passenger seat, and the shipmate and the other woman were in the backseat. When the women exited the car, the shipmate got out to move to the front seat. The applicant stated that the

[6] An Administrative Remarks record entry, form CG-3307, better known as a "Page 7," is used to document a member's notification of important information, achievements, or counseling about positive or negative aspects of a member's performance in the member's military record.

shipmate pulled on the purse of one of the women and the chain broke. The shipmate got in the car with the purse and said "go" to the applicant, who then "panicked" and drove off.

The applicant stated that he yelled at the shipmate and asked him what he had done. The shipmate reportedly said to him "I'm a thief." The shipmate found the money paid to the prostitute inside the purse and put it inside the applicant's shirt. The applicant stated he took the money out of his shirt and threw it into the door compartment. While driving away, the applicant told the shipmate that he needed to dispose of the purse. The applicant pulled up to a dumpster for the shipmate to dispose of the purse. The CGIS investigators were not able to locate the purse the next day. The applicant prepared an apology letter to the victim and her friend and stated "I think harming a female is one of the worst things ever." The applicant showed the CGIS investigators his car where the money was still in the door, and it was collected for evidence.

Along with his interview, the applicant provided a voluntary, sworn affidavit. He stated that he came to the CGIS office to make a statement of his own free will. He stated that he and his shipmate had been at a bar on Friday, July 14, 2012, where they met two women who "decided to come back to [the shipmate's] house" with them. He stayed on a couch with one of the women, while the other woman and the shipmate went upstairs. When the women were ready to leave, they reportedly asked for taxi money. The applicant asked the shipmate if he was going to give the women money, and the shipmate said he did not have any money and "jokingly" said he was going to take her money. The applicant stated that he thought it was a joke so he laughed it off. The applicant offered to give the women a ride, and the shipmate came too. When they arrived at the apartment, the applicant explained, "I said bye they said bye and [the shipmate] was getting in the front seat. He got in the front seat rapidly with one of the girls holding on and wrestling with him for the purse as he yelled GO." The applicant claimed that he panicked and drove off and asked the shipmate what he had done. The shipmate laughed and replied "I'm a thief." He described how the shipmate took $40 out of the wallet and put it in his shirt, and how the applicant then placed the money in the door compartment. The applicant stated that he knew this was a bad situation and that it looked bad on him and not just the shipmate. He told the shipmate to throw the purse out, and he did. The applicant then went home. The applicant stated that he was going to call the shipmate the next morning to talk to him when he realized he had left his phone in the car (which was with the shipmate). A woman was at his house the next morning to take the applicant in for questioning before he ever got a chance to speak with the shipmate.

On August 7, 2012, the applicant was formally charged with five violations of the UCMJ. The applicant was informed of the charges on this date. The charges were referred to a SCM. The five charges were: accessory after the fact; conspiracy, violating a written order, robbery, and patronizing a prostitute. The conspiracy and robbery charges were crossed out on October 16, 2012, with the word "WITHDRAWN."

On October 12, 2012, the applicant and his counsel signed a pre-trial agreement, which was approved and signed by the convening authority on October 16, 2012. The agreement states that in exchange for "good consideration" and after the applicant had consulted with his counsel, he agreed to a trial by SCM without representation by counsel. He agreed to the addition of the language "which conduct was to the prejudice of good order and discipline and was of a nature to bring discredit upon the armed forces" to the prostitution charge, and he understood that this was

a "major change" from the original language.[7] The applicant agreed to request a discharge under OTH conditions for the good of the service in accordance with COMDTINST M1000.4, Chapter 1.B.20, and that his discharge could be based on any act reflected in the charges subject to the SCM. The agreement states that if he was given testimonial immunity, he agreed to provide truthful testimony against his shipmate regarding the events of July 14, 2012. The applicant also agreed to plead guilty to the charges of violating a lawful order and patronizing a prostitute.

In consideration for these agreements, the convening authority withdrew the charges that had been referred to a Special Court Martial on August 7, 2012, and referred them instead to a SCM. At the conclusion of the SCM, the convening authority agreed to dismiss with prejudice all charges to which the applicant did not plead guilty. If the applicant did not comply with this agreement, the convening authority retained the ability to re-refer the charges to a Special Court Martial. A handwritten addition to the agreement notes that once the applicant pled guilty, jeopardy would attach such that none of the charges could be brought by another Court-Martial. The agreement states that the applicant was satisfied with the counsel he had received and that he fully understood and comprehended "the meaning and effect of, [his] guilty pleas and all attendant effects and consequences, including the possibility that [he would] be processed for administrative discharge."

