

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2012-003

**XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX**

FINAL DECISION

This proceeding was conducted under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case upon receiving the completed application on October 13, 2011, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated July 12, 2012, 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 overturn the results of an Administrative Separation Board (ASB) convened on October 18, 2007, and to reinstate him on active duty or, as alternative relief, to upgrade his discharge from general to honorable. The applicant alleged that he is entitled to reinstatement because his discharge was erroneous because he was denied due process because (1) before the ASB convened, he was not provided sufficient notice of the basis for his proposed separation to prepare a defense and (2) the ASB reconvened improperly without him or his counsel being present. The applicant summarized the Coast Guard's actions against him as follows:

In short, the Command ran afoul of the proper and legally required notification requirements to separate a member from the Coast Guard. First, they initiate [an ASB] for "misconduct". Then, they place [the applicant] on probation. Next, they draft a negative page 7 stating an allegation of drug incidents. Then, they proceed to hold [an ASB] on allegations of adultery. Finally, they hold a supplemental [ASB] without [the applicant] or his attorney present. The entire course of events completely disregards the established regulatory procedure set forth by various Commandant Instructions.

The applicant alleged that the only basis for discharge he was provided notice of in writing was drug abuse. When the ASB decided that he could not be discharged based on allegations of drug abuse, the inquiry should have stopped, and if the ASB was to be reconvened to consider his discharge on other grounds, he should have received official, written notice of the other grounds. However, after deciding that he could not be discharged based on drug abuse, the ASB

simply continued its inquiry and recommended his discharge first for adultery and then for assault and battery even though he was never notified of these other grounds for discharge.

The applicant alleged that the Coast Guard's failure to give him adequate notice of the basis for his discharge violated his rights under the Personnel Manual and the Constitution and deprived him of the chance to investigate the charges, gather evidence, and prepare his defense. His attorney attempted to address the assault and battery allegations when they arose during the hearing, but the lack of notification prevented him from investigating and presenting evidence in his defense.

The applicant argued that he was entitled to specific, written notice of the basis for his discharge, not just constructive notice, citing *Crane v. Secretary of the Army*, 92 F. Supp. 2d 155, 165 (W.D.N.Y. 2000). He argued that by awarding him a stigmatizing general discharge for spousal abuse without written notice and an opportunity to respond, the Coast Guard denied him not only his rights under the Personnel Manual and ASB Manual but his rights under the Constitution, citing *Casey v. United States*, 8 Cl. Ct. 234, 239 (1985).

The applicant alleged that the drug and spousal abuse charges were laid against him by his then wife in an email to his command in the midst of a bitter divorce and child-custody fight. However, once joint custody was awarded, he alleged, his ex-wife withdrew her allegations. He alleged that she fabricated her allegations to gain custody of their children. He alleged that the evidence shows that she was the aggressor in their confrontations and that she admitted that he never hit her. He alleged that even though his wife got an Emergency Protective Order against him, she continued to text him repeatedly, which shows that she was not afraid of him. He also alleged that there is no evidence supporting the ASB's finding that he used excessive corporal punishment on his children or that he made a false official statement, which was another surprise basis for discharge the ASB relied on. In addition, contrary to the ASB's findings, he was not involved in a "prohibited relationship" as defined in Article 8.H.2.g. of the Personnel Manual. However, he was unable to adequately defend himself against these charges before the ASB because he was never advised of any potential grounds for his discharge except drug abuse so he did not know that he was going to have to defend himself against such allegations.

The applicant alleged that when the ASB originally relied on an old version of the Personnel Manual, and when it reconvened to consider the case under the current version, he had a right to be present. He argued that the change in the regulations applied constituted new evidence and that the regulations allow him to be present during the proceedings, except when the ASB meets in closed session, and to make a closing statement after the presentation of the evidence. The applicant argued that when the ASB reconvened to redeliberate his case under new regulations, he "should have had an opportunity to present any evidence or argument concerning the effect of considering his discharge under Change 41 of the PERSMAN." Because he was not afforded this right, the findings, opinions, and recommendations of the ASB should be invalidated.

SUMMARY OF THE EVIDENCE

The applicant enlisted in 1997. His personnel data record (PDR) contains many accolades and awards, including a Distinguished Flying Cross and a Coast Guard Air Medal. However, it also includes several Page 7s showing that the applicant was also counseled about his poor conduct on various occasions:

- On June 10, 2005, the applicant was placed on six months' probation for repeatedly failing to follow his supervisors' orders, inappropriate behavior, setting a poor example, lack of responsibility, not working well with others, lack of professionalism, and disrespectful communications with superiors.
- On January 4, 2006, the applicant was counseled about his inability to balance his work and his personal life, which "placed a great burden on your peers as they have to assume your duties."
- On July 17, 2006, the applicant, who was married, was counseled about having a "prohibited romantic relationship" with a married, female petty officer and committing "lewd and lascivious acts" as a male stripper. The applicant was also counseled about attending Coast Guard events with women other than his wife and engaging in inappropriate public displays of affection. He was placed "on probation for misconduct and sexual perversion" for one year and warned that further misconduct could result in a General Discharge.
- On September 18, 2006, the applicant was counseled about driving with his daughter standing on the passenger seat with her head sticking up out of the sunroof. His base driving privileges were suspended for 60 days.
- In 2006, CGIS conducted an investigation into allegations that the applicant used and possessed illegal drugs and had assaulted his wife and children. The investigator gathered police reports and statements from family members, family friends, and Coast Guard members. Although the applicant denied the allegations, the investigation identified "several witnesses that stated he has used illegal drugs and also physically abused his wife and/or children." The investigator also received allegations of adultery, and noted that the applicant admitted that he had sneaked his wife into Coast Guard housing and lied to law enforcement about her presence when they arrived to investigate a disturbance. No disciplinary action was taken against the applicant, but his security clearance was suspended and he was reassigned to duties not involving classified information.
- On January 17, 2007, the applicant was counseled about "talking back and arguing" with his supervisor in front of subordinates, displaying an apathetic attitude, wearing inappropriate clothing in training, drinking alcohol to excess, and claiming he would lie about whether he had drunk alcohol if he was asked to take the watch within 12 hours of drinking alcohol.

