

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-048

XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX

FINAL DECISION

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case after receiving the completed application December 18, 2008, 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 August 20, 2009, 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 asked the Board to correct his record by upgrading his reenlistment code from RE-4 (ineligible to reenlist) to RE-1 (eligible to reenlist). He alleged that his chain of command railroaded his discharge on April 23, 2007, in retaliation for his decision to file a formal EEO complaint against his supervisor, who had harassed him because of his religion. Moreover, because of the RE-4 code on his DD 214, he has had difficulty finding civilian employment.

The applicant alleged that in March 2007 he filed a discrimination complaint after experiencing constant religious discrimination for four months by his supervisor, MKC W, aboard the XXXXXX, a 110-foot cutter homeported in Xxxxxx. Because his complaint was not resolved satisfactorily on an informal level, he filed a formal complaint. As a result of his EEO complaints, the commanding officer (CO) and executive officer (XO) of the cutter began retaliating against him, and within a few weeks of his initial complaint, he was taken to mast twice, given four negative Page 7s (CG-3307s) documenting adverse performance, placed on performance probation, and discharged with a General discharge due to an alleged "Pattern of Misconduct."¹

In support of his allegations, the applicant submitted copies of emails and numerous documents from his record, which are summarized below. He did not submit a complete copy of

¹ The character of discharge and narrative reason for separation on the applicant's DD 214 have already been upgraded to Honorable and "Miscellaneous/General Reasons" by the Discharge Review Board (DRB).

the Report of Investigation of his EEO complaint, which was sent to him by the Coast Guard Office of Civil Rights on December 26, 2007.

SUMMARY OF THE RECORD

On July 27, 1999, the applicant enlisted in the Coast Guard. He attended MK "A" School and thereafter advanced to MK2/E-5. His military record contains several awards and letters of appreciation highly praising his excellent performance and hard work as an MK. His record also contains documentation showing that in 1999 and 2000 he was counseled on Page 7s many times about unacceptable behavior, including insubordination, argumentativeness, apathy, provocative and contemptuous language, and ignoring military customs and courtesies. He was also placed on performance probation and awarded nonjudicial punishment (NJP) at mast in 2000 because of such behavior. In 2001, the applicant received another Page 7 for disrupting work with sarcasm, provocative language, and resentment, and he was referred for Anger Management training. However, there are no negative entries in his record from 2002 to December 2006.

On the applicant's performance evaluation dated April 30, 2006, he received above average, excellent, and superior marks (5s, 6s, and 7s, on a scale of 1 to 7) and was recommended for advancement by his rating chain aboard the cutter, which included his supervisor, MKC W, who was Chief of the Boat; the XO; and the CO. On June 15, 2006, the CO of the cutter selected the applicant as the "Sailor of the Quarter" for his exemplary performance and dedication. On the applicant's performance evaluation for the period ending October 31, 2006, he received mostly above average, excellent, and superior marks and was recommended for advancement.

On December 8, 2006, the applicant was arrested and charged with battery and kidnaping. The alleged victim was his wife. The applicant was released from jail on December 21, 2006. On December 29, 2006, his CO issued a Military No-Contact Order requiring the applicant not to have any contact with his wife for 30 days except during formal marriage counseling sessions through the Work Life/Employee Assistance Program (EAP). The order prohibited the applicant from approaching within 100 feet of her or from communicating with her either directly or through others in any manner, including writing, telephone, and computer/electronic means. The order noted that disobedience would be punishable under the Uniform Code of Military Justice (UCMJ) by confinement for up to five years, total forfeiture of pay, reduction to paygrade E-1, and a dishonorable discharge. The CO noted that the applicant could request rescission of the order in writing through the chain of command with supporting documentation. The applicant acknowledged the order by signature. In addition, the command required him to undergo anger management training. Because of the no-contact order, the applicant began sleeping in the berthing on the cutter.

On February 1, 2007, the command renewed the no-contact order and made it indefinite until rescinded. The applicant acknowledged the renewed order by signature.

On February 13, 2007, the battery and kidnaping charges were dropped by the State.

On February 27, 2007, MKC W charged the applicant with failing to obey the no-contact order in violation of Article 92 of the UCMJ.

On March 1, 2007, the applicant called a local Coast Guard civil rights office to make allegations about discrimination and harassment by MKC W.

On March 2, 2007, the CO ordered the XO to investigate MKC W's charge. The applicant was notified of his rights in the investigation and at mast. The applicant admitted to the investigator that he had begun contacting his wife in January 2007 after the State lifted its civil and criminal restraining orders, and that he had been living at home when the cutter was in port. He alleged that the CO had told him "in passing" that the military no-contact order "would be dropped pending the successful dismissal of the civil and criminal restraining orders," so when his attorney told him those orders had been dismissed, he assumed he could go home. He also alleged that his EAP counselor had recommended that he be allowed to go home. The applicant alleged that when he told MKC W that the CO had said he could go home, the MKC told him that he could go home as long as he did not let the command know. When asked when he realized the no-contact order was still in effect, the applicant stated,

[a]fter going home initially I was told to keep it secretive and did so accordingly, but upon reissuance of the [order] on 01 February 07, I realized that I was disobeying the [order] but I wasn't told anything differently by [MKC W] so I assumed that it wouldn't be a problem as long as nothing went wrong at home with my family. I didn't fully realize the magnitude of the circumstances until the booking chit was presented to me on 28 Feb 07.

MKC W told the investigator that he suspected that the applicant was violating the no-contact order because he had noticed the applicant having prolonged, argumentative, and verbally abusive conversations on his cell phone. In addition, on January 24, 2007, the MKC saw the applicant removing his clothes and personal items from the cutter and asked him where he was going. The applicant replied that the CO had given him permission to return home. When the MKC denied this claim, the applicant argued with him for over an hour questioning the Coast Guard's right to issue orders about his personal life and to attend marriage counseling through the EAP instead of through his church. MKC W told the applicant to follow proper procedures with respect to the no-contact order.

On March 8, 2007, the applicant's CO took him to mast for failing to obey the no-contact orders and awarded him as nonjudicial punishment (NJP) reduction in paygrade to MK3/E-4, restriction to base for two weeks, and two extra hours of duty per day for two weeks. On a performance evaluation prepared pursuant to the mast, the applicant received high marks in certain categories, such as professional knowledge and stamina, but low marks for communicating, working with others, responsibility, setting an example, military bearing, customs and courtesies, integrity, loyalty, respecting others, and judgment. The applicant was not recommended for advancement.

Also on March 8, 2009, the CO put the applicant on performance probation and prepared the following Page 7, which the applicant refused to sign in acknowledgement:

This is to inform you that in the past three months your behavior and conduct has been unsatisfactory compared to your peers and others of your paygrade. Consequently, you are hereby placed on a six-month probationary period that will be closely monitored by your supervisors.

You are being placed on probation because of your failure to obey direct orders, lack of attention to detail, and your general argumentative and disrespectful behavior. Your inattention to detail resulted in the violation of Article 92 of the Uniform Code of Military Justice. You also failed to adhere to direct orders on numerous other occasions including reporting to the mast in an improper uniform, going around the chain of command after being told not to, and addressing senior members without their due respect. Since reporting to [the cutter], you have been brought to mast once and received numerous counseling sessions from your superiors for your lack of leadership, judgment, and subsequent issues.

This is what you need to do to successfully complete this probationary period:

- a. Provide documentation in memo format to myself indicating all civil and criminal court proceedings have been finalized, routed through the Chain of Command.
- b. Complete all required marriage and anger management counseling during said period.
- c. Continue to improve professionally with regards to following all direct orders and maintaining proper military customs and courtesies when addressing both senior and subordinate members.

You have been placed on probation to afford you an opportunity to become a contributing, productive member of the Coast Guard. However, should you fail to make an effort to overcome your documented deficiencies or should you violate the conditions of this probation in any way or at any time prior to the expiration of this probation, I am authorized to recommend you for an administrative discharge for misconduct.

On March 12, 2007, the applicant appealed his NJP, arguing that the reduction in grade was disproportionate under the circumstances. He alleged that on January 24, 2007, the CO had told him that canceling the no-contact order should not be a problem if the State's orders were rescinded and the EAP counselor recommended it. The applicant alleged that since his lawyer had told him that the State's restraining orders had been rescinded and his counselor had told him he would recommend rescission of the military no-contact order, he assumed he could go home. He admitted that he did not check this assumption with the XO or CO. He also argued that his reduction in paygrade to E-4 was too harsh because he was an E-5 above the cut on an advancement list for E-6, so the mast by itself prevented his advancement from E-5 to E-6.

