DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2019-106

[redacted] OS2/E-5

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on March 26, 2019, and prepared the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated February 14, 2020, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant, who was honorably discharged on August 13, 2018, asked the Board to correct his record by

- removing documentation of nonjudicial punishment (NJP) that he received at mast on November 3, 2017, for alleged insubordination and communication of a threat;
- restoring his paygrade to E-6;
- removing his disciplinary Enlisted Evaluation Report (EER) dated November 3, 2017, which was required by the NJP;
- restoring his security clearance and removing all documents related to its revocation; and
- reinstating him on active duty, with a choice of duty locations.

With respect to his discharge on August 13, 2018, the applicant asked the Board to correct his DD 214 by

- changing his separation code and the corresponding narrative reason for separation from KND and "Separation for Miscellaneous/General Reasons" to MBK and "Completion of Required Active Service"; and
- changing his reenlistment code from RE-4 (ineligible to reenlist) to RE-1 (eligible).

APPLICANT'S ALLEGATIONS AND ARGUMENTS

The applicant claimed that the commanding officer (CO) of his cutter abused his discretion, acted out of bias, discriminated against him, violated his due process rights at mast, and "totally failed him as a CG member." He explained that on September 6, 2017, he was working aboard the cutter in a limited duty status because in June 2017 his doctor had directed him not to lift more than ten or fifteen pounds. He "got into a verbal altercation with the Command Senior Chief" (CSC) that day because the CSC directed him to participate in offloading heavy equipment from the cutter. When he told the CSC that he was in a limited duty status on doctor's orders, the CSC became enraged, cursed at him, pointed his finger in the applicant's face, and provoked the applicant to lose his temper. The applicant was then accused of insubordinate conduct, failing to obey an order, and communicating a threat. The next day, he was ordered off the cutter even though it was hundreds of miles from the cutter's homeport. Since the cutter was underway, he received TAD orders to report for duty to the Base at the cutter's homeport. Subsequently, he was charged with violating Article 91 of the Uniform Code of Military Justice (UCMJ) for insubordinate conduct toward a petty officer;[1] Article 92 UCMJ, for failing to obey an order;[2] and Article 134, for communicating a threat.[3]

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[1] UCMJ Article 91, 10 U.S.C. § 891, "Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer," states the following:

> Any warrant officer or enlisted member who—
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> (1) strikes or assaults a warrant officer, noncommissioned officer, or petty officer, while that officer is in the execution of his office;
>
> (2) willfully disobeys the lawful order of a warrant officer, noncommissioned officer, or petty officer; or
>
> (3) treats with contempt or is disrespectful in language or deportment toward a warrant officer, noncommissioned officer, or petty officer while that officer is in the execution of his office;
>
> shall be punished as a court-martial may direct.

[2] UCMJ Article 92, 10 U.S.C.§ 892, "Failure to obey order or regulation," states the following:

> Any person subject to this chapter who—
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> (1) violates or fails to obey any lawful general order or regulation;
>
> (2) having knowledge of any other lawful order issued by a 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 direct.

[3] UCMJ Article 134, 10 U.S.C. § 934, "General Article," makes punishable, *inter alia*, "all disorders and neglects to the prejudice of good order and discipline." MCM, paragraph 110, on page IV-151, states that the elements for a charge of communicating a threat in violation of Article 134 are as follows:

> b. *Elements*
>
> (1) That the accused communicated certain language expressing a present determination or intent to wrongfully injure the person, property, or reputation of another person, presently or in the future;
>
> (2) That the communication was made known to that person or to a third person;
>
> (3) That the communication was wrongful; and
>
> (4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.
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> c. *Explanation*. For purposes of this paragraph, to establish that the communication was wrongful it is necessary that the accused transmitted the communication for the purpose of issuing a threat,

Lack of Due Process

The applicant stated that after the cutter returned to homeport, he was formally charged. On October 3, 2017, he consulted an attorney about his rights and the charges against him. The attorney erroneously advised him that he could not refuse mast and demand trial by court-martial because he was "attached to a ship." He explained that under the "vessel exception" in the Manual for Courts-Martial United States (MCM)[4] and the Military Justice Manual (MJM), COMDTINST M5810.1,[5] members assigned to cutters do not normally have the right to refuse NJP and demand trial by court-martial instead. However, the "vessel exception" did not apply to him because at the time of the mast, he had been reassigned from the cutter to the Base on temporary active duty (TAD) orders. Therefore, he was "not attached to or embarked upon a vessel at the time of his NJP" but was erroneously misinformed of his right to reject NJP and demand trial by court-martial.

The applicant argued that this erroneous legal advice and denial of due process "nullifies the entire NJP action against this Applicant and warrants the relief as requested." He stated at different points in his application both that he was assigned TAD to the Base when he received

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> with the knowledge that the communication would be viewed as a threat, or acted recklessly with regard to whether the communication would be viewed as a threat. However, it is not necessary to establish that the accused actually intended to do the injury threatened. Nor is the offense committed by the mere statement of intent to commit an unlawful act not involving injury to another. …

[4] MCM, p. V-2, states the following about a member's right to demand trial by court-martial in lieu of accepting NJP from a CO:

> Except in the case of a person attached to or embarked in a vessel, punishment may not be imposed under Article 15 upon any member of the armed forces who has, before the imposition of nonjudicial punishment, demanded trial by court-martial in lieu of nonjudicial punishment. This right may also be granted to a person attached to or embarked in a vessel if so authorized by regulations of the Secretary concerned. A person is "attached to" or "embarked in" a vessel if, at the time nonjudicial punishment is imposed, that person is assigned or attached to the vessel, is on board for passage, or is assigned or attached to an embarked staff, unit, detachment, squadron, team, air group, or other regularly organized body.

[5] MJM, Chapter 1.H.1. states the following about a member's right to demand trial by court-martial in lieu of accepting NJP from a CO:

> If the matter will be forwarded for NJP, a member who is not attached to or embarked on a vessel must be informed that he or she has a right to demand trial by court-martial in lieu of NJP. He or she must also be informed of the right to consult with an attorney before accepting or rejecting NJP. Acknowledgment of Rights – Acceptance of NJP (Enlisted Member Attached to Shore Unit), Form CG-5810A, or Acknowledgment of Rights – Acceptance of NJP (Officer Attached to Shore Unit), Form CG-5810B should be used to document that the member was notified of his or her rights and whether the member demanded court-martial in lieu of NJP. The command should facilitate the consultation with the attorney by contacting the command's servicing legal office for the appropriate contact information. … Members assigned TAD ashore from a vessel are not attached to or embarked upon a vessel and therefore must be afforded the right to demand trial by court-martial. Members assigned under PCS orders to a vessel as their permanent unit who, subsequent to allegedly committing misconduct, are placed temporarily at shore units, even if not officially assigned under TAD orders, are not attached to or embarked upon a vessel and therefore must be afforded the right to demand trial by court-martial.

MJM, Chapter 1.H.2., states, "There is no right to demand trial by court-martial in lieu of NJP by member attached (via PCS orders) to or embarked on a vessel."

NJP on November 3, 2017, and that he had been assigned TAD to the Base "prior to and immediately thereafter the NJP proceeding." At mast, the applicant stated, the CO dismissed the Article 92 charge but found him guilty of violating Articles 91 and 134 and reduced him in rate to E-5.

The applicant claimed that his CO never intended to have him return to the cutter as part of the crew. As evidence, he pointed to the fact that after the mast, he was placed in a Temporary Limited Duty Status and reissued TAD orders to the Base "on or about 20 Nov 2017." Thus, the CO violated his due process rights by failing to inform him of his right to request trial by court-martial and violated both "the spirit and intent of the MJM and MCM …. Therefore, the NJP must be expunged and all negative effects stemming from what [he] experienced after the illegal NJP must be restored by operation of law."

