DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2007-122

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FINAL DECISION

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case on April 13, 2007, upon receipt of the completed application, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated December 19, 2007, 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, who was discharged on May 12, 2005, under other than honorable (OTH) conditions, after more than six years of service, asked the Board to

- vacate his OTH discharge with an RE-4 reenlistment code (ineligible to reenlist), reinstate him on active duty as a first class petty officer (BM1/E-6), and award him back pay and allowances; or

- upgrade his discharge to honorable, upgrade his reenlistment code to RE-1 (eligible to reenlist), and award him "any pay, allowances, and benefits which were denied him as a result of the administrative separation on 12 May 2005."

The applicant alleged that he is entitled to the requested relief because of an egregious error by the Coast Guard's trial counsel, which denied him due process. He explained that on January 13, 2005, as a result of an investigation into allegations that he had physically abused his current girlfriend, Ms. G, and a prior girlfriend, SK1 O, he was charged with violating Articles 128 and 134 of the Uniform Code of Military Justice (UCMJ), including three specifications of assault, one of indecent language, and two of kidnapping. The applicant stated that he quickly retained civilian counsel who, on January 27, 2005, submitted a request for discovery pursuant to the rule under *Brady v. Maryland*, 373 U.S. 83 (1963), and *United States v. Webster*, 1 M.J. 216 (C.M.A. 1975), which requires the Government to disclose to the defense any evidence that is favorable to the defense. His counsel specifically requested copies of all written statements by

witnesses. On February 23, 2005, the charges against him were referred to a Special Court Martial. On March 22, 2005, the judge issued a court order stating that "trial counsel shall comply with the disclosure or notification requirements" and that "[b]oth counsel shall immediately notify opposing counsel of any additional disclosures."

On March 21, 2005, his current girlfriend, Ms. G, signed two affidavits "attest[ing] to the mutuality of the abuse during their heated arguments" and "to the fact that [Ms. G] did not desire to participate in the case against the [applicant] in any way, to include testifying for the government." However, on March 21, 2005, based on the potential testimony of his prior girlfriend, SK1 O, the applicant submitted a request for separation in lieu of trial by court martial without admitting to any wrongdoing. His request was endorsed by his CO on March 30, 2005, and by the officer exercising general court-martial jurisdiction (OEGCMJ), a rear admiral, on March 31, 2005.

On April 14, 2005, the applicant alleged, SK1 O told the trial counsel for the government, LT S, that "she did not desire to pursue or be involved in the prosecution of the matter." LT S typed up her statement, which she signed, but he never provided a copy of it to the applicant's counsel, in violation of the court's discovery order. Also on April 14, 2005, the Coast Guard Personnel Command (CGPC) approved the applicant's request for separation, and the applicant received an OTH discharge on May 12, 2005.

On May 23, 2006, SK1 O personally told the applicant about the statement she had signed on April 14, 2005, and his counsel requested a copy of it under the Freedom of Information Act. On June 7, 2006, a staff attorney for the Coast Guard admitted to the applicant's counsel that he had located the statement but refused to provide a copy, alleging that the release of the information "would result in a clearly unwarranted invasion of personal privacy while shedding little or no light on how the Coast Guard carries out its statutory duties." The applicant alleged that the Coast Guard's response was unfounded and irrelevant given that the statement was evidence in his court martial proceedings and subject to his discovery request and the court's order. After the applicant's counsel submitted two more requests for SK1 O's statement on August 4, 2006, and September 26, 2006, the Coast Guard's attorney again denied his request, saying that the discovery obligation terminated upon May 13, 2005, when the matter was finalized, and yet sent him a copy of SK1 O's statement because it was taken on April 14, 2005, before the matter was finalized.

The applicant alleged that the Coast Guard committed a serious error by withholding exculpatory evidence during court martial proceedings. He alleged that SK1 O's April 14th statement that she did not intend to testify should have been provided to his counsel immediately. He alleged that if he had known about SK1 O's statement, he "would have elected to proceed in a different manner." He argued that "knowledge that neither alleged victim would testify against [him] would have very likely ended the court martial proceedings and forced the government to take other actions." However, the Coast Guard withheld the exculpatory evidence "to provide for [his] request to be discharged in lieu of trial by court martial to be fully processed. They **never** intended to disclose the existence of the second statement. … The [Coast Guard's] repeated refusal to provide the requested statement [in 2006] speaks volumes about how critical its existence is to the [applicant's] case."

The applicant stated that the Coast Guard may argue that even if SK1 O's statement had been sent to his counsel, the Coast Guard would still have taken action against him, but the outcome of such proceedings cannot now be known because LT S, the trial counsel, failed to disclose the exculpatory evidence to the defense counsel.

The applicant noted that before the charges were made against him, he had a promising career and made consistently above average and excellent marks on his performance evaluations. He had been advanced to BM1 within just six years of his enlistment. However, he lost his career and was "denied the right to properly defend himself. If the government had followed the rules of evidence, then the outcome for [him] would have been very different."