On March 13, 2007, the CO forwarded the applicant's appeal to the District Commander, a Rear Admiral, with a recommendation that it be denied. The CO noted that the applicant had admitted at mast to having disobeyed the no-contact orders and that his first violation was on or about January 14, 2007. The CO wrote that the "only verbal statement [the applicant] made at the mast proceeding to justify his actions was that he thought it was all right to go home." However, the CO had twice counseled the applicant about the requirements of the no-contact order and the requirements for its rescission in the presence of the XO and MKC W. He stated that the applicant's counselor had sent the command an email denying that he had told the applicant in January that he would recommend rescission of the order. In addition, at mast, the applicant had blamed the MKC, the XO, the CO, and his counselor for misleading him into believing that he could return home. The CO noted that even though the applicant had been charged with disobeying the no-contact order on February 27, 2007, the applicant's car had been seen parked outside his wife's apartment on March 7, 2007, the night before the mast. At mast, the applicant had denied knowing how his car got there. The CO concluded that the applicant's record showed that he "has the engineering savvy to continue to advance in his rate [but] he lacks the ethical fiber that we must insist on in our petty officers." The Sector Commander forwarded the applicant's NJP appeal and concurred with the CO's recommendation that it be denied.

On March 14, 2007, the CO of the cutter rescinded the no-contact order based upon the recommendations of a doctor and the EAP counselor. He also instructed the applicant to continue participating in the Domestic Violence Intervention Program until its completion and highly recommended that he attend regular marriage counseling sessions.

Also on March 14, 2007, the applicant submitted a request for nine days of leave from March 21 to 31, 2007.

On March 15, 2007, the applicant submitted an informal complaint of religious discrimination and retaliation by MKC W. His allegations are summarized beginning on page 13 below.

On March 16, 2007, the applicant attended sick call with a complaint of lower back pain radiating to his right leg. He was referred for an MRI and placed on limited duty, which included “no boat or sea duty” for five days.

On March 19, 2007, the applicant’s request for leave from March 21 to 31, 2007, was denied by the XO, who wrote that “with civil rights issue pending, we want you here for interview purposes [and] to resolve the issue as soon as possible w/ the timeline in mind.”²

On March 20, 2007, the CO entered another Page 7 in the applicant’s record regarding counseling for failure to obey direct orders. The Page 7 states that the applicant did not report for duty at 0700 that morning, as ordered by the XO the day before. The CO noted that his failure to report as ordered was an obvious violation of the terms of his performance probation and that further violations might result in the applicant’s discharge. The applicant refused to sign this Page 7 in acknowledgement.

Also on March 20, 2007, another MK3 aboard the cutter, signed a statement for the applicant in which he wrote that the applicant had reported for duty before 0700 and had asked him to tell “any command personnel that he was going to medical for a personal problem.” However, the MK3 left without doing so. At 1135, MKC W asked him about the applicant, and he told MKC W what had happened.

On March 21, 2007, the applicant submitted a request for four days of leave from March 26 to 31, 2007. The XO denied this request the same day, stating “we can relook at this pending timeline for D7 investigation.”

Also on March 21, 2007, the applicant attended sick call again and was placed on limited duty for two weeks with “no boat or sea duty.” The MRI showed that the applicant had “central disk herniations at L4-5 and L3-4 intervertebral disk spaces without nerve root impingement or central canal stenosis.” The report also notes that homogenous signal intensity was preserved throughout the lumbar and lower thoracic spine. The applicant was referred for physical therapy.

² Under Chapter 3.F.4.d. of the Equal Opportunity Manual, COMDTINST 5350.4B, after a member makes an informal complaint of discrimination or retaliation, the unit command has up to 15 days to attempt informal resolution within the unit. Thereafter, there may be up to 90 days of counseling, investigation, and mediation with an Equal Opportunity Advisor from the Sector, Group, or District office. At the end of this period or whenever the complainant refuses further mediation, the EOA gives the member notice of the right to file a formal complaint.

On March 27, 2007, the District Commander denied the applicant's appeal of the NJP. He stated that the NJP, including the reduction in pay grade, "was appropriate given the seriousness of the offense" and concluded that the punishment was not disproportionate.

On March 30, 2007, the applicant filed a formal discrimination complaint after a meeting with his chain of command and a District mediator the day before had not resolved his complaint. On the complaint form, he indicated that he first became aware of the alleged discrimination on or about February 20, 2007, and that the most recent discriminatory event occurred on March 20, 2007. He also indicated that he was unwilling to participate in further mediation.

On April 3, 2007, the Coast Guard Director of Civil Rights acknowledged receipt of the applicant's formal complaint and noted that it would be reviewed to determine if it met the requirements for a formal complaint. Her letter stated that if the complaint met the requirements, the Coast Guard would "conduct a fair and appropriate investigation" of his complaint within 180 calendar days, after which he would receive a copy of the Report of Investigation. If, after issuance of this report, his command did not resolve the complaint informally, the Department's Office of Civil Rights and Civil Liberties would issue a final agency decision within 90 days of the issuance of the report.

On April 6, 2007, the CO entered a Page 7 in the applicant's record counseling him "for failure to follow military customs and courtesies when address by a chief petty officer." The CO wrote that on April 2, 2007,

while being tasked with daily work by [MKC W] you showed a display of blatant disrespect towards him by turning your back on him and walking away from him while he was directly speaking to you. Following that, [MKC W] attempted to verbally counsel you on your actions during which you still continued to display an unsatisfactory attitude and a lack of respect towards him while other subordinates were present. This blatant insubordination set a very poor example in front of junior members onboard and is not something that the command [of the cutter] will tolerate. Your abrasive behaviors and mannerisms will not be tolerated in the future and subsequent actions will result in further page 7's and/or further administrative action. Communication is an essential part of the military protocol and affects how we conduct business.

The CO further noted on the Page 7 that the applicant's disrespect was a violation of the terms of his performance probation and that continued violations might result in his discharge. The applicant refused to sign this Page 7 in acknowledgement.

On April 9, 2007, the applicant was charged with two offenses: failure to obey an order, in violation of Article 92 of the UCMJ and absence without leave (AWOL) in violation of Article 86 of the UCMJ because he had allegedly failed to report for duty by 0900 on Saturday, April 7, 2007, as directed, and did not report for duty until 1145. The report was submitted by EM1 B and the witness listed on the charge sheet was a GM2 in the Deck Department. The CO of the cutter assigned a first class petty officer to investigate the two charges, and the applicant was notified of his rights in the investigation and at mast.

Also on April 9, 2007, the CO of the cutter entered a Page 7 in his record in which he counseled the applicant about

direct disrespect and insubordination to your Commanding Officer. When ordered to report to your supervisor on board the cutter you refused to do so. It was explained to you on Saturday 07 APR by [MKC W] that a “no sea duty” chit did not mean that you did not have to go on board the cutter. When told by your CO on 09 APR that, once again, you were wrong in your assessment that you did not need to come aboard due to medical problems, you once again refused. Direct orders from your Commanding Officer are not open to your own personal interpretation. Your limited duty chit from ISC Medical does not exempt you from military customs and courtesies. Your disrespect to personnel on board of greater rank, and especially to me will not be tolerated.

On April 10, 2007, the applicant consulted a physician, who placed him on limited duty for seven days with “no boat or sea duty,” “no climbing ladders,” and “desk work only.”

On April 11, 2007, the investigator reported that the applicant had been told by a supervisor, EM1 B, to report for duty at 0800 on April 7, 2007. The applicant had acknowledged the notification and confirmed that he understood what was expected of him. However, the applicant did not report for duty at 0800 and instead attended an anger management session from 0900 to 1030. He returned to the base sometime between 1110 and 1130. The investigator concluded that the applicant was AWOL for three or four hours that day and had violated a direct order issued by EM1 B. The investigator also found that the applicant did not make enough effort to notify his superiors that he would not be reporting for duty on time. The investigation included the following statements:

- The applicant told the investigator that at 1900 hours on the evening of Friday, April 6, 2007, when he recalled that he had an anger management session the next morning, he called EM1 B and left him a voicemail message about the scheduling conflict. EM1 B did not call him back. The applicant stated that he left both voicemail and text messages with EM1 B at about 0730 the next morning. He also tried to call MKC W “somewhere between 0805 and 0900” but received no answer. At 0855 he received a voicemail message from EM1 B telling him to report for duty by 0900. In response, he sent EM1 B a text message saying that he had to attend anger management training and to please call him. At 0915, EM1 B left him a voicemail message telling him to attend the training and report to the cutter when it ended. When the training ended, the applicant called EM1 B again and left another voicemail message. The applicant stated that EM1 B told him that his “phone had been messing up” and that he did not receive most of the applicant’s five voicemail messages and four text messages. The applicant further explained that he did not report for duty at 0800 and instead went to his anger management training because the training was mandatory so missing it could have “further repercussions” and because EM1 B’s instruction to report for duty at 0800 was a “directive” rather than an “order” because EM1 B is not a commissioned officer.
- EM1 B stated that on Friday, April 6, 2007, he called the applicant on his cell phone at about 1300 and told him that he needed to be aboard the cutter at 0800 the next morning. The applicant told him “that it would not be a problem and he asked if everyone else had to come in and I told him that myself and [MKC W] would be here, to which he replied ‘not a problem,’ he would see me in the morning.” When the applicant had not shown up by 0900 the next morning, EM1 B called him and left a message on the applicant’s cell phone asking the applicant to call him, MKC W, or the cutter when he received the message. Later, EM1 B checked his voicemail and did not find any messages but did

find two text messages from the applicant. In the first, which had been sent at 0905 on April 7, 2007, the applicant stated that he had to attend anger management counseling that morning. In the second, which was sent at 1120, the applicant stated that he was on his way to the cutter. EM1 B stated that on Monday morning, April 9, 2007, the applicant claimed to have left EM1 B, MKC W, and the XO numerous voicemail messages. However, EM1 B's phone showed that he had received no voicemail messages or missed calls from the applicant.

- GM2 I, who was the Officer of the Day on April 7, 2007, stated that the applicant did not report for duty by 0900 that day. GM2 I saw EM1 B call the applicant on his cell phone and leave him a message when the applicant did not answer. When the applicant called the cutter at 1125, GM2 I advised him to call MKC W, the Chief of the Boat, right away.
- MKC W stated that he called the applicant at 0803 on April 7, 2007, and several times thereafter and finally left him a voicemail message to call him back as soon as possible. He then asked EM1 B to try to contact the applicant. The applicant did not contact the MKC back until after the MKC left him a message telling him he was AWOL. When the applicant reported for duty at about noon, he told MKC W that he had left EM1 B text messages about his anger management training and thought that that was sufficient. MKC W stated that the applicant had stopped returning any of the MKC's calls in February 2007, despite counseling, so he was not surprised that the applicant had made no attempt to contact him or to return their voicemail messages.
- A group facilitator at the Alliance for Psychological Services informed the applicant's command that he had attended a domestic violence class from 0900 to 1030 on April 7, 2007. The facilitator noted that the applicant "is required to attend 26 sessions in total and has elected to attend that time period. Other sessions are available We will gladly accommodate him according to his work requirements, but he has attended the past five weeks during this time period."

On April 16, 2007, the CO took the applicant to mast on the charges of failing to obey an order and being AWOL. The CO awarded him two weeks of restriction to base and extra duties.

Also on April 16, 2007, the CO notified the applicant in a Page 7 that he was being processed for a General discharge because of continued misconduct. The CO informed the applicant that he had a right to consult a lawyer and to submit a statement on his own behalf. The applicant was shown the Page 7 and refused to sign it in acknowledgement.

On April 17, 2007, the applicant submitted a request "to attend off-base religious services on the following Sundays during restriction. 22 APR 07 and 29 APR 07." His request was disapproved by the CO of the cutter and the stated reason for the disapproval was that the applicant had "violated restriction on 16 APR 2007."

In a memorandum to the applicant dated April 17, 2007, the CO wrote that his conduct in recent months had been inexcusable and supported a General discharge for unsuitability. He again advised the applicant that he had a right to consult a lawyer and to submit a statement on his own behalf. He told the applicant to submit his statement within three days and that the statement would be forwarded with the recommendation for separation. The CO's memorandum to the applicant contains the following information:

a. You were arrested in December 2006 for Domestic Violence and Kidnapping. Since the incident, you have failed to adhere to the Coast Guard core values of honor, respect, and devotion to duty. On 29 December 2006, I imposed a Military No-Contact Order on you after your release from jail. On numerous occasions following the issuance of the no-contact order, I met with you and communicated my requirements for lifting the order. After becoming suspicious that you were communicating with your wife in late February 2007, I ordered the Executive Officer to investigate into the matter. His investigation discovered that on or about 14 January 2007, you began not only communicating, but living with your wife despite the no-contact order. Due to your failure to obey a direct order you were taken to Captain's Mast for the first time on board [the cutter]. Since this instance you were brought to mast once more for failure to obey direct orders and absence without leave, and received negative CG-3307's for being late to work, insubordination and gross disrespect.

b. You have shown a complete lack of respect and obedience to the Command Chief, Executive Officer, and me. Furthermore you have been disrespectful on multiple occasions and failed to follow proper military customs and courtesies when dealing with the Sector Command Master Chief. Your lack of respect for authority, and your personal mission to prove everyone wrong is not something that I will allow to continue. Since being brought to mast in March 2007 and subsequently being placed on performance probation, you have continuously displayed to your superiors an unwillingness to embrace the structure of the military and have on more than one occasion complained about not being treated as an "equal" by senior members of the crew.

c. You have failed to follow direct orders which have resulted in your being verbally counseled by the Command Chief and Executive Officer multiple times, numerous negative CG-3307s and two Captain's Mast proceedings. Additionally, you have made statements both verbally and in writing that you cannot work for any members of this command thus proving your utter lack of military discipline. Furthermore you have refused to come on board the cutter after being given direct orders to do so.

d. You have displayed questionable moral character since your arrest in December 2007. You have shaded the truth and blamed the command for your own shortcomings. Your reluctance to change and take accountability for your own actions, despite being placed on performance probation and numerous verbal counseling sessions, has verified to me that you are not worth retaining in the Coast Guard organization. You do not have the ethical fiber I believe we must instill and demand from our petty officers.

The notification also bears a handwritten notation signed by EM1 B that the applicant had been shown it and had refused to sign the acknowledgement form. However, later that day, the applicant signed a modified acknowledgement form with a note stating that he would contact a lawyer that day and would submit a statement within three working days. The Sector faxed this acknowledgement form to the Personnel Command the same day. In response, the Personnel Command advised the Sector to be sure that the applicant knew he had five days from the date of notification to submit his statement and that the Sector should inform them when the applicant had spoken to an attorney. The Personnel Command stated that the member did not have the right to refuse to sign the first notification, so his refusal to sign it would not stop the Personnel Command from approving his discharge.

The CO's memorandum to the Personnel Command requesting authority to discharge the applicant with a General discharge is also dated April 17, 2007. The CO wrote that since the applicant's arrest in December 2006, he had failed to adhere to the Coast Guard's core values of honor, respect, and devotion to duty. He had repeatedly violated the no-contact orders and

showed no respect for the MKC, the XO, the CO, or the Sector's Command Master Chief. The CO wrote that since being punished at mast on March 8, 2007, and placed on performance probation, the applicant had "continuously displayed to his superiors an unwillingness to embrace the structure of the military and has, on more than one occasion, complained about not being treated as an 'equal' by senior members of the crew." The CO noted the two masts and several Page 7s and noted that the applicant had stated that he could not work for any members of the command. In addition, the applicant had refused to board the cutter despite a direct order from the CO to do so. The CO stated that the applicant had shown "questionable moral character" since his arrest in that he "shaded the truth and blamed the command for his own shortcomings. His reluctance to change and take accountability for his own actions, despite being placed on performance probation and numerous verbal counseling sessions, has verified to me that he is not worth retaining in the Coast Guard."

The endorsement of the CO's request by the Chief of Logistics for the Sector is also dated April 17, 2007. She strongly recommended that the applicant receive a General discharge as soon as possible.

Also on April 17, 2007, the CO replied to an email from the applicant and stated that he could not submit his NJP appeal by email and that it had to be submitted in memorandum format through his chain of command, specifically, to his supervisor MKC W. Later that day, the CO notified the applicant that he had received the applicant's memorandum appealing his NJP and would forward it to the Sector office quickly because the cutter was getting underway. The CO also stated that he was disappointed in the condition of the applicant's memorandum because it had coffee stains and scribbles on the back side. In emails dated April 18, 2007, a YN1 and BM1 L took responsibility and apologized to the CO for the coffee stains and the scribbles on the applicant's NJP appeal memorandum, saying that they did not go back to the applicant for a clean copy because he had said the memorandum had to be delivered to the CO as soon as possible. In reply emails, which he copied to the applicant and his own chain of command, the CO stated that the applicant should have put the memorandum in a folder since it was going to a two-star admiral and that the applicant "should have ... handed it to the Chief of the Boat [MKC W] appropriately. [The applicant's] refusal to deal directly with his chain of command is the reason why his memo was a mess."

