

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2020-075

ITC ([REDACTED])

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 February 19, 2020, and assigned the case to the Deputy Chair to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated October 1, 2021, 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 Chief Information Systems Technician (ITC/E-7) who received a general discharge on May 26, 2020, asked the Board to correct his record by taking the following actions:

- Void and remove a CG-3307 (“Page 7”) dated July 11, 2019, which states that he had incurred an alcohol incident on February 15, 2019;
- Set aside nonjudicial punishment (NJP) that he received on July 30, 2019, for assault consummated by a battery and disorderly conduct, drunkenness;
- Remove and replace his disciplinary Enlisted Evaluation Report (EER); and
- Remove his Separation Authorization dated September 24, 2019, and allow him to reenlist.

The applicant, through counsel, stated that on February 15, 2019, he was at a bar with his fellow shipmates. He acknowledged that he and his co-workers had been drinking. At one point, he alleged, he grabbed a nipple of one of his male shipmates and twisted it in what is commonly referred to as a “titty-twister.” As a result of his conduct, he received a Page 7 documenting an alcohol incident and NJP for assault consummated by a battery and disorderly conduct, drunkenness. Shortly thereafter, his commander recommended that he not be allowed to reenlist, and he was discharged from the Coast Guard when his enlistment contract ended on May 26, 2020.

The applicant argued that the Coast Guard committed an error by imposing NJP because his conduct did not rise to the level of assault or disorderly conduct. Specifically, he argued that he did not have the requisite intent needed to prove an assault. Instead, the applicant characterized his conduct that resulted in NJP as “mutual horseplay.” He argued that based on all of the circumstances, he reasonably believed that he had consent from the alleged victim to twist his nipple. To support this assertion, the applicant quoted the alleged victim who stated that he believed the applicant’s actions were done in a “playful manner” and that his conduct was not out of character for him.

The applicant also argued that his NJP was erroneous because the Coast Guard violated his due process rights. He argued that the Coast Guard repeatedly denied requests by his counsel to hand over exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Specifically, the applicant argued that the Coast Guard withheld a statement made by the alleged victim and seven witness statements from him. He argued that these statements should have been provided so that his counsel could have analyzed them and mounted a proper defense. In fact, the applicant argued that had his counsel been provided this evidence prior to NJP, he likely would have recommended that the applicant refuse NJP and demand trial by court-martial. He stated that it was not until about six months after he had received NJP that he finally received the alleged victim’s statement concerning the matter.

The applicant also argued that the Coast Guard committed a number of procedural errors. First, the applicant stated that the statement taken by the investigative officer in which the alleged victim’s statement is summarized is unsigned. The applicant argued that there is no way to authenticate the statement and that this is a violation of the Administrative Investigations Manual. Second, the applicant argued that the Coast Guard Investigative Service (CGIS) investigation regarding his conduct was incomplete at the time he was sentenced to confinement. Third, the applicant stated that the document used to prevent him from reenlisting contains an incorrect employee ID number. Fourth, the applicant argued that his Commanding Officer (CO) failed to provide him with a copy of the memorandum explaining why the applicant’s appeal of his NJP should be denied. Finally, the applicant argued that the CGIS improperly fingerprinted him after he was released from confinement.

The applicant concluded by arguing that his command failed to consider his potential for a successful and productive career before he was denied an opportunity to reenlist. He argued that according to Coast Guard policy, COs should not refuse reenlistment to members who have demonstrated the potential for a successful and productive Coast Guard career. The applicant argued that his exemplary military record shows that he had the potential for success. To support this allegation, he provided copies of several awards and medals. Specifically, the applicant noted that he received four Achievement Awards during his final enlistment. He also provided copies of his counseling receipts that show that he consistently earned above average marks. Finally, the applicant provided approximately thirty letters addressed to the Administrative Separation Board (ASB) in support of his retention in the Coast Guard. The letters praised the applicant’s technical performance, work ethic, leadership abilities, willingness to teach others, selflessness, and passion for the Coast Guard.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on November 28, 2005. He was designated as a Coast Guard Basic Training Honor Graduate.