In support of his allegations, the applicant submitted many documents pertaining to the investigation, the charges against him, his request for separation, etc., which are summarized below, and a character reference from LT G, for whom the applicant worked as a team leader for about sixteen months. LT G stated that he was "impressed with [the applicant's] high level of drive, professionalism and responsibility. He was one of my highest performing team leaders … [He] always struck me as a person who was interested in improving himself and those around him and was a definite asset to my detachment." The applicant also submitted a statement signed by the parents of Ms. G, in which they wrote that he is a "polite, responsible, always respectful and helpful" individual who provided care for Ms. G when she was ill and "has often demonstrated patience and respect for her needs." They further wrote that the applicant had "matured significantly in the last seven months. His attitude about life and responsibility has improved considerably. … He sought help when he needed it and we believe he has learned from his mistakes."

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on September 29, 1998, as a seaman recruit (SR/E-1) and thereafter advanced to boatswain's mate, first class (BM1/E-6).

On February 7, 2002, while still a BM3, the applicant was cited for public intoxication and criminal mischief. The command prepared a "page 7" (CG-3307) entry for his record noting that it was "not the first time in recent months that [his] abuse of alcohol [had] negatively impacted [his] ability to carry out [his] responsibilities." The command documented the incident as his first alcohol incident and warned him that any further such incidents would result in his separation from the service. The alcohol incident resulted in the only unsatisfactory conduct mark on a performance evaluation in his record.

On October 20, 2004, the applicant's CO asked Coast Guard Investigative Services (CGIS) to investigate allegations of assault against the applicant. The request was made when PS3 P reported that a civilian, Ms. S, had told her that the applicant had struck Ms. G and had asked her if there was anything she could do about it. PS3 P reported the civilian's inquiry to her superior, who reported it to the CO.

Report of Investigation

On November 18, 2004, CGIS issued a Report of Investigation into the allegations of assault against the applicant. The report included the following statements by witnesses.

SK1 O, who dated the applicant from December 2001 to August 2002, signed two statements describing the applicant's violent behavior towards her on various occasions, especially when he had been drinking alcohol. She estimated that he spit in her face 20 times; held her down against her will on a bed or the ground 20 to 30 times; used wrestling moves against her 10 to 15 times; put his fingers down her throat to gag her 8 to 10 times; threw her against a wall or fence 2 to 3 times; and put his hands around her shoulders or neck 2 to 3 times. After describing a few of the violent incidents in detail, SK1 O concluded that

> [the applicant] was very jealous and manipulative person when we were dating. I often felt that I walked on eggshells around him. He often drank and would start fights with me for no reason. He was the kind of person that you didn't want to get mad. So I would try to do anything to keep him happy. I was pleasing. He would often turn the tables around and blame me for what he did or everything was my fault. I'm not scared of [him] physically anymore because my boyfriend now would never let anyone hurt me. But I am scared of [the applicant because] he can ruin me in other ways. I try to stay friends with him now so that he doesn't talk bad about me to other people. I just hope this doesn't affect my career in the Coast Guard. I know if [the applicant] finds out that I helped in this investigation he would try to get back at me somehow. I think he would get revenge on me somehow.

BM2 M stated that the applicant was "hot tempered" and that one night he heard the applicant and SK1 O screaming at each other and saw that the applicant had her pinned on the floor. BM2 M further stated that the applicant got "into verbal arguments with men and women. The men to men arguments were over stupid things, i.e., someone looked at him wrong, but the arguments with women were normally over control issues, i.e., don't talk to other guys unless I know them. … [The applicant and SK1 O] seemed good together, but [he] is controlling. He knows it and tries to make up for it by giving her flowers and gifts. I don't think it works."

Ms. G, who dated the applicant from November 1, 2003, beyond the date of his discharge, provided a statement on October 28, 2004, in which she wrote that she met the applicant in a bar where she worked as a waitress:

> From the beginning, he's been concerned about my past and even though I didn't think it was any of his business, I told him about it and answered his questions. I figured he would let things go but he didn't. Somehow he knew that I had lied about my past to "make myself look better" and indeed I had. I didn't think he would care about exact numbers or specifics but he sure did. When we fought, my past was mainly the focus of the argument or it would somehow come up. On many occasions, I would say at least 15 or so, he used his strength to hold me down against my will, which intimidated me on about 7 occasions or so, he covered my mouth and nose to stop me from screaming. I couldn't breathe. He told me he would let go if I calmed down. On many occasions he called me names and insulted me and on one specific occasion, I felt like I couldn't take it anymore. I felt degraded and humiliated and cornered, so I slapped him and he slapped me back, so I slapped him again and he slapped me back. I think at that point he felt really guilty and we were both in shock. On a couple of occasions, his friends had to get involved by separating us and talking to him so he would calm down … very embarrassing! He went to a counselor from the Coast Guard who according to [the applicant] blamed his behavior on me. He told me that this woman made him realize that as he kept drawing the line, I kept crossing it by lying. To this day

> he says he doesn't trust me. I have tried to walk away from this relationship a couple of times but I always managed to find my way back. He has done some wonderful things for me this year that we have been together. He's been very supportive and caring through some difficult times that I have gone through this year. Unfortunately our lives and our fights everybody knows about. He has yelled at me over the phone so loud my friends could hear him across the table. I have spent most of our relationship crying and blaming myself. My family and friends and even one of his sisters have at one time or another told me to leave him but I haven't been able to. I truly love him and even though I don't know how much more I can take, I hope the relationship and [the applicant] can change. He has been going to new counselor and focusing on changing his behavior … To me, things have changed dramatically in the past month or so. For the most part, we fight like normal people do. We no longer yell or call each other names; we take "time outs" if things get too frustrating and he has not put his hands on me for months … at least 4 months … not like he used to. … I don't know if I'm being unrealistic here and a dreamer, but things have changed some and I hope they continue to do so.