Also on April 18, 2007, the applicant emailed the CO a clean copy of his NJP appeal memorandum in a pdf file without any accompanying message. In a reply email, which he copied to his own chain of command, the CO informed the applicant that he had already endorsed the first copy and sent it to the Sector since the cutter was getting underway. In addition, he stated, "Next time you send me an email have the courtesy to write something."

On April 19, 2007, the Sector Chief of Logistics sent an email to the Personnel Command stating that the applicant had consulted an attorney and had had ample opportunity to prepare his rebuttal statement but had not yet done so. She requested authority to discharge the applicant. She stated that she would "like to see [discharge] orders tomorrow."

On April 20, 2007, a chief warrant officer at the Sector sent an email to the Personnel Command inquiring into the status of the applicant's discharge. He noted that the applicant had

not yet submitted a rebuttal statement although he “has been given ample time to work on it (no other work except to work on his statement).”

Also on April 20, 2007, the Coast Guard Personnel Command issued separation orders authorizing the applicant’s General discharge “by reason [of] misconduct due to [involvement] of a discreditable nature with civil or military authorities.” The orders required use of the separation code JKA, which denotes an involuntary discharge due to a “pattern of misconduct.”

On April 23, 2007, the applicant received a General discharge from the Coast Guard. His original DD 214 showed that he received an RE-4 reenlistment code (ineligible for reenlist) and a JKA separation code, reflecting separation due to a “Pattern of Misconduct” pursuant to Article 12.B.18. of the Personnel Manual.

Following his separation, the applicant applied to the Discharge Review Board (DRB) to have his discharge and reenlistment code upgraded. He included with his application many documents from his record and his discharge rebuttal, in which he wrote the following:

1. I am submitting my response on 19 April 2007 without the benefit of counsel. It was my and my counsel’s understanding that my statement was not due until close of business on 20 April 2007. Therefore, my attorney has not had the opportunity to review this statement or provide me with legal advice. Upon notification from BM1 [L] at 1400 hours today, I was told that my response was due to Headquarters by close of business on 19 April 2007. My reason for disagreement is based on the fact that I never violated my performance probation to wit:

(a) On 08 Dec 2006 I was arrested for domestic violence and kidnapping. From the beginning conversations dealing with this matter, I have claimed my innocence and asked for a chance to have my day in court. Thru conversation with [MKC W], he mentioned that while speaking to the arresting officer, it was said that the only reason I was charged with kidnapping was because his supervisor instructed him to do so. Within a month or so, I was exonerated of all charges. My wife had communicated with the state prosecutor and explained that everything was just a misunderstanding between her and I. Since the event my wife and I have been attending weekly marital counseling and things couldn’t be any better between her and I.

2. Upon my release from jail on 21 December 2007, I was given a no contact-order by [the CO]. This order stated to stay in effect for 30 days. On numerous occasions, I met with [the CO] concerning the rescinding of my no-contact order. During these conversations [the CO] stated to me that when [a counselor] from Work Life contacted him with a recommendation to have the no-contact order lifted that it shouldn’t be a problem for me to go home. On or around 14 January 2007 [the counselor] and I spoke. In conversation I asked him about the no-contact order being that the 30-day time frame was vastly approaching. He mentioned to me that he had already spoken to and left voice messages on [the CO’s] cell phone recommending the no-contact order be dropped, but never received a call back. Around this time is when I began to speak to and see my wife. My wife had also been undergoing and having dental complications in which she needed me. On 01 February 2007 I still had not received any paperwork from [the CO] officially removing the no-contact order, so I asked about it thru my chain of command. [MKC W] asked [the XO] about the no-contact order and [the XO] replied saying he would look into it. Approximately 2 hours later [the XO] approached me with another no-contact order, stating that this one would be indefinite. I then asked about the 30-day time frame. [The XO] replied by saying “that was just a number we put in there; I’ve never had to deal with this before.” I felt this was cruel and unusual punishment to continue to keep me from my wife and my son.

3. During [the cutter's] February 2007 patrol in Key West, ongoing issues that I had been dealing with from [MKC W] unfortunately came to a boil. Several disrespectful, unfair treatment, belittling and nearly physical situations took place. As I tried to communicate these issues out thru the chain of command, I was told by [the CO] to deal with it, work it out amongst myself and the MKC due to both of us being grown men and that I was overly sensitive. The very next day I was put on report for Article 92, failure to obey a lawful order. At this point I notified [the XO] that I would be contacting the equal opportunity office. He replied to me by saying, "no don't you call them, I'll call them and have them call you." It is definitely my right to call the equal opportunity office and not have to face reprisal for doing so. Since this phone call I have been taken to mast twice in a time span of five weeks, I have been given 3 negative CG-3307's, I have been placed on performance probation without any prior documentation of being deficient in any area of my performance and now I'm being recommended for discharge. Despite my constant efforts and attempts to be placed under a different command TAD or PCS pending the outcome of my EEO complaint, I was expeditiously told no. I was given an effortless effort on trying to reposition me and told that no other options or avenues were available to me. This was told to me by the command onboard the [cutter], all the way up to the Command Master Chief, MKCM [B]. When joining the Coast Guard, I was under the impression that commands are supposed to look out for their members and set them up for success, not failure. I unfortunately have been set up for failure. In all my years of living and experience, I have never known anyone to go from a 7, 6, 5 performer to a 2, 3 performer in a matter of 2 months. It just doesn't happen.

4. I was due to make E-6 before my command stripped me of that. In essence they have also stripped me of my freedom to see my wife and son again by placing me on restriction. My last mast on 16 April 2007 was conducted with a bias and unfair attitude. Not all of my information which would have proved my innocence was looked at and considered. I also have never in my career had an issue with being late or AWOL. I am a Coast Guard member with 7 years and nine months. One doesn't come this far by disrespecting authority, not following orders, being argumentative, not adhering to military customs and courtesies and definitely not by showing a lack of respect and obedience to the Command Master Chief. Again, it just doesn't happen.

5. I would never have thought that someone with as much character as myself would be in this position, pleading for my career in the Coast Guard. I don't consider myself as a good leader because I can tell someone what to do or how to do it. I consider myself a great leader because of my good deeds, my positive actions and treating others with respect and dignity. At this point it's not and never was a matter of proving anyone wrong, but a matter of reprisal and clearing my name of all the false charges that have been placed on me within the last 2 months by my command. It is untrue that I have had numerous counseling sessions with MKCM [B] and [the XO]. Every meeting with MKCM [B] was respectfully requested by me.

6. I have never said that I can't work with members of the [cutter's] command. My comments and concerns were that I shouldn't have to work under a command where I'm being treated unfairly, disrespected, oppressed and receiving reprisal. My military discipline is very strong, proof by way of my history of enlisted employee reviews. No one on the ISC ... base seems to feel the same way or see the horrific accusations said about me as being true or factual. I'm a man of integrity and always have been. Whenever I have been wrong, I have never had a problem admitting it.

7. I was also told by [MKC W] that I needed to and must come on the boat despite my doctors and physical therapist orders no to do so. The slightest movement of going up or down ladders or a wake could cause my back to go into spasms. I was then told that because I would not come onboard the boat that I was being disrespectful and was not following direct orders. Every time I tried to explain my back condition and the doctor's ... orders, I was cut off from speaking and very disrespectfully told that what I had to say didn't matter.

8. I am a dedicated, loyal member to the Coast Guard and the Coast Guard really means a lot to me. I have served my country by serving in the United Kingdom of Bahrain. Others and I know

with all our hearts that what is taking place is a true tragedy and if it's allowed to happen, the Coast Guard will be losing a very valuable member and asset.

The DRB first convened to consider the applicant's request on both August 1, 2007. The DRB noted that the applicant's EEO complaint was still pending and that the results could have a direct bearing on the recommendation of the DRB. Upon inquiry, however, the applicant asked the DRB to proceed without awaiting the results of the EEO complaint. Therefore, on May 12, 2008, the DRB reconvened and, based on the record before it, found that the applicant's discharge was proper and equitable and recommended that his requests for relief be denied. However, on November 12, 2008, the Commandant informed the DRB that there was a "procedural flaw" in the discharge and that the applicant's record would be corrected to show an Honorable discharge for "Miscellaneous/General Reasons" with separation code JND under Article 12.B.12. of the Personnel Manual. However, the Commandant did not upgrade the applicant's reenlistment code. On February 12, 2009, the Personnel Command issued the applicant a new DD 214 reflecting the changes so that the original, derogatory information would not appear therein.