On October 18, 2012, the applicant sent a request for discharge under OTH conditions for the good of the service to the Personnel Service Center (PSC). His request states that he had consulted with defense counsel who had "fully advised [him] of the implications of such a request." He requested to be administratively discharged and stated that he was "completely satisfied" with the counsel he had received. He further stated that he understood that an OTH discharge could deprive him of nearly all of his veterans' benefits and cause "substantial prejudice in civilian life." He did not wish to submit a statement on his own behalf, and he stated that he made the request voluntarily in conjunction with his pre-trial agreement.

On November 8, 2012, the applicant signed an acknowledgment of rights and accepted trial by SCM. The applicant acknowledged that he had the right to refuse a SCM and that he had the right to consult an attorney prior to deciding whether to accept a SCM, but he had no right to an appointed attorney during the SCM. During the SCM, he had the right to be represented by a civilian attorney at his own expense, to remain silent and plead not guilty therefore "placing upon the government the burden of proving [his] guilt beyond a reasonable doubt," to have witnesses called to testify on his behalf, to cross-examine witnesses against him, and, if found guilty, to present mitigating evidence in his favor. If he refused trial by SCM, he acknowledged, his CO could refer the charges to a Special or General Court Martial, and he would have additional rights in those fora. The acknowledgement also discussed the maximum punishment that could be awarded at a Summary, Special, and General Court Martial. The maximum punishment at the SCM could be two months restriction, forfeiture of two-thirds of one month's pay, reduction in pay grade, and reprimand. At the end of the document, the applicant initialed next to "I accept summary court-martial."

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[7] The original charge stated in full "Violation of UCMJ Article 134, Patronizing a Prostitute; In that [the applicant], USCG, on active duty, did at or near…, on or about 14 July 2012, wrongfully procure [the woman], a person not his spouse, to engage in an act of sexual intercourse with the accused in exchange for money."

The SCM convened on November 8, 2012. The Record of Trial by Summary Court-Martial states that the applicant was given a copy of the charge sheet and was informed of the nature of the charges, his rights, and the maximum sentence that could be adjudged. The Record states that the applicant did not object to trial by SCM and that he was not represented by counsel. The applicant pled guilty and was found guilty on all three remaining counts: accessory after the fact, violating a written order, and patronizing a prostitute. At the bottom of the Record is a hand-written note stating that the applicant was provided a copy of this Report after the sentence was announced.

A memorandum was prepared by the SCM on November 8, 2012. The memorandum describes the process the applicant had received, including being informed of his rights, having consulted with an attorney, and accepting a SCM. The applicant pled guilty to Charge I – Accessory After the Fact; Charge III – Violation of Lawful Order; and Charge V – Patronizing a Prostitute. The Court-Martial wrote that he had conducted "an appropriate inquiry to determine whether the offered guilty pleas were provident." After a thorough discussion, he concluded that the facts surrounding the charged offenses and the applicant's responses to his questions determined that the pleas were acceptable. The Court-Martial also reviewed each of the terms in the Pre-trial Agreement with the applicant. The applicant was found guilty on all three counts and was informed of his right to provide mitigating evidence prior to sentencing.

The SCM entered eight documents from the applicant's military record showing the character of his service into the record. The applicant had four people testify on his behalf. All of the witnesses testified that the applicant was a positive and hard-working man, and they all stated that they believed this incident to have been out of character for him. They also stated that they believed he could be rehabilitated, and those who worked with the applicant during this time frame stated that he was an asset to the team and could continue to be if he was permitted to stay with the Coast Guard. The applicant also submitted six documents into the record; an unsworn statement, two character reference letters, and a printout of awards and evaluation marks from his military record. In his unsworn statement to the Court-Martial, the applicant reiterated his deep remorse for getting involved with his shipmate and for the harm he had caused himself and others in the Coast Guard. He stated that he firmly believed he could continue to be an asset to the Coast Guard and that he would never get into trouble again if he was permitted to continue serving.