Ms. S, who had been a friend of Ms. G for seven years, provided a statement for the investigation in which she described the applicant yelling at Ms. G, calling her fat in front of his friends, accusing her of cheating on him, and "making her cry." Ms. S stated that the applicant told Ms. G not to be friends with Ms. S and thereafter Ms. G did not meet her or return her calls. When Ms. G finally called Ms. S from her mother's house, they met for lunch, and Ms. G told Ms. S that she and the applicant had "extremely intense arguments" during which the applicant "would call her horrible names like bitch, slut, and whore." Ms. G told Ms. S that she avoided being in public with the applicant because, if they ran into a male friend, the applicant would later interrogate her about her relationship with the man. Ms. G told Ms. S that the applicant had slapped or hit her in the face on three occasions and that he threw her down on the bed to keep her from leaving. Ms. G told her that "he usually only gets violent when he's been drinking alcohol, but he is always trying to control." Ms. S concluded that Ms. G was afraid of the applicant hurting her but "is the kind of girl that will give everything to her boyfriend, do anything to keep him happy. That's how she has always been, and I think that's why she is still with [him] even though he is hurting her."

On November 2, 2004, the applicant was informed that he was suspected of kidnapping, assault, and indecent language. He was advised of his rights and indicated that he wished to answer questions without consulting a lawyer. The applicant signed the following statement:

> My girlfriend [Ms. G] and I had gotten into an argument and … I had insulted her and she slapped me. I told her that if she hit me again, I would hit her back. She slapped me again so I slapped her. She hit me once again and I hit her again. We stopped the argument and discussed what had happened. I have also told [her] that I do not like her friends and that I did not want her to go drink[ing] with her friend [Ms. S] because I do not trust [Ms. S] and do not like her because she is dirty. I have on numerous occasions been in arguments with [Ms. G] where it has become physical and I would hold her on the bed and cover her mouth after she had pushed or hit me. During a deployment to Galveston, Texas, I was charged with [being] drunk in public. I was at a strip club and used the women's bathroom three times. On the third time, the owner came in and then called the cops. … My relationship with [SK1 O] was also physical. In the summer of 2002 my team had a softball game and I called [her] to ask if she cared if I went to Hooters with the guys. She said that she didn't. When I came home, I asked [her] what was wrong and she threw my boot and hit me in the testicles. We were screaming at one another and I held her on the floor and put my fingers in her mouth. [Another resident] walked in and went straight to his room. There were also several other times when we had got into physical altercations. There were also two other relationships I had been in where there was physical altercations. I explained to [the CGIS agent] that I had been attending both individual and couples counseling for about six weeks and that I am

> learning about this behavior and how to stop it. I learned that this behavior was due to my upbringing and to prior relationships. I told [him] that drinking has played a role in these actions. … I explained I try to treat women with the same respect as men, if not more.

Judicial and Administrative Proceedings

On January 13, 2005, the applicant was charged with three specifications of violating Article 128 of the UCMJ for (a) physically assaulting SK1 O on divers occasions in 2001 and 2002 by pushing her, slapping her, grabbing her by the hair, using joint manipulations, spitting in her face, and shoving his fingers down her throat causing her to choke or gag; (b) physically assaulting SK1 O in April 2002 in New Orleans by pushing her, grabbing her by the hair, and throwing her to the ground; and (c) physically assaulting Ms. G on divers occasions in 2003 and 2004 by pushing, hitting, and grabbing her. He was also charged with three specifications of violating Article 134 of the UCMJ for (d) using indecent language to Ms. G on divers occasions in 2004, including the words bitch, slut, whore, spic, and cunt; (e) confining and holding SK1 O on divers occasions in 2001 and 2002 against her will; and (f) confining and holding Ms. G on divers occasions in 2004 against her will.

On January 21, 2005, the applicant's civilian attorney sent the Coast Guard a letter explaining that he would be representing the applicant in the proceedings and asking that the legal office send him "any and all related documentation which in any manner supports the allegation against my client." On January 26, 2005, the attorney submitted a detailed request for discovery, including a request for "copies of all written statements in the possession of the government made by any witness to any law enforcement agency, command investigator, trial counsel, or social worker"; "any evidence favorable to the defense"; and "[a]ny and all exculpatory evidence, information or statements of whatever form, source, or nature, whether written, recorded or otherwise … that may tend to favor the accused … or that may favor in any way the accused at trial or mitigate his sentence."

On February 23, 2005, the charges against the applicant were referred to a special court martial.