CO's Determination at Mast

The applicant stated that even if the Board finds that the "vessel exception" applied to him, the NJP should still be removed and his rank restored with back pay and allowances for the following reasons:

- His conduct on September 6, 2017, did not meet the elements of a violation of Article 91 of the UCMJ because he was in a limited duty status when the CSC told him to participate in the unloading of heavy equipment on September 6, 2017. Therefore, the CSC's order was unlawful, and the applicant's refusal to engage in the unloading of the equipment was not a violation of a lawful order. The applicant further alleged that when he told the CSC about his medical status, he should have been excused from the duty, but instead the CSC cursed him out, denied that the applicant was on a limited duty status, and provoked him. Therefore, the applicant argued, his CO abused his discretion by finding him guilty of violating Article 91 at mast.
- His behavior toward the CSC on September 6, 2017, did not meet the elements of communicating a threat in Article 134 because he did not communicate any language expressing a present determination or intent to wrongfully injure anyone. The applicant stated that he responded to the CSC's verbal attack "by walking away from him and expressing his anger and frustration of the constant disrespect he endured. He did not express any threats in front of the Command Senior Chief." The applicant alleged that he "was talking to himself while trying to defuse the situation and get away from the aggressor," who was the CSC. He argued that his walking away from the CSC showed his intent to no longer engage with the CSC, who was trying to provoke him and issuing him an unlawful order. He argued that the evidence shows that he had no intention "to verbally threaten anyone and was simply expressing his anger from being treated sub-human at his Command."
- When assessing his guilt and determining his punishment, the CO "failed to look and take into account all the evidence in Mitigation, which should have led to a much lighter or even a suspended sentence based on the facts and circumstances giving rise to the altercation." The applicant claimed that the CSC was the aggressor, treated him disrespectfully, intentionally provoked him, and – when the applicant "tried to defuse the situation by walking away – the Command Senior Chief pursued [him] to continue his verbal attack and continued provoking [him]" while other members of the crew watched. In addition, the applicant

was "undergoing mental health therapy and counseling" at the time. The applicant argued that his reduction in rate was therefore disproportionate to the alleged offenses, excessive, and "too severe considering all of the circumstances." He noted that receiving NJP and being reduced in rate could delay his advancement or make him ineligible to reenlist.

- The applicant received disparate treatment because although the CSC was the aggressor and issued an unlawful order on September 6, 2017, the CSC was not punished.
- His appeal of the NJP was denied despite its illegality and the disproportionate punishment. The applicant argued that the new CO of the cutter should have set aside the NJP and restored his rate to E-6.

Disciplinary EER

The applicant stated that because of the NJP on November 3, 2017, he received the disciplinary EER dated the same day with low numerical marks, an Unsatisfactory Conduct mark, and a mark of Not Recommended for Advancement. He argued that because the NJP was erroneous and unjust, this disciplinary EER should also be removed from his record. He stated that the low marks and negative comments in the EER "cannot be viewed as a fair and accurate depiction of [his] performance based on the reliance of the invalid NJP."

Security Clearance

The applicant stated that because he should not have been subject to NJP, he should never have "been in jeopardy of having his security clearance revoked." He claimed that it was revoked "based solely on his NJP proceeding and subsequent results." He argued therefore that if the Board removes his NJP, the revocation of his security clearance must be nullified and the documentation of it removed from his record.

Reason for Separation and Reenlistment Code

The applicant stated that when his enlistment expired on August 13, 2018, he did not reenlist. He argued that he should have received an RE-1 reenlistment code, allowing him to reenlist, because the RE-4 code barring him from ever reenlisting in the military is based solely on the erroneous and unjust NJP and clearly unwarranted. He also argued that he should have received MBK as his separation code and the corresponding narrative reason for separation, "Completion of Required Active Service," given the circumstances of his discharge. He argued that although the KND and "Separation for Miscellaneous/General Reasons" entries are not viewed as negative *per se*, they do not fit the circumstances of his discharge, and an MBK and "Completion of Required Active Service" are more appropriate.

Reinstatement

The applicant argued that the Board should require the Coast Guard to reenlist him and provide him with a choice of duty assignments because he was subject to disparate treatment. In addition to his allegations about the NJP and reduction in rate, he alleged that the command refused to support him while he was dealing with personal family matters; failed to assist him when he

was on light and limited duty; prevented him from transferring to another command; revoked his security clearance; trashed his reputation with the new CO of the cutter; and conspired to drive him off the cutter and out of the Coast Guard. He argued that because of this maltreatment, he was left "with no choice but to end his service in the Coast Guard."

In support of his allegations, the applicant submitted copies of official records, which are included in the Summary of the Record below, and numerous copies of "Good Order and Discipline" summaries of disciplinary and administrative actions taken against Coast Guard military personnel from 2014 to 2017. He also submitted five statements gathered by the officer who investigated his altercation with the CSC, which are included with the summary of the investigation below, and two other statements signed by crewmates:

- A crewmate, PO1 B, stated that on September 6, 2017, she went to the hangar with the applicant after an "all hands" was piped for members E-6 and below to muster there. When they were told they would be moving heavy equipment, the applicant told her that he was on light duty and could not move the equipment. The CSC asked the applicant to repeat what he had said to her, and so the applicant told the CSC that he was on light duty. The CSC told the applicant he was not on light duty and that he could move some equipment or go down and supervise. The applicant "again repeated that he was on light duty to which [the CSC] began cussing and pointing his finger in [the applicant's] face and said that he was tired of his shit and he wasn't going to get out of this." The applicant told the CSC to stop cussing at him and that "he was sick of it. The last I saw [the applicant] was backing out of the hangar with [the CSC] following him."
- An HSC stated that on September 6, 2017, he was piped to the focsle,[6] and when he arrived he found the applicant talking to his second-level supervisor, who was a senior chief petty officer (SCPO). The applicant "appeared to be angry and emotionally upset," and the SCPO asked the HSC to talk to the applicant due to his recent conflict with the CSC. The HSC stated that he repeatedly asked the applicant to calm down because he "was extremely upset and began to express his anger by cursing, crying and yelling." The applicant then said that he had been disrespected by the CSC and that "he would not take that type of disrespect from anyone. He again began to curse and yell so I asked him to meet me in sickbay so we could talk due to his current behavior. I cannot disclose what was said in sickbay due to HIPAA."

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard in 2009. After recruit training, he was assigned to a cutter for nine months before attending "A" School to earn a rating. He graduated and advanced to E-4 in 2010 and to E-5 in 2012. While assigned to a Sector Command Center from July 2013 to June 2016, he advanced to E-6 in 2014. In June 2016, he was transferred from the Sector Command Center to a cutter homeported at a nearby Base. On his first EER aboard the

[6] The witnesses in this case used the term "focsle" without apostrophes. It is an abbreviation of "forecastle" and traditionally has apostrophes to indicate the missing letters. The forecastle is the upper deck of a ship in front of the mast.

cutter, dated November 30, 2016, the applicant received mediocre marks in the various performance categories and was not recommended for advancement. On his second EER aboard the cutter, he received slightly better marks but was again not recommended for advancement.

On September 7, 2017, the Commander of the Base where the applicant's cutter was homeported issued him orders regarding his duties and responsibilities while assigned to the "Temporary Duty Branch" of the Base. The memorandum addresses him as a member assigned to the cutter and advises him that he must use his chain of command, starting with his temporary duty supervisor, for all requests for leave and must inform the supervisor of and show up on time for all legal and medical appointments.

On September 8, 2017, the Command Senior Chief (CSC) of the cutter completed a Report of Offense in which he stated that at an all-hands muster in the hangar on September 6, 2017, he had seen the applicant starting to leave. The applicant was ordered to stay and help the crew and then said he was on light duty, so he was ordered to stay and help without lifting anything. The CSC stated that the applicant started yelling that "no one talks to him like that" and that he would hurt or kill anyone who did. When the applicant's second-level supervisor, a senior chief petty officer (SCPO) tried to calm him down, the applicant struck the air compressor with his fist and arm. He also struck the bulkhead multiple times while walking down the passageway to the focsle with the SCPO. The CSC listed four members as witnesses.