In March 2007, the applicant's divorce became final. On April 23, 2007, the applicant's commanding officer (CO) notified him that he was initiating action to separate the applicant for misconduct under Article 12.B.18. of the Personnel Manual and that he could receive an other than honorable (OTH), general, or honorable discharge at the discretion of Commander, CGPC. The CO advised him of his right to submit a statement on his own behalf and to be represented by counsel and appear before an ASB. On the same day, the CO designated the senior member of the ASB and instructed him to convene the ASB by May 8, 2007. On April 24, 2007, the senior member advised the applicant that the ASB would

gather evidence, both in your favor and adverse to you, as necessary for the separation authority to make sound decisions regarding whether to separate you from the Coast Guard, and if so, how to characterize your service. I understand that you have chosen to be represented at the board by [counsel's name]. Note that you, or your representative, must assert your rights in a timely manner. If you believe that the Board or any person involved is not properly observing your rights or is otherwise not acting in accordance with Coast Guard policy, you should notify me, or [the CO] immediately so that the situation can be corrected.

The senior member directed the Recorder to provide the applicant with a "list of any reasons for discharge from [the Personnel Manual] that the Recorder believes are merited by the evidence"; a "summary of the following information derived from the member's official personnel and health records," including military offenses, disciplinary action, personality disorders, civil convictions, Page 7s, and performance marks; documents to be presented in evidence at the hearing; extracts of pertinent Coast Guard regulations; and a list of witnesses with a brief summary of the expected testimony.

The Recorder provided the applicant with the exhibits he intended to submit and a list of 22 witnesses who were to testify regarding "drug abuse, discreditable involvement with civil authorities, sexual perversion, and abuse of family member." The exhibits included extracts of the Personnel Manual, photographs of bruises on the applicant's wife and daughter and of the applicant performing at a bachelorette party, the applicant's PDR, a CGIS report of an investigation into the applicant's alleged drug abuse, and Family Advocacy Program records. The list of witnesses included the name of a married, female petty officer with whom the applicant was allegedly having an affair.

The ASB was not immediately initiated. Instead, on May 16, 2007, the CO placed the applicant on a 9-month probationary period. The Page 7 documenting the start of the period states that the reasons for the probation were (1) multiple occasions of illegal drug use; (2) multiple occasions of discreditable involvement with civil authorities; (3) multiple occasions of sexual perversion; and (4) multiple occasions of abuse of a family member. The Page 7 advised the applicant that if he failed to make a conscientious effort to overcome his deficiencies in conduct during the probationary period or if he violated the conditions of probation at any time, the CO could initiate his separation prior to the end of the period.

On May 8, 2007, the Command Security Officer recommended permanent termination of the applicant's security clearance. He noted that the CGIS investigation had revealed evidence of drug use; domestic abuse; lying to local police; sexual perversion, including performance as a male exotic dancer and "several extra-marital affairs, including two with other active duty mem-

bers and another with the wife of another member”; and discreditable involvement with civil authorities, including violations of restraining orders and lying to police during an investigation.

On July 9, 2007, the applicant’s CO prepared another Page 7 stating that a CGIS report had revealed that the applicant had illegally used marijuana, ecstasy, and cocaine on numerous occasions while on active duty and had even invited his cocaine supplier to attend a party in Coast Guard housing in 2005. Based on the CGIS report, the CO determined that the applicant was involved in a “drug incident” and would be processed for separation. The CGIS report contains statements from a few people claiming that the applicant had used marijuana, cocaine, and/or ecstasy.

On August 23, 2007, the CO reissued the memorandum to the senior member of the ASB and instructed him to convene the ASB on 18 and 19 October, 2007. On August 24, 2007, the senior member reissued his April 23, 2007, letter to the applicant about the ASB.

Before the ASB first convened in October 2007, however, the applicant’s ex-wife and her family and friends wrote statements refusing to testify against the applicant and withdrawing all prior statements. In early October, the Recorder provided the applicant’s counsel with an amended list of 30 witnesses and various exhibits. In addition to those provided previously, the exhibits included more recent Page 7s, documentation of the loss of the applicant’s security clearance, and local law enforcement records of various interactions with the applicant and his ex-wife. The witness list included the ex-wife’s attorney.

After convening on October 18 and 19, 2007, the ASB issued a report on November 21, 2007, with thirty findings of fact about incidents of misconduct and ten opinions alleging that the applicant had exposed himself and engaged in indecent acts at a bachelorette party, engaged in extramarital public displays of affection at official Coast Guard events, engaged in an adulterous relationship with another married petty officer, emotionally and physically abused his spouse, “exhibited behaviors consistent with that of an abuser” in a “cycle of violence,” and been discreditably involved with local civil authorities six times. However, the ASB found insufficient evidence of illegal drug use or child abuse. The record also showed that the applicant’s ex-wife suffers from bipolar disorder and had admitted to using illegal drugs and cutting herself to feel better. The ASB recommended that the applicant be discharged for misconduct due to his discreditable involvement with civil authorities, sexual perversion, involvement in a prohibited relationship, and abuse of a family member. The ASB recommended that the applicant receive a General Discharge, instead of an OTH Discharge, based on his receipt of a Coast Guard Air Medal and Distinguished Flying Cross.

The applicant’s counsel submitted a response to the ASB report in which he complained that he had not received notice of all the potential bases for discharge.

On February 15, 2008, Commander, CGPC issued a memorandum noting that when the applicant’s CO originally initiated the ASB in April 2007, Change 39 of Article 12.B. of the Personnel Manual was still in effect but that by the time the ASB convened in October 2007, Article 12.B. had been revised pursuant to Change 41. He ordered the ASB to “reconvene to reconsider

their findings of facts, opinions and recommendations in accordance with current Coast Guard policy.”