On March 21, 2005, Ms. G signed an affidavit in which she stated that she did not desire to testify at the applicant's court martial or to participate in the case against him in any way. She also signed another affidavit stating the following:

> I understand that [the applicant] is charged with assaulting me by slapping me, pushing me, and grabbing me with his hands. I further understand that [he] is also charged with wrongfully holding me down against my will.
>
> [The applicant] and I began dating on or about November 1, 2003. We have been involved in a dating relationship from that date until the present. In the course of our relationship there have been several occasions when [he] and I argued. I sometimes have a difficult time controlling my emotions and my anger. As a result, when [the applicant] and I would argue, there were numerous occasions when I would swing at [him] with my open hand and numerous times when I would push him out of anger and frustration. During these arguments, [he] only laid his hands on me after I first struck him or pushed him or after I tried to strike him.

> [The applicant] only pushed me to get me to back away from him when I lost control and pushed him first or tried to hit him. He only did so to create some space between us and out of self-defense so that I would not be able to hit him. I want to emphasize that [the applicant] never pushed me hard enough for me to fall or lose my balance. I was never injured as a result of him pushing me.
>
> [The applicant] slapped me on only one occasion. I slapped him first, and he slapped me back. He did not hit me hard, and this slap did not leave a mark. I was not injured as a result of this slap.
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> Sometimes when I was angry with [the applicant], and I tried to hit him or started pushing him, [he] would hold me down on the bed until I calmed down. He would usually grab my arms with each of his hands and use his body weight to hold me down on the bed. [He] did this out of self-defense to keep me from hitting him or hurting him when I lost control. He would immediately release me once I settled down. I was not injured at any time as a result of [his] holding me down on the bed.
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> Sometimes [the applicant] would not hold me down on the bed but would instead simply grab both of my arms to prevent me from striking him. Again, any time [he] grabbed my arms he was doing so out of self defense. I was not injured as a result of [him] grabbing my arms, and he would immediately release me once I calmed down.

On March 22, 2005, a military judge issued Court Order No. 1 in the proceedings against the applicant. The judge scheduled the trial for April 26, 2005; ordered that all responses to discovery requests be made on or before April 6, 2005, if practicable; encouraged counsel to disclose matters under Rule 914[1] of the Rules for Courts Martial (R.C.M.) and under the Military Rules of Evidence (M.R.E.); and ordered the trial counsel, LT S, to "comply with the disclosure and notification requirements" of various rules, including R.C.M. 701(a)(6),[2] and to "immediately notify opposing counsel of any additional disclosures or notifications that are required as a result of further case preparation."

On March 25, 2005, the applicant submitted through his chain of command a formal "Request for Separation in Lieu of Trial by Court Martial." He stated the following:

> 1. Per [the Personnel Manual], I fully understand the elements of the offenses charged … and I hereby voluntarily submit this request, free from any duress or promises of any kind, for separation in lieu of trial by court martial.
> 2. I have been afforded an opportunity to consult with counsel and I did consult with counsel, to wit: …, a civilian attorney of my own selection.
> 3. I voluntarily admit that there is sufficient evidence to convict me of violation of the UCMJ, Article 128 (assault), to wit: assault [SK1 O] by pushing, slapping, grabbing her by the hair, throwing her to the ground, spitting in her face and shoving fingers down her throat causing her to choke or gag. A summary of the evidence provided to me pertaining to the offense to which I acknowledge sufficient evidence to convict of the said offense as noted above, is included …

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[1] R.C.M. Rule 914 states that "[a]fter a witness other than the accused has testified on direct examination, the military judge, on motion of a party who did not call the witness, shall order the party who called the witness to produce, for examination and use by the moving party, any statement of the witness that relates to the subject matter concerning which the witness has testified, and that is: (1) In the case of a witness called by the trial counsel, in the possession of the United States …"

[2] R.C.M. Rule 701(a)(6) states the following: "*Evidence favorable to the defense.* The trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to: (A) Negate the guilt of the accused of an offense charged; (B) Reduce the degree of guilt of the accused of an offense charged; or (C) Reduce the punishment."

4. I respectfully request to be discharged with a general discharge (under honorable conditions), but I understand that if my discharge is Under Other Than Honorable Conditions, it may deprive me of virtually all veteran's benefits based upon my current period of active service, and that I may expect to encounter substantial prejudice in civilian life in situations wherein the type of service rendered in any branch of the Armed Forces or the character of discharge received therefrom may have a bearing.
5. I understand that I may submit a sworn or unsworn statement in my behalf. … I do not desire to submit a sworn/unsworn statement. …

On March 30, 2005, the applicant's CO forwarded the applicant's request for discharge to the OEGCMJ (the Commanding General of Maintenance and Logistics Command Atlantic) and recommended approval. He stated that "[t]here is evidence to support the charges and the case is proceeding toward a court martial, pending final action on this request. The particular circumstances of this case are amenable to resolution through a discharge under Other Than Honorable conditions, vice a General Discharge, which the member requested. … [The applicant] was involved in numerous confrontations with several different individuals that became physical over the course of a period beginning on or about November 2001 until on or about June 2004." The CO enclosed a copy of the CGIS Report of Investigation.