Investigation

On September 20, 2017, the XO of the cutter designated an officer to serve as a preliminary inquiry officer (PIO) for an investigation of the confrontation between the applicant and the CSC in the hangar on the cutter on September 6, 2017. On October 4, 2017, the PIO submitted a report on the investigation. Based on interviews of five witnesses, the PIO stated that the applicant had apparently taken the CSC's statement that the applicant did "not have to lift any weight" as a personal insult. The PIO concluded that the applicant had violated Articles 91 (insubordination), 92 (disobeying an order), and 134 (communicating a threat) of the UCMJ and recommended that the charges be disposed of at mast. The PIO also stated that the applicant should be discharged because of his sudden and violent outburst toward the CSC.

- The CSC stated that after the applicant arrived in the hangar for the muster and learned that it was for moving heavy equipment, he appeared to turn and leave, and so the CSC told him that it was an all-hands "and he WILL assist." The CSC then turned to listen to an MK1's explanation of the offload. When he heard the applicant say something, he looked over and saw the applicant staring at him. So he asked the applicant what he had said to him. The applicant "then started asking why I was talking to him like that and then stated that he was on light duty. I told him, raising my voice, that I did not know he was on light duty but he did not have to lift anything and he could assist with the supervision of the offload." Then the applicant "started yelling that no one talks to him like that. I started asking [him] who he thought he was talking to and why he would not assist the crew." The applicant then began

> walking towards me raising his arms and shrugging his shoulders when [the SCPO] stepped in and tried to calm [the applicant] down and move us forward out of the hangar. At this

> point, [the applicant] started yelling and started punching (with his fist and forearm) the Low Pressure air compressor in the [forward] part of the [starboard] hangar. Numerous times during this period [the applicant] was yelling that no one talks to him like this and the last person that did talk to him like that he kicked their ass and he would kill or kick the ass of the next person that did. As we … were walking forward through the boat deck, [the applicant] was walking backwards and I told him to watch out for the potable water shore tie hose at which time he started yelling again that no one tells him what to do. As we entered the covered passageway to the Focsle [the applicant] began punching bulkheads again yelling about the command. At this point I broke off leaving [the applicant] with [the SCPO] and went to the XO's stateroom to make him aware of what had just transpired.

- The SCPO who was the applicant's second-level supervisor stated that he was in the hangar for the muster when he saw the applicant and PO1 B arrive. He heard the applicant ask what the all-hands was for, and the CSC told him it was to move heavy equipment. "I turned away and next I heard screaming and yelling from [the applicant]. I overheard him say, 'I am a Man, don't talk to me like that', followed by a loud outburst including several violent threats." The SCPO walked toward them and told the applicant to come with him. He escorted the applicant out of the hangar to the boat deck so that the crew would not witness anything more. On the boat deck, he asked the applicant what had happened, but the applicant was unable to calm down. The applicant "stated that he would take him ([the CSC]), that he [the CSC] had no clue who he was speaking to, and that he [the applicant] was a man." Then the CSC arrived and tried to calm the applicant down. The applicant began walking backwards and was backing into the firehose line. The CSC told him to watch out for the firehose, and the applicant told the CSC to "watch out for himself." The SCPO said that he "had to step between both members due to the situation seemingly becoming violent. I stepped in to protect both members from bodily harm. [The applicant], still extremely irate, cursing, and making violent overtures, walked thru the air castle and onto the focsle." The SCPO followed him and picked up the applicant's cover (hat), which he had thrown on the deck. He reminded the applicant that he had children and again asked him what had happened. Then he used the radio to ask the HSC to come. He and the HSC did their best to calm the applicant down. The applicant said that "he does everything for the cutter and that he is tired of the command, and he didn't care what happens, but he was going to kill people, etc." After the applicant calmed down, the HSC took him to sickbay, and the SCPO went to the XO to ask for a medical appointment for the applicant.
- An MKC stated that he was present during the altercation between the applicant and the CSC. The MKC was standing near the CSC when the applicant and PO1 B arrived. The applicant asked the CSC what the muster was for and was told they were offloading heavy equipment. The applicant replied that he "was on light duty and he didn't need to be here for it." CSC told the applicant that he could "supervise and coordinate what needs to go where." CSC then "began to walk away, only to hear [the applicant] begin to lose his temper stating he didn't need to be here for the [equipment] offload and that he was not going to stay." "Of course there was foul language involved. Upon hearing [the applicant], [the CSC] quickly returned, stating this is an all hands event, you will stay and supervise. Of course there was foul language involved from [the CSC]." Then, the applicant lost his temper and said, "I'm a grown ass man, you don't fucking talk to me like that, who the fuck do you think you are." At that point, it "became a yelling contest between the two." The SCPO began to step in, and the applicant headed back to where he had come from,

with the SCPO following him, and the CSC following the SCPO. As he walked, the applicant was punching the bulkhead.

- A junior officer stated that after the muster was piped on September 6, 2017, he stood with the chiefs in the hangar. As the task—moving heavy equipment—was being explained, the applicant and PO1 B arrived. When the explanation was finished, the applicant asked "what we were doing" which had just been explained. The CSC told him they were moving equipment. "[A]t the realization that this tasking would require physical effort, [the applicant] turned around and began to leave with [PO1 B] in toe [sic]." The CSC asked him where he was going. The junior officer could not hear the applicant's answer, but the CSC's response was, "Well then you can supervise this evolution." Then the applicant "proceeded to make a scene in front of the whole crew by raising his voice and shouting at Senior, "Don't you yell at me! Don't you disrespect me like that!" The applicant again started to leave. The junior officer stated that he was "[s]tunned at the extremely rapid and unexpected escalation of this situation" and turned to follow the applicant. But the SCPO and the CSC followed the applicant toward the focsle, and he decided that "two Seniors could handle one unruly First Class without my help." A chief boatswain's mate (BMC) then said to everyone, "Nothing to see guys, they'll handle it."
- A BMC stated that while standing in the hangar after an "all hands" was piped, she heard the CSC say something "in a normal tone of voice." But the applicant got angry and raised his voice towards the CSC. The SCPO and the CSC ushered the applicant away from the muster, but she saw the applicant "clench his fists several times and say things to both Senior Chiefs in a loud tone of voice." Then they ushered the applicant down the passageway and out of sight.

On October 3, 2017, the applicant signed a "UCMJ and Miranda/Tempia Rights" form on which he acknowledged that he was being investigated on charges of violating Articles 91, 92, and 134 of the UCMJ and that anything he said for the investigation could be used against him. He also acknowledged his rights to remain silent, to consult counsel, and to stop answering questions at any time. He indicated that he wanted to consult counsel.