The SCM awarded the applicant a reduction in pay grade to E-4, restriction to his home base for 25 days, forfeiture of $500 for one month, and a reprimand. The Court-Martial stated that he was not authorized to suspend any of the sentence. The applicant was informed of his right to submit an appeal, and he received a copy of the Record of the Trial.

On November 13, 2012, the applicant's command received a Separation Authorization stating that the applicant must be discharged no later than December 17, 2012. The action was authorized pursuant to Article 1.B.20. of the Separation Manual. The type of separation was to be "For the Good of the Service," the reason was to be "Triable by court martial," and he was to receive an RE-4 reenlistment code (ineligible to reenlist).

On November 15, 2012, the applicant sent a request for clemency from his SCM sentence to the Area Commander. He stated that he had pled guilty at his SCM and described his punishment. The applicant stated that he was a proud member of the Coast Guard and that until the incident in July, he had worked hard to always do his best and serve honorably. He stated that the incident at issue here was "an isolated incident involving [his] poor judgment." He asserted that the actions were out of character and that he was deeply remorseful. The applicant explained that he was going to be a father, and he was looking forward to the responsibility that this would entail. As a result, he specifically requested that the forfeiture and restriction be suspended so that he could use his leave to look for employment and set aside money to prepare for the birth of his first child.

On November 16, 2012, the Convening Authority replied to the applicant's request for clemency. After "careful consideration of the clemency request," the Convening Authority approved the sentence and stated that it would be executed as adjudged.

A Judge Advocate completed a review of the SCM on November 20, 2012. He concluded that the SCM had jurisdiction over the charges, each specification of guilty was not disapproved, and the sentence was legal. He found that the applicant did not make a written allegation of error within the waiting period. The Judge Advocate therefore stated that the SCM conviction could be sent to the Commandant.

The applicant was discharged on November 20, 2012. His DD-214 shows that he had four years, ninth months, and sixteen days of active duty service. The character of service is "Under Other Than Honorable," the separation authority is COMDTINST M1000.4 1.B.20., the reentry code is RE-4, and the narrative reason for separation is "Triable by Court Martial."

The applicant applied to the Discharge Review Board (DRB) following his separation. His application is not before the Board. On January 29, 2014, the DRB issued a decision denying his request.

VIEWS OF THE COAST GUARD

On January 6, 2017, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief. The JAG first argued that the application is untimely because it was not submitted within three years of the alleged error or injustice.

Regarding the applicant's contention that the government would have been unable to prove the element of knowledge of a criminal act for the charge of accessory after the fact, the JAG argued that the evidence contradicts the applicant's statements. In the Brief submitted with his application, the applicant stated, "Not wanting to get his shipmate apprehended for taking the purse, the [applicant] drove away." The JAG stated that this statement in his own petition "attributes the knowledge and intent to his actions which he later attempts to deny." In addition, when the applicant voluntarily spoke with CGIS the day after the incident, he told the investigators that he suggested his shipmate get rid of the purse and drove to a dumpster so the purse could be

disposed of. He also described how the shipmate grabbed the purse, got into the car and yelled "go" and the applicant "panicked" and drove off.

Regarding the applicant's argument that his conviction for failure to obey an order was legally insufficient because the government could not prove that he had knowledge of the order and that the order is overly broad and restrictive, the JAG stated that this argument is factually incorrect and legally flawed. On June 29, 2012, the applicant received a Page 7 which acknowledged that he had completed indoctrination training wherein he was counseled on the overseas Command's policy. The applicant initialed each item, which included the alcohol policy prohibiting driving after consuming any alcohol. He also signed at the bottom of the Page 7 acknowledging that he received an indoctrination binder with all of the referenced policies.

Regarding the argument that the order was unjustly broad, as it was more restrictive than UCMJ Article 111, Drunken or reckless operation of a vehicle, the JAG argued that prohibiting alcohol consumption before operating a vehicle is "a completely acceptable military order." Orders that require performance of a military duty are inferred to be lawful, and what constitutes a military duty is broad and includes "all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the service."[8] The JAG pointed out that the Army BCMR has previously found that the consumption of alcohol in violation of an order not to drink alcohol while in Panama was a violation of Article 92.[9] The applicant was deployed to a predominately Muslim country where drinking alcohol is considered taboo and "tolerance for drinking any amount of alcohol and driving is much stricter than in the United States." The JAG therefore argued that the command could ban drinking alcohol prior to driving to protect its members and to conform to the local custom; both of which are valid military purposes. Lastly, the applicant argued that UCMJ Article 111 requires a certain blood alcohol content level; the JAG stated that this is not the case as "drunk" means "any intoxication which is sufficient to impair the rational and full exercise of the mental or physical faculties."[10]