On March 31, 2005, the OEGCMJ forwarded the applicant's request for discharge to CGPC and recommended approval. He stated that the discharge was in the Service's best interest and that the court-martial proceedings would be delayed pending final action on the applicant's request.

On April 14, 2005, SK1 O signed an affidavit, which was witnessed by the trial counsel, in which she acknowledged that she had reported being physically assaulted by the applicant on various occasions in 2001 and 2002 but stated that "[a]t this point in time, I do not wish to pursue or be involved in the prosecution of this matter. I have been informed that if I change my mind at a later date, I may ask that the case be reopened and an investigation reinitiated." She also acknowledged having been advised of her rights as a crime victim, including her right to counseling and to consultation with a victim advocate.

Also on April 14, 2005, CGPC took final action on the applicant's request for separation by issuing an order requiring that he be discharged no later than May 12, 2005, under other than honorable (OTH) conditions pursuant to Article 12.B.21. of the Personnel Manual. The record does not show whether the order was issued before or after SK1 O signed her third statement.

On May 12, 2005, the applicant received an OTH discharge under Article 12.B.21. of the Personnel Manual, with an RE-4 reenlistment code and "Triable by Court Martial" as his narrative reason for separation.

Post-Discharge Requests for SK1 O's April 14th Statement

On May 23, 2006, the applicant submitted a request under FOIA for SK1 O's statement dated April 14, 2005. On June 7, 2006, the Coast Guard notified the applicant that the statement was being withheld in its entirety under 5 U.S.C. §§ 552(b)(6) and 7(C) "because release of the information would result in a clearly unwarranted invasion of personal privacy while shedding little or no light on how the Coast Guard carries out its statutory duties," as well as under

§ 552(b)(7)(F) "because this information was compiled for law enforcement purposes, and the release of which could reasonably be expected to endanger the life or personal safety of an individual."

On August 4, 2006, the applicant asked for a copy of SK1 O's statement pursuant to Court Order No. 1 and the discovery request, alleging that that approval of his request for separation in lieu of trial by court martial "did not alleviate Trial Counsel from disclosing any subsequent evidence under his custody and control." On November 29, 2006, the Coast Guard responded, stating that the proceedings against the applicant were finalized on May 13, 2005, and that the "discovery obligation did not continue once the matter had been finalized. Therefore, your request for the document is denied. However, in re-reviewing this matter, I am disclosing the requested document under your previous request dated May 23, 2006, and pursuant to 5 U.S.C. § 552."

VIEWS OF THE COAST GUARD

On October 4, 2007, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case.

The JAG stated that Court Order 1 required the trial counsel to comply with Rule 701(a)(6) of the Rules for Courts Martial, which requires disclosure of any evidence that would tend to negate the guilt of the accused, reduce the degree of guilt, or reduce punishment. The JAG also noted that the order asked the parties to "be liberal in compliance with discovery requests." The JAG stated that it is not clear whether SK1 O signed the April 14, 2005, affidavit before or after CGPC issued the orders—also dated April 14, 2005—to separate the applicant, but both things happened before the charges against the applicant were dismissed.

Citing *United States v. Hart*, 27 M.J. 839, 842 (A.C.M.R. 1989),[3] the JAG argued that the trial counsel's apparent failure to disclose SK1 O's April 14th statement can be considered material to the proceedings against the applicant "only if there is a reasonable probability that, had the evidence been disclosed, the result would have been different." The JAG argued that the failure to disclose her April 14th statement was harmless error and nothing therein contradicted the evidence that SK1 O had previously provided. He explained that the

> general purpose of memorializing an alleged victim's desire not to participate in the prosecution of the accused is a tool to protect the interests of the government. In the event that the government chooses not to prosecute, it serves to prevent a later claim by a victim that the case was not pursued. A memorialized statement is not exculpatory evidence in favor of the accused and does not prevent the victim from later requesting to participate, nor does it prevent the government from utilizing subpoena powers to require the victim/witness to participate in the judicial process.

[3] *United States v. Hart*, 27 M.J. 839, 842 (A.C.M.R. 1989) (holding that in deciding whether a court-martial conviction should be set aside, "failure to disclose information specifically requested by the defense is material unless failure to disclose it would be harmless beyond a reasonable doubt" and that "failure to disclose all other information, whether pursuant to a possible regulatory disclosure requirement, a 'standing request,' or a 'general request,' is material only if there is a reasonable probability that, had the evidence been disclosed, the result would have been different").

The JAG concluded that SK1 O's April 14th statement was not material to the court-martial proceedings because there is "no reasonable probability that, had the evidence been disclosed, the result would have been different." The JAG also noted that in his request for separation in lieu of trial by court martial, the applicant admitted that the record contained sufficient evidence to convict him of violating Article 128 of the UCMJ by assaulting SK1 O. The JAG argued that the applicant had confessed to assaulting and using indecent language toward both SK1 O and Ms. G and that "[t]o garner a conviction, the prosecution would merely have to corroborate that confession."