On October 10, 2017, the applicant sent the PIO an email with the following description of his conflict with the CSC on September 7, 2017, for the report of the investigation:

> Approx 1000 on 06 SEP 17, while in … for dry dock prep, an all hands pipe was made to lay to the hangar. I made my way down to the hangar from CIC w/ [PO1 B]. … Uncertain as to why the pipe was made, we started asking. We realized it was [heavy] equipment. [The CSC] said get in there and I informed him I was on light duty. [He] immediately responded with "you're not fucking getting out of this, go fucking stand over there and fucking supervise". I had asked him "why are you cussing at me?". With all the words mentioned, [he] had removed his hard hat raised his hand and began approaching me, he said "Don't you fucking start with me". From the start of our interaction it was nothing but wholesome aggression on his part. I believe it had something to do with him being upset at the fact the JOs [junior officers] weren't supervising. He was visibly upset on the messdeck with the JO dilemma. I was in a predicament of having to violate a medical order of lifting [heavy] equipment—resulting in further injury and possible administrative action being taken for violating my duty status, fearful of [the CSC] putting his hands on me/assaulting me, and the amount of disrespect he initial[ly] inflicted. I've been on light duty for a couple months prior to the incident and the command has been aware of this. Upon [the CSC] approaching me in an aggressive demeanor, I was pushed to the final limit of amount of disrespect I've endured on the ship. I looked

> at [the SCPO, the applicant's second-level supervisor] while [the CSC] was cussing me out for help, he didn't intervene. I proceeded forward towards the focsle to defuse the situation, [the CSC] was yelling and following me. [The SCPO] was on the focsle with me, I tried to explain how [the CSC] was disrespecting me and made me feel physically endangered. [The SCPO] had HSC [a chief health services technician] come up forward. HSC asked what's wrong, [the SCPO] claimed he didn't know anything. I told HSC, [the CSC] didn't need to cuss me out. HSC responded with "he's a senior chief". This is wrong for anyone to see that the Command Senior Chief has the freedom to cuss out whomever he wants to.

The PIO recommended that the charges be disposed of at mast, and the XO concurred.

Psychologist's Report

In a "Progress Report" dated November 1, 2017, which the applicant submitted, his psychologist noted that he had initially seen the applicant on August 10, 2017, for intense stress and a generalized anxiety disorder. He stated that the applicant had two children who were about one year old and lived in separate households with their mothers, and the applicant was "learning coping skills to reduce the impact of stress of work demands and family life." He noted that on September 12, 2017, the applicant had told him about a conflict with a superior who had asked him to lift a heavy object. The applicant told him that he could not persuade his superior that he was on light duty because of his hernia, and the Medical Officer had not provided the applicant with the necessary paperwork. The applicant told him that the situation became very intense, he felt trapped, he cried uncontrollably, and he was taken to sickbay. The psychologist opined that the applicant had suffered a severe panic attack. The psychologist stated that when the applicant was anxious, he would appear angry and even aggressive, but he was "more apt to leave the field" than get physical. He stated that the applicant's "anger then dissipates into despair. Anger management is definitely the appropriate therapeutic modality." He stated that the applicant needed to learn that "others may mistrust him when, as far as he is concerned, their mistrust is unwarranted. And, in a work context, [he] needs to learn how to cope with authority figures he believes are being unreasonable without escalating the situation." The psychologist prescribed a six-month course of anger-management therapy.

NJP Proceedings

On October 31, 2017, the applicant signed an "Acknowledgement of Rights – Acceptance of NJP" form, which lists the charges again him and his rights at mast, including the right not to incriminate himself. The right to refuse NJP and demand trial by court-martial is not mentioned on this form, and so someone signing the form would not necessarily know that he was being denied the right due to being assigned to a vessel.

A Court Memorandum dated November 3, 2017, states that the applicant had been charged with violating Articles 91, 92, and 134 of the UCMJ. The Offense Narrative states the following:

> On 06 SEP 17 at approx. noon time all hands were piped to the [starboard] hangar. [The CSC] ordered [the applicant] to stay in the hangar and assist his crew members. Then [the applicant] informed [the CSC] that he was on light duty. [The CSC] said he could stay and assist without lifting anything. [The applicant] then started yelling that "No one talks to him like that" and that he would hurt/kill anyone who does. [The SCPO] tried to calm [the applicant] down at which time [the applicant] struck the air compressor in the [starboard] hangar with his fist and arm. [The applicant]

> also struck the bulkhead multiple times while he was walking through the passageway to the focsle with [the SCPO].

The Court Memorandum shows that the charge under Article 92 was dismissed but that the applicant was reduced in rate to E-5 for violating Articles 91 and 134 of the UCMJ.

In a Mast Memorandum dated November 3, 2017, the CO advised the applicant that he had reduced him in rate and ordered him "to continue counseling with your health care provider for your anger management issues for the next six months."

The applicant apparently did not appeal the NJP based on illegality or injustice within five days, as authorized by Article 15 and the Military Justice Manual.

Disciplinary EER

On his disciplinary EER dated November 3, 2017, the applicant received an Unsatisfactory Conduct mark, a mark of Not Recommended for Advancement, and numerous low numerical marks of 2 and 3 (out of 7) in performance categories such as Communicating, Working with Others, Responsibility, Setting an Example, Customs and Courtesies, Respecting Others, and Human Relations. The supporting comments note that he frequently became frustrated and angry; failed to teach and provide guidance to his subordinates; used intimidation when trying to lead or direct subordinates; failed to complete tasks and blamed others; mocked and laughed at other members; and threatened and cursed others. The comment regarding the recommendation against advancement noted that he had been reduced in rate at mast "and give the opportunity to correct his actions and attitude and earn his rank back. … To gain recommendation in the future, [he] shall: complete anger management classes over the next six months, cultivate an atmosphere of respect amongst his shipmates and supervisors, and become cognizant that his actions impact more than just him and that he shall take responsibility for those actions."

Security Clearance

On December 4, 2017, the Director of the Coast Guard Security Center advised the applicant that he intended to revoke the applicant's security clearance after reviewing his records. He stated that the documentation showed a "pattern of personal conduct involving questionable judgment, reliability, and unwillingness to comply with rules and regulations to include disruptive, violent, or other inappropriate behavior." One of the documents cited was a March 2017 investigation of an allegation that the applicant had been involved in a domestic violence incident, although no action was taken against him. The Director also cited five instances in which the applicant had been fired by or received warnings from civilian employers due to altercations or attendance problems before he enlisted. He advised the applicant that he could submit a response to refute, mitigate, or explain the adverse information within thirty days.

On December 24, 2017, the applicant asked the Director of the Coast Guard Security Center to vacate the suspension of his Top Secret security clearance. He stated that he had taken corrective measures to control his anger and that the prior accusation of domestic violence was irrelevant in determining his suitability. He stated that since the mast, he had

> learned means of effective communication and importance of respect for all. I've learned how to use proper channels to voice all concerns. Respect for others is vital, especially senior members that are responsible for everything. My actions are not excusable, but are a life lesson. Life lesson that has fueled me for a change for the better. Enthusiastically participating in anger management to cope better with life's challenges.

On March 26, 2018, the applicant received a "Final Favorable Security Clearance Determination with Caution."

Applicant's Civil Rights Complaint

On January 31, 2018, the applicant signed an affidavit regarding a civil rights complaint he had initiated on September 7, 2017. In the affidavit, the applicant asked first to be released from his contract; second, to have his rank restored and be transferred to the Reserve; or, as his least preferred option, to have his rank restored and be transferred to another unit immediately. He listed the following complaints:

- **Leave requests**: From July to November 2016, the applicant stated, his requests for leave and request not to get underway with the cutter when it deployed in August so that he could spend time with his newborn children were denied by the cutter's Operations Officer "based on marital and parental status (single parent)." He requested leave for the entire deployment from August to November 2016 but "was not given time off for the birth of my children," and had to purchase his own plane tickets with his own money. He said, "I even made the suggestion that after I leave the first time [for the first child's birth], I should not have to come back." He wanted to wait at the Base between the births of his children in late August and early November. But he was told that he was needed aboard the cutter to stand watches even though he was only in training as a watch-stander and could not yet stand a watch by himself. He stated, "In my mind, I had no significant value, and I was not hurting any rotation. It was not affecting anyone if I was there or not."

