

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-236

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XXXXXXXXXXXXXXXXXX

FINAL DECISION ON RECONSIDERATION

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 August 21, 2009, after receiving the applicant's request for reconsideration of the final decision in BCMR Docket No. 2009-048 along with substantial new evidence, 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 on reconsideration, dated May 27, 2010, 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). In addition to requesting reconsideration of the Board's prior decision about his reenlistment code, he asked that his rate be returned MK2/E-5.

The applicant 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 X, aboard the XXXXX, a XX-foot cutter homeported in Xxxx. In reprisal for his complaint, he was punished at a captain's mast and reduced in rank from MK2 to MK3 even though he was on an advancement list to MK1. Because his discrimination 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 continued to retaliate against him, and within a few weeks of his initial complaint, he was taken to mast twice, reduced in rate, given four negative Page 7s (CG-3307s) documenting adverse performance, placed on perform-

ance 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. When requesting reconsideration, he also submitted a copy of the Report of Investigation (ROI) of his EEO complaint, which was sent to him by the Coast Guard Office of Civil Rights on December 26, 2007, but was not in the record when the Board first considered his request for an upgraded reenlistment code. However, he did not submit a copy of the Final Agency Decision on his EEO complaint.

Pursuant to his request for reconsideration, the applicant also submitted several letters alleging that the Board’s original decision contained numerous factual errors and contorted and disregarded all of the evidence he submitted. He did not specifically identify any factual errors, but alleged that there were some. In addition, he did not identify any evidence that had been omitted from the Board’s decision. The applicant also alleged that the Board ignored the Coast Guard’s “misleading behaviors, statements or actions” and paraphrased Coast Guard communications in a way that disguised the animosity behind them. The applicant further alleged that even though he did everything possible that was “right in nature” and with good intent, the Board consistently found that he could or should have behaved differently. He repeatedly asked for a hearing to explain the facts of his case.

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 X, 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 kidnapping by civil authorities. The alleged victim was his wife. The police report indicates that the

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).

applicant's wife had a cut lip and bruises on her forehead and arm. In addition, she was complaining of pain in her waist. She reported that in addition to punching and slapping her, the applicant held her down on the sofa when she tried to leave the apartment. The applicant was held for two weeks and 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 pay grade 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 January 23, 2007, the Integrated Support Command informed the applicant's command that the Family Advocacy Specialist handling his case had determined that the allegations of spousal abuse resulting in minor physical injury against the applicant had been substantiated. This report described the abuse as "pushing and restraining of spouse by member" and "name calling, screaming and yelling, and blocking partner's path when attempting to exit." Therefore, he would have to attend a Domestic Violence Intervention Program; his wife would be offered individual counseling; and marital counseling could begin at a later time.

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 kidnapping charges were dropped by the State.

On February 27, 2007, MKC X 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 X.

Investigation of Violations of No-Contact Orders

On March 2, 2007, the CO ordered the XO to investigate MKC X's charge. The applicant was notified of his rights in the investigation and at mast. According to a three-page report, which was signed by both the applicant and the XO, the applicant admitted to the investigator that he had begun contacting his wife on or about January 14, 2007, and living with her on non-duty days after the State lifted its civil and criminal restraining orders. 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 X 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. He did not discuss the matter with the CO or the XO because he “assumed that [he] was good to go” and did not want to jump the chain of command.

MKC X 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, he saw the applicant removing his belongings from the cutter. The applicant told him 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 X told the applicant to follow proper procedures with respect to the no-contact order before returning home and the applicant agreed.

On March 6, 2007, the applicant’s EAP counselor advised the command to leave the no-contact order in effect until their marriage counselor recommended its rescission.

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 pay grade 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. He was not recommended for advancement.

Performance Probation

Also on March 8, 2009, the CO put the applicant on performance probation for “failure to obey direct orders, lack of attention to detail, and your argumentative and disrespectful behavior.” The CO noted that the applicant had “received numerous counseling sessions and advised him of what he needed to do to successfully complete the probationary period.” In addition, he advised the applicant that if he failed to make an effort to overcome his deficiencies or violated the conditions of the probation, the CO would initiate his discharge.

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 pay grade 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 X. 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.

Informal Discrimination and Retaliation Complaint

On March 15, 2007, the applicant submitted an informal complaint of religious discrimination and retaliation by MKC X. His allegations are summarized below along with other evidence in the EEO investigation.

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 fail-

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.

ure to report as ordered was an obvious violation of the terms of his performance probation and that further violations might result in his discharge. The applicant refused to sign this Page 7.

Also on March 20, 2007, a crewmate, MK3 B, 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, MK3 B left without doing so. At 1135, MKC X asked him about the applicant, and he told MKC X 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.

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.

Formal Discrimination and Retaliation Complaint

On March 30, 2007, the applicant filed a formal complaint of discrimination and retaliation 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, the applicant had turned his back and walked away while MKC X was speaking to him while other subordinates were present. 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.

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 on Saturday, April 7, 2007, as directed, and did not show up until 1145. The report was submitted by EM1 X 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 the applicant's record in which he counseled the applicant about showing direct disrespect and insubordination to the CO by refusing to board the cutter when ordered to do so even after he was told that his "no sea duty" chit did not mean that he could not walk aboard the cutter when it was docked.

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."