The JAG alleged that the OTH and RE-4 reenlistment code were properly assigned to the applicant and that he has failed to demonstrate the existence of any "injustice" in his record under *Reale v. United States*, 208 Ct. Cl. 1010, 1011, *cert. denied*, 429 U.S. 854 (1976).[4] The JAG stated that the applicant "was well on his way to a federal court to be possibly convicted, but instead requested to be separated with an OTH in lieu of court martial. From an equitable standpoint, the true injustice in this case would be to allow [him] to escape with no punishment to behavior he has admitted to on various occasions. The punishment he did receive is the very OTH he now garners and now wishes to vacate. To take away his punishment for what he has admitted to would be a certain injustice to the alleged victims."

The JAG concluded that pursuant to 33 C.F.R. § 52.64, "this case presents issues of significant policy regarding character of service and narrative reasons for discharge for a member requesting discharge in lieu of court-martial."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 13, 2007, the applicant responded to the JAG's advisory opinion. He stated that the trial counsel clearly violated Court Order 1 by failing to notify defense counsel of SK1 O's April 14th statement, which had been specifically requested in the discovery request dated January 26, 2005. The applicant alleged that the JAG's claim that the April 14th statement was not significant evidence is contradicted by the Coast Guard's repeated failure to provide applicant with a document prior to his discharge and in its initial response to his FOIA request. He alleged that the Coast Guard's failure to quickly produce the April 14th statement pursuant to his requests in 2006 proves that the trial counsel's failure to disclose it was intentional.

The applicant argued that "if either 'alleged victim' failed to testify again [him], then the government would have been left with only [the applicant's] own statement and no way to corroborate the purported admissions in that statement." He argued that the judge "would have been obligated to enter a finding of Not Guilty upon motion of the defense in accordance with R.C.M. 917, or if said motion was not made, to enter a finding of Not Guilty to those charges."[5]

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[4] *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976) (finding that for purposes of the BCMRs under 10 U.S.C. § 1552, "injustice" is treatment by military authorities that "shocks the sense of justice"); *see also Sawyer v. United States*, 18 Cl. Ct. 860, 868 (1989), *rev'd on other grounds*, 930 F.2d 1577.

[5] R.C.M. Rule 917(a) states that the judge, "on motion by the accused or *sua sponte*, shall enter a finding of not guilty of one or more offenses charged after the evidence on either side is closed and before findings on the general issue of guilt are announced if the evidence is insufficient to sustain a conviction of the offense affected." Paragraph (d) states that the judge shall make such a finding of not guilty "only in the absence of some evidence which, together with all reasonable inferences and applicable presumptions, could reasonably tend to establish every

The applicant stated that "the judicial system in the military is not one based upon trickery and deception, but instead is one based upon fairness and due process guarantees." He argued that the trial counsel's failure to provide the applicant with SK1 O's April 14th statement that she would not testify against him was "relevant and material to the proceedings – in all respects it is an exculpatory document that may have had an overwhelming effect if presented in Court to the trier of fact."

The applicant argued that if his case had proceeded to trial and if he had been convicted, "the post-trial disclosure of this statement would have clearly served as a proper basis for a motion to set aside the findings and sentence of the trial on the after-discovered evidence that was intentionally withheld from the defense by the Government." He argued that the significance of the trial counsel's conduct "is not in any manner lessened by virtue of the fact that [the applicant] elected to submit a request for discharge in lieu of court martial." He alleged that "had he been aware of the existence of [SK1 O's April 14th] statement prior to being discharge, [he] could have certainly withdrawn his request to be discharged in lieu of court martial and elected to proceed to trial where he would have the opportunity for his counsel to confront his accuser in court and argue the significance of that statement before the court members or military judge."

The applicant argued that the SK1 O's decision to sign the April 14th statement might have triggered CGPC's decision to approve his request for discharge instead of denying it and proceeding to trial. The applicant concluded that the Coast Guard's conduct was "extremely egregious and warrants the granting of affirmative relief."

APPLICABLE REGULATIONS

Article 12.B.21. of the Personnel Manual authorizes "separations for the good of the Service." Article 12.B.21.a. states that an enlisted member

> may request a discharge under other than honorable [OTH] conditions for the good of the Service in two circumstances: in lieu of UCMJ action if punishment for alleged misconduct could result in a punitive discharge or at any time after court-martial charges have been preferred against him or her. This request does not preclude or suspend disciplinary proceedings in a case. The officer who exercises general court-martial jurisdiction over the member concerned determines whether such proceedings will be delayed pending final action on a request for discharge. Send requests for discharge under other than honorable conditions for the good of the Service through the officer exercising general court-martial jurisdiction for his or her personal review and comment.

Article 12.B.21.b. states that a "member who indicates a desire to submit a request for a discharge under other than honorable conditions for the good of the Service will be assigned a lawyer counsel."

Article 12.B.21.c. provides a sample format for requests for separation in lieu of trial by court martial:

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essential element of an offense charged. The evidence shall be viewed in the light most favorable to the prosecution, without an evaluation of the credibility of the witnesses."