  The applicant stated that the cutter got underway in late August and at their first port of call, the command "allowed me to fly back to homeport on my own dime to be with my newborn son in the NICU unit." He stated that before he left, he had to sign a document agreeing to be back aboard the cutter on a certain date and to keep in touch through email. He returned to the cutter on September 8, 2016, and then needed to fly back to homeport for the birth of his daughter. On September 15, 2016, they told him that he "would be flying out on October 22, 2016, or so." His daughter was born on November 1, 2016, and he had to fly back to meet the cutter on November 5 or 6, 2016, for the remaining three weeks of the deployment. He stated that he received only about three weeks of leave during the deployment, and it "took a toll" on his work performance because he could not concentrate. The command "looked down on me for having two children with different women at the same time. The things I requested were treated as outrageous requests." The applicant stated that a married E-5 in his rating had been allowed to miss the next deployment due to the birth of twins. But the E-5's twins were born prematurely, released from the NICU, and at home before the deployment began.

- **October 31, 2016, semiannual EER**: The applicant stated that he was not recommended for advancement on this EER based on his national origin. He stated that he had been

unable to concentrate on his work after the birth of his son and so the denial of his request for leave had had a big impact on the EER. The applicant stated that he was told he had not shown proper respect by standing up fast enough when the CO had entered his work space, but his mind had been "elsewhere, at home," and his delay had not been intentional. His supervisor also mentioned his "alleged tardiness, and miscommunication as far as watch standing goes. Someone else who had positional authority over me, but showed me disrespect, that was disregarded. A lot of hostile work environment was in full swing." In addition, the SCPO, his second-level supervisor, had "made a comment about [people of the applicant's national origin] thinking they are better than others in [that region]."

Aboard the cutter, the applicant stated, "favoritism was shown" and the "things that I was chastised about were overlooked with other individuals." Another E-6 in his rating had not completed tasking or followed through and continued to be recommended for advancement on her EERs. "When things that I was not aware of were not completed, I was reprimanded, cussed out, mistreated and not recommended for advancement."

The applicant stated that when shown this EER, which was not accurate, he was counseled about what he had done wrong but not given a plan or guidelines for how to improve. He stated that the EER comments were not sufficiently specific to tell him what he needed to do to be recommended for advancement: "Everything was very general, such as someone telling you that you need to brush your hair, but not what kind of brush, or in what direction (just an example)." He stated that he had not been certain whether he would be recommended for advancement but was surprised by the EER. "I did tell them I could see where they were coming from, but I did not agree with them." He noted that an E-5 in his rating had been "allowed to make sarcastic comments, be somewhat degrading, undermining, and [was] never held accountable for the things he did. He went up a pay grade [to E-6]."

- **May 31, 2017, semiannual EER**: The applicant stated that on this EER he was again not recommended for advancement based on his national origin. His first and second level supervisors (a CPO and the SCPO) had told him that they would recommend him for advancement, but he was not recommended by the CO because the Operations Officer had not recommended him. He was counseled about being "late a couple of times" and about his demeanor and appearance. The SCPO told him that he was "coming off as intimidating," and he replied that he could not change or control the way he looked. He stated that his supervisors' complaints "were minor" but they "magnified them." The EER did not tell him how his performance had been deficient or what to do to be recommended for advancement. He "did not receive guidance, mentorship, help, assistance, any of that." The applicant stated that the hostile work environment and his ability to perform had been the same as in the prior evaluation period. After receiving this EER, the applicant stated, he began to make notes about harassment.

  The applicant stated that at the end of May, when the EER was being prepared, he "brought the chain of command together," including his supervisors, the Engineering Officer, the Assistant Operations Officer, the SCS, and others, "to discuss some concerns." The SCPO's demeanor during the meeting was aggressive and stern "even though this was supposed to be a meeting to find a resolution." The applicant stated that he had not received "guidance overall" and he "tried to get things laid out on the table." He stated that he had been singled out a couple of times by the SCPO and reported this to his Division Officer. Afterward, the SCPO had said that "anyone who went around him" was "done." The SCPO

had been checking the applicant's qualifications but not anyone else's. His Division Officer had said that they would "have everyone sit down and discuss standards and expectations." But the "meeting started to turn onto me, to what I was not doing. Nothing got resolved about the SCPO yelling down the passageway asking where I was at, and what I was doing. [He] was addressing me in front of my subordinates, which made for lack of confidence from them. I was singled out and targeted, and this shows a great amount of harassment, looking for me to not be doing what I was supposed to be doing. I think this was a real big point of not having [his] trust and him seeking some sort of reprisal." Later, he "said that I was scaring people, and no one wanted to work around me."

- **Sexual comments**: The applicant stated that on August 18 and 28, 2017, a chief culinary specialist aboard the cutter made "inappropriate comments of a sexual nature (i.e., comments implying that [the applicant was] fraternizing/in a sexual relationship with a female crewmember," and this harassment was based on his on sex (male). The first time, the applicant was on watch when the Engineering Officer came by in her workout clothes. The chief said to him, "I know what you are looking at. That ass, don't worry we all look at it." On the second occasion, the applicant was cooking something with a female crewmate, PO1 B, on the mess deck, and the chief said that he had seen them together a lot and asked, "'is something going on, what are you two doing?' He said it with a smile." Both incidents made the applicant feel uncomfortable because he was not friends with the chief and did not like his insinuations. The applicant stated that he asked the chief each time what he was talking about, and the chief replied that he was just kidding. The applicant stated that the harassment took a toll on his job performance.

- **Removal from cutter**: On September 6, 2017, the applicant stated, he was relocated from the cutter based on his national origin. He stated that at the time, he was on light duty because of a hernia and was not to lift more than ten or fifteen pounds. The CO and XO knew about this status, and he underwent a surgical repair of the hernia on October 4, 2017. However, when he went to the hangar where the crew was unloading heavy equipment, the CSC told him to help. The applicant told him that he could not because he was on light duty. The CSC said, "You're not on fucking light duty, get in there and help." The CSC cussed and told the applicant to go to the SCPO. At "that point, I reached my breaking point due to the hostility throughout the shop. [The SCPO] was there and did not intervene, and did not attempt to defuse the situation. I believe that is because of who I am and where my family is from. It also is based on [the SCPO's] comment about anyone trying to take him out, he is going to take them out. I had already made them aware of [the] situation with [the SCPO]. I think [he] seized that opportunity to make sure there was some sort of negative light on me."

  The applicant stated that both he and the CSC had been shouting at each other, but only he was sent to sick bay and then sent off the cutter and back to homeport. He stated that he thinks he was sent to sick bay "to calm down, as I think they were worried about my mental status." The SCPO told the Executive Officer (XO) that the applicant had been the aggressor and had made threats, and the XO told him to leave the cutter and return to homeport. The applicant stated that a seaman who was suspected of having a "drinking problem" had been similarly sent home from another deployment.

The applicant stated, "No one heard my side of things. No one sat both of us down. At that point, people were allowed to say what they wanted even though there was an investigation going on. That ruined my credibility." He claimed that all but one of the statements gathered by the investigator sounded like they had been written together and they made him look like the aggressor although he was not. (The standout was the statement of PO1 B.) The applicant stated that he believes he was removed from the ship because the SCPO told him that he was "coming off as intimidating" and the CSC is Caucasian.

- **Spreading knowledge of complaint**: On October 20, 2017, the applicant stated, a junior officer who worked in the Sector office where the applicant used to work retaliated against him for having initiated an informal civil rights complaint on September 7, 2017, by telling his daughter's mother (who was also assigned to that Sector office) in the presence of others that the applicant was "raising issues with the Office of Civil Rights." He stated that he believes that the CSC had told his wife, who also worked at the Sector office, about the applicant's civil rights complaint and that the wife had told the junior officer. Another E-6 had told his daughter's mother that "they were looking to get me discharged from the service." The applicant stated that this gossip made him feel embarrassed, like his complaint was being "taken as a joke," and like no one would help him and they only wanted to ruin his career. The applicant stated that the gossip was reprisal because "they wanted to make sure the word got out even further about what I did" and to discredit him.