On July 29, 2008, the applicant received a Page 7 documenting his first alcohol incident when his abuse of alcohol was determined to be a significant and/or causative factor in his lack of situational awareness. Specifically, the application became so inebriated that he wandered into campsites of the general public. He was unaware of his actions until the next morning. The applicant was notified that any further incidents could result in his separation.

On March 26, 2019, Witness 1 was interviewed regarding the incident that occurred on February 15, 2019. Witness 1 stated that several crewmembers had convened at a local cigar bar and that the applicant had consumed alcohol. At one point, all the crewmembers were seated together with the applicant and the victim seated at opposite ends of the table. He stated that the applicant randomly got up from his seat, walked to the other side of the table, and grabbed the victim's nipples with both hands. Witness 1 stated that the victim then began to punch the applicant in the chest in an attempt to get him to release his nipples from his grasp. When the applicant let go, Witness 1 stated that he heard the victim exclaim: "What the fuck are you doing? That's sexual assault." He stated that the victim was upset by the assault and expressed that this was not the first time the applicant had made physical contact with him on a deployment that made him uncomfortable. Witness 1 stated that the victim shared that on a previous deployment, the applicant had become intoxicated and made physical advances on him in a drunken emotional state. Witness 1 stated that the victim is not comfortable around the applicant and would continue to keep his distance from him.

On March 27, 2019, Witness 2 was interviewed regarding the incident that occurred on February 15, 2019. He stated that on the night in question, crewmembers went to a cigar bar to celebrate a job well done. Witness 2 stated that the applicant seemed to have had a couple of drinks and was very loud and animated. As the members began to leave, the applicant walked from one end of the table to the other where the victim was sitting. Witness 2 stated that after a couple of words were exchanged, the applicant grabbed the victim's nipples in a "titty twister." He stated that the victim seemed very surprised and began to knock the applicant's hand away. However, Witness 2 stated that the applicant would not let go. Then, he stated that the victim forcefully punched the applicant in the chest. Witness 2 stated that after the applicant had let go of the victim, the two members hugged and exchanged words that he was unable to hear.

On April 1, 2019, a CGIS investigation was initiated regarding alleged abusive sexual contact between the applicant and the victim. Prior to the CGIS investigation, an administrative investigation had been initiated. However, when the victim disclosed that there were other physical encounters with the applicant, the administrative investigation was terminated and CGIS was contacted.

On April 12, 2019, CGIS agents interviewed the victim. The victim described the applicant as someone who gets into people's personal space and likes to "hug a lot, place arms around you, and speak really close." He then addressed the incident that occurred on February 15, 2019. That

evening, the victim and his fellow crew members were socializing at a local cigar bar. He stated that he was sitting down and conversing with a coworker to his left, when suddenly he observed a hand reach from his right side, and then grab and pinch his right nipple. The victim stated that he recognized the person grabbing him as the applicant. He stated that he yelled at the applicant to stop multiple times. When the applicant failed to stop, the victim punched him in the chest. The victim stated that he believed the applicant's actions were done in a playful manner, but that he felt angry and violated by his actions.

On April 25, 2019, CGIS agents attempted to interview the applicant. The applicant was informed that he was suspected of cruelty maltreatment and assault. He was advised of his rights under the Uniform Code of Military Justice (UCMJ). The applicant did not waive his rights and declined to be interviewed.

On May 17, 2019, the CGIS investigation regarding the applicant's conduct was closed.

On July 11, 2019, the applicant received a Page 7 documenting his second alcohol incident when his abuse of alcohol was determined to be a significant and/or causative factor in assaulting one of his subordinates for an unprovoked reason while displaying drunken behavior in a public setting. The applicant was notified that since this was his second alcohol incident, an administrative discharge proceeding would be initiated.

On July 30, 2019, the applicant received NJP for assault consummated by a battery¹ and disorderly conduct, drunkenness.² Specifically, the applicant was seen becoming obnoxious and displaying drunken behavior. While in a drunken state, the applicant assaulted another member by grabbing him and twisting both of his nipples. The applicant was sentenced to restriction for 30 days and forfeiture of \$2,147.45 for two months.

On July 31, 2019, the applicant was notified that his CO had initiated action to separate him from the Coast Guard due to unsuitability. His CO cited the applicant's second alcohol incident and his NJP as the reasons. In response, the applicant indicated that he wanted to consult with a civilian lawyer on the matter and waived his right to make a statement.