APPLICANT'S EEO COMPLAINT

Informal Complaint

The applicant made initial contact with a local Equal Opportunity Advisor (EOA) on March 1, 2007. On March 15, 2007, he filed an informal complaint with the EOA. Based on their first interview, the EOA reported that the applicant alleged that MKC W had retaliated against him for complaining about him to the XO in September 2006 because the MKC frequently interrupted him and told him he was wrong and that the applicant should respect him because the MKC was the Chief of the Boat. About two weeks after the applicant complained to the XO, he alleged, he began noticing retaliatory actions by the MKC. He also alleged that the MKC challenged him "on several occasions dealing with [the applicant's] religion. He has debated with me on several occasions about my beliefs and has tried to push his religion upon me despite attempts to stop it." The applicant alleged that on February 17, 2007, he was reading his bible while on watch when the MKC confronted him and engaged him in another debate about religion. When the applicant interrupted him, the MKC yelled at him saying, "Don't fucking interrupt me." When the applicant objected to his use of profanity, the MKC calmed down.

The applicant told the EOA that on February 20, 2007, when he was on the cutter and having a personal cell phone call, the MKC asked him with whom he was conversing. (The applicant was subject to the no-contact order at this time.) When the applicant told him that was an inappropriate question, the MKC got very upset and forcefully demanded that the applicant answer him. When the applicant refused to answer him, the MKC threatened to prepare a negative Page 7 and told him to "shut up" when the applicant asked him why he would receive a Page 7. Then the XO and the MKC both told him that the next time he was seen on the phone during the work day, he would receive a negative Page 7. However, they did not give this rule to anyone else.

The applicant alleged to the EOA that on February 21, 2007, he asked to speak to the CO and met with the CO, the XO, and MKC W. He told the CO that the only issue he had was that the MKC was treating him differently and talking to him disrespectfully. The CO, however,

sided with the MKC and told the applicant to listen to the MKC and to do as he was told. When the applicant asked to be transferred to a different command, the CO denied his request. The CO also stated that the applicant and the MKC were both adults and should “work it out amongst yourselves” and that the applicant was being “overly sensitive.”

The applicant described several incidents to the EOA as examples of how his command was harassing him and treating him disrespectfully. One incident concerned some important counseling the applicant had been told he would be sent to Xxxxxx to receive between February 22 and 24, 2007. He asked the MKC about it on both of those dates and was told both times that the command would let him know when they figured out a date for the counseling. The second time, the MKC’s reply was delivered “in a very irritated manner.” However, another crewmember was sent to Xxxxxx during that period for a personal matter. On February 28, 2007, the applicant alleged, the MKC singled him out at muster even though the applicant had done nothing wrong, told the applicant he was acting up even though the applicant was simply responding to him with “Yes Chief,” and accused him of trying to grab a door out of his hand when the applicant was simply trying to clean the door as he had been ordered to do. On March 27, 2007, he was told by the XO to stand by his cell phone to await a call about his request for leave. He did not receive the call and left the XO several messages, which the XO did not return. Although the applicant told the XO the next morning that it was okay, he had never been treated this way in the past.

The applicant told the EOA that after being charged with violating a direct order on February 28, 2007, he told the XO that he was going to contact an EOA, and the XO told him not to call and that the XO would call the civil rights office and have them call the applicant. The XO repeated this order when the applicant objected and said it was his right to contact an EOA. The applicant called the civil rights office the next morning, March 1, 2007, and since then had been taken to mast and placed on performance probation. The applicant alleged that this was the only time he had gone around his chain of command, and yet going around the chain of command was used as a basis for his performance probation.

Regarding the Page 7 dated March 20, 2007, the applicant told the EOA that he reported for duty at 0640—20 minutes early—and left to attend sick call to follow-up on his MRI results at 0705. Because no one in the chain of command had shown up by 0705, he asked another MK3 to let them know that he was “in medical.” At 1105, however, the XO pulled him into the office and gave him a negative Page 7, which the XO had already prepared, for not reporting for duty on time and disobeying a direct order. Even when the applicant explained what had happened, the XO told him he “was still wrong” and reminded him that the terms of his performance probation required him to conform or risk being discharged. When the XO told the applicant that he “needed to be walking on eggshells,” he realized that the command intended to destroy his Coast Guard career, split up his family, and ruin him.

The applicant told the EOA that he is not certain what soured the relationship between him and MKC W because it had been “great at one point,” but recently the applicant had been “receiving reprisal from the whole command.” The applicant alleged that the reprisal and negative actions all started on February 20, 2007, when “things between [the] MKC and [him] came to a boil.” The applicant alleged that at a meeting with the Command Master Chief, the CO told

him that the discrimination complaint “pissed [him] off” and warned him that if he went forward with a formal complaint, “things may come back your way and I wouldn’t want to see you get yourself in a position.”

Formal EEO Complaint

On April 18, 2007, the applicant submitted his own summary of his complaint to the EOA. The applicant repeated many of the allegations summarized above. On March 20, 2007, the applicant alleged, the XO prepared the Page 7 about disobeying an order before he even spoke to the applicant, and he would not accept the applicant’s explanation that he showed up for duty on time but had to attend sick call because of severe back pain. When the applicant asked if he could work at another command, the XO denied his request because it was not required by regulation and he insulted the applicant by saying “that’s why we follow manuals.”

Regarding his absence on April 7, 2007, the applicant stated that he had left his supervisor text messages and that his supervisor had left him a voicemail telling him to report for duty when his anger management session ended. He argued that the voicemail proved that he was not AWOL and that his supervisor knew where he was. However, the CO took him to mast and awarded him NJP on April 16, 2007. The applicant submitted a copy of his Sprint bill which, he alleged, shows that he attempted to contact his supervisor on the evening of April 6, 2007, at 2133 (3-minute charge), and on the morning of April 7, 2007, at 0735 (3 minutes), 0802 (2 minutes), 0855 (3 minutes), 1033 (2 minutes), and 1053 (1 minute). It also shows that he made several other short calls between 0800 and 0900 and between 1012 and 1033.

The applicant alleged in his complaint summary that just after his second mast on April 16, 2007, he overheard MKC W tell someone who asked him how his day was going, “It’s a wonderful, no it’s an excellent Coast Guard day.” The applicant alleged that he had complained about such mistreatment to the Sector’s Command Master Chief several times but was always told he was in the wrong. Eventually, the Command Master Chief told him that he could not help him once his EEO complaint became formal, that his appeal of his first mast had backfired on him, and that he was “bringing all of this on [him]self” with his decision to file a formal complaint. The Command Master Chief also told him that it was “funny that [his] back all of a sudden started to hurt when [he] was given extra duty” as NJP at the first mast. He then told the applicant that he was being argumentative and disrespectful and ordered him to “get the ‘FUCK’ out of [his] office.” The Command Master Chief also accused the applicant of beating his wife even though, the applicant alleged, the court had exonerated him. The applicant alleged that his command was building a false paper trail against him to railroad him and justify his discharge.

On July 26, 2007, the Coast Guard Office of Civil Rights notified the applicant that his complaint had been accepted for investigation. The notification stated that he had alleged that he had been subject to a hostile work environment because of his religion and in reprisal for participation in a prior EEO protected activity. He had alleged that between September 1, 2006, and March 30, 2007, his supervisor “[c]hallenged [his] religious beliefs and, on several occasions, attempted to force [him] to adopt alternative religious beliefs.” The alleged reprisal included repeated abusive and profane language; nonjudicial punishment (NJP); negative Page 7 entries in his record; and denial of requests for leave on March 19 and 21, 2007.

Report of Investigation

On December 26, 2007, the Office of Civil Rights issued a Report of Investigation (ROI) and sent a copy to the applicant. Neither the applicant nor the Coast Guard submitted the ROI to the Board. The only parts of the ROI in the record before this Board are those that appear in the applicant's military record as part of the DRB proceedings, and they are (1) the investigator's summary of the applicant's allegations and (2) the affidavit of the Sector Chief of Logistics.³ The ROI states that the applicant is Baptist and that MKC W was reared as a Baptist but had converted to Islam.

In the ROI's summary of the applicant's allegations, many of the allegations summarized above. In addition, the ROI states that the applicant alleged that MKC W "constantly challenged his religious beliefs" with a "pushy attitude." For example, MKC W had given him printed information about Islam and had told him that the bible was written by a man, that the bible contradicts itself, that Jesus did not die for our sins, and that preachers are not called by God. MKC W tried to convert him to Islam. The applicant alleged that when he tried to stop these conversations, MKC W would say, "Don't fucking interrupt me." The applicant alleged that he had complained about MKC W's actions but received no help from his chain of command. Instead, he was told that he was disrespectful, and MKC W began harassing him and belittling him in front of crewmates and telling him to stand down and bow down.