> 1. Under the provisions of [the Personnel Manual], I hereby request a discharge under other than honorable conditions for the good of the Service in lieu of trial by court-martial under circumstances which could lead to a bad conduct or dishonorable discharge.
>
> 2. I have consulted with [counsel's grade, name, or if civilian, name and title], a member of the Bar in the State of [fill in] who has fully advised me of the implications of such a request. The basis for my request for a discharge under other than honorable conditions for the good of the Service stems from my misconduct contained in the court-martial charges preferred against me in enclosure (1). I elect to be administratively discharged rather than tried by court-martial. I am completely satisfied with the counsel I have received.
>
> 3. I understand if this request is approved I will receive a discharge under other than honorable conditions, which may deprive me of virtually all veterans' benefits based on my current period of active service, and I may expect to encounter substantial prejudice in civilian life in situations in which the type of service rendered in any Armed Forces branch or the character of discharge received therefrom may have a bearing.
>
> 4. I understand once I submit this request, I may withdraw it only with the consent of Commander, (CGPC-epm-1).

Article 12.B.21.d. states that the member should "send[] the request for discharge through the chain of command to Commander, (CGPC-epm-1). The member's commanding officer shall recommend approval or disapproval of the member's request with appropriate justification for his or her recommendation, certify accuracy of the court-martial charges … "

Article 12.B.21.e. states that the "reason for discharge shall be for the good of the Service, and commanding officers shall not recommend the member for reenlistment. If Commander, (CGPC-epm-1) believes the member warrants a more favorable discharge type than under other than honorable conditions based on the facts of the case, Commander, (CGPC-epm-1) may direct issuing an honorable or general discharge."

The Separation Program Designator (SPD) Handbook states that when a member is voluntarily discharged "for conduct triable by court martial for which the member may voluntarily separate in lieu of going to trial," the member receives an RE-4 reenlistment code (ineligible); a KFS separation code; and "triable by court martial" as the narrative reason for separation."

FINDINGS AND CONCLUSIONS

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

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

2. Court Order No. 1, issued on March 22, 2005, required the Coast Guard's trial counsel to comply with the disclosure requirement under R.C.M. Rule 701(a)(6), which requires trial counsel to "disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to: (A) Negate the guilt of the accused of an offense charged; (B) Reduce the degree of guilt of the accused of an offense charged; or (C) Reduce the punishment." The

JAG has admitted that the trial counsel failed to send the applicant's counsel a copy of SK1 O's April 14, 2005, statement even though the criminal charges were not dismissed until May 13, 2005, the day after the applicant's discharge. SK1 O's April 14th statement did not contradict or undermine any of her prior allegations about the applicant's violent assaults and so cannot be considered exculpatory evidence. She indicated that she would not pursue and did not want to be involved in the prosecution against the applicant at that time and noted that she could change her mind at a later date. Although the April 14th statement does not contradict the charges against the applicant, a victim's zeal or lack of zeal for prosecution could theoretically affect either a verdict or a sentence, regardless of the strength of the evidence against the accused. Therefore, the Board finds that the Coast Guard's trial counsel erred in failing to provide the applicant's counsel with a copy of SK1 O's April 14th statement prior to his OTH discharge and the dismissal of the charges against him.

3. The applicant alleged that the trial counsel's error was intentional and pointed to the Coast Guard initial refusal to produce SK1 O's April 14th statement in response to his May 23, 2006, FOIA request as evidence of the trial counsel's alleged intention. The record shows that the Coast Guard initially withheld the statement under FOIA but released it on November 29, 2006, following a second review. The Board finds that the Coast Guard's decision-making about the applicant's requests for the April 14th statement more than a year after his discharge are not probative of whether the trial counsel in April and May 2005 intentionally failed to disclose the April 14th statement or simply forgot to do so after CGPC approved the applicant's request for separation. The applicant has not proved that the trial counsel intentionally failed to disclose SK1 O's April 14th statement.

4. When an applicant proves that an error has been made, he must also demonstrate how he has been prejudiced by the error.[6] Therefore, the Board must determine what would have happened had the trial counsel promptly sent the applicant's counsel a copy of SK1 O's April 14th statement. Since CGPC issued orders to discharge the applicant on April 14, 2005, the Board finds that when SK1 O signed her April 14th statement, the applicant's request to be discharged in lieu of standing trial was either pending imminent approval by CGPC or had already been approved by CGPC.

5. The applicant alleged that SK1 O's April 14th statement weakened the case against him so much that CGPC might have approved his request for separation only because of its existence. However, the April 14th statement does not contradict SK1 O's prior statements and would not have prevented the Coast Guard from eliciting her testimony at trial. Therefore, the Board is not persuaded that, if CGPC was aware of the April 14th statement prior to issuing the orders to discharge the applicant, the existence of the statement *per se* would have affected in any way CGPC's decision on the applicant's request for separation.

6. The applicant alleged that if the trial counsel had promptly forwarded him a copy of SK1 O's April 14th statement, he would have withdrawn his request for separation, and the charges against him would have been dismissed or he would have been acquitted at trial. The

[6] *Denton v. United States*, 204 Ct. Cl. 188, 199-200 (1975) (holding that a BCMR applicant who proves that the Coast Guard committed an error is entitled "to nothing more than placement in the same position he would have been had no error been made"); *see also Kimmel v. United States*, 196 Ct. Cl. 579 (1971).