Investigation of New Charges

On April 11, 2007, the investigator reported that the applicant had been told by a supervisor, EM1 X, to report for duty at 0800 on April 7, 2007. The applicant had acknowledged the notification but 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 X. 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 he had left EM1 X a voice mail message on Friday evening, April 6, 2007, about having an anger management session the next morning. When EM1 X did not call him back, the applicant left both voicemail and text messages with EM1 X at about 0730 the next morning. He alleged that he also tried to call MKC X "somewhere between 0805 and 0900" but received no answer. At 0855 he received a voicemail message from EM1 X telling him to report for duty by 0900. In response, he sent EM1 X a text message saying that he had to attend anger management training and to please call him. At 0915, EM1 X 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 X again and left another voicemail message. The applicant stated that EM1 X 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 X's instruction to report for duty at 0800 was a "directive" rather than an "order" because EM1 X is not a commissioned officer.

- EM1 X stated that on Friday, April 6, 2007, he told the applicant that he needed to be aboard the cutter at 0800 the next morning. When the applicant had not shown up by 0900 the next morning, EM1 X called him and left a message on the applicant's cell phone asking the applicant to call him, MKC X, or the cutter when he received the message. Later, EM1 X 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 X stated that on Monday morning, April 9, 2007, the applicant claimed to have left EM1 X, MKC X, and the XO numerous voicemail messages. However, EM1 X's phone showed that he had received no voicemail messages or missed calls from the applicant.
- MKC X 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 X 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. MKC X 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.

Notification of Discharge

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. 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 states that an investi-

gation had determined that the applicant began not only communicating but living with his wife on or about January 14, 2007, despite the no-contact orders. It also notes that the applicant had been insubordinate and disrespectful on numerous occasions and that he had complained more than once “about not being treated as an ‘equal’ by senior members of the crew” and said that he could not work for any member of the command.

The notification also bears a handwritten notation signed by EM1 X 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 summarized the applicant’s misconduct since December 2006 and concluded 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 X. 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 X] 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." In his endorsement of the appeal, the CO stated that the applicant

claims that on Friday night he left multiple voice mails on EM1 [X's] cell phone in an attempt to tell him that he had anger management class the following morning at 0900. EM1 says he didn't receive any voice mails, and, in any event, I'm not sure it mattered. The fact is that [the applicant] did not get in touch with EM1 and he was never given permission to absent himself from the ship. ... Furthermore, [he] could have spoken to anyone in the chain of command when he couldn't get hold of his supervisor and he did not. His statement says that he called the Chief and didn't leave a voice mail, and that he called the XO and hung up after one ring. However, his statement says he made these calls between 0805 and 0900 when he was already late. He never attempted to call the cutter and speak to the [Officer of the Day], nor did he attempt to contact me which he has done numerous times in the past when unable to get in touch with the XO.

The CO noted that the applicant could have reported for duty at 0800, requested permission to attend the anger management class, and still been on time for the class at 0900. In addition, he stated that the fact that at 0915 EM1 X responded to the applicant's text message by leaving him a voice mail giving him permission to remain at the class did not excuse his absence at 0800 that morning.

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.

Discharge Review Board

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 X], 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 X] 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 X] 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 com-

mand 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 X] 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 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, 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. The Commandant did not upgrade the applicant's reenlistment code. On February 12, 2009, the Per-

sonnel Command issued the applicant a new DD 214 reflecting the changes so that the original, derogatory information would not appear therein.

APPLICANT'S DISCRIMINATION AND RETALIATION COMPLAINTS

Applicant's 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 interview, the EOA prepared a summary of the applicant's complaint, which the applicant signed on March 30, 2007. In the summary, the EOA reported that the applicant alleged that MKC X 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 X 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 whom he was talking to. 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, this rule did not apply 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 X. He told the CO that the only issue he had was that the MKC Xas 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 Xere 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 counseling the applicant had been told he would be sent to Xxxx to receive between February 22 and 24, 2007. He asked the MKC about it twice 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 Xxxx 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. 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 MK3 B 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 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,” the applicant stated, he realized that the command intended to destroy his 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 X 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.”

EOA Counselor’s Report

On April 1, 2007, the EOA prepared a report regarding the applicant’s allegations. *Inter alia*, she noted that the applicant alleged that he had “technically” violated the no-contact order but that the CO had orally vacated the order on or about January 24, 2007, by telling him that his return home “shouldn’t be a problem.” The EOA noted that this allegation was not what was stated on the report of his mast testimony, and the applicant alleged that he had signed that document without reading it. The applicant further alleged that MKC X’s testimony about telling the applicant that the no-contact order was still in effect on January 24, 2007, was false.

The EOA reported that the applicant alleged that MKC X had been disrespectful of the applicant's faith "commencing on or about January 13, 2007, and continuing through February 20, 2007. MKC X had challenged the applicant's faith and "pushed" his own faith on the applicant. This persisted, the applicant alleged, even after he asked MKC X to stop discussing religion with him on January 17, 2007. He alleged that on February 17, 2007, when MKC X was discussing religion and the applicant interrupted him, MKC X responded, "Don't fucking interrupt me." He alleged that MKC X had created a hostile work environment and that he no longer felt comfortable reading the bible in MKC X's presence.

The EOA stated that the applicant alleged that if he had not contacted the Office of Civil Rights (OCR), his CO would have taken no action against him for his alleged violations of the no-contact order or would have issued a lesser punishment.

The EOA stated that according to MKC X, no one had interfered with the applicant's right to contact the OCR but that when the applicant stated that he would do so, the XO told him to "stand by" and that the XO would make an appointment for him. MKC X gave the EOA a statement signed by ENS A (then EM1 A), who stated that he had witnessed MKC X tell the applicant on January 24, 2007, that the no-contact order was still in effect.