The ROI states that the applicant had alleged that in December 2006, his wife "became spiteful and created a situation between them and she called the police out to their home." Because his wife told the police that he had hit her and held her against her will, he was jailed for 14 days. Through required marriage counseling, he and his wife were having discussions and working through their problems, but his command would not let him go home so he had to live on the cutter. The applicant alleged that MKC W had launched an investigation into his contact with his wife because his wife had called him on his cell phone about insurance, dental, and financial issues. After MKC W refused to discuss the matter with him, the applicant initiated his EEO complaint about MKC W.

The ROI states that the applicant alleged that he was punished at mast for violating the no-contact order, but he had only done so after both MKC W and the XO told him that the order would be dropped and there would be no problem communicating with his wife. He alleged that the NJP he received on March 8, 2007, for violating the no-contact order was reprisal for having contacted the civil rights office on March 1, 2007, instead of waiting for the XO to do so. The ROI states that the applicant claimed to have reported for duty as ordered on March 20, 2007, at 0640. However, he left at 0705 because "his back was causing him great concern and had become worse from the stress to which he was being subjected," but he told the other MK3 to let the chain of command know he would return "after he received medical attention." The ROI states that the applicant alleged that

³ The ROI's summary of the applicant's allegations and the affidavit of the Sector Chief of Logistics were apparently relevant to the Commandant's determination that there had been a "procedural flaw" in the discharge proceedings and so are included in the applicant's record as part of the proceedings of the DRB.

everything the command put him through with regard to his performance and discipline from December 2006 through April 2007 amounted to a direct threat of discharge. ... He alleged he was set up for failure and the command methodically planned to create a paper trail that would justify his discharge. ... He stated he was given only three days to provide a rebuttal to his discharge and had to do so without the benefit of counsel. He suggested that normally discharge takes between three and four months to effect; however, his discharge took place in six days. He suggested that in this amount of time, fair consideration could not have possibly been afforded to his rebuttal statement. He stated his belief that his command, Command Master Chief ..., and [the Sector Chief of Logistics] masterminded his discharge.

The EEO investigator interviewed many members, but the only statement provided by the applicant from the ROI and included in the DRB proceedings was the November 15, 2007, affidavit of the Sector Chief of Logistics to the EEO investigator, in which she stated that she

endorsed the [CO's] discharge recommendation based on my knowledge of [the applicant's] misconduct. [He] could have been placed on probation in December 2006 based on his arrest for domestic violence and abuse of his spouse. He was placed on probation in March 2007. [The applicant's] discharge could have been recommended by his Commanding Officer in March 2007 based on his arrest for domestic violence, abuse of his spouse, and violation of his probation. [He] was recommended for discharge by his Commanding Officer in April 2007. [His] Commanding Officer chose leniency in order to assist [him] in any way possible and minimize any negative impact upon his family. However, [the applicant] violated the Military No-Contact Order issued for his protection and the protection of his wife and family.

[The applicant] was brought to mast on several occasions based on his disrespectful conduct, failure to follow the chain of command, disobeying a direct order, and absence from his place of duty. Prior to every mast, a thorough investigation is conducted to ensure the facts of the issue are identified properly before action is taken. [The applicant] was informed on April 16, 2007, that the discharge process was being started. The discharge process began on April 17, 2007. [He] refused to sign the notification memorandum and refused to make a statement. The discharge package was submitted to the Coast Guard Personnel Command. Subsequently, we were provided a memo from [the applicant] stating that he wanted to make a statement. Therefore, he was given ample opportunity to provide a statement. After no attempt to provide a statement 48 hours later, we requested discharge orders from the Coast Guard Personnel Command for [him]. [The applicant] subsequently provided a statement. We received the discharge decision on April 20, 2007, and [he] was discharged effective April 23, 2007. A discharge for reasons of misconduct is fast-tracked and the discharge is effected as soon as possible.

I recall one instance where [the applicant] was in [the Command Master Chief's] office. [The Command Master Chief] came to me and stated that [the applicant] wished to speak with me. I informed [him] that I could not speak with [the applicant] that instant; and I never received any further request from [the applicant]. [The applicant] never informed me that he felt he was being harassed based on his religion and never informed me that he felt he was being subjected to a hostile work environment"

VIEWS OF THE COAST GUARD

On April 30, 2009, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the requested relief and adopting the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC). The PSC noted that under the Separation Program Designator (SPD) Handbook, the only reenlistment codes authorized for someone discharged for miscellaneous/general reasons with the JND separation code are the RE-1 code (eligible) and the RE-4 code (ineligible). The

PSC stated that the RE-4 code was warranted because the applicant was punished at most three times during his enlistment and his record contains numerous negative Page 7 entries. The PSC stated that the record lacks evidence supporting the applicant's allegations and request for a better reenlistment code.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 18, 2009, the Board received the applicant's response to the views of the Coast Guard. The applicant stated that the "lack of evidence ... is an absolute vague, non-descriptive in nature and quite frankly cowardly cop-out of a reason to deny any relief." The applicant stated that his application included "several pages of derivative, direct, corroborating and exculpatory evidence," whereas the Coast Guard submitted "no reliable or reputable inculpatory evidence" against him. He stated that his "accolades, accomplishments, awards, and honors speak for themselves."

The applicant noted that although he was taken to mast and awarded NJP in 2000, while he was still adjusting to military life, from 2001 through 2006, there are no masts and only one negative Page 7 in his record, but there are many positive awards and accolades. The applicant alleged that the retaliatory nature of his discharge is shown by the two masts, four negative Page 7s, and performance probation he received in the six weeks after he filed his EEO complaint.

The applicant alleged that he never went AWOL and that the Sprint bill he submitted shows that his whereabouts on the morning of April 7, 2007—required anger management training—were licit and known by his supervisor and chain of command. In addition, he alleged that because he was under a doctor's orders not to perform boat or sea duty or to climb ladders, he was not being disrespectful when he declined to board the cutter since "any wake, wave or climbing of ladders could trigger [his] back into spasms." He alleged that when his command interpreted the doctor's orders to mean that he was allowed to board the cutter when it was stationary at the dock, they were "play[ing] with the terminology as to what the definition of no sea duty meant." The applicant argued that the statement of the MK3 proves that, contrary to the text of the Page 7 dated March 20, 2007, he did show up on time for work that morning.

The applicant stated that he was having marital problems during this period, but that his decision-making was always sound and he never deviated from his principles of working hard and always showing respect for others. He alleged that his now-ex-wife charged him with battery and kidnapping out of spite and anger and the charges against him were all dropped.

The applicant stated that he was given three calendar days to submit his statement regarding his discharge and that he did submit his statement timely but was nonetheless discharged within a week. He alleged that he later found out that the Sector Commander had requested his discharge just 48 hours after he was notified. In support of this allegation, the applicant submitted a copy of one of the pages of the Sector Commander's statement to the EEO investigator dated November 15, 2007, in which she stated that the Sector requested discharge orders after the applicant did not provide a statement within 48 hours.

The applicant alleged that he was steamrolled out of the Coast Guard after he filed his complaint of religious discrimination. As a result of his discharge, he has been unable to find employment. He alleged that he has been considered for employment several times but the process always stops when his background is investigated. Since his discharge, he alleged, he has earned a bachelor's degree in criminal justice and been accepted in a master's degree program at XXXXXX International University. He has also taken leadership positions at his church. However, because of his discharge, he is in financial crisis.

APPLICABLE REGULATIONS

Article 3.A.3.a. of the Coast Guard's Equal Opportunity Manual states that "[a]lthough the statutory prohibitions against discrimination in civilian employment do not apply to members of the uniformed services, it is the Coast Guard's policy to provide its military members equal opportunity during their military service and access to the rights, responsibilities, and privileges of such service, regardless of: race; color; religion; sex; national origin; or participation in EO related activities."