Board is not convinced that the applicant would have sought to withdraw his request for separation had he timely known of SK1 O's statement on April 14, 2005. The April 14th statement does not contradict any part of SK1 O's prior statements about the applicant's alleged assaults against her; it notes her entitlement to change her mind about pursuing the applicant's prosecution at a later date; and it would not have prohibited the Coast Guard from having SK1 O testify at trial about the alleged assaults. Moreover, on November 2, 2004, the applicant confessed to much of the behavior attributed to him in the specifications and witnesses' statements. Therefore, as the JAG argued, to gain a conviction against the applicant, the trial counsel needed only to produce corroborative evidence, of which there was plenty in the record. In light of the strong evidence against him, including his own confession, the Board is not persuaded that the applicant would have sought to withdraw his request for separation in lieu of trial had the trial counsel timely disclosed SK1 O's April 14th statement.

7. Assuming *arguendo* that the applicant would have tried to withdraw his request for separation had trial counsel disclosed the April 14th statement, the Board is not persuaded that the applicant would have been allowed to do so. Article 12.B.21. of the Personnel Manual, which governs such requests, does not allow a member to unilaterally withdraw a request for separation. As indicated in Article 12.B.21.c., after a member has submitted a request for separation in lieu of trial by court martial, the request can only be withdrawn with the consent of Commander, CGPC.[7] Given the following facts, the Board finds that the applicant has failed to prove by a preponderance of the evidence that Commander, CGPC would have permitted the applicant to withdraw his request for separation:

a. The applicant was a trained and well qualified BM1, most of whose performance marks had been good.

b. The Report of Investigation—including the applicant's November 2, 2004, confession—revealed that the applicant had a long history of physically assaulting women and detaining them against their will. The applicant confessed to having had "physical altercations" in two other relationships, as well as in his relationships with Ms. G and SK1 O.

c. Both the applicant's CO and the OEGCMJ recommended approval of the applicant's request for separation as being in the best interest of the Coast Guard. The CO expressly recommended that the applicant receive an OTH discharge rather than a general discharge.

d. The applicant had already incurred one "alcohol incident" on February 7, 2002, when he was cited for public intoxication and criminal mischief. Under Article 20.B.2.h.2. of the Personnel Manual, "[e]nlisted members involved in a second alcohol incident will normally be processed for separation." Under Article 20.B.2.i., "[e]nlisted members involved in a third alcohol incident shall be processed for separation from the Service." The Report of Investiga-

[7] The Board notes that in drafting the applicant's request for separation, his counsel failed to follow the format provided in the Personnel Manual and so did not include the acknowledgement that, once submitted, a request for separation in lieu of trial cannot be withdrawn without Commander, CGPC's consent. However, as the applicant was represented by counsel, he presumably was aware of the rule about withdrawal when he submitted his request.

tion, including the applicant's confession, revealed a history of numerous alcohol-fueled violent incidents, each of which met the definition of an "alcohol incident."[8]

8. The Board finds that the applicant has not proved by a preponderance of the evidence that, if he had asked to withdraw his request for separation in lieu of trial by court martial, CGPC would have permitted him to do so. The preponderance of the evidence shows that it was clearly in the Coast Guard's best interest to separate the applicant, and the applicant has submitted no evidence or reason why CGPC would not have approved his March 25, 2005, request for separation if he had asked to retract it.

9. Although the applicant proved that the trial counsel committed a procedural error by failing to provide the applicant's counsel with a copy of the April 14th statement, he has failed to prove that he would likely have ended up in a different position if the trial counsel had not committed the error.[9] He has failed to prove that CGPC's approval on April 14, 2005, of his voluntary request for separation was erroneous or unjust or that his OTH discharge on May 12, 2005, was erroneous or unjust. [10] The applicant's March 25, 2005, request for separation was voluntarily made and he could not unilaterally retract it. The evidence of record, including his own confession, amply supports CGPC's decision to separate him with an OTH discharge and an RE-4 reenlistment code.

10. The applicant made numerous allegations with respect to the Coast Guard's handling of his post-discharge requests for the April 14th statement and the possible outcome of a trial had CGPC not approved his request for discharge. Those allegations not specifically addressed above are considered to be not dispositive of the case.

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

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

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[8] Article 20.A.2.d.1. of the Personnel Manual defines an "alcohol incident" as "[a]ny behavior, in which alcohol is determined, by the commanding officer, to be a significant or causative factor, that results in the member's loss of ability to perform assigned duties, brings discredit upon the Uniformed Services, or is a violation of the Uniform Code of Military Justice, Federal, State, or local laws. The member need not be found guilty at court-martial, in a civilian court, or be awarded non-judicial punishment for the behavior to be considered an alcohol incident."

[9] *Denton*, 204 Ct. Cl. at 199-200 (holding that a BCMR applicant who proves that the Coast Guard committed an error is entitled "to nothing more than placement in the same position he would have been had no error been made").

[10] *Reale*, 208 Ct. Cl. at 1011 (finding that for purposes of the BCMRs under 10 U.S.C. § 1552, "injustice" is "treatment by military authorities that shocks the sense of justice").

ORDER

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

Steven J. Pecinovsky

J. Carter Robertson

Richard Walter