Also on July 31, 2019, the applicant appealed his NJP through counsel. He argued that his NJP should be set aside in the interest of justice and good order and discipline of the service. First, the applicant argued that he was not provided due process because he was unlawfully prohibited from reviewing all of the evidence against him. Second, the applicant argued that the Coast Guard did not have sufficient evidence that he violated the UCMJ. Specifically, he argued that mutual horseplay does not constitute assault or disorderly conduct. Regarding the violation of assault, the applicant argued that he did not have the requisite intent because he reasonably believed that he had the consent of the alleged victim.

On August 2, 2019, the applicant submitted a memorandum regarding his involuntary separation. He stated that he had consulted with a civilian lawyer, that he waived his right to submit a written statement, and that he wanted to appear before an ASB.

¹ Article 128, UCMJ.

² Article 134, UCMJ.

On August 6, 2019, the applicant's CO sent a memorandum to the Advancements and Separations Branch of the Enlisted Personnel Management Division of the Personnel Service Center. In the memorandum, the CO recommended that the applicant be discharged from the Coast Guard by reason of unsuitability and cited the applicant's second alcohol incident as the reason. The CO noted that the applicant had elected to appear before an ASB.

On August 15, 2019, the applicant contacted an Equal Employment Office (EEO) official and alleged that he had been subjected to harassment based on his gender and religion.

On August 22, 2019, the applicant's appeal of his NJP was denied by Rear Admiral (RADM) S who stated that there was sufficient evidence to establish that the applicant had violated Articles 128 and 134 of the UCMJ. Further, RADM S determined that the applicant had not been denied any substantive rights before or during the NJP proceeding.

On August 29, 2019, the applicant received a Page 7 notifying him that he was not eligible to reenlist or extend his enlistment in the Coast Guard and that he would be discharged upon the expiration of his current enlistment. He was notified that he was ineligible to reenlist/extend because he did not meet the eligibility requirements and he had failed to receive a positive recommendation from his CO. Specifically, the CO stated that he did not recommend the applicant for reenlistment/extension because he had received NJP for assault consummated by a battery.

On September 1, 2019, the applicant sent the Civil Rights Directorate an email with additional information regarding his allegation of harassment and asked that it be taken into consideration when determining the outcome of his EEO complaint. Specifically, he sent a timeline of events. In his email, the applicant discussed the evidence that he was able to review before his NJP by stating the following:

The evidence provided was the 4 sheets of paper consisting of 2 signed witness statements and 1 summary of a witness interview (unsigned). When asked to see the PIO report, we were told that due to it not being used in the mast and that it was incomplete, we were not entitled to see it. We then asked to see the CGIS report in which we were told that there wasn't one but we were provided a couple pages of a summary of interview [sic] from CGIS. When asked where CGIS said it wasn't sexual assault and that it was normal assault we were told it was in an email but it was not provided to us.

On September 9, 2019, in response to the notification of his ineligibility to reenlist, the applicant submitted a statement requesting his retention in the Coast Guard. He argued that a single event of misconduct does not merit denial of his reenlistment because it should not define an entire career of honorable service.

On September 24, 2019, the applicant received a Separation Authorization that showed that he would receive a general discharge by reason of expiration of enlistment due to completion of required active service under Article 1.B.11. of the Coast Guard Separations Manual, no later than May 26, 2020.

VIEWS OF THE COAST GUARD

On July 27, 2020, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which she recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC argued that the applicant failed to show that the Coast Guard committed an error or injustice regarding his reenlistment. First, PSC stated that according to the Military Drug and Alcohol Policy Manual, enlisted members who receive a second alcohol incident must be separated. Second, PSC stated that according to the Enlistments, Evaluations, and Advancements Manual, members who commit an offense for which the maximum penalty includes a punitive discharge are ineligible for reenlistment. In this case, the applicant received NJP for assault consummated by a battery, which carries a maximum punishment of a punitive discharge.