Regarding the applicant's argument that the conviction for patronizing a prostitute was based on legally insufficient evidence because the government could not prove that he knew the woman was a prostitute beforehand, the JAG stated that this claim is not supported by the evidence. The applicant told the CGIS investigators that the woman wanted $40, but he was only willing to pay $30 so his shipmate paid the additional $10. The applicant therefore admitted that he had bargained for his own prostitute prior to having sexual intercourse with her. This admission provides "substantial evidence that he was aware that he procured a prostitute."

The JAG also stated that the applicant has pled guilty to each of these offenses, which includes pleading guilty to all of their elements. He signed a pre-trial agreement with advice from counsel and certified that he had been fully advised of the meaning and effect of his guilty plea. Pleading guilty to an offense is "generally considered to be sufficient legal evidence." Therefore, the JAG argued, the applicant did not meet his burden of proving by a preponderance of the

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[8] UCMJ, paragraph 14c(2)(a).
[9] *U.S. v. Gussen*, 33 J.J. 736 (1991).
[10] UCMJ, paragraph 35b(6).

evidence that there was an error or injustice in his military record, and recommended the Board deny relief.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 10, 2017, the Chair sent the applicant a copy of the Coast Guard's views and invited him to response within 30 days. After an extension, the Chair received a reply from the applicant, through counsel, on June 9, 2017. The applicant disagreed with the Coast Guard's advisory opinion.

The applicant first argued that his application was submitted to the Board timely. He stated that he became aware of the legal errors when an attorney advised him in May 2015. The application was thereafter received by the Board in June 2016, within the three year statute of limitations. In addition, he argued that it is in the interests of fairness and justice to consider the application.

Regarding the accessory after the fact charge, the applicant stated that he had already explained to the Board that he had "no prior knowledge of [the shipmate's] actions and then when he shouted 'go' the Applicant didn't know what else to do but go because he did not know what was going on." The Coast Guard relied on the applicant's brief that stated the applicant did not want to get the shipmate in trouble. The applicant's attorney replied, "Counsel for the Applicant may not have precisely articulated the facts. The facts are that the Applicant said that he…didn't want to get in trouble for something that he did not do." The applicant claimed that he told the shipmate to get rid of the purse because he did not want to be a part of the shipmate's actions. Overall, the applicant argued, he "was caught off guard and reacted to a shocking situation that he was not a part of."

Regarding the failure to obey an order charge, the applicant "stands on the evidence and documents submitted in his petition." He asserted that the law on this matter is clear and concise, and a guilty plea cannot stand if the evidence does not support each of the elements of the offense.

Regarding the patronizing a prostitute charge, the applicant stated that it was "clear that there was not a bargaining between he and any girl," but that the shipmate negotiated the price of the women beforehand so the applicant had no knowledge she was a prostitute.

Despite the fact that the applicant had pled guilty to each offense, he claimed, he "did not realize or understand the full elements" of each offense. He respectfully requested that the Board take this into consideration and upgrade the characterization of his discharge to "at least a General under honorable conditions."

APPLICABLE LAW AND REGULATIONS

Title 10 U.S.C. § 1552(f) states:

> With respect to records of courts-martial and related administrative records pertaining to court-martial cases tried or reviewed under chapter 47 of this title (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)), action under subsection (a) may extend only to – (1) correction of record to reflect

> actions taken by reviewing authorities under chapter 47 of this title (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)); or (2) action on the sentence of a court-martial for the purposes of clemency.

The Uniform Code of Military Justice (UCMJ), Article 78, states "Any person subject to this chapter who, knowing that an offense punishable by this chapter has been committed, receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial, or punishment shall be punished as a court-martial may direct."

Article 92 of the UCMJ states "Any person subject to this chapter who – (1) violates or fails to obey any lawful general order or regulation; (2) having knowledge of any other lawful order issued by any member of the armed forces, which it is his duty to obey, fails to obey the order; or (3) is derelict in the performance of his duties; shall be punished as a court-martial may determine."