MKC X told the EOA that the applicant had never asked him to stop discussing religion with him and had, in fact, tried to engage MKC X in such conversations, but that MKC X had on his own initiative stopped engaging in such conversations with the applicant.

The XO told the EOA that he had not interfered with the applicant's right to contact the Office of Civil Rights directly but had "conveyed to [the applicant] his desire to go to Sector Xxxx in an attempt to resolve that issue and, that if someone didn't get back with [the applicant] the following day, [he] could go directly to OCR. The XO stated that the Page 7 statements about the applicant not following the chain of command had referred to the applicant initiating contact with the District legal office and the Command Master Chief about his arrest and no-contact order even though the XO had told him to wait for the XO to make appointments for him.

The EOA reported that FN G stated that he remembered at one time MKC X telling the applicant not to interrupt him when they were bickering with each other about religion. However, FN G stated that MKC X's "actions didn't have anything to do with harassment or discrimination." FN G stated that the bickering between the applicant and MKC X "was more about who had more knowledge."

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 and was not charged for accepting an incoming call until 1508 on April 7th.

The applicant alleged in his complaint summary that just after his second mast on April 16, 2007, he overheard MKC X 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 of the Complaint

On December 26, 2007, the Office of Civil Rights issued a Report of Investigation (ROI) and sent a copy to the applicant. The ROI includes a statement signed by the applicant on October 18, 2007, in which he repeated many of the allegations summarized above. In addition, he alleged that MKC X “constantly challenged his religions beliefs” with a “pushy attitude.” For example, MKC X 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 X tried to convert him to Islam. The applicant alleged

that when he tried to stop these conversations, MKC X would say, “Don’t fucking interrupt me.” The applicant alleged that he had complained about MKC X’s actions to his command to no avail. Instead, he was told that he was disrespectful, and MKC X began harassing him and belittling him in front of crewmates and telling him to stand down and bow down.

The applicant 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 X 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 X refused to discuss the matter with him, the applicant initiated his EEO complaint about MKC X.

The applicant alleged that he was punished at mast for violating the no-contact order, but he had only done so after MKC X, the CO, and the XO led him to believe 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.

In a supplemental affidavit dated October 29, 2007, the applicant stated that although he had been told he would be sent back to Xxxx for some very important counseling between February 22 and 24, 2007, the command did not allow him to go, even though the command allowed FN G to go back “to attend to a personal situation.” The applicant alleged that all of the Page 7s and NJPs in his record were prepared in retaliation for his discrimination complaint and that his command had created a paper trail to justify his discharge. Then he was given only three days to prepare his rebuttal to the proposed discharge and had to do so without benefit of counsel.

The EO investigator also interviewed MKC X, the XO, the CO, the Sector Chief of Logistics, the Command Master Chief, and MK3 B. In addition, at the request of the applicant, the EEO investigator interviewed ENS A, EM1 X, EM2 F, and FN O. All of these witnesses stated that they adhered to a Christian religion except MKC X, who was Muslim, and EM1 X, who had no religious preference.

Statement of MKC X

MKC X stated that on February 28, 2007, after he had charged the applicant with violating the no-contact order, the applicant told him that he intended to file a complaint against him for using abusive and profane language. The applicant later modified the complaint to include religious discrimination and reprisal.

MKC X alleged that when the applicant reported for duty on the XXXXX in January 2006, MKC X quickly became aware of the applicant’s religion because the applicant made many comments. The applicant was not then aware that MKC X was Muslim. However, in August 2006, when the applicant “asked him if he was going to eat chow,” MKC X told him that

he was fasting for Ramadan. Thereafter, the applicant initiated religious discussion with him by asking him why he had converted to Islam and by telling MKC X about his experiences in the Middle East. Most of these discussions occurred late at night. Then in January 2007, the applicant began telling everyone he was “reborn.” In addition, he asked MKC X about the Islamic view of divorce. MKC X replied that “in Islam it is all about his intentions and what is in his heart. At this point, I never had disagreed with [the applicant] when he expressed a different point of view.” In February 2007, the applicant asked MKC X “about divinity and who had divine power.” When the applicant claimed that his own preacher had divine powers, MKC X disagreed. Then the applicant “became aggressive and argumentative, stating that his preacher had a news article that proved that he had divine powers. When the applicant asked him how his preacher could make an accurate prediction if he did not have divine powers, MKC X tried to respond, but the applicant kept interrupting him. At that point, MKC X said to the applicant, “Let me fucking talk,” but then stopped further discussion. The next morning, when the applicant came to his stateroom on the cutter “with verses from the Bible that proved his point,” MKC X apologized for having used profanity, and the applicant accepted the apology and shook his hand. MKC X stated that the applicant “enjoyed reading the Bible and would talk with everyone about what he had read. He often would want to discuss what he read with other members of the crew. I never in any way attempted to force [him] or anyone else to adopt alternative religious beliefs.

MKC X stated that after the applicant’s arrest in December 2006, the command learned that the police had been called to the applicant’s home for domestic violence issues four to six times since he married in July 2006. MKC X stated that he told the applicant on January 24, 2007, that the no-contact order would remain in effect. MKC X charged the applicant with violating the no-contact order after overhearing him speaking on the phone to his wife in a very disrespectful and irate manner. MKC X stated that after the Coast Guard became more diligent about enforcing the no-contact order, the applicant became more and more disrespectful and used his cell phone during working hours so much that it interfered with his duties.

MKC X stated that on March 20, 2007, the applicant reported for duty but then left to attend sick call and only informed a junior staff member even though the CO was present in his office. The applicant became disrespectful when he was questioned about the incident and reminded that he needed to follow the chain of command. MKC X stated, “We never pass information to junior staff. We are all required to follow the chain of command.”