The JAG argued that the Coast Guard did not commit an error by finding by a preponderance of the evidence that the applicant committed an assault consummated by a battery. According to the applicant, his behavior should have been considered “mutual horseplay.” However, the JAG argued that the evidence shows that there was nothing mutual about his interaction with the victim. First, the JAG argued that the victim’s reaction to the applicant was not that of someone engaged in “mutual horseplay.” In contrast, the JAG argued that the victim’s statement shows that the applicant’s behavior was unwelcome. While the victim believed that the applicant’s actions were done in a playful manner, he stated that he felt angry and violated. The JAG also argued that there was nothing in the victim’s statement to suggest that the applicant’s conduct was within the bounds of their normal interaction. Second, the JAG argued that there were witnesses who countered the applicant’s narrative that his conduct was “mutual horseplay.” For instance, one witness stated that the applicant and the victim were seated on opposite ends of a table when the applicant unexpectedly got up from his seat, walked to the other side of the table, and grabbed the victim’s nipples. The witness stated that the victim was upset by the assault and that it made him uncomfortable. A second witness stated that when the applicant grabbed the victim’s nipples, the victim seemed very surprised and tried to knock the applicant’s hands away. When the applicant would not let go, the victim forcefully punched him in the chest in an attempt to get him to stop. Finally, the JAG argued that the applicant’s conduct cannot be considered “mutual horseplay” since he was interacting with a subordinate in his chain of command. Rather than “mutual horseplay,” the JAG argued that the applicant’s grabbing and twisting of the victim’s nipples was a stunt by a supervisor performed on his subordinate in the presence of several other members of the unit.

The JAG also argued that the Coast Guard did not violate the applicant’s due process rights. The JAG stated that according to the Manual for Courts-Martial, most of the military rules of evidence do not apply to NJP proceedings. The JAG argued that had the applicant wanted the military rules of evidence to apply, he should have demanded to go to court-martial. However, the JAG stated that members who are subject to NJP are allowed to examine the documents that are relied on in deciding whether and how much punishment to impose. In this case, the applicant acknowledged that the Coast Guard provided him with “4 sheets of paper consisting of 2 signed witness statements and 1 summary of a witness interview (unsigned).” The JAG argued that the applicant failed to show that the outcome of his NJP was influenced by evidence outside of what

he was provided. As such, the JAG argued that the applicant failed to show that the Coast Guard was under an obligation to provide him with any further evidence.

Finally, the JAG argued that the Coast Guard did not fail to consider the applicant's service record and future potential in denying him an opportunity to reenlist. In fact, the JAG argued that aside from the fact that he was denied reenlistment, the applicant failed to provide any evidence that his command did not consider his service record and future potential. Further, the JAG argued that the applicant did not meet the eligibility criteria for reenlistment. According to the Enlistments, Evaluations, and Advancements Manual, a member is ineligible for reenlistment if they have a documented offense for which the maximum penalty includes a punitive discharge. In this case, the JAG stated that the applicant's NJP for assault consummated by a battery constitutes a documented offense for which the maximum penalty includes a punitive discharge. Finally, the JAG argued that even if the applicant had not received NJP for assault consummated by a battery, he would have been subject to mandatory separation. The Military Drug and Alcohol Policy Manual requires enlisted members who receive a second alcohol incident to be processed for separation. In this case, the applicant received his first alcohol incident on July 29, 2008, and he received his second alcohol incident on July 11, 2019.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 12, 2020, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. In his response, the applicant asked the Board to consider his diagnosis of Post-Traumatic Stress Disorder (PTSD).

The applicant stated that he has been diagnosed with service-connected PTSD by the Department of Veterans Affairs (VA). To support his assertion, the applicant provided a letter from the VA that shows that he was diagnosed with service-connected PTSD on May 27, 2020, and that he received a disability rating of 50% for his diagnosis. The applicant argued that a Memorandum from the Department of Defense entitled "Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder," establishes that PTSD and related mental health conditions can be a mitigating factor when a member commits misconduct. The applicant argued that his PTSD diagnosis is an important factor that should be taken into consideration in his case. Specifically, he argued that hyper-arousal and other symptoms of PTSD are a contributing factor to any behavior that was deemed to be inappropriate by the Coast Guard.