- **Spreading medical information**: In late October or early November 2017, the applicant stated, he was subject to reprisal when the cutter's Operations Officer, who was also the Command Security Officer (CSO), shared the applicant's medical information with the SCPO, who was the Alternate CSO. He explained that after his psychologist sent a letter to his CO stating that the applicant had "a general anxiety disorder from the high stress and disrespect" he had received, the SCPO "alluded to [him] seeing a psychologist" and the command began barring him from classified spaces. The applicant claimed that while the CSO had a "need to know" his medical information, the Alternate CSO did not. He stated that his first-level supervisor was also "included in the email that alludes to possible medical information being shared, security clearance updates and things of that nature."

- **NJP and reduction in rate**: The applicant stated that on November 3, 2017, his CO retaliated against him by reducing him in rate from E-6 to E-5 at mast. He stated that his reduction in rate was "extreme" and that he should have been put on probation for six months instead. But at the mast, his new first-level supervisor—the CPO who had arrived in the summer of 2017—made very negative comments about him and had not one good thing to say, which likely swayed the CO to reduce him in rate with no suspension. The applicant stated that no one had paid attention to the hostile work environment and toxic leadership "that led to me allegedly making threats." He stated that he thought his CO reduced his rate to try to get him to leave the Service, but he was actually trying to leave the Service himself because he had "had it with the lack of action that has taken place." The applicant noted that previously, an E-4 had been convicted at mast on multiple charges, but his reduction in rate had been suspended for six months.

  The applicant stated that his reduction in rate was reprisal because he had already filed his informal civil rights complaint, and he had not agreed to the offered terms during the Alternative Dispute Resolution (ADR) process. During the ADR, he had told them many

times to "stop the investigation," transfer him from the cutter, and recommend him for advancement, but they had refused.

- **Security clearance**: The applicant stated that he was subject to reprisal on November 17, 2017, when the Director of the Coast Guard Security Center suspended his security clearance based on a recommendation from his CO. The applicant was informed of this action in an email from the CSO. The CSO cited concerns about his "mental well-being, a potential security concern, and items from the NJP." The CSO also mentioned irrelevant issues, such as an allegation of domestic violence against him in early 2017 that had been investigated but not substantiated.

  The applicant stated that on December 6 or 7, 2017, he was notified of the intent to revoke his security clearance but it was still under review. He stated that they were trying to revoke his security clearance because they thought he had "an anger problem," but an anger problem is not a security risk. However, revoking his security clearance would prevent him from doing his job and so "possibly begin the process for a discharge." He was also told that the SCPO, as the Alternate CSO, had called the security center on December 6, 2017. The SCPO had been given "the lead" and could "provide the security center with all kinds of documentation," which "goes back to [his] comment that if someone tries to take him out he will take them out." The applicant alleged that other members with charges against them, including an E-4 accused of domestic violence, had had their security clearances suspended but not revoked.

- **Temporary Limited Duty (TLD) Status**: The applicant stated that on November 20, 2017, he was subject to reprisal when his Medical Officer placed him in TLD status for a period of six months. His prior TLD status (based on a hernia) had just expired. His TLD status "restrict[ed] his ability to deploy with his unit and [made] him ineligible to transfer" to another unit. The Medical Officer told him that she did it so that he could see his psychologist regularly. He stated that he was told that his command had to place him in that status in order "to get someone to fill my spot" and he was not due to transfer until the summer of 2018. He stated that placing him in TLD status "was just another way to make sure that I am doing something that they want me to do (go to a psychologist); otherwise, if I do not follow through or if there is no progress, that is grounds for discharge." He stated that it was also another way to try to push him out of the Service. The applicant noted that the E-4 who had been accused of domestic violence was not put in TLD status.

- **January 31, 2018, EER**: The applicant amended his complaint to include the semiannual EER he received on January 31, 2018, which he alleged was also inaccurate and retaliatory. He stated that he had been improperly counseled by management and not allowed to appeal.

Request to Set Aside NJP

The applicant was not transferred from the cutter although he did not deploy while undergoing anger management therapy for six months. On his next semiannual EER, dated April 30, 2018, the applicant received better marks and was recommended for advancement to E-6. On April 20, 2018, he submitted a request to the new CO of the cutter to have the NJP set aside and his E-6 rate restored. On May 25, 2018, the new CO denied the applicant's request because the Military Justice Manual states that NJP should only be set aside within four months and because he did not believe that setting aside the NJP would best serve justice or discipline.

Discharge

On June 12, 2018, the applicant was issued orders to transfer to another Sector Command Center. The next day, he signed a Page 7 (CG-3307) stating that he wanted to be discharged. On June 14, 2018, a yeoman aboard the cutter sent the Personnel Service Center an email request approval of the applicant's "separation in lieu of orders." The yeoman noted that the applicant's enlistment was not due to end until July 4, 2023. The yeoman also stated that the applicant was "eligible for reenlistment"[7] and recommended for reenlistment by the CO. On a Page 7 dated July 3, 2018, however, the applicant was advised by his CO that he did not meet the eligibility requirements for reenlistment and would not be recommended for reenlistment.

On August 13, 2018, the applicant was honorably discharged with an RE-4 reenlistment code, a KND separation code, and "Separation for Miscellaneous/General Reasons" as his narrative reason for separation. His Member Information page shows that his "expected loss date" and "expected active duty termination date" before his discharge were both July 4, 2023.

VIEWS OF THE COAST GUARD

On September 6, 2019, a judge advocate (JAG) recommended that the Board deny relief in this case. In recommending denial, she stated that the applicant was not misadvised about his legal rights or denied due process, and she provided the following chronology:

- In September 2017, the applicant's permanent duty station was the cutter.
- On September 7, 2017, the applicant was temporarily assigned to the Base at the cutter's homeport because of his altercation with the CSC the day before.
- On September 20, 2017, the XO of the cutter detailed a PIO to investigate the altercation.
- On October 3, 2017, the PIO provided a rights advisement to the applicant regarding the investigation. The applicant was advised of his right not to incriminate himself but chose to submit a statement and actually "admitted to the charges against him."
- On October 4, 2017, the PIO issued his Report of Investigation into the altercation.
- On or about October 20, 2017, the applicant returned to duty aboard the cutter. The JAG submitted emails from the Base command with this information.
- On or about October 31, 2017, the applicant was notified of his rights regarding NJP.
- On or about November 3, 2017, the applicant was taken to mast, admitted his guilt, and was reduced in rate as NJP for violating Articles 91 and 134 of the UCMJ.

The JAG stated that this chronology shows that the applicant had returned to duty aboard the cutter, his permanent duty station, two weeks before the mast and so he was permanently

[7] However, Article 1.E.2.e. of COMDTINST M1000.2 states that one of the criteria for reenlistment is that the member "[h]ave no documented offense for which the maximum penalty for the offense, or closely related offense under the UCMJ and Manual for Courts-Martial, includes a punitive discharge during the current period of enlistment."

"attached to or embarked upon a vessel" when he was notified of his rights at mast and taken to mast on November 3, 2017. Therefore, he was correctly informed that he did not have the right to refuse NJP because the "vessel exception" to that right applied. The JAG noted that the script that the CO reads at mast specifically states whether the accused has or does not have the right to refuse NJP and asks the accused to confirm that he has consulted an attorney. The JAG noted that the applicant admitted that he had discussed this issue with the attorney. She argued that if either of those issues had been unresolved, they would have been mentioned in the Mast Memorandum, but they were not. Therefore, she concluded, the applicant has not proven by a preponderance of the evidence that he was entitled to refuse mast, erroneously counseled, or denied due process.

The JAG stated that at mast, the CO found that the preponderance of the evidence showed that the applicant had violated Article 91 of the UCMJ by being insubordinate and Article 134 by communicating a threat. She stated that these findings are supported by the statements gathered by the PIO and by the applicant's own admissions at mast. She argued that the applicant has not shown that the elements of the two offenses were not met.