With regard to the applicant’s allegations about having been denied counseling, MKC X stated that in February 2007, he asked the applicant to find out when the counseling would be offered and “we would see if we could spare him from the vessel and send him back to Xxxx” for the counseling. However, they knew he had already violated the no-contact order, and “[a]s his behavior became more troublesome, we felt that sending him back to Xxxx [where his wife was] with the restraining order still in effect with no oversight from his command was not in the best interests of him or his family.” Therefore, the applicant attended the counseling after the cutter returned to Xxxx.

On April 7, 2007, MKC X stated, the applicant failed to report for duty at 0800 hours even though he and EM1 X had both told him to do so. The applicant “did not return any phone

calls from his chain of command on April 7th.” At 0900, MKC X called the applicant and left him a message saying he was AWOL and to call the command as soon as possible. The applicant “made no attempts to return my phone calls,” but finally sent EM1 X a text message about attending an anger management session. The applicant could have reported for duty at 0800 and still had an “ample amount of time to attend the counseling session” at 0900. In addition, the applicant could have attended a different session. as they were scheduled at various times throughout the week. and he had a year to complete the counseling.

On April 9, 2007, MKC X stated, the applicant stood on the dock and refused to board the boat, which was docked. To meet with the CO in his stateroom as ordered, the applicant would not have had to climb any stairs or ladders. The applicant refused to board the boat when MKC X urged him to do so, claiming that his medical chit prohibited him from boarding a vessel. The CO came out on deck and told the applicant to come to his stateroom, but the applicant refused. When the CO said, “You’re trying my patience,” the applicant responded, “Well, you’re trying my back,” and walked away. The applicant later claimed that somebody told him he did not have to board the boat because of the “no sea duty” chit, but he could or would not name the person. MKC X noted that the applicant lived in an apartment that required him to climb stairs to enter or leave.

MKC X stated that he submitted the initial recommendation for the applicant’s discharge. He noted that the arrest in December 2006 was not the applicant’s first arrest, that the police had been called to his home six times within the past year, and that he had already been transferred four times and “had encountered similar difficulties with every crew he was assigned to.” MKC X stated that he had nominated the applicant for “Sailor of the Quarter in an effort to make him feel comfortable as part of our crew.” However, his “behavior deteriorated very quickly over a six-month period and it became necessary, for the safety of the crew and the accomplishment of the Coast Guard mission, to initiate his discharge.” MKC X denied that the applicant was discriminated against based on his religion or in reprisal.

Statement of the XO of the XXXXX

The XO stated that the applicant never complained to him of religious discrimination by MKC X. The XO knew that the applicant routinely read a bible on the Mess Deck, and the applicant once asked him for his opinion about how a passage was relevant in the modern world. The XO advised him to use his own judgment and offered no personal opinion.

The XO stated that after the applicant’s arrest in December 2006, he, the CO, and MKC X discussed what approach to take. Because the applicant “had seemed to be an upstanding individual,” they decided not to conduct an investigation and to await the result of the civil charges. However, after consulting counsel, they decided to issue a no-contact order to prevent further incidents. The XO attended a hearing on the charges against the applicant and learned that the police had been called to his house several times in recent months. Therefore, the command decided that the no-contact order should remain in place and also ordered the applicant to attend domestic violence classes. The applicant became very angry when he received the no-contact order, and he was made “fully aware of the requirements of the order and his responsibilities in connection with it.” However, when the XXXXX was in Key West in January 2007, the

applicant was seen using his cell phone excessively during work hours and was issued a warning. The XO stated that the applicant was not treated differently than other crewmembers in this regard. However, a couple of days after the warning, the applicant was seen on the bridge shouting obscenities into his cell phone. The content of his speech and his demeanor indicated that he was talking to his wife in violation of the no-contact order. The applicant knew that the order remained in effect indefinitely until rescinded by the CO. The CO tasked him with investigating the applicant's alleged violation of the no-contact order. During the investigation, the applicant admitted that he had been talking to his wife, so he was awarded NJP. The applicant "became more and more belligerent and continued to display unsatisfactory and disrespectful behavior to his chain of command, ignoring standard procedure on many occasions."

The XO stated that on March 8, 2007, the applicant was placed on performance probation in part because he had failed to obey orders and follow the chain of command. However, on March 20, 2007, the applicant told only MK3 B that he was leaving even though the CO was present in his office and the applicant "was well aware that he was required to follow his chain of command and let me or [MKC X] know of his whereabouts." When the applicant returned to the unit, the XO advised him that he had once again failed to follow an order and to follow the chain of command. The applicant became disrespectful and so was issued a Page 7.

With respect to the applicant's leave, the XO stated that the first leave chits were denied because they conflicted with a scheduled meeting about the applicant's EEO complaint. The XO advised him he could begin leave the day after the meeting and approved the applicant's subsequent leave request.

The XO stated that he never saw the MKC X treat the applicant with disrespect. Once when the applicant complained about MKC X's use of profanity, the XO discussed the matter with MKC X, who apologized to the applicant. After the apology, the applicant told the XO that the issue had resolved. The XO stated that the applicant seemed to enjoy debating issues but was not argumentative until after his arrest in December 2006. MKC X was normally a quiet person who did not preach or coerce anyone regarding his religious beliefs.

Regarding the applicant's allegation that the command did not let him return to Xxxx from Key West for counseling, the XO stated that the command never promised him that he would be sent back for counseling and that crewmembers normally leave an underway vessel only in an emergency. The applicant's counseling did not have a particular start date and could begin when the XXXXX returned to Xxxx in early March.