APPLICABLE LAW AND POLICY

Article 2.j.1. of the Military Justice Manual, COMDTINST M5810.1G, discusses the examination of documents and evidence as follows:

Prior to imposition of NJP, the member must be allowed to examine documents and other evidence that the NJP authority will examine and consider in determining whether to impose NJP. If a command is concerned that permitting examination will compromise an interest such as a victim's or witness' privacy, or an ongoing law enforcement investigation, the command should contact the servicing legal office. However, the commanding officer may redact documents or place limitations on examination or disclosure of documents to protect any interests. Upon request, such documents

should also be provided to military counsel representing or advising the member. To avoid delays during the mast itself, the member and his or her designated mast representative should be provided the opportunity to review such materials, including the Report of Offense and Disposition and Record of Non-judicial Punishment, Form CG 4910, the PIO's report and any witness statements, prior to the mast. This may have been accomplished at some commands by the PIO or executive officer. Alternatively, the commanding officer may review the documents and evidence with the member during the mast hearing. The regional CGIS office should be consulted prior to examination of a CGIS Report of Investigation.

Article 4.c.3. of Part V of the Manual for Courts-Martial states the following regarding evidence with respect to NJPs:

The Military Rules of Evidence (Part III), other than with respect to privileges, do not apply at nonjudicial punishment proceedings. Any relevant matter may be considered, after compliance with paragraph 4(c)(1)(C) and (D) of this Part.

Article 1.E. of the Enlistments, Evaluations, and Advancements Manual, COMDTINST M1000.2B, discusses eligibility for reenlistment and/or extension:

The Coast Guard offers reenlistments and/or extensions only to those members who consistently demonstrate the capability and willingness to maintain high professional standards, moral character, and an adherence to the Coast Guard's core values. To be eligible for reenlistment, or extension of enlistment, a member must receive a positive recommendation from their commanding officer in accordance with Article 1.E.1. of this Manual, and meet the eligibility criteria listed in Article 1.E.2. of this Manual. In addition, SELRES members and IRR members on active duty or approved to drill for points, must also meet the eligibility criteria listed in 1.E.3. of this Manual. Members who have eight or more years of total active duty and/or reserve military service that meet the eligibility criteria, but are not recommended for reenlistment by their commanding officer, are entitled to a reenlistment board, as outlined in Reference (c), Military Separations, COMDTINST M1000.4 (series). However, members who do not meet the eligibility criteria are not entitled to a reenlistment board, even if they have eight or more years of total active and/or reserve military service. The procedures in Article 1.E.4. of this Manual must be followed for members who do not meet the eligibility criteria.

1. Commanding Officer Recommendation.

a. Each active duty, SELRES, and IRR member on active duty or approved to drill for points must be recommended by the officer effecting discharge to reenlist or extend. In making such recommendation, the officer effecting discharge should consider the member's overall performance, potential for continued service, and conduct during the current period of enlistment. If a member has received an unsatisfactory conduct mark, court-martial conviction(s), or NJP punishment(s), the officer effecting discharge should also consider how the severity and nature of the offense(s) impact the member's overall record of service during the current period of enlistment.

b. Active Status List (ASL) and IRR members not on active duty orders and not approved to drill for points, as well as Inactive Status List (ISL) members, will not be authorized to re-enlist or extend unless there is a service need as approved by Commander (CG PSC-RPM).

2. Eligibility Criteria. Each member must meet the basic eligibility requirements listed below during their current period of enlistment/reenlistment, including any extensions, unless an appeal is approved by Commander (CG PSC-EPM) or (CG PSC-RPM):

a. Have a minimum factor average equal to or above 3.5 in each factor. See Reference (c), Military Separations, COMDTINST M1000.4 (series) for direction in determining the final factor average.

b. Be physically qualified in accordance with Article 1.D. of this Manual.

c. If an alien at the time of original enlistment, must be a naturalized citizen prior to reenlistment or extension of enlistment/reenlistment.

(1) This does not apply to members who enlisted from the following: Republic of the Philippines if they enlisted prior to 18 September 2008 (Reference (c), Military Separations, COMDTINST M1000.4 (series)); Republic of the Marshall Islands (RMI); The Federated States of Micronesia (FSM); or Palau.