The JAG noted that under Article 1.M. of the MJM, the maximum punishment that the CO could have awarded the applicant at mast included not only the reduction in rate but confinement for 30 days, forfeiture of half his pay for two months, restriction to the cutter with diminished rations for 3 days, restriction to the Base for 60 days, and extra duties for 45 days. The JAG stated that the applicant's reduction in rate was therefore neither illegal nor unjust and it was far below the maximum allowed. The JAG noted that at a general court-martial, the applicant could have received a dishonorable discharge, confinement for three years, and total forfeiture of pay and allowances for violating Article 91 or 134 of the UCMJ.

Regarding the applicant's claim that the CO did not consider mitigating circumstances, the JAG pointed out that the CO opted to dismiss one of the charges against him and could have awarded much greater punishment. She also argued that the statements gathered by the PIO do not support the applicant's version of his altercation with the CSC: None of the witnesses supported his claims that he was provoked by the CSC, that the CSC refused to believe that he was on TLD status, or that the CSC pointed a finger in the applicant's face, although both the applicant and the CSC were heard using foul language. She noted that the witnesses heard the CSC tell the applicant to supervise the work after the applicant informed him that he was on limited duty. She also noted that the applicant did not submit evidence that he was on TLD status on September 6, 2017. She stated that if the CSC had ordered him to help lift the equipment, that would not have been an illegal order, although it might have been an "unenforceable order,"[8] which is one that is lawful but "may be respectfully declined." She stated that the order to supervisor the work was neither illegal nor unenforceable.

The JAG stated that the CSC may have been "partially to blame for what transpired" that day, but as the Command Senior Chief, he was "entitled to the utmost respect at all times from all subordinates." She stated that if the applicant was on TLD status, he should have respectfully

[8] The JAG cited the explanation of a lawful order under Article 90 of the UCMJ in the MCM. She noted that Article 90(c)(2)(a)(iv) states that a lawful order must relate to military duty and "may not, without a valid military purpose, interfere with private rights or personal affairs."

informed the CSC, and if he was incapable of even supervising the work, he should have respectfully said that too. Raising his voice, cursing at, and threatening violence toward the CSC "was inappropriate," and as an E-6, he should have known how to respectfully decline an order if it was contrary to his medical status and to seek assistance from a higher authority.

The JAG also adopted a memorandum submitted by Commander, Personnel Service Center (PSC), who recommended denying relief. PSC stated that the applicant was temporarily assigned to the Base from September 7 to October 20, 2017, but he returned to duty aboard the cutter on October 20, 2017, and so was "attached" to the cutter and could not refuse NJP. Because of the NJP, "all subsequent actions of security clearance notification and a discipline EER were submitted as required in accordance with policy. PSC noted that on March 26, 2018, the applicant was provided with a letter stating that he would retain his security clearance "with caution."

PSC stated that the applicant was issued orders to transfer to another unit in the summer of 2018 but opted not to accept the orders and be discharged in lieu of accepting the transfer orders. When the applicant indicated that he would reject his transfer orders and be discharged, PSC noted that the applicant would not have been eligible to reenlist based on the reenlistment criteria since he had received NJP for UCMJ offenses for which the maximum allowable punishment included a punitive discharge. Therefore, PSC issued discharge orders for "miscellaneous/general reasons" and assigned him an RE-4 reenlistment code.

SUMMARY OF APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 23, 2019, the applicant responded to the views of the Coast Guard and strongly disagreed with them. He repeated the allegations and arguments made in his application. He claimed that he was not removed from the cutter so that the command could investigate but "for the sole purpose of 'getting rid' of the Applicant on a permanent basis." He was then returned to the cutter "for the sole purpose of holding a Captain's Mast proceeding, which he would have never agreed to but for the incorrect legal advice" he received. He alleged that he "never really did" return to duty aboard the cutter after the mast.

The applicant stated that the CSC's provocation and escalation of the argument were not considered when he was awarded NJP. And he "should not have been demoted just because he was in an argument with a Senior Chief Petty Officer who should have known better to not antagonize and provoke the Applicant." He noted in this regard that the JAG admitted that the CSC may be partially to blame for what transpired. He stated that although he cannot prove it, his "horrible treatment may have been racially motivated in an attempt to just 'kick him out' of the Coast Guard." Therefore, he concluded, he is entitled to the relief he has requested.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely filed.

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.[9]

3. The applicant alleged that his reduction in rate at NJP, the disciplinary EER, the (alleged) revocation of his security clearance, his discharge from active duty, his reenlistment code, and his narrative reason for reenlistment are erroneous and unjust. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in the military record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.[10] Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."[11]

4. **Application of Vessel Exception**: The applicant alleged that he was denied due process with respect to the NJP because he was denied the right under Article 15 of the UCMJ to refuse NJP and demand trial by court-martial. He argued that he had this right and the "vessel exception" under Article 15 of the UCMJ did not apply because he had received TAD orders reassigning him from the cutter to the Base before the mast was held on November 3, 2017. He claimed that his return to the cutter was short and just a pretext to deprive him of the right to refuse NJP. And Chapter 1.H.1. of the MJM states that vessel crewmembers who are serving on TAD orders ashore or who are assigned ashore informally following alleged misconduct "are not attached to or embarked upon a vessel and therefore must be afforded the right to demand trial by court-martial."

The record shows that the cutter was the applicant's permanent duty station from June 2016 until his discharge in August 2018. He was temporarily removed from the cutter and assigned to the Base from September 7 to October 20, 2017, following an altercation with the CSC. During that period, the cutter completed its deployment; the command investigated the altercation; and the applicant underwent surgical repair of his hernia and then submitted a statement for the investigation on October 10, 2017. On October 20, 2017, the applicant returned to his permanent duty aboard the cutter, and on October 31, 2017, he was advised of his rights at mast, which did not include the right to refuse NJP because he was "attached to" a cutter.

Although the applicant alleged that his return to the cutter must have been a pretext, the Board disagrees because as of October 20, 2017, the command knew only what was in the report of the investigation. In particular, as of October 20, 2017, the command did not know that the applicant's psychologist was going to prescribe six months of anger management training, which would conflict with future deployments. In addition, the applicant himself noted that it was

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[9] *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).
[10] 33 C.F.R. § 52.24(b).
[11] *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

likely his new supervisor's very negative testimony at the mast on November 3, 2017, that persuaded the CO to reduce him in rate. Therefore, the preponderance of the evidence shows that although the applicant had been assigned to the Base briefly, as of October 20, 2018, he was again working aboard the cutter full-time and expected to do so—aside from underway periods—until his tour of duty ended the following summer. And so the Board is not persuaded that the applicant's return to duty aboard the cutter on October 20, 2017, was a pretext to deprive him of the right to reject NJP, as he alleged.

Because the applicant returned to his permanent duty assignment aboard the cutter on October 20, 2017, and was never transferred to another unit, the Board finds that the preponderance of the evidence shows that he was "attached to" the cutter from October 20, 2017, until his discharge. Therefore, the "vessel exception" applied and he was not entitled to refuse NJP and demand trial by court-martial. He has not proven by a preponderance of the evidence that he was deprived of due process with respect to the mast.

5. **Insubordination**: The applicant has not proven by a preponderance of the evidence that his CO erred or abused his discretion in finding that the applicant had violated Article 91 (insubordination) of the UCMJ. He argued that his conduct did not meet the elements of the offense because he did not violate a lawful order when he refused to lift heavy equipment on September 6, 2017. As the JAG noted, however, the CSC's order was not clearly unlawful and the CSC changed the order to one that was clearly lawful as soon as the applicant told him that he was on light duty. Moreover, a violation of Article 91 does not require the member to have disobeyed a lawful order. A member can also violate Article 91 by treating a petty officer with contempt or using disrespectful language or deportment toward a petty officer while the petty officer is executing his duties, and the record shows that the applicant used disrespectful language toward the CSC on September 6, 2017. The evidence gathered by the PIO amply supported the CO's finding that the applicant had violated Article 91.