In April 2007, when the applicant received a medical chit restricting him from sea duty, the XO investigated and "was told that as long as the vessel was pier-side, [the applicant] was able to come on board." However, when the applicant was ordered aboard for counseling, he refused the direct order and was blatantly disrespectful.

Statement of the CO of the XXXXX

The CO stated that he never stopped the applicant from pursuing his EEO complaints. He advised the applicant that "if he chose to engage in EEO activity, he should be prepared with

the necessary information to file a complaint.” The CO stated that he never observed MKC X harassing or coercing the applicant and his investigation of the applicant’s complaint led him to believe that it was fabricated. The applicant was bringing his bible into the work environment and “[e]veryone on the mess deck would engage in discussion regarding what was written in the bible. [MKC X and the applicant] had differing beliefs, which they would discuss. In my opinion, these discussions were non-malicious and non-coercive.”

The CO stated that before the applicant was punished for violating the no-contact order, he had been warned a number of times about his violations of the order. On March 8, 2007, he put the applicant on performance probation based upon his repeated failure to obey direct orders, lack of attention to detail, disrespect for superiors, and failure to follow the chain of command, but the applicant’s behavior deteriorated further. For example, with regard to the events of March 20, 2007, the CO stated that the applicant knew that he should tell a superior, rather than a subordinate, when he left the place where he had been ordered to report for duty to go to sick call. The CO stated that the applicant had his cell phone number and had used it to call him many times on Sundays to discuss his personal problems and yet did not contact him to let him know why he was not present for work.

The CO stated that when MKC X complained to him about the applicant’s disrespectful behavior, the CO asked EM1 X about it because he was the new Assistant Engineering Officer and had a “fresh set of eyes.” EM1 X told him that the applicant’s behavior was “the most disrespectful behavior he had ever seen in his time in the Coast Guard.”

On April 7, 2007, the CO stated, the applicant was ordered to report for duty at 0800 and did not show up on time. The applicant claimed that he had left EM1 X several voice mail messages, but EM1 X did not receive any voice mails from him. The applicant knew that when he could not contact EM1 X, he should have gone “up the chain of command until he spoke with someone and got permission to be absent,” but he did not. The CO noted that the applicant’s attendance at anger management was not mandatory on that specific day and that the session began at 0900 and was “less than 15 minutes from the vessel,” so he had ample opportunity to report for duty and ask for permission to attend the session at 0900.

On April 9, 2007, the CO said, the applicant refused to board the boat when it was in dock even though both MKC X and the XO explained to him that his “no sea duty” medical chit did not mean that he could not board a docked cutter. The CO checked with the doctor who had issued the chit, and the doctor said that the chit did not mean that the applicant could not board the cutter while it was docked. Then the CO himself told the applicant what the doctor had said and ordered him to board the cutter, but the applicant refused. The CO stated that although the applicant tried his patience, he never used an abusive language or tone with the applicant.

The CO stated that after the applicant’s arrest in December 2006, MKC X and he tried to help him and give him “every opportunity to remain a successful member” because the applicant was “a savvy Engine Room Engineer who knew his job and performed very well.” However, the applicant’s behavior and attitude became worse. The CO stated that a member’s discharge “can be effected in as little as 48 hours depending on the circumstances.” When the CO told the applicant that he could submit a statement objecting to his discharge, the applicant declined and said

he would let his EEO complaint “take care of it.” After that, the Sector Chief of Logistics called and told him that the applicant complained that he had not been counseled about his pending discharge properly, so the CO did so again.

Statement of the Sector Chief of Logistics

CDR T, Chief of Logistics for the Sector, told the EEO investigator that 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”

Statement of the Command Master Chief

The Command Master Chief (CMC) denied having threatened the applicant about his intent to file an EEO complaint. He also denied having accused the applicant of beating his wife. The CMC stated that the applicant sought his counsel on numerous occasions and that he advises anyone who makes allegations about another member that “they need to be prepared to substantiate those allegations.” He admitted that he once spoke to the applicant “in a less than favorable manner” for which he later apologized. He stated that he remembers the applicant once asked to speak with the Sector Chief and she declined, but he did not know her reasons for declining.

Statement of MK3 B

MK3 B stated that he had observed the applicant and MKC X discussing religion multiple times and that he had observed some conversations that “appeared to be getting out of hand” but the two of them “were getting out of hand together.” He further stated, “I cannot state that I feel [the applicant] was discriminated against because of his religion based on the fact that we have a diverse environment. However, I do feel that the command had made a decision to discharge [him] regardless of the circumstances.” MK3 B also repeated the statement he had given the applicant about the events of March 20, 2007.

Statement of EM1 X

EM1 X stated that he reported for duty on the XXXXX in March 2007 and became the applicant’s “immediate supervisor.” EM1 X stated that he never observed MKC X harassing or

coercing the applicant about his religious beliefs. In addition, the applicant never told EM1 X that he was being subjected to a hostile work environment, and he never saw the applicant having religious discussions with other crewmembers.

On April 2, 2007, when MKC X was introducing EM1 X to the crew, including the applicant, the applicant did not acknowledge MKC X and started walking away. The applicant was “totally disrespectful” to MKC X even though MKC X had not provoked such behavior.