(2) Non U.S. citizens are ineligible for a security clearance and cannot serve in or pursue a rating requiring a security clearance per Reference (d), Personnel Security and Suitability Program, COMDTINST M5520.12 (series).

d. Have no more than one unsatisfactory conduct mark during the current period of enlistment. However, if a member receives any unsatisfactory conduct mark during their current period of enlistment for any of the following reasons, that one unsatisfactory conduct mark will render the member ineligible for reenlistment/extension:

(1) A documented offense for operating a vehicle, or any other mode of transportation, under the influence of alcohol or controlled substances during the current period of enlistment.

(2) A documented offense as a perpetrator of sexual assault during the current period of enlistment.

e. Have 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. Use the following guidance to assist.

(1) This criteria is aimed at serious offenses, analogous to those warranting the "Commission of a Serious Offense" basis for discharge identified in Reference (c), Military Separations, COMDTINST M1000.4 (series). Commission of a serious offense does not require adjudication by non-judicial or judicial proceedings. In some circumstances, military justice action is precluded due to state or federal court proceedings, but a commanding officer may remain convinced that credible evidence establishes, by a preponderance of the evidence, that the member has committed a serious offense. In these circumstances, if warranted by the particular facts of the case, Commander (CG PSC-EPM) or (CG PSC-RPM), may determine that a serious offense has been committed, even without a judicial adjudication, and deny the member the opportunity to reenlist.

(2) An acquittal or finding of not guilty at a judicial proceeding or not holding nonjudicial punishment proceeding does not prohibit proceedings under this provision. However, the offense must be established by a preponderance of the evidence. Police reports, Coast Guard Investigative Service reports of investigation, etc., may be used to make the determination that a member committed a serious offense.

f. Have no special or general courts-martial conviction(s) during the current period of enlistment.

g. Have no conviction(s) by a civil court (or other civilian judicially imposed decision amounting to a conviction such as, but not limited to: adjudication withheld; deferred prosecution; entry in a pretrial intervention programs; or any similar disposition of charges which includes imposition of fines, probation, community service, etc.) for any civilian offense, that could warrant a punitive discharge if prosecuted under the UCMJ and Manual for Courts-Martial, during the current period of enlistment.

h. Have not had their most recent Government Travel Charge Card (GTCC) closed for misuse or delinquency during the current period of enlistment.

(1) Members who have had an account closed for delinquency or misuse who meet the criteria for reinstatement in accordance with Government Travel Charge Card (GTCC) Program Policies and Procedures, COMDTINST M4600.18 (series) can submit a reinstatement request in advance of reenlistment.

(2) Members who have had an account closed for reasons other than misuse or delinquency (such as never having an account, determination the account was no longer needed, failing to activate the card, or failing to complete required training) are eligible for reenlistment.

i. Have no more than three weight probationary periods during the current period of enlistment. If a member reenlists while on weight probation that probationary period must be recorded as the first probationary period of the new period of enlistment.

Article 4.D. of the Military Drug and Alcohol Policy Manual, COMDTINST M1000.10A, defines an alcohol incident as follows:

Except as set forth in Paragraph 4.D.3. below, any behavior, in which the CO/OIC determines by a preponderance of evidence after considering the relevant facts (i.e., police reports, eyewitness statements, and member's statement if provided) that alcohol was a significant or causative factor that resulted in the member's loss of ability to perform assigned duties or is a violation of the UCMJ, Federal, State, or local laws. The military member need not be found guilty at court-martial, in civilian court, or be awarded non-judicial punishment for a behavior to be considered an alcohol incident.

Article 4.H. of the manual states that enlisted members who receive a second alcohol incident must be processed for separation in accordance with the Military Separations Manual, COMDTINST M1000.4.

On September 3, 2014, the Department of Defense issued a Memorandum titled "Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder," which states the following: "Liberal consideration will be given to petitions for changes in characterization of service to Service treatment record entries which document one or more symptoms which meet the diagnostic criteria of Post-Traumatic Stress Disorder (PTSD) or related conditions."

FINDINGS AND CONCLUSIONS

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

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

2. The application is timely because it was filed within three years of the applicant's discovery of the alleged error or injustice in the record, as required by 10 U.S.C. § 1552(b).