Article 111 of the UCMJ is titled "Drunken or Reckless Driving." It states, "Any person subject to this chapter who operates any vehicle while drunk, or in a reckless or wanton manner, or while impaired by a substance described in 912a(b) of this title (Article 112a(b)), shall be punished as a court-martial may direct."

Article 134 of the UCMJ is a General Article. It states "though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court." "Patronizing a prostitute" is one of the specified ways to violate this article pursuant to the Manual for Courts-Martial United States.

The Military Separations Manual, COMDTINST M1000.4, which was in effect at the time of the applicant's discharge in November 2012 includes Chapter 1.B.20., which covers discharges for the good of the service. Chapter 1.B.20.a. states the following:

> An enlisted member may request a discharge under other than honorable 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…for the preferred charges includes a punitive discharge… A member may request a discharge for the good of the Service any time after charges have been preferred, but if a punitive discharge has been adjudged, the request must be submitted before the convening authority takes action on the sentence. Because this type of discharge is initiated by the member, no prior notice need be given the member, as is required for an involuntary discharge due to misconduct under Article 1.B. of this Manual. 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…refer the charges to a summary court-martial.

Chapter 1.B.20.b. of this Manual states that a member will be assigned military counsel if he indicates he wishes to submit a request for discharge under other than honorable conditions. This Chapter also includes a format that must be followed, which aligns with what the applicant submitted.

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.

2. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice. Although the applicant in this case filed his application more than three years after his discharge in November 2012, he filed it within three years of the decision of the Discharge Review Board, which has a fifteen-year statute of limitations. Therefore, the application is considered timely.[11]

3. The applicant alleged that his sentence at SCM and his discharge on November 20, 2012, were erroneous and unjust because the government would not have been able to prove all of the elements of each of the offenses. 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.[12] 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."[13]

4. The applicant requested that the Board expunge from his record his SCM conviction and reinstate him on active duty. According to 10 U.S.C. § 1552(f), however, the Board is limited in what it can do in matters concerning a court-martial conviction. Pursuant to this statute, the Board is not authorized to expunge or overturn a court-martial conviction. Therefore, the applicant's request in this regard cannot be granted.

5. The applicant argued that his pre-trial agreement, conviction at SCM, and discharge are erroneous and unjust because the government would have been unable to prove at least one element of each of the three offenses for which he pled guilty. Regarding the charge of UCMJ Article 78, accessory after the fact, the applicant alleged that the government would have been unable to prove he was aware a criminal act had occurred. Although the attorney claimed that he misspoke in the original petition, there is ample evidence that the applicant was in fact aware of what had happened before he drove away from the women. In his own written affidavit for CGIS the day after the events took place, he stated "[the shipmate] got in the front seat rapidly with one of the girls holding on and wrestling with him for the purse as he yelled GO." In addition, the applicant continued driving away and assisted his shipmate in disposing of evidence after he knew that his shipmate had snatched the woman's purse, and he kept some of the proceeds of the theft for himself in his car. This evidence shows that the government would have been able to prove all of the elements of this offense beyond a reasonable doubt. Moreover, the applicant received

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[11] *Ortiz v. Secretary of Defense*, 41 F.3d 738, 743 (D.C. Cir. 1994).

[12] 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.").

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

counsel concerning the pre-trial agreement, and he has submitted nothing to show that he was not properly counseled about the charges and evidence against him. The applicant has therefore not proven by a preponderance of the evidence that the SCM erred in accepting his plea of guilty or that his command abused his discretion regarding the applicant's request for discharge.

6. The applicant likewise argued that the government would have been unable to prove the elements of failure to obey an order because there was no proof he had any knowledge of the order. The applicant initialed and signed a Page 7 on June 29, 2012, acknowledging that he had completed indoctrination training for the command and specifically noting that he had been counseled on the command's alcohol policies. Therefore, the preponderance of the evidence shows that the government could have proven that the applicant had knowledge of the order. Moreover, the applicant received counsel concerning the pre-trial agreement, in which he agreed to plead guilty to this offense, and he has submitted nothing to show that he was not properly counseled about the charges and evidence against him and the likelihood of a conviction at a special or general court-martial if he did not sign the pre-trial agreement. The applicant has not proven by a preponderance of the evidence that the government would have been unable to prove each element of this offense beyond a reasonable doubt.