Regarding the events of April 7, 2007, EM1 X stated that he called the applicant the day before and informed him that he was to report for duty at 0800 the next day. The applicant told him “it would be no problem.” However, the applicant did not show up on time the next day. EM1 X called the applicant at 0900 and left him a message to call back or to call MKC X or the cutter. Later that day, MKC X told EM1 X that the applicant had not reported until 1130 and asked him if the applicant had left him any voicemail messages. EM1 X told MKC X that he had received no voice mail messages from the applicant, but he did find one text message the applicant sent at 0905 stating that the applicant was attending anger management counseling and a second text message sent at 1120 stating that the applicant was on his way back to the cutter. On April 9, 2007, the applicant told EM1 X that he had left numerous voice mail messages for him, MKC X, and the XO, but EM1 X “did not have any voice mails or missed calls from [the applicant].”

Statement of ENS A

ENS A, who worked aboard the XXXXX, stated that up until he left the cutter in February 2007, the applicant had good relationships with MKC X and the CO. The applicant often discussed his problems with MKC X, who went out of his way to help the applicant. ENS A stated that he does not believe that MKC X ever tried to convert the applicant to Islam. However, the applicant would

read his Bible and then would engage others in religious discussion based on what he had read. I am aware that [MKC X] is Muslim, and he would respond to [the applicant] during these discussions. However, I never witnessed any conflict. In my observation, it was a discussion involving clarification of each other’s beliefs. ... At no point did I witness [MKC X] attempt to force [the applicant] to change his religious beliefs or adopt a different religion. What I observed was a discussion initiated by [the applicant] between shipmates.

Statement of EM2 F

EM2 F stated that he worked with the applicant intermittently from February to May 2007. He never saw MKC X try to harass or coerce the applicant into adopting alternative religious beliefs. Two or three times, he saw confrontations between MKC X and the applicant when the applicant would respond to an order from MKC X by saying words to the effect of, “okay, no problem, I’ll get to it when I can.” EM2 F stated that at some point the working environment became hostile because MKC X tried to keep tabs on the applicant, which was odd because the applicant was “a solid performer and in my opinion made every attempt to follow rules.” EM2 F further stated that when the applicant was having “family legal issues,” MKC X

was making a more than the required attempt to help rectify the situation in a compassionate manner. After some time, I perceived that the working relationship was no longer amicable or trusting. [The applicant] seemed to follow the rules, however, he seemed to be picked on. Minor infractions of rules and regulations seemed to be highlighted by [MKC X]. [MKC X] tried to remain on an even keel; however, in my view it was not successful. By the middle of March or April, the work environment turned into one that was [not] good for either [the applicant or MKC X]. In my view, any fault was shared between [them] which makes it all that much more disappointing because both were competent and diligent coastguardsmen.

Statement of FN O

FN O stated that he could recall one incident about a religious discussion between MKC X and the applicant. He awoke at 0200 and heard them

engage in a somewhat hostile conversation. I walked in during the middle of the conversation but did not join in. [They] have similar personalities and would at times go back and forth regarding their differing opinions. I never observed doors being slammed in [the applicant's] face or [him] being spoken to in a manner that was less favorable than the rest of the crew by a superior officer. [MKC X] was higher ranked and in my observation kept his respect for the most part.

At times, [the applicant] appeared to be somewhat of an outcast on the boat. In my opinion, this was due to the fact that [the applicant] stood up for what he believed. Even though [the applicant] was not my immediate supervisor, many times he would mentor crewmembers and put in more effort than other supervisors in an effort to be helpful. [The applicant] was always on top of his work and I felt he was a good person.

Rebuttal of the Applicant

After reading the statements gathered for the ROI, the applicant submitted a letter to the investigator. He denied ever having initiated a conversation about religion with the MKC X. Instead, he alleged that MKC X initiated such conversations when he saw the applicant reading his bible on the mess deck. MKC X debated his religious beliefs and put the applicant on the defensive. He alleged that the only crewmate he ever willingly discussed religion with was FN G. The applicant denied the allegation that he had been counseled numerous times and noted that there was no documentation "for these many alleged counseling occasions." The applicant denied having used his cell phone more than other crewmates or having lost eligibility for his upcoming advancement due to the arrest. He argued that MKC X's claim that he was not sent back to Xxxx for counseling because of his violations of the no-contact order was false because he was not charged with violating the no-contact orders until February 28, 2007, a few days after the proposed dates for the counseling.

The applicant alleged that he had been singled out to report for duty on April 7, 2007, and that the Officer of the Day told him that only he, MKC X, EM1 X, and the CO had come to work that day, rather than the entire engineering department, as he had been told. The applicant alleged that he did not have time to report to the cutter before going to his counseling session. He alleged that at about 0850 he received a message from EM1 X saying that the report time had been postponed to 0900, which was when his counseling session commenced.

The applicant denied that the police had been to his house six times. He stated that they had been to his house "about three times" and they were "domestic disturbance calls initiated by

my ex-wife not domestic violence.” The applicant also stated that each of his transfers had been for usual reasons, such as advancement or end of tour, not because of conflicts with crewmates, as MKC X had alleged.

With regard to the XO’s affidavit, the applicant alleged that he first complained about MKC X’s treatment of him in September 2006, when he met with MKC X, EM1 A, and the XO on the bridge. The applicant denied ever having asked the XO about a bible verse. The applicant alleged that the command maintained the no-contact order against him even though his EAP counselor “had already made several recommendations to them to drop the no-contact order.” In addition, he alleged that the XO’s claim that he never tried to contact anyone but EM1 X on April 7, 2007, was false, because he tried to call MKC X, who “never answered his phone.” The applicant also denied the XO’s allegation that the CO was present in his office when the applicant left work to go to sick call on March 20, 2007, or that the XO arrived at 0705. The applicant also alleged that the XO had exaggerated his alleged past disciplinary problems.