The Commandant's Equal Opportunity Statement in COMDTINST 5350.21D states the following in pertinent part:

All Coast Guard personnel—military, civilian, auxiliary—shall be treated with respect. The Coast Guard prohibits all forms of discrimination that violate law or policy in any action affecting our personnel, ... Our goal is to recruit, retain, train and deploy a highly capable, diverse and flexible workforce; ensure that all people are given fair and equal treatment in personnel decisions; evaluate personnel based on their job performance; provide advancement and retention opportunities based on demonstrated performance and potential; and take prompt, appropriate, and effective measures to enforce this policy and to ensure personal accountability. Every Commander, Commanding Officer, Officer-in-Charge, and supervisor is to be personally committed to and responsible for fair and equal treatment of all Coast Guard personnel and those with whom we interact. We must be a model organization that ensures no unlawful discrimination in recruitment, selection, assignment, retention, training, or general treatment of any member of the Coast Guard. T. H. COLLINS Admiral, U. S. Coast Guard

Article 12.B.18. authorizes the General or Honorable discharge of members for misconduct, including "[d]iscreditable involvement with civil or military authorities." Article 12.B.18.c. states that, before initiating members' separation under this article,

[c]ommanding officers must afford a member a reasonable probationary period to overcome deficiencies before initiating administrative discharge action in cases of frequent discreditable involvement with civil or military authorities; abuse of a family member; shirking; failure to pay just debts, contribute adequate support to dependents, or comply with valid orders of civil courts to support dependents; or involvement in a prohibited romantic relationship as described in Article 8.H. For cases of family (spouse or child) abuse, a treatment period will also serve as a probationary period and commands shall comply with current Family Advocacy Commandant Instructions. If a command contemplates discharging a member for reasons contained in this paragraph, it shall counsel the member a formal probation or treatment period of at least six months has begun and make an appropriate Administrative Remarks, CG-3307, entry in the member's PDR stating the command will initiate administrative discharge processing unless the member shows significant improvement in overcoming the deficiency during the probationary period. The member must acknowledge the entry in writing. ... However, commanding officers are authorized to recommend discharge at any time during the probation if the member is not making an effort to over-

come the deficiency. ... Submit copies of all CG-3307 entries as an enclosure to the discharge recommendation submitted to Commander (CGPC-epm-1).

Article 12.B.18.e. states that if a member being discharged for misconduct under this article has, like the applicant, fewer than eight years of service, the commanding officer shall:

1. Inform the member in writing of the reason(s) for being considered for discharge (specifically state one or more of the reasons listed in Article 12.B.18.b. supported by known facts).

2. Afford the member an opportunity to make a written statement. If the member does not desire to do so, the commanding officer sets forth that fact in writing over the member's signature. If the member refuses to sign a statement his or her commanding officer will so state in writing.

3. Afford the member an opportunity to consult with a lawyer as defined by Article 27(b)(1), UCMJ, if contemplating a General discharge. If the member requests counsel and one is not available, the commanding officer must delay discharge proceedings until such time as counsel is available.

4. Send the case containing a recommendation and these documents to Commander (CGPC-epm-1) for action:

a. The reason(s) for processing (include reason such as repeated military offenses, drug abuse, indebtedness, etc.)

b. If the reason(s) is (are) civil conviction(s), include: ...

c. Summary of Military Offenses. List in chronological order all disciplinary action during current enlistment, including:

(1) Dates of non-judicial punishment or court-martial by type.

(2) Description of offense(s).

(3) Non-judicial punishment or sentence as approved and approval date.

(4) All violations of regulations during current confinement with action taken.

(5) The commanding officer's comments, including information on the counseling requirement for cases processed for frequent discreditable involvement with civil or military authorities, dishonorable failure to pay debts, shirking, and dishonorable failure to support dependent(s).

(6) The commanding officer's recommendation.

d. These enclosures:

(1) The copy of the letter notifying the member of the reason(s) for the processing and information on the member's rights and privileges.

(2) The member's signed statement of awareness of rights and privileges and request to exercise or waiver of these rights.

(3) The member's signed statement, or member's written, signed statement declining to make a statement.

(4) A copy of the closed-out form CG-3306 dated 30 June 1983 showing average Proficiency, Leadership, and Conduct marks and a copy of the current Enlisted Employee Review showing factor marks.

(5) Other pertinent documents such as psychiatric or medical evaluations (especially in aberrant sexual behavior cases), statements of any witnesses (Chapter 12.E. for homosexual conduct policy), police reports, etc.

(6) A copy of the chain of custody test results form and the appropriate page from unit's drug urinalysis sampling ledger (applicable in cases of recommendations for discharge resulting from a urinalysis indicating drug abuse).

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 because it was filed within three years of the applicant's discharge.

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.⁴

3. The applicant alleged that his RE-4 reenlistment code, which bars him from reenlisting, should be upgraded because, although he was an excellent MK and a hard worker, his command railroaded his discharge in reprisal for his decision to file a formal EEO complaint against his supervisor, MKC W, who had harassed him and discriminated against him because of his religion, and against the XO and CO, who retaliated against him for contacting the Office of Civil Rights and filing his EEO complaint.

4. The Board begins its analysis in every case by presuming that the disputed information in the applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.⁵ Absent evidence to the contrary, the Board presumes that Coast Guard officials have carried out their duties "correctly, lawfully, and in good faith."⁶

5. The request of the applicant's CO for discharge authority dated April 17, 2007, shows that the applicant's discharge for misconduct and RE-4 code resulted from many instances of misconduct and disrespect in January, February, March, and April, 2007, which were documented in his record. If the applicant proves by a preponderance of the evidence that the negative documents in his record, which were used to justify his fast-tracked discharge on April 23, 2007, were erroneous and unjust and a product of reprisal rather than of actual misconduct by the applicant, he would be entitled to an upgraded reenlistment code.

6. There is no evidence in the record before this Board to support the applicant's allegation that MKC W harassed him and discriminated against him because of his religion. If such evidence exists in the ROI prepared by the Office of Civil Rights and sent to the applicant on December 26, 2007, the applicant has failed to submit it.

7. With no evidence whatsoever of religious discrimination by MKC W in the record before the Board, the applicant's allegations of religious discrimination appear frivolous and

⁴ See *Steen v. United States*, No. 436-74, 1977 U.S. Ct. Cl. LEXIS 585, at *21 (Dec. 7, 1977) (holding that "whether to grant such a hearing is a decision entirely within the discretion of the Board"); *Flute v. United States*, 210 Ct. Cl. 34, 40 (1976) ("The denial of a hearing before the BCMR does not per se deprive plaintiff of due process."); *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

⁵ 33 C.F.R. § 52.24(b); see Docket No. 2000-194, at 35-40 (DOT BCMR, Apr. 25, 2002, approved by the Deputy General Counsel, May 29, 2002) (rejecting the "clear and convincing" evidence standard recommended by the Coast Guard and adopting the "preponderance of the evidence" standard for all cases prior to the promulgation of the latter standard in 2003 in 33 C.F.R. § 52.24(b)).

⁶ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

meritless. The timing of the applicant's first contact with the Office of Civil Rights on March 1, 2007, supports this conclusion because MKC W had charged the applicant with violating the military no-contact orders just two days earlier, on February 27, 2007. Although the applicant alleged that his NJP at mast on March 8, 2007, and his placement on performance probation were reprisal for his initial contact with the Office of Civil Rights, the Board finds that both the NJP and the probation were instead the direct and natural results of the applicant's repeated and flagrant violations of the military no-contact orders, as proven at mast.

8. Because the applicant's complaint of religious discrimination by MKC W appears to have been frivolous and meritless, the applicant's allegation that his XO and CO had reason to and threatened to retaliate against him for having complained about MKC W to the Office of Civil Rights is not substantiated. A frivolous and meritless complaint against MKC W by the applicant could not harm the careers of his XO or CO. In addition, the applicant's allegation that his CO threatened reprisal for his EO complaint during a meeting with the Sector Command Master Chief is not supported by other evidence in the record.

9. The applicant alleged that the negative Page 7s dated March 20, April 6, and April 9, 2007; the mast on April 16, 2007; and the denial of leave request chits dated March 14, March 21, and April 17, 2007, were also reprisal resulting from his EO complaints against the MKC, the XO, and the CO. With regard to these allegations, the Board finds the following:

(a) Regarding the Page 7 dated March 20, 2007, the Board finds that the applicant was ordered to report for duty at 0700. He left at 0705 without making any effort to call his superiors or the OOD and told only a fellow MK3 where he was going. (In addition, the Board notes that although he initially told the EOA that he left at 0705 because he wanted to learn the results of his MRI, he later told the EOA that he left because he was suffering severe back pain.) The CO apparently concluded that the applicant's departure from his place of duty within five minutes of when he was supposed to report without waiting for or making a reasonable effort to contact his superiors directly justified the Page 7 he prepared. The Board is not persuaded that the CO erred in this finding simply because the applicant was physically present from 0640 to 0705 and asked another MK3 to let the command know where he was going.

(b) Regarding the Page 7 dated April 6, 2007, the applicant has not submitted any evidence that supports his allegation that he did not behave toward MKC W in the disrespectful ways described therein on April 2, 2007.