7. Although the applicant argued that the government would have been unable to prove beyond a reasonable doubt that he drank alcohol before driving himself, his shipmate, and the prostitutes to his home and from there to his shipmate's home, the Board disagrees. The evidence shows that they met the prostitutes in a bar, and the applicant has not shown that he was alone in the bar or that no one was available to testify that he drank alcohol at the bar. The applicant himself admitted that he drove from the bar to his home and then to the shipmate's home. The Board finds that the fact that no blood alcohol test was taken does not prove that the government would not have been able to prove that the applicant drank alcohol before driving beyond a reasonable doubt.

8. Although the applicant claimed that the order prohibiting driving after consumption of alcohol was unreasonably strict, the Board disagrees. The record shows that the command was located in a host country with very strict laws about alcohol consumption and a culture that is much less accepting of it than American culture. Therefore, the Board is not persuaded that the order was unreasonably strict given the Coast Guard's need to maintain good relations with the host country. Moreover, the applicant received counsel concerning the pre-trial agreement, in which he agreed to plead guilty to this offense, and he has submitted nothing to show that he was not properly counseled about the charges and evidence against him and the likelihood of a conviction if he did not sign the pre-trial agreement.

9. The applicant argued that his conviction for disobeying an order was unjust because the order prohibiting driving after drinking alcohol is overly broad and void for vagueness, but the Board disagrees. The Board notes that the applicant did not submit a copy of the order, and so the exact wording is unknown. In addition, the record shows that the applicant drove his car immediately after leaving the bar and so, presumably, very soon after he drank alcohol. If he had begun driving his car a few hours after he left the bar, he could reasonably argue that his drinking did not occur "before" his driving as a reasonable person would interpret the alleged wording of the order. Given the applicant's admissions, however, the Board finds that he has not proven by a preponderance of the evidence that the order—as allegedly written—was unjustly applied in his case or

that he could not have known that driving a vehicle directly after drinking alcohol at the bar would be considered a violation of the order. Moreover, the applicant received counsel concerning the pre-trial agreement, in which he agreed to plead guilty to this offense, and he has submitted nothing to show that he was not properly counseled about the charges and evidence against him and the likelihood of a conviction if he did not sign the pre-trial agreement.

10. The applicant also argued that the government would have been unable to prove that he knew the woman was a prostitute before having sexual intercourse with her beyond a reasonable doubt. In the applicant's own statement to CGIS investigators, however, he stated, "the prostitutes wanted [a particular amount] per girl, and that he was only willing to pay [less]." The applicant's statement shows that after negotiating the price for sexual intercourse, they went first to his home to get a condom and then to the home of the shipmate. This evidence shows that the applicant was well aware that the woman was a prostitute prior to engaging in sexual intercourse with her, especially given the cultural mores for women in that country. The Board finds that the applicant has not proven by a preponderance of the evidence that the government would not have been able to prove beyond a reasonable doubt that the applicant knew that the women were prostitutes before he had sexual intercourse with one of them. Moreover, the applicant received counsel concerning the pre-trial agreement, in which he agreed to plead guilty to this offense, and he has submitted nothing to show that he was not properly counseled about the charges and evidence against him and the likelihood of a conviction if he did not sign the pre-trial agreement.

11. The applicant has not proven by a preponderance of the evidence that the SCM erred in accepting his plea of guilty to the three charges. The record shows that the applicant received due process, including receiving counsel before signing the pre-trial agreement. The record also shows that the applicant was asked various questions during the SCM to ensure that the pleas of guilty were proper. The applicant has not shown that the pre-trial agreement, SCM, or his own request for an OTH discharge were erroneous or unjust. He has not shown that his CO abused his discretion by discharging the applicant in accordance with his request pursuant to the pre-trial agreement to avoid potential punishment by a special or general court-martial. The Board therefore finds no grounds for voiding the applicant's discharge or upgrading the characterization of his discharge.

12. The applicant has failed to prove by a preponderance of the evidence that either his pre-trial agreement or OTH discharge is erroneous or unjust. The Board finds no error or injustice that warrants voiding the discharge, reinstating him on active duty, advancing him, awarding him back pay, or upgrading his character of discharge, reason for discharge, or reentry code on his DD-214. His conviction and punishment by the SCM and the Coast Guard's decision to award him, at his request, an administrative OTH discharge with an RE-4 are strongly supported by his own admissions regarding the events of July 14, 2012. Accordingly, his requests for relief should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

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

July 28, 2017

[redacted]