With regard to the CO’s affidavit, the applicant alleged that the CO did not warn him to be prepared to back up his allegations and instead warned him to be prepared for “whatever came my way” as a direct threat of reprisal. He alleged that the Command Master Chief made the same sort of threats. In addition, he alleged that the CO never investigated his discrimination complaint.

The applicant claimed that only two counseling sessions were available each week on Thursdays and Saturdays, and that the command knew he was attending them on Saturday mornings.

Regarding his discharge, the applicant denied ever having been told by the CO that he could submit a statement and he denied ever having refused to submit a statement. He alleged that between April 17 and 19, 2007, when he was trying to write his statement rebutting the proposed discharge, the Sector Chief of Logistics sent people in her chain of command sometimes three times a day to try to get the statement from him. He alleged that she initiated his discharge within 48 hours instead of giving him the three days the CO had told him he would have to submit his statement. He alleged that his rebuttal statement was not properly considered because by the time he turned it in, the decision to discharge him had already been made.

VIEWS OF THE COAST GUARD

On January 12, 2010, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the requested relief.

The JAG argued that the ROI “fails to provide evidence of error or injustice [with respect to] applicant’s RE code designation. The Coast Guard did not abuse its discretion/commit error or an injustice when recommending the applicant’s discharge and RE-4 code designation.

The JAG also adopted 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 dis-

charged 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 noted that although the applicant claimed that he was subject to a hostile work environment and retaliation for his discrimination complaint, he did not submit the agency's final action on his complaint. The PSC stated that the record lacks evidence supporting the applicant's request for a better reenlistment code.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 8, 2010, the applicant submitted his response to the views of the Coast Guard. He alleged that the Coast Guard's reasoning is nonsensical, biased, and arbitrary. He repeated his allegations that the Board's original decision in his case distorted the facts, failed to focus on the Coast Guard's "misleading behaviors," and contained many errors. He alleged that "it is not the board's job to analyze the distinct and obvious black and white facts of the case then apply their own stipulations as to what protocol, regulation, statute or law is right and wrong," as the Board did in reaching the original decision. He alleged that the board's decision not to hold a hearing resulted in it prematurely disposing of his case and issuing a decision impregnated with biased judgments and an arbitrary outcome, which was not "based upon the evolving standards of decency." Therefore, he asked for a hearing because of the complexity of his case and because written statements allow for misunderstanding and misinterpretation and do not allow for questioning that would lead to greater understanding.

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 overcome 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.³ The Board notes the applicant's strong desire for a hearing but believes that the numerous written statements from the applicant already in the record explain his point of view on the issues in this case.

3. The applicant alleged that his RE-4 reenlistment code should be upgraded because his command railroaded his discharge in reprisal for his discrimination complaint against his supervisor, MKC X, 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 OCR and for filing his complaint. The applicant also asked the Board to correct his pay grade. He alleged that his reduction in grade at NJP and failure to advance as scheduled were also reprisal. 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.⁴ Absent

³ 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).

⁴ 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)).

evidence to the contrary, the Board presumes that Coast Guard officials have carried out their duties “correctly, lawfully, and in good faith.”⁵

4. The applicant’s quick discharge was based on documentation of repeated misconduct from January through April 2007, including two NJPs for misconduct and several Page 7s alleging continuing disrespect and failure to follow the chain of command. If the applicant proves by a preponderance of the evidence that the negative documents in his record were erroneous and unjust and a result of religious discrimination or reprisal rather than of actual misconduct, he would be entitled to an upgraded reenlistment code and pay grade. However, the Board finds insufficient evidence in the record to conclude that he was ever discriminated against or harassed because of his religion. There is evidence that the applicant engaged in discussions of a religious nature with MKC X, and there is evidence that many of their conversations were acrimonious. However, there is little evidence that their acrimonious conversations were about religion. In fact, the record indicates that their conversations about religion stopped when the acrimony between them began. The Board finds that the preponderance of the evidence in the record, such as the affidavits in the ROI, shows that the applicant himself voluntarily initiated numerous conversations about religious beliefs with his supervisor, MKC X, and other crewmembers and that these conversations were neither coerced nor coercive.

5. The applicant’s allegations of reprisal also appear meritless. Although he alleged that his NJP on March 8, 2007, was in reprisal for his discrimination complaint, the timing of the applicant’s first contact with the OCR on March 1, 2007, suggests that his complaint against MKC X was itself retaliation because MKC X had charged the applicant with violating the military no-contact orders just two days earlier, on February 27, 2007. The applicant’s varying allegations that the CO, XO, MKC X, and/or the EAP counselor led him to believe that the orders were no longer in effect in January and February 2007 are not credible. Therefore, the Board finds that both the NJP dated March 8, 2007, and the applicant’s placement on probation were the natural results of his repeated violations of the military no-contact orders and were not retaliatory.

6. 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. By his own admission, he left at 0705 without making any effort to call his superiors or the OOD and told only a fellow MK3 and an FN where he was going. The CO found the applicant’s decision to leave his place of duty within five minutes of when he was supposed to report without making an effort to speak to his superiors justified the Page 7. The Board is not persuaded that the CO erred in this regard.

(b) Regarding the Page 7 dated April 6, 2007, the applicant has not submitted any evidence to support his allegation that he did not behave toward MKC X in the disrespectful

⁵ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

ways described therein on April 2, 2007. The Board notes that EM1 X, who had just reported aboard the cutter, stated that he had never before seen a member show so much disrespect as the applicant showed to MKC X.