3. The applicant alleged that his NJP dated July 30, 2019, a Page 7 documenting an alcohol incident dated July 11, 2019, a disciplinary EER, and his Separation Authorization 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.³ 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."⁴

4. The applicant argued that the Coast Guard committed an error by imposing NJP. Specifically, he argued that he did not have the requisite intent to commit an assault consummated by a battery. According to the Manual for Courts-Martial, the elements for assault consummated by a battery are as follows: a) that the accused did bodily harm to a certain person; and b) that the bodily harm was done with unlawful force or violence. The applicant's argument that he did not have the requisite intent to commit assault is based on the assertion that the victim consented to the applicant grabbing and twisting his nipples in an exchange of mutual horseplay. Consent can convert what might otherwise be offensive touching into non-offensive touching.⁵ However, the Board finds that the facts do not supporting a finding that the victim consented to the applicant's touching. The victim's statement that he believed the applicant's actions were done in a "playful manner" does not equate to consent. In fact, the victim stated that he was very angry and felt violated by the applicant's actions.

Even if a victim did not actually consent, the applicant should not have received NJP for assault consummated by a battery if he was mistaken that the victim lawfully consented. Because assault consummated by a battery requires only a general intent, the mistake as to consent must not only have existed in the mind of the applicant, but his mistaken belief must also have been reasonable under all the of circumstances.⁶ The Board finds that the facts do not support a finding that the applicant was reasonably mistaken to believe that the victim had consented to his conduct. First, the applicant and the victim were not engaging in mutual horseplay at the time of the assault. The victim's statement shows that he was unpleasantly surprised when the applicant grabbed his nipples. And a witness stated that the applicant and the victim had been seated at opposite ends of a table, when the applicant unexpectedly rose from his seat to go and grab the victim's nipples. Second, the applicant failed to show any evidence that he and the victim had ever before engaged in mutual horseplay similar to the applicant's conduct. Finally, the victim stated that he both physically and verbally resisted the applicant's conduct. Specifically, the victim stated that he yelled at the applicant several times in an attempt to get him to stop touching him. When the applicant failed to let go of him, the victim punched the applicant in the chest. Therefore, the

³ 33 C.F.R. § 52.24(b).

⁴ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁵ *United States v. Joseph*, 37 MJ 392, 396 n. 5 (CMA 1993).

⁶ R.C.M. 916(j)(1).

applicant has failed to prove by a preponderance of the evidence that the Coast Guard committed an error or injustice by imposing NJP.

5. The applicant argued that the Coast Guard committed an error by violating his due process rights with respect to his NJP. Specifically, the applicant argued that the Coast Guard failed to provide him with exculpatory evidence. To support his allegation, the applicant cited the United States Supreme Court case *Brady v. Maryland*, which found that suppression by the prosecution of evidence favorable to an accused who requested it violates due process where the evidence is material to either guilt or punishment. However, according to Article 4.c.3. of Part V of the Manual for Courts-Martial, the military rules of evidence, other than with respect to privileges, do not apply at NJP proceedings. As such, the NJP authority was not required to provide the applicant with all exculpatory evidence as the applicant alleged. Instead, according to Article 2.j.1. of the Military Justice Manual, the applicant was only permitted to examine the documents and other evidence that the NJP authority considered in determining whether to impose NJP. In an email from the applicant's counsel to the Civil Rights Directorate dated September 1, 2019, he stated that he received the following evidence to review before the NJP: "the evidence provided was the 4 sheets of paper consisting of 2 signed witness statement and 1 summary of a witness interview (unsigned)." While the applicant alleged that he was not provided the full victim's statement or additional witness statements until after he had received NJP, the applicant failed to prove that the NJP authority had reviewed and relied on that evidence in the proceeding. As noted by the JAG, had the applicant wanted to review all exculpatory evidence held by the Coast Guard, he should have requested court-martial. Therefore, the applicant has not proven by a preponderance of the evidence that the Coast Guard violated his due process rights.