On May 15 and 16, 2008, the ASB reconvened in closed session and reconsidered their findings of facts, opinions, and recommendations under Change 41 of the Personnel Manual. In a report dated May 17, 2008, the ASB noted the evidence of poor conduct and performance probationary periods documented on Page 7s in the applicant’s record and also found that the exhibits and testimony supported the following findings of fact:

- The applicant had previously admitted to slapping his wife sometime prior to 2005.
- During a loud confrontation with his wife in August 2005, the applicant forced her to the ground and restrained her legs and her arms behind her back with plastic zip ties, causing the neighbors to call the sheriff when they heard the confrontation and the applicant’s children told them what had happened. (The applicant told police he restrained her because she was hitting her head against the wall and threatening to kill herself. She told them he forced her to the ground during an argument and repeatedly threatened to have her committed.)
- In October 2005, the applicant’s wife went to the sheriff with a report of domestic violence, drug abuse, and child abuse and showed them bruises on her arm and lower left back from a physical confrontation with the applicant.
- In October 2005, the applicant’s therapist terminated her service with the applicant because of his “explosive anger, deceptions, and attempts to discredit his wife” and reported that the family was at risk for domestic violence.
- In October 2005, the applicant’s wife was banned from Coast Guard housing due to admitted drug use on the premises.
- In January 2006, the applicant performed as a male stripper at a bachelorette party, and photographs showing his indecent exposure and implying “physical contact of a suggestive nature with the party attendees” were posted on the internet.
- In June 2006, while exchanging their three children in a public parking lot, the applicant slammed his wife’s car door on her hand. He was arrested and spent four days in jail.
- In June 2006, a restraining order was issued against the applicant to stay away from his wife and children.
- In July 2006, the applicant sneaked his wife into Coast Guard housing and became involved in a physical confrontation with her that resulted in her receiving a black eye. When the neighbors heard the confrontation and called the police, the applicant hid his wife and told the police his wife was not present.
- In 2006, the applicant threatened his wife’s counsel saying, “You’d better watch your back.”
- The married, female petty officer with whom the applicant was having an affair called his wife and left her a voicemail message in which she “taunted” her about their affair.
- In August 2006, the police investigated the applicant in response to allegations of child abuse after he used “corporal punishment on one of the children that left visible welts and caused the child to limp for more than 24 hours.” The police photographed the bruising and an Emergency Protective Order was issued. (The applicant told police that he had “swatted” their five year old because she had refused to say “please” when reminding her

mother to put on her seatbelt (which was her “job”) even though he had asked her to do so three times.)

- In September 2006, when the applicant was seen driving with his daughter standing unrestrained on the passenger seat, he was driving his vehicle in excess of 30 miles per hour; her head, chest, and arms were outside the sunroof; and he drove the vehicle onto the base in this way.
- In a confrontation with his wife in October 2006, the applicant wrestled her cell phone from her and threw it against a wall, breaking it. His wife locked herself in the bathroom, and the applicant called a crisis hotline saying she was going to hurt herself. His wife received a black eye, which the applicant claimed she gave to herself with a hairbrush. His wife claimed he gave her the black eye by hitting her and then told her the police would never believe he hit her once they saw all of the scars on her arms.
- In October 2006, the sheriff’s department referred the applicant’s case to the State’s Child Welfare Services after finding that the applicant had inflicted “inappropriate corporal punishment” on his child. Although an arrest warrant was issued for the applicant, he was not arrested because the arresting officer was severely injured by a drunk driver that evening and the statute of limitations expired on the warrant.
- In November 2006, a representative of the Family Advocacy Program terminated services for the applicant and declared him a “treatment failure for not demonstrating a significant change in behavior.”
- In December 2006, his security clearance was suspended, and he was reassigned.
- The applicant’s ex-wife’s counsel testified that she was aware of more than 30 separate incidents of spousal abuse. However, the ex-wife and her family had refused to testify because the applicant had told her that she could visit him and their children on the base and take the children to her family in Iowa only if she did not testify against him.
- The applicant’s documented interactions with civil law enforcement numbered six and resulted in one arrest, two restraining orders, a CGIS investigation, and “one arrest avoided by a tragic accident.”

Based on the applicant’s PDR, the other exhibits, and the testimony, the ASB stated as its “opinions” that the applicant had committed assault consummated by battery, indecent exposure, adultery, insubordinate conduct, disobedience to orders, false official statements, reckless endangerment of a child, obstruction of justice, and communication of a threat. However, the ASB stated that there was “insufficient evidence ... to substantiate charges of illegal use of controlled substances or child abuse.”

Based on these findings of fact and opinions, the ASB stated that the applicant should receive an OTH discharge for misconduct due to commission of a serious offense. However, the ASB recommended that he receive a General Discharge because he had received a Coast Guard Air Medal and Distinguished Flying Cross for heroism in search and rescue operation and so special consideration was due in accordance with Article 12.B.2.f.1.f.1. of the Personnel Manual.

On May 27, 2008, the applicant’s counsel submitted a response to the ASB’s report. He alleged that the Coast Guard had failed to properly inform him of the basis or bases for separation prior to the ASB in October 2007 and that the only basis for discharge he had been properly informed of was drug abuse, of which the ASB had found insufficient evidence. He did not

argue that the reconvening of the ASB in closed session in May 2008 violated the applicant's right to be present during the proceedings.

The ASB's report was endorsed by the CO on June 12, 2008. He noted that he could not trust the applicant to maintain the aircraft, survival equipment, or security secrets and that the frequency of problems reported from the AST shop had dropped from weekly to none at all since the applicant had been reassigned.

On April 8, 2009, Commander, Personnel Service Center (PSC)¹ took final action and "substantially approved" the ASB's findings, opinions, and recommendation that the applicant be discharged for "commission of a serious offense." He noted that he had reviewed the report and the applicant's counsel's response to it and found the evidence of spousal abuse "particularly compelling." He alleged that the applicant had not disputed the most egregious of the incidents of spousal abuse. Aside from this "serious offense," Commander, PSC noted that the applicant had been on probation for various performance and conduct issues for most of a three-year period beginning in June 2005 and that there was documentation of adultery, lying to police, "the endangerment and excessive corporal punishment of a child," and credible accusations of drug abuse. However, on April 9, 2009, PSC issued orders for the applicant to receive a General Discharge for a "Pattern of Misconduct" with a GKA separation code.²

On April 28, 2009, the applicant submitted a response to Commander, PSC's final action, disputed his comments, and requested suspension of his discharge. On May 6, 2009, a new Commander, PSC (the previous one had just retired) denied the applicant's request, stating that while he "appreciate[d] the efforts of so many people in providing you strong letters of recommendation, ... I do not find their collective merit to be persuasive or convincing to the extent of justifying reconsideration of the final action decision." The applicant was discharged in accordance with PSC's separation orders on May 7, 2009. He had completed 12 years, 3 months, and 24 days of active duty.

VIEWS OF THE COAST GUARD

On April 4, 2012, the Judge Advocate General (JAG) submitted an advisory opinion in which he recommended that the Board deny relief in this case.