(c) Regarding the Page 7 dated April 9, 2007, the applicant alleged that the CO wrongfully ordered him aboard the cutter. He alleged that he was under orders not to perform “boat or sea duty” or to climb ladders. On that date, however, the applicant’s most recent medical record, dated March 21, 2007, prohibited him from performing “boat or sea duty” for two weeks. The medical order to avoid ladders was not issued until April 10, 2007, the day after the applicant received the Page 7 for disobeying a direct order from the CO to board the cutter, and according to MKC X, no ladder or stair climbing was required to meet the CO in his stateroom. Moreover, the CO stated that he had checked with the doctor who issued the “no sea duty” chit and that the doctor stated that the chit did not prohibit the applicant from boarding a docked cutter.

(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 prove that he did not commit the offenses for which he was punished at mast. The applicant’s Sprint bill shows that he was charged minutes for contacting a number, which was presumably EM1 X’s cell phone number, on the evening of April 6th and the morning of April 7th. However, EM1 X, who had been assigned to the cutter for about a week at that point, denied having received any voice mail messages from the applicant about having to attend anger management training and found only two text messages from the applicant. The first of the text messages was sent at 0905 on April 7th, which was more than an hour after the applicant was supposed to report for duty. The investigator presumably had access to the applicant’s cell phone log and the messages EM1 X received from him and yet concluded that the applicant had disobeyed an order and been AWOL. Moreover, the preponderance of the evidence indicates that the applicant could have reported for duty before attending the anger management training or could have attended a different session. Although the applicant claimed that he tried to call MKC X that morning, both MKC X and EM1 X denied receiving phone calls from him and both apparently tried to call the applicant. However, the Sprint bill indicates that he did not accept an incoming call until the afternoon of April 7th even though he made many outgoing calls that morning both before and after the training. In light of the telephone bill and all of the statements in the investigations, 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 disobeyed an order and been AWOL.

(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.

7. The applicant alleged that all of the negative documents in his record constituted a false paper trail that his command fabricated to justify his discharge in reprisal for his discrimination and retaliation complaints. However, the applicant has not proved that the documentation of misconduct is false or misleading. The applicant's record reveals that following his arrest in December 2006, he repeatedly violated orders and showed disrespect. His pattern of misconduct and "shading of the truth" documented by the command constituted a valid and ample basis for his discharge. 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 and by the NJP dated April 16, 2007, 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 Board is not persuaded that either the documentation of misconduct in the applicant's record or the CO's decision to initiate his discharge was a matter of reprisal.

8. The applicant has made many allegations of discrimination and reprisal and repeated them several times for the EOA, the DRB, and this Board, but he has not submitted substantial evidence to prove that his allegations of discrimination and reprisal are valid. The preponderance of the evidence in the record shows that the Page 7s and NJPs, which he claims resulted from discrimination and reprisal, were justified by misconduct he committed.

9. 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 mandate a particular number of days for this "opportunity." The record shows that the applicant was allowed to consult an attorney but apparently did not have a chance to have the attorney 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, indicates that the applicant should have had five days. Despite this information, the CO prepared his request for discharge and the Sector Chief prepared her endorsement on April 17, 2007, and they apparently forwarded the discharge package to the Personnel Command on April 19, 2007—only two days after the applicant was told that he would have three days to submit his statement. Therefore, it appears that the applicant may have been misled about how long his "opportunity" to submit his discharge rebuttal would be.

10. Although the applicant dated his rebuttal statement April 19, 2007, it appears that the Personnel Command may not have received it nor reviewed it before issuing the discharge orders on April 20, 2007. 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. Assuming that the applicant's rebuttal statement was not timely considered prior to the issuance of his discharge orders in accordance with Article 12.B.18.e. of the Personnel Manual, the Board still is not persuaded that his discharge was wrong. Every member of the applicant's chain of command from his immediate supervisor up to the Sector Chief of Logistics had found his behavior to be unacceptable, and numerous incidents of misconduct, including ongoing disrespect, were documented in his record. Furthermore, the substance of the applicant's rebuttal statement is insufficient to rebut his CO's allegations of misconduct. Therefore, it is extremely unlikely that the applicant's rebuttal statement, timely considered, would have prevented his discharge for misconduct, and under the Separation Program Designator Handbook, the only reenlistment code authorized for members discharged for misconduct is an RE-4. Moreover, the Board finds that any negative effect the procedural error could theoretically have had on the applicant's character of discharge and narrative reason for discharge has been corrected by the Commandant through the DRB.

11. Under the Separation Program Designator Handbook, someone discharged for "miscellaneous/general reasons" may receive either an RE-1 or RE-4 reenlistment code. In light of the applicant's history of misconduct and disrespect toward his chain of command from January through April 2007, the Board finds that the applicant has not proved by a preponderance of the evidence that the Coast Guard committed an error or injustice⁶ in assigning him the RE-4 code so that he may not reenlist.

12. Accordingly, the applicant's requests for relief should be denied because he has not proved by a preponderance of the evidence that his RE-4 reenlistment code or his reduction in pay grade at mast were or are erroneous or unjust.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

⁶ For the purposes of the BCMRs, "[i]njustice", when not also 'error', is treatment by the military authorities, that shocks the sense of justice, but is not technically illegal." *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976). The Board has authority to determine whether an injustice exists on a "case-by-case basis." Docket No. 2002-040 (DOT BCMR, Decision of the Deputy General Counsel, Dec. 4, 2002).

ORDER

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

Randall J. Kaplan

Erin McMunigal

Thomas H. Van Horn