(c) Regarding the Page 7 dated April 9, 2007, the applicant alleged that it was improper for the CO to order him to board the cutter because he was under orders not to perform "boat or sea duty" or to climb ladders. On that date, the applicant's most recent medical record was dated March 21, 2007, and it stated that he should not perform "boat or sea duty" for two weeks. The first and only written medical order to avoid ladders in the record before the Board is dated April 10, 2007, the day after the applicant received the Page 7 for not boarding the cutter upon a direct order from the CO. In addition, the Board agrees with the CO that a medical limitation prohibiting boat and sea duty cannot reasonably be interpreted as prohibiting the applicant from obeying his CO's direct order to board a cutter which is stationary in port.

(d) Regarding the NJP at mast on April 16, 2007, for disobeying an order and being AWOL on April 7, 2007, the Board finds that the applicant has submitted insufficient evidence to rebut his CO's finding that the applicant committed these offenses. The applicant submitted a detailed Sprint bill showing that he was assessed minutes for contacting a certain number (presumably EM1 B's cell phone) on the evening of April 6th and the morning of April 7th. However, EM1 B, who had been assigned to the cutter for only a week, stated that he had received no voicemail messages and only two text messages from the applicant, the first of which was sent at 0905 on April 7th, more than an hour after the applicant had been ordered to report for duty. Moreover, the record shows that the investigator had access to the applicant's cell phone log and the messages EM1 B received from him and yet concluded, based on that hard evidence and their statements, that the applicant had disobeyed an order and been AWOL. In addition, although the applicant was required to attend anger management training sessions, the evidence of the group facilitator shows that he could have attended a meeting at a different time. The Board also notes that the applicant's supervisor, MKC W, stated that he had tried to call the applicant a few times between 0800 and 0900 on April 7th, and the applicant did not answer, although his Sprint bill shows that he made several short calls during that hour. In addition, the applicant made several phone calls beginning at 1012 on April 7th and did not call EM1 B until 1035. Therefore, the Board finds that the applicant has not proved by a preponderance of the evidence that the CO acted erroneously or unreasonably in finding that the applicant had committed the two offenses as charged.

(e) Regarding the denial of the applicant's leave requests, the Board finds that each of the denials was reasonably explained and justified by the command. After the applicant filed his informal EO complaint on March 15, 2007, the command had just 15 days to attempt to resolve his complaint within the unit to his satisfaction. Therefore, his request dated March 19, 2007, for leave from March 21 to 31, 2007, and his request dated March 21, 2007, for leave from March 26 to 31, 2007, were justifiably denied. The Board notes in this regard that the District's mediator did not visit the cutter until March 29th. Likewise, his violation of restriction on April 16, 2007, the very day of his mast, reasonably justified the denial of his leave request dated April 17, 2007.

10. The applicant alleged that his discharge was reprisal by his command for his EO complaints. However, the CO's second discharge notification and memorandum requesting discharge authority, both dated April 17, 2007, detail the applicant's pattern of misconduct and moral deficiencies, which constituted a valid and ample basis for his discharge. The applicant had been placed on performance probation on March 8, 2007, after he was found to have repeatedly violated two military no-contact orders. Under Article 12.B.18.c., the CO was entitled to initiate discharge proceedings if he found that the applicant was "not making an effort to overcome the deficiency." In light of the applicant's repeated violations of the terms of his probation, as documented in the Page 7s, the Board finds that the CO reasonably concluded that the applicant was not making a reasonable effort to overcome the deficiencies detailed in the probationary Page 7 dated March 8, 2007. The applicant has made many allegations of discrimination and reprisal and repeated them for the EOA, the DRB, and this Board several times, but he has not submitted supportive evidence to prove that his allegations of discrimination and reprisal are accurate.

11. The applicant's performance evaluations in 2006 and the many awards and letters of appreciation he received during his Coast Guard career show that his technical expertise and stamina as a machinery technician were excellent. The CO of the cutter, in forwarding the applicant's appeal on his NJP dated March 8, 2007, noted that the applicant had "the engineering savvy to continue to advance." However, technical expertise and hard work are not all that is required of a member of the military. Obedience to orders, respect for members of superior rate and rank, accountability, and honesty are also paramount. The CO noted in his memoranda concerning the proposed discharge that the applicant had repeatedly failed to follow orders; shown disrespect; complained about not being treated as an equal by his superiors; circumvented the chain of command by, for example, refusing to communicate with his supervisor, MKC W; blamed others for his problems; and shaded the truth. The applicant has submitted evidence showing that his CO's patience with him had indeed run out, but he has not submitted sufficient evidence to persuade the Board that the CO's assessment of the applicant's conduct and that his decision to initiate the applicant's discharge were erroneous or unjust or a matter of reprisal for the applicant's EO complaint.

12. Under Article 12.B.18.e. of the Personnel Manual in effect in 2007, a member being separated with a General discharge for misconduct was entitled to consult an attorney and to have "an opportunity to make a written statement." The regulation does not state a particular number of days for this "opportunity." The record shows that the applicant was allowed to consult an attorney. In the rebuttal statement he dated April 19, 2007, the applicant alleged that he was submitting it "without benefit of counsel" but he also stated that it was his attorney's understanding that, contrary to the CO's notification, he had more days to prepare his rebuttal. Therefore, by his own admission, the applicant had been allowed to consult an attorney although the attorney apparently did not review his rebuttal statement. The Board notes in this regard that according to the Sector Chief of Logistics, the applicant was assigned no other duties from April 16 through April 19 except to consult the attorney and write his rebuttal statement. The CO first notified the applicant of the proposed discharge on a Page 7 dated April 16, 2007, but in his notification memorandum dated April 17, 2007, the CO gave the applicant three calendar days to submit his statement. However, an email from the Personnel Command dated April 17, 2007, states that the applicant should have five days. The record shows, however, that the CO prepared his request for discharge and the Sector Chief of Logistics prepared her endorsement on April 17, 2007, and that they forwarded the discharge package to the Personnel Command on April 19, 2007, which was only two days after the applicant was told in writing that he would have three days to submit his statement. Therefore, it appears that the applicant may have been misled or confused about how long his "opportunity" to submit his discharge rebuttal would be.

13. Although the applicant dated his rebuttal statement April 19, 2007, it appears that the Personnel Command neither received it nor reviewed it before issuing the applicant's discharge orders. The Board notes that the rebuttal statement was not listed as an enclosure to the CO's memorandum and is not included in the file labeled "discharge package" in the applicant's military record. In addition, the Commandant's decision to upgrade the applicant's discharge to Honorable and his narrative reason for separation to "Miscellaneous/General Reasons" appears to have been based on a finding of error concerning the processing of the applicant's rebuttal statement. If the applicant had submitted evidence to this Board that he could have submitted a rebuttal statement within five days of April 17, 2007, that could have convinced the Personnel

Command to deny the CO's request for discharge orders, the Board would find that his separation from active duty was erroneous and unfair, but the applicant has not done so. His rebuttal statement is unpersuasive and confirms the CO's allegation that the applicant refused to accept responsibility for his misconduct, and the applicant submitted nothing from the ROI to support his own allegations of discrimination and reprisal. In the absence of any evidence that the applicant could have rebutted his CO's allegations about his repeated misconduct, disrespect, and shading of the truth, the Board finds that the apparent failure to have the Personnel Command review the applicant's rebuttal statement must be considered harmless error⁷ in that the applicant would have been discharged with an RE-4 even if he had been given five days to submit his rebuttal. In addition, the Board finds that any negative effect the procedural error could have had on the applicant's character of discharge and narrative reason for discharge has been corrected by the Commandant in overturning the recommendation of the DRB.

14. The applicant has not proved by a preponderance of the evidence that his RE-4 reenlistment code is erroneous or unjust. Although his military record contains no adverse entries from 2002 through November 2006, the applicant's repeated misconduct and disrespect for superiors in the first four months of 2007 justify the Coast Guard's decision to make him ineligible for reenlistment.

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

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

⁷ *Texas v. Lesage*, 528 U.S. 18, 21 (1999) (“[W]here a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting relief”); *Quinton v. United States*, 64 Fed. Cl. 118, 125 (2005) (finding that harmlessness requires that there be “no substantial nexus or connection” between the proven error and the prejudicial record that the applicant wants the Board to remove or correct); *Engels v. United States*, 678 F.2d 173, 175 (Ct. Cl. 1982) (finding that an error in an officer's military record is harmless unless the error is “causally linked with” the record the officer wants corrected); *Hary v. United States*, 618 F.2d 704, 707-09 (Ct. Cl. 1980) (finding that the plaintiff had to show that the proven error “substantially affected the decision to separate him” because “harmless error ... will not warrant judicial relief.”).

ORDER

The application of former MK3 xxxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is denied.

Francis H. Esposito

Evan R. Franke

Darren S. Wall