The JAG denied that the applicant was not provided adequate notice of the basis of the discharge proceedings. He argued that the record shows that the applicant received a "litany of documented instances of misconduct" including two probationary periods in which he was counseled in writing about his conduct. The JAG stated that the applicant was advised by his CO on 23 April 2007 that he was initiating his discharge for misconduct and, after his CO decided to give him a second chance, specifically counseled about the misconduct at issue on May 16, 2007, including multiple instances of illegal drug use, discreditable involvement with civil authorities, sexual perversion, and abuse of a family member. Moreover, he was warned that any further misconduct would result in separation proceedings. The JAG stated that after the CO determined

¹ In January 2009, CGPC became the PSC.

² Under the Separation Program Designator Handbook, the separation code for a discharge for "commission of a serious offense" via an ASB is GKQ.

that a drug incident had occurred, he also determined that the applicant had violated his probation and reinitiated the ASB process for a misconduct separation. Therefore, the JAG argued, the applicant “knew or should have known the basis for his separation which was various instances of misconduct. Therefore, any and all allegations of misconduct would be evaluated” by the ASB. The JAG argued that the applicant “should have been prepared to contest any and all instances of misconduct that [were] documented in his record.”

The JAG argued that assuming *arguendo* that the applicant was unaware of the specific instances of misconduct the ASB would consider, his counsel was provided with a detailed list of the Coast Guard’s witnesses and the misconduct they would testify about. The JAG argued that the applicant’s reliance on a sample of a notification provided in Enclosure (1) to the ASB Manual is misplaced and that the sample provided does not extend the notification requirement beyond what is stated in the regulation. The JAG argued that the sample provides a format for providing additional information, if needed, and that in the applicant’s case, there were so many instances of misconduct that “it would [have been] impractical to attempt to list all the information as provided by the sample with respect to the Applicant’s litany of misconduct offenses.”

The JAG stated that an ASB is a fact-finding board and is not limited to reviewing specific evidence but reviews all pertinent information, including anything in a member’s service record and reports of investigations. “Thus, great detail regarding the basis for separation is not a factor because the [ASB’s] duty is to review all information properly presented” and make findings of fact. The ASB “is charged with reviewing all records and information pertaining to the basis for discharge, which in this case is misconduct.” The JAG argued that the applicant therefore knew or should have known that any instances of misconduct were fair game for review and he should have been prepared to refute them. The JAG further argued that the applicant’s reliance on the decision in *Casey* is misleading because the plaintiff in that case was discharged from the Army without any ASB, whereas the applicant received an ASB with proper notification and all due process.

The JAG further argued that an ASB is not a court-martial but “a fact-finding body appointed to investigate a member’s suitability for retention in the service, render findings based on the evidence obtained, and make specific recommendations for use by Coast Guard separation authorities.” An ASB is “concerned with a member’s performance, traits of character, personality disorders, ethical behavior, honor, and other behavior” in evaluating a member’s suitability for retention. An ASB is not punitive but renders a recommendation about an employment decision based on the preponderance of the evidence presented.

The JAG stated that because the original ASB relied on an old version of the Personnel Manual when it convened in October 2007, Commander, CGPC ordered the ASB to “reconvene to reconsider their findings of facts, opinions and recommendations in accordance with Change 41 of the PERSMAN.” The JAG stated that the ASB was *not* reconvened to consider additional evidence, and it reconvened in a closed session for deliberations, which is allowed by the ASB Manual.

The JAG stated that the applicant’s ASB was conducted in substantial compliance with the Personnel Manual and the ASB Manual, and the applicant received all rights and privileges

to which he was entitled. He noted that the applicant had received ample warnings and three probationary periods. The JAG opined that the applicant “is extremely fortunate that his Commanding Officer decided to handle Applicant’s numerous violations of the [UCMJ] administratively, rather than punitively, “which could and most likely would have resulted in multi-year incarceration, fines, and a punitive (BCD/DD) discharge.” The JAG noted that the CO’s finding that the applicant was involved in a drug incident, by itself, could have resulted in a general discharge.

The JAG also adopted the facts and analysis provided by the Personnel Service Center (PSC) in an attached memorandum. The PSC stated that the list of witnesses and evidence provided to the applicant five months before the ASB convened “clearly notified the applicant that the Recorder would be putting on witnesses and introducing evidence about a broad range of the applicant’s misconduct and substandard performance when the Board convened.” PSC noted that the evidence included photographs of the applicant at a bachelorette party and of his wife’s and daughter’s bruises, as well as a report of an investigation by the Coast Guard Investigative Service (CGIS), Family Advocacy Program Records, and the applicant’s entire Personnel Data Record (PDR). PSC stated that the applicant was also advised that under the regulations, the ASB “would be looking into ‘facts related to [the applicant’s] conduct, competency, background, character and attitudes,’ as well as ‘any reasons’ for the applicant’s separation.”

PSC stated that although the ASB had already recommended the applicant’s general discharge for misconduct, the board was reconvened to review the evidence under the new provisions of the Personnel Manual “as an act of fairness, meant to determine whether the recent change in Coast Guard policy could support a more favorable outcome for the applicant.” PSC stated that no new evidence was introduced during the closed session and only the only new information provided was the new policy. PSC noted that the rules allowed Commander, CGPC to return a report to the ASB for reconsideration in closed session. The revised ASB report was sent to the applicant’s counsel, who submitted a rebuttal. Commander, CGPC approved the ASB’s recommendation that the applicant receive a general discharge for commission of a serious offense and later reviewed and denied the applicant’s request for a third probationary period.

PSC argued that the applicant was recommended for separation under both the old and new policies and noted that the applicant did not dispute the fact that he had committed a serious offense. PSC also argued that the applicant’s counsel waived the right to appeal the outcome of the ASB on these issues because he did not raise them at the time, when any perceived shortcomings could have been addressed. PSC argued that this Board should also consider the applicant’s unsuitability for continued military service, given his

numerous counts of spousal abuse, engaging in numerous adulterous affairs including one with another married Coast Guard enlisted member, alleged drug use while on duty as a rescue swimmer (which was uncovered during a CGIS investigation), sexual perversion (male exotic dancing; indecent exposure), lying, etc. This behavior is unbecoming of a Coast Guard Petty Officer and disruptive of good order and discipline at a unit if tolerated.

PSC further noted that the ASB's report is a recommendation only, and the authority for deciding whether a member will be retained rests with Commander, CGPC, who considers the member's entire record of performance, character, honor, suitability, etc.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On April 26, 2012, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to submit a response within thirty days. No response was received.

APPLICABLE REGULATIONS

Personnel Manual

Under Article 12.B. of the Personnel Manual (COMDTINST M1000.6A, Change 41) in effect from June 2007 through 2009, enlisted members could be administratively discharged for many reasons, including misconduct, incompetence, a diagnosed personality disorder, homosexuality, financial irresponsibility, phobias, alcohol abuse, and unsanitary habits. Members with more than eight years of active duty are normally entitled to an ASB before being administratively separated. Under Article 12.B.18.b., Commander, CGPC was authorized to separate a member for misconduct for the following reasons:

- (1) civilian or foreign conviction,
- (2) pattern of misconduct,
- (3) commission of a serious offense,
- (4) drug abuse, and
- (5) fraudulent enlistment.

Article 12.B.18.b.2. states that members may be separated for a "pattern of misconduct" when they have

- a. two or more non-judicial punishments, courts-martial, or civilian convictions or a combination thereof within a 2-year period;
- b. three or more unauthorized absences, each is at least three or more days, within a 2-year period;
- c. six or more unauthorized absences and the total amount is at least six days, within a 2-year period;
- d. a pattern of failure to contribute adequate support to dependents (see Art. 8.M);
- e. a pattern of failure to pay just debts; [or]
- f. a pattern of shirking.

Article 12.B.18.b.3. states, regarding the commission of a serious offense, that it

does not require adjudication by non-judicial or judicial proceedings. An acquittal or finding of not guilty at a judicial proceeding or not holding non-judicial punishment proceeding does not prohibit proceedings under this provision. However, the offense must be established by a preponderance of the evidence. Police reports, CGIS reports of investigation, etc. may be used to make the determination that a member committed a serious offense.

- a. Members may be separated based on commission of a serious military or civilian offense when:
 - (1) The specific circumstances of the offense warrant separation; and

(2) The maximum penalty for the offense or closely related offense under the UCMJ and Manual for Courts-Martial includes a punitive discharge.

Under Change 39 of the Personnel Manual, however, Article 12.B.18.b. authorized Commander, CGPC to separate a member for misconduct for the following reasons:

- (1) civilian or foreign conviction,
- (2) fraudulent enlistment,
- (3) absenteeism,
- (4) drug abuse or involvement in a drug incident,
- (5) discreditable involvement with civil or military authorities,
- (6) sexual perversion, including lewd and lascivious acts, sodomy, indecent exposure, child molestation, "other indecent acts or offenses," and involvement in a prohibited romantic relationship pursuant to Article 8.H.,
- (7) abuse of a family member,
- (8) an established pattern of shirking,
- (9) an established pattern showing dishonorable failure to pay debts,
- (10) an established pattern showing dishonorable failure to support dependents,
- (11) sexual harassment by assault or coercion or a pattern of sexual harassment,
- (12) unreasonable refusal to submit to medical or dental care, and
- (13) refusal to submit to a vaccination ordered by competent authority.

Article 12.B.18.c. of Change 39 states that a CO should provide a probationary period of at least six months "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 ... 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." Change 41 limited the requirement for a probationary period to members accused of "a pattern of failure to contribute adequate support to dependents (see 8.M.), a pattern of failure to pay just debts, or shirking."

Article 12.B.18.b.4.a. of the Personnel Manual (both Change 39 and Change 41) states that "[a]ny member involved in a drug incident or the illegal, wrongful, or improper sale, transfer, manufacture, or introduction onto a military installation of any drug, as defined in Article 20.A.2.k., will be processed for separation from the Coast Guard with no higher than a general discharge."

Article 12.B.31.a. (both Change 39 and Change 41) states that an ASB is "a fact-finding body appointed to render findings based on the facts obtained and recommend either retention in the Service or discharge. If recommending a discharge, the board also recommends a reason for discharge and the type of discharge certificate to be issued."

Article 12.B.31.d. (both Change 39 and Change 41) states that Commander, CGPC

is the discharge authority in all cases of administrative separations. Send the original and one copy of the administrative discharge board report to Commander, (CGPC-adm-2) through the chain of command for endorsement. When Commander, (CGPC-c) receives the record of administrative discharge proceedings, he or she will review the board record and approve or disapprove the board's findings of fact, opinions, and recommendations in whole or in part. Commander, (CGPC-c) may disapprove findings and opinions if they were made based on incomplete evidence, contrary to the evidence the board considered or to law or regulation, a misunderstanding or misapplication of written policy, or otherwise clearly in error. If Commander, (CGPC-c) disapproves the findings of fact, opinions, or recommendations; he or she may:

1. Amend, expand, or modify findings of fact and opinions or take final action other than that recommended without returning the record, if evidence of record supports that action and the final action states the specific reasons; or

2. Return the record to the board for further consideration with a statement of the specific reasons to disapprove the findings of fact, opinions, or recommendations.

Article 12.B.31.e. (both Change 39 and Change 41) states that Commander, CGPC may take any one of these final actions:

1. Approve the board's findings of fact, opinions, and recommendations and direct their execution.
2. Approve the board's recommendation for discharge, but change its type either to one more favorable than recommended if the circumstances warrant it or to one less favorable than recommended based on a determination the type of discharge recommended does not fall within Article 12.B.2. guidelines.
3. Approve the board's recommendation for discharge but change the basis for discharge when the record indicates such action would be appropriate, except Commander (CGPC-c) will not designate misconduct if the board has recommended discharge for unsuitability.
4. Approve a discharge, but suspend its execution for a specified probationary period. See Article 12.B.34.
5. Disapprove the recommendation for discharge and retain the member in the Service.
6. Disapprove the recommendation for retention and direct discharge under honorable conditions with an honorable or general discharge certificate as warranted.
7. Disapprove the findings, opinions, and recommendations and refer the case to a new board based on a finding of legal prejudice to the substantial rights of the respondent.

ASB Manual

The ASB Manual, COMDTINST M1910.2, provides the procedures for holding ASBs. Chapter 1.A.1. states that an ASB "is a fact-finding body appointed to investigate a member's suitability for retention in the service, render findings based on the evidence obtained, and make specific recommendations for use by Coast Guard separation authorities. The determinations of an ASB are advisory only, not binding upon the Coast Guard." Chapter 1.B.1. states the following:

Coast Guard discharge and retention decisions are driven by the needs of the Coast Guard overall, not by the needs of individual members or individual commands. Members do not have a right to remain on active duty in the Coast Guard, regardless of the length of their service or the hardship their separation might cause. Nevertheless, a member's military career often represents a considerable investment, both by the member and by the service. In addition, when a member is discharged, the Coast Guard's characterization of that service – as honorable, general under honorable conditions, or other than honorable – and occasionally other determinations surrounding that

decision, can have a profound impact on the member's future. Sound personnel management, as well as fairness, dictate that the decision to separate such a member be carefully considered, and that the member be provided an opportunity to be heard and to present and challenge evidence to be considered by the separation authority.

Chapter 1.C. states the following regarding an ASB's scope of inquiry:

1. An ASB documents the facts relating to the Respondent's conduct, competency, background, character and attitudes, so that the separation authority may properly determine whether the member should be retained or separated, the reason for separation, and the proper characterization of the member's service that should be reflected in any separation documents. In its deliberations regarding separation, the Board's foremost consideration is whether separation or retention is in the best interest of the Coast Guard. Available statements from superiors and peers, and available records bearing upon Respondent's suitability for retention, are among the types of evidence to be considered by the Board.
2. The Board shall inquire into, assemble evidence, and provide findings of fact, opinions, and recommendations regarding all matters relevant to the decisions before the separation authority; including:
 - a. Whether the Respondent should be retained or separated from the Coast Guard;
 - b. The extent to which the evidence supports separation for specific reasons listed in Personnel Manual, COMDTINST M1000.6A, Chapter 12;
 - c. The proper characterization of the Respondent's service (i.e., Honorable, General under Honorable Conditions, or Other than Honorable) using the standards provided in Personnel Manual, COMDTINST M1000.6A, Article 12.
 - d. Any other issues specified in the convening order.

Under Chapter 1.E. and 5.O., the member has many rights, including the right

- to be informed of "the factual basis for separation processing," or, if more than one, "each basis for the recommended discharge. ... See enclosure (1) for a sample notification letter."
- to be represented by counsel,
- to "be present during the proceedings (except for members confined by civil authorities), but not when the ASB is in closed session,"
- to "examine and to object to the consideration of physical and documentary evidence and written statements,"
- to "object to the testimony of witnesses and to cross-examine witnesses," and
- to make or have counsel make opening and closing statements about the evidence and issues before the ASB.

Chapter 1.E.5. states that "[a]ny of these rights may be voluntarily waived, and any error will generally be forfeited by failure to make timely objection or otherwise assert the right in a timely manner to the Senior Member prior to or during the hearing, and to the Convening Authority at other times."

Chapter 1.F.1. states that "[t]he proceedings of the Board should be conducted substantially in accordance with the rules and principles prescribed in this Manual. Deviations from these requirements do not create any right to relief on the part of the Respondent, unless they

substantially prejudice the rights listed above so as to adversely affect the decisions of the separation authority. Failure to follow the requirements of this Manual may, however, result in return of the case to the Board for further proceedings and result in additional costs to the Coast Guard.”

Chapter 4.A. states that “[t]he Senior Member shall also coordinate mutual disclosure by the Respondent and Recorder of information to be presented at the hearing, so as to avoid unnecessary surprise and delay once the hearing has commenced.”

Chapter 5.C. states that the ASB “may be closed at any time for deliberation or consultation, whereupon all persons but the voting Board members will withdraw.”

Chapter 5.F.2., titled “Resolution and Preservation of Disputed Procedural Issues,” states that “[f]ailure to make a timely objection or to preserve a record of an alleged error in this manner generally constitutes forfeiture of the error in subsequent review.”

Enclosure (1) to the ASB Manual provides a “Sample Separation Notice” in which paragraph 2 reads as follows: “The reasons for my action are: (State specific facts and incidents that are the basis for the recommendation. Include the dates and circumstances of contributory events, including, if applicable, nonjudicial punishment and courts-martial, together with evaluation of the member’s potential for advancement and satisfactory completion of enlistment.)”

Interpersonal Relationships

Adultery is an offense punishable under Article 134 of the UCMJ. The Coast Guard’s regulations regarding interpersonal relationships appear in Article 8.H. of the Personnel Manual. Article 8.H.1.d. states that “[t]he Coast Guard has relied on custom and tradition to establish boundaries of appropriate behavior in interpersonal relationships.”

Article 8.H.2. states that personal relationships between members may be acceptable, unacceptable, or prohibited. Article 8.H.2.c. describes an “acceptable” relationship and notes that it cannot violate a punitive article of the UCMJ. Article 8.H.2.d.3.d. states that a “prohibited” relationship violates the UCMJ. Article 8.H.2.g.2. states that “regardless of rank, grade, or position of the persons involved ... [r]omantic relationships outside of marriage between commissioned officers and enlisted personnel” are prohibited. Article 8.H.2.f. provides that, even if not prohibited by the UCMJ, some romantic relationships between members are “unacceptable” by policy, such as when one is a subordinate of the other or both are assigned to the same cutter or the same small shore unit.

Exhibit 8.H.1. includes a matrix and summarizes Coast Guard policy as follows:

Character of Relationship

Personal: Non-intimate, non-romantic associations between two or more people (of the same gender or not) ... (Does not include conduct which constitutes fraternization.)

Romantic: Cross-gender sexual or amorous relationship. (Does not include conduct which violates the UCMJ.)

Married/Family: Service members married to service member, or otherwise closely related; e.g., parent and child, or siblings, etc.

Service Policy:

A = Acceptable: Permissible provided conduct meets Service standards. ([see] Article 8.H.2.c.)

U = Unacceptable: Inappropriate; not allowed under Service policy. Relationship must be terminated or otherwise resolved once recognized. Resolution is normally administrative.

P = Prohibited: The relationship violates the UCMJ.

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 filed within three years of the applicant's discharge on May 7, 2009.³

2. The applicant alleged that his discharge was erroneous because he was denied due process in his ASB proceedings. 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 evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."⁵

3. The applicant alleged that he was not provided adequate notice of the basis of his discharge and so was deprived of the chance to investigate the allegations against him, gather evidence, and prepare his defense. He alleged that the only basis for discharge of which he was notified in writing was drug abuse. Under Chapter 1.E. of the ASB Manual, a member is entitled to notification of the "the factual basis for separation processing" (or bases, if more than one). Chapter 12.B. of the Personnel Manual authorizes administrative discharges of enlisted members for many reasons, such as misconduct, incompetence, a diagnosed personality disorder, homosexuality, financial irresponsibility, phobias, alcohol abuse, and unsanitary habits, all of which could be the basis of an ASB. In the official separation notification letters dated April 23 and August 23, 2007, the applicant was notified that the basis for his proposed discharge was misconduct.

4. The applicant alleged that he was entitled to more specific notification under the Constitution to protect his liberty interest and because the sample separation notification letter provided in Enclosure (1) to the ASB Manual suggests inclusion of the following: "The reasons for my action are: (State specific facts and incidents that are the basis for the recommendation. Include the dates and circumstances of contributory events, including, if applicable, nonjudicial

³ 10 U.S.C. § 1552(b).

⁴ 33 C.F.R. § 52.24(b).

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).

punishment and courts-martial, together with evaluation of the member's potential for advancement and satisfactory completion of enlistment.)" The Board agrees with the JAG that the ASB Manual only suggests and does not require the specificity indicated in Enclosure (1), but this finding does not end the Board's consideration of this issue because the applicant's General Discharge for misconduct is stigmatizing.⁶

5. As the applicant argued, "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential" pursuant to the individual's liberty interest under the Constitution.⁷ Therefore, the Board must decide whether the applicant received adequate notice of the basis or bases for his discharge processing to enable him to respond. Notice of a proposed adverse action is adequate when it "apprises the employee of the nature of the charges 'in sufficient detail to allow the employee to make an informed reply.'"⁸ In *King v. Alston*, 75 F.3d 657 (Fed. Cir. 1996), the court found that under 5 U.S.C. § 7513(b)(1), the plaintiff had a right to notice of the "specific reasons" for the suspension of his security clearance and that the agency's notification that the suspension was due to a "potential medical condition" was "sufficient information to permit him to make an informed reply."⁹ Of course, a person presumably knows his own medical diagnoses, but he does not necessarily know all the accusations of misconduct other people have made against him. In *Cheney v. Department of Justice*, 479 F.3d 1343 (Fed. Cir. 2007), the court found that notification of the suspension of a security clearance due to "potentially derogatory personal conduct and possible violations of law and DEA Standards of Conduct ... [failure] to comply with security regulations and ... a pattern of dishonesty and/or rule violations" was insufficient and deprived the plaintiff of due process.¹⁰ The court stated, "We fail to see how Mr. Cheney could have made a meaningful response to such broad and unspecific allegations when there was no indication of when his alleged conduct took place or what it involved."¹¹

6. In the case at hand, before the ASB convened, the Coast Guard informed the applicant he was being discharged for misconduct; provided him with a list of witnesses showing that the misconduct to be considered by the ASB included allegations of "drug abuse, discreditable involvement with civil authorities, sexual perversion, and abuse of family member"; and provided him with numerous exhibits documenting the specific incidents of alleged misconduct, including Page 7s in his PDR, the CGIS report, security clearance-related documents, photo-

⁶ *Casey v. United States*, 8 Cl. Ct. 234, 241 (1985); *Birt v. United States*, 180 Ct. Cl. 910, 914 (1967).

⁷ *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). The Due Process Clause of the Fourteenth Amendment states the following: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1. Procedural due process claims require a two-part analysis: (1) whether the plaintiff has a life, liberty, or property interest that is entitled to procedural due process protection; and (2) if so, what process is due. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). "The essential requirements of due process ... are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

⁸ *King v. Alston*, 75 F.3d 657, 661 (Fed. Cir. 1996) (quoting *Brook v. Corrado*, 999 F.2d 523, 526 (Fed. Cir. 1993), and *Brewer v. United States Postal Serv.*, 227 Ct. Cl. 276, 647 F.2d 1093, 1097 (1981), cert. denied, 454 U.S. 1144 (1982)).

⁹ *King*, at 662.

¹⁰ *Cheney v. Department of Justice*, 479 F.3d 1343, 1345 (Fed. Cir. 2007).

¹¹ *Cheney*, at 1352.

graphs of the bachelorette party and his wife's and daughter's bruises, and local law enforcement reports of their interactions with the applicant. This material provided the applicant with detailed notification of numerous specific incidents and allegations of misconduct that were to be considered by the ASB, including drug abuse, lewd and lascivious conduct, adultery, lying to law enforcement, abuse of family member, insubordinate conduct, child endangerment, discreditable involvement with civil authorities, and probationary periods covering most of three years. The Board finds that the applicant was clearly provided with "the factual basis for separation processing"—i.e., the information and evidence that caused his CO to initiate his discharge—and with the notice he was entitled to under the Constitution.

7. Although the applicant alleged that he had no notice of the allegation of making a false official statement, and he disagrees with the ASB about whether the underlying incident meets the definition for that offense under the UCMJ, the accusation that he lied to local law enforcement appears clearly in the CGIS investigation and the documentation of the termination of the applicant's security clearance, which were provided to him in advance of the ASB. Therefore, the Board finds that he did have notice of this potential basis for discharge.

8. Likewise, although the applicant alleged that he was not given notice that he needed to prepare a defense to an allegation of adultery, the Board finds that he was provided notice that the ASB would consider this allegation against him. Allegations of adultery appear in the report of the CGIS investigation, which he was given in advance of the ASB. In addition, the applicant was provided notice that the ASB would consider allegations of "sexual perversion" and a "prohibited relationship," and both of those terms include adultery.¹²

9. The Board also disagrees with the applicant's contention that he received no notice that "commission of a serious offense"—which was the basis for discharge recommended by the ASB and approved by Commander, PSC—would be a possible basis for discharge. The record shows that prior to the ASB, the applicant's counsel was provided with Article 12.B. from Change 39, instead of Change 41, of the Personnel Manual, and Change 39 does not explicitly state that any "serious offense" may be a basis for a misconduct discharge. However, Change 39 does state that "abuse of a family member" is grounds for separation, the applicant was given notice that the ASB would consider such evidence and allegations, and spousal abuse is the "serious offense" that Commander, PSC identified in approving the ASB's recommendation that the applicant be discharged for "commission of a serious offense." Therefore, the Board finds that the applicant clearly was provided notice of the "serious offense" for which he was discharged before the ASB convened.

¹² Personnel Manual (Change 39), Article 12.B.18.b.(6) (defining "sexual perversion," as a basis for discharge, to include any prohibited relationship pursuant to Article 8.H.); *Id.* at Article 8.H.2.d.3.d. and Exhibit 8.H.1. (providing that any relationship that violates the UCMJ is a "prohibited relationship"); MANUAL FOR COURTS-MARTIAL UNITED STATES (1995), IV-95 (including adultery as a violation of Article 134 of the UCMJ). The Board notes that Article 8.H.2.g. of the Personnel Manual confusingly prohibits "[r]omantic relationships outside of marriage between commissioned officers and enlisted personnel," which could lead one to think that only adultery that is also fraternization is prohibited, except that it also says "regardless of rank, grade, or position of the persons involved." However, Article 8.H.2.d.3.d. and Exhibit 8.H.1. clearly state that any relationship that violates the UCMJ is a "prohibited relationship."

10. Moreover, under Article 12.B.18.b.3.a. of Change 41 of the Personnel Manual, whether an act of misconduct constitutes a “serious offense” depends only upon whether “the circumstances of the offense warrant separation” and whether the maximum punishment for the offense under the UCMJ includes a punitive discharge. The fundamental purpose of an ASB is to find facts about offenses and make a recommendation about whether separation is warranted,¹³ and most if not all of the allegations of misconduct considered by the ASB, including physical abuse of a family member (assault consummated by battery), are offenses under the UCMJ for which the maximum punishment includes a punitive discharge.¹⁴ Therefore, the Board is not persuaded that the applicant was deprived of notice that any evidence of commission of a serious offense under the UCMJ was a potential basis for discharge.

11. The only types of misconduct that the ASB or Commander, CGPC found to be substantiated but that cannot easily be discerned from the documents provided to the applicant in advance of the ASB are the accusations that he once threatened his then wife’s lawyer by warning her to “watch her back” and that he obstructed justice by using threats and intimidation to prevent his ex-wife and others from testifying against him. The Board does not believe that a member’s entitlement to “the factual basis for separation processing” under Chapter 1.E. of the ASB Manual or constitutional right to notice means that he is entitled to notification of every possible fact the ASB might find, which is unknowable in advance of the testimony. Instead, the Board finds that a member is entitled to notice of the allegations and evidence on which his CO is relying in deciding to initiate the applicant’s discharge processing so that the member may make an informed reply or meaningful response during the ASB.¹⁵ Therefore, the Board must decide whether the apparent lack of notice about two of the numerous allegations of misconduct considered by the ASB so hindered his ability to make an informed reply to the allegations and evidence against him that his discharge should be voided or upgraded.

12. In *Boyle v. United States*, 101 Fed. Cl. 592 (2011), the plaintiff claimed that the Army BCMR’s decision upholding his separation and General Discharge for a “Pattern of Misconduct” following an ASB was arbitrary and capricious because he had not been advised of one of the several bases for discharge that the ASB relied on when recommending his separation. The plaintiff was notified that the ASB would consider evidence that he had been arrested for disorderly conduct, been absent without leave, assaulted two women, and failed to report to his assigned place of duty, but he was not notified that the ASB might also find that he had “violated his profile by consuming alcohol.”¹⁶ Although the Army BCMR had failed to address this issue, the court stated that its “decision upholding plaintiff’s separation was not rendered arbitrary or capricious by the Army’s failure to notify plaintiff that violation of his profile by consuming alcohol was a basis for his separation.”¹⁷ The court noted that the ASB’s finding about the profile violation was one of many findings of misconduct and that there were enough findings of

¹³ ASB Manual, Article 1.A.1.

¹⁴ MANUAL FOR COURTS-MARTIAL UNITED STATES (1995), IV-83 (maximum punishment for assault consummated by battery, a violation of Article 128 of the UCMJ); IV-95 (maximum punishment for adultery, a violation of Article 134); IV-110 (maximum punishment for indecent exposure, a violation of Article 134); IV-122 (maximum punishment for communicating a threat, a violation of Article 134); IV-56 (maximum punishment for wrongful use of a controlled substance, a violation of Article 112a).

¹⁵ *King*, at 661; *Cheney*, at 1352.

¹⁶ *Boyle v. United States*, 101 Fed. Cl. 592, 598 (2011).

¹⁷ *Id.* at 600.

other misconduct to support the ASB's recommendation for discharge.¹⁸ In this regard, the court noted that under 10 U.S.C. § 1552, a BCMR's "correction is intended to put the servicemember in the same position [he would have been in] had the injustice or error not occurred. Correspondingly, no changes will be made when the error or injustice is deemed harmless because harmless errors are not sufficiently significant to change the outcome of a case."¹⁹

13. As in *Boyle*, the Board finds that in the applicant's case, the apparent failure of the Recorder to notify the applicant in writing that the Board would make findings about an alleged threat and obstruction of justice constitutes harmless error²⁰ given the numerous other findings supporting the conclusion that the applicant had committed a "serious offense," of which the applicant received notice. The record before the ASB included ample grounds for discharging the applicant for commission of a "serious offense."²¹ In this regard, the Board notes that the serious offense that the final decision-maker—Commander, PSC—relied on and found "particularly compelling" was spousal abuse and that he also noted the applicant's long probationary periods for misconduct and documentation of adultery, lying to police, "the endangerment and excessive corporal punishment of a child," and credible accusations of drug abuse. Commander, PSC did not mention the alleged threat to the attorney or obstruction of justice. As the court decided in *Boyle*, this Board finds that the lack of notification on these two issues is harmless because it does not affect the outcome of the case.²² Neither issue was the "serious offense" identified by Commander, PSC.

14. Finally, the applicant alleged that by meeting in closed session to review the evidence of record in light of Change 41 of the Personnel Manual, the ASB deprived him of the right to be present during the presentation of the evidence and to make opening and closing arguments about the evidence and issues. The Board rejects the allegation that the revised rules in Article 12.B.18. constituted new evidence. Evidence is something a board, judge, or jury weighs to establish the facts of a case based on its credibility, probative value, and quantity;²³ a revision of the applicable rules is not.

¹⁸ *Id.*

¹