6. The applicant asked the Board to remove his alcohol incident dated July 11, 2019. However, the applicant did not put forth any arguments in support of his request. For purposes of this case, the Military Drug and Alcohol Policy Manual defines an alcohol incident as any behavior in which the CO determines by a preponderance of the evidence that alcohol was a significant or causative factor that resulted in a violation of the UCMJ. And a member need not receive NJP or court-martial for a CO to determine that an alcohol incident has occurred. But as discussed above, the applicant properly received NJP for assault consummated by a battery, as well as disorderly conduct, drunkenness. Further, the applicant's CO determined at the time that alcohol was a significant and/or causative factor when the applicant assaulted one of his subordinates. The applicant failed to put forth any evidence to the contrary. In fact, the applicant acknowledged that he had been drinking on the night of the incident. Therefore, the applicant has not submitted sufficient evidence to overcome the presumption of regularity accorded his CO's determination that his consumption of alcohol was a significant or causative factor that resulted in a violation of the UCMJ and that he incurred an alcohol incident.

7. The applicant asked the Board to remove and replace a disciplinary EER from his record. However, a disciplinary EER is not required when a member receives either an alcohol incident or NJP.⁷ Nor has the applicant provided any documentation of the disciplinary EER, and there are no copies of a disciplinary EER in his record. Even if a copy of a disciplinary EER were available to the Board for review, the applicant has failed to allege or show a particular error or injustice.

⁷ COMDTINST M1000.2A, Article 4.C.2.c.

8. The applicant argued that the Coast Guard committed an error in denying him the opportunity to reenlist because he demonstrated potential for a successful and productive career in the Coast Guard. According to the Enlistments, Evaluations, and Advancements Manual, active duty members must be recommended by their COs to reenlist. In making such recommendations, the CO should consider the member's overall performance, potential for continued service, and conduct during the current period of enlistment. However, in addition to being recommended by their COs, members must meet the basic eligibility requirements to reenlist. According to Article 1.E.2.e. of the manual, to be eligible for reenlistment, members must not have a documented offense for which the maximum penalty includes a punitive discharge during the current period of enlistment. In this case, the applicant's NJP for assault consummated by a battery constitutes a documented offense for which the maximum penalty includes a punitive discharge. As such, the applicant did not meet the basic eligibility requirements to reenlist. Further, as noted by the JAG, had the applicant not been denied an opportunity to reenlist, he would have been discharged because he had received a second alcohol incident on July 11, 2019. According to Article 4.H. of the Military Drug and Alcohol Policy Manual, enlisted members who receive a second alcohol incident must be processed for separation. Therefore, the applicant has not proven by a preponderance of the evidence that the Coast Guard erred in denying him an opportunity to reenlist.

9. The applicant made numerous allegations with respect to procedural errors in violation of Coast Guard regulations. Those allegations not specifically addressed above are considered to be unsupported by substantial evidence sufficient to overcome the presumption of regularity and/or are not dispositive of the case.⁸

10. Finally, in his response to the advisory opinion, the applicant asked the Board to consider his diagnosis of PTSD. However, the guidance cited by the applicant to support this allegation is not applicable. The Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder requires that the Army, Navy, and Air Force correction boards grant liberal consideration to petitions for upgrades in characterization of service or narrative reason for service. DHS has similar policies, but they do not apply to the applicant's request. According to the DHS liberal consideration guidance, the Board must provide "liberal consideration" pursuant to 10 U.S.C. 1552(h) and "due consideration" pursuant to 10 U.S.C. 1554b(b) when deliberating and deciding a veteran's request for modification of his discharge based in whole or in part on a claim that a mental health condition excuses the conduct that adversely affected the discharge or otherwise warrants modifying the discharge. The term "discharge," as used in the guidance, refers to a veteran's character of service, narrative reason for separation, separation code, and reenlistment code. In this case, the applicant did not request a modification of his character of or reason for discharge. The applicant's request for removal of documents, removal of his discharge, and reinstatement on active duty falls outside the scope of the liberal consideration guidance. Even if the liberal consideration applied in the applicant's case, he failed to demonstrate that he suffered from PTSD while he was in the Coast Guard and he submitted no evidence to show that his mental health condition caused or contributed to his misconduct.

⁸ 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").

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

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

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

October 1, 2021

[REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED]

[REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED]

*

[REDACTED] [REDACTED]

*The member concurred in the decision but was unavailable to sign. Pursuant to 33 C.F.R. 52.11(b), two members constitute a quorum.