6. **Communicating a Threat**: The applicant has not proven by a preponderance of the evidence that his CO erred or abused his discretion in finding that the applicant had violated Article 134 of the UCMJ by communicating a threat. The statements of witnesses show that the applicant accused the CSC of disrespecting him and then threatened to harm or kill anyone who disrespected him. He also made fists and punched an air compressor and the bulkhead repeatedly. Although the applicant dismissed his speech and conduct as anger that the CSC had provoked, the Board finds that the evidence supports the CO's finding that the applicant had communicated a threat in violation of Article 134.

7. **Reduction in Rate**: The applicant has not proven by a preponderance of the evidence that his CO failed to consider the CSC's own foul language or the applicant's stress and anxiety when he decided to reduce the applicant's rate from E-6 to E-5 as NJP. Evidence of the CSC's foul language was in the report of the investigation, and the CO's order to undergo anger management therapy proves that the CO had considered the psychologist's report. The reduction in rate was well within the CO's authority to impose at mast and was substantially less than the maximum punishment the CO could have imposed. The "Good Order and Discipline" summaries that the applicant submitted show a variety of punishments imposed for a variety of offenses by members in a variety of ranks whose own mitigating circumstances are not shown, and they do not

prove that the applicant's reduction in rate was disproportionate to his offenses, excessive, or too severe considering the circumstances. Because the applicant has not shown that his punishment was illegal or disproportionate, he has not shown that his CO's denial of his April 20, 2018, request to have the NJP set aside was erroneous or unjust.[12]

8. **Disparate Treatment**: The applicant has not submitted evidence sufficient to overcome the presumption of regularity or to prove by a preponderance of the evidence that he was punished more harshly than other members of his command for similar or worse offenses. He submitted his own affidavit for his civil rights complaint but no evidence to support the claims therein. Nor do the "Good Order and Discipline" summaries show that he was treated disparately by his command or the Coast Guard. The CSC apparently yelled and used some foul language on September 6, 2017, and received no NJP, but there is no evidence that the CSC violated the UCMJ that day.

9. **Disciplinary EER**: Article 4.C.2.c.(1) of COMDTINST M1000.2A requires the preparation of a disciplinary EER whenever a member receives NJP. Therefore, the applicant has not proven by a preponderance of the evidence that the disciplinary EER dated November 3, 2017, in his record is erroneous or unjust. The numerical marks are supported by appropriate comments, and the Board finds no grounds for amending or removing the EER.

10. **Security Clearance**: The applicant asked the Board to restore his security clearance and to remove all the documentation of its revocation. The JAG stated, however, that a member's security clearance must be reviewed whenever NJP is awarded, and the applicant did not deny it. In addition, the applicant is mistaken because his security clearance was not revoked. The letter he was sent on March 26, 2018, shows that he received a "Final Favorable Security Clearance Determination with Caution." The Board finds no grounds for removing any of the documentation concerning his security clearance from his record.

11. **Reason for Separation**: The applicant alleged that his separation code and narrative reason for discharge on his DD 214 are erroneous and unjust. He claimed that they should show that he was discharged upon completing his required active service. However, the applicant did not complete his enlistment, which ran to July 4, 2023. Therefore, he had not completed his active service obligation. He was discharged only because he refused to accept his transfer orders to a different duty station when his tour of duty aboard the cutter was complete in 2018. The Coast Guard's Separation Designator Code (SPD) Handbook has no separation code or narrative reason for separation denoting a discharge when a member asks to be discharged in lieu of accepting transfer orders, although presumably a member could be discharged for misconduct for refusing orders. But given that the applicant had two toddlers living near the cutter's homeport, the KND code and "Miscellaneous/General Reasons" entry on the applicant's DD 214 are the most appropriate entries authorized by the SPD Handbook. The applicant has not proven by a preponderance

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[12] *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976) (finding that for the purposes of the BCMRs, "injustice" is "treatment by the military authorities that shocks the sense of justice but is not technically illegal."); *but see* 41 Op. Att'y Gen. 94 (1952), 1952 WL 2907 (finding that "[t]he words 'error' and 'injustice' as used in this section do not have a limited or technical meaning and, to be made the basis for remedial action, the 'error' or 'injustice' need not have been caused by the service involved.").

of the evidence that his separation code and narrative reason for separation on his DD 214 are erroneous or unjust.

12. **Reenlistment Code**: The applicant alleged that his RE-4 code is erroneous and unjust because it prevents him from reenlisting. Although he characterized it as an absolute bar to future military service, recruiting policies vary over time, and military recruiting commands do sometimes waive their policy requirements and reenlist members with RE-4s. The Coast Guard stated that the applicant was assigned an RE-4 code because he is ineligible to reenlist under Coast Guard policy. Article 1.A.5.b.(4) of COMDTINST M1000.2A states that one criterion for reenlisting is that the member must "[h]ave no documented offense for which the maximum penalty for the offense, or closely related offense under the UCMJ and Manual for Courts-Martial, includes a punitive discharge during the current period of enlistment." The MCM states that the maximum punishment for violating Article 91 of the UCMJ by disobeying a lawful order or by showing contempt to a superior petty officer includes a bad conduct discharge, and the maximum punishment for violating Article 134 of the UCMJ by communicating a threat includes a dishonorable discharge. Therefore, the applicant is in fact ineligible to reenlist in the Coast Guard pursuant to Article 1.A.5.b.(4), and his RE-4 code is accurate and appropriate. The Board is not persuaded that his ineligibility to reenlist constitutes an error or injustice.

13. **Other Allegations**: The applicant included with his application a copy of his affidavit for a civil rights complaint. The allegations and requests for relief in this affidavit are not the same as those in his BCMR application and are not supported by evidence. Nor did he state how his complaint was resolved. The applicant also made numerous allegations in his application to the Board regarding the actions and attitudes of various members of his command. Those allegations not specifically addressed above are considered to be unsupported by substantial evidence sufficient to overcome the presumption or regularity and/or are not dispositive of the issues presented in the application.[13]

14. **No Grounds for Reinstatement**: The applicant has not proven by a preponderance of the evidence that the NJP and EER dated November 3, 2017, are erroneous or unjust or that he was treated disparately or unfairly by the command of the cutter. The record shows that his discharge was voluntary because he did not want to accept his transfer orders to another unit when his tour of duty aboard the cutter ended in 2018. He had been recommended for advancement, and, had he accepted the transfer orders, he could have continued serving on active duty until his enlistment ended in 2023. The applicant chose to be discharged, however, and so there are no grounds for reinstating him on active duty.[14]

15. Accordingly, the applicant's requests for relief should be denied.

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[13] 33 C.F.R. § 52.24(b); *see Frizelle v. Slater*, 111 F.3d 172, 177 (D.C. Cir. 1997) (noting that the Board need not address arguments that "appear frivolous on their face and could [not] affect the Board's ultimate disposition").

[14] *See Wright v. United States*, 81 Fed. Cl. 369, 375 (2008) (holding that "a decision to retire is not rendered involuntary merely because the servicemember is faced with an undesirable choice"), *citing Cruz v. Dep't of Navy*, 934 F.2d 1240, 1245 (Fed. Cir. 1991) ("This court has repeatedly held that the imminence of a less desirable alternative does not render involuntary the choice made."). *See also Scarseth v. United States,* 52 Fed. Cl. 458, 468 (2002) (citing *Christie v. United States,* 207 Ct. Cl. 333, 338 (1975), for its determination that "the exercise of an option to retire is not rendered involuntary by the impending prospect of a less desirable alternative").

ORDER

The application of former OS2 [redacted], USCG, for correction of his military record is denied.

February 14, 2020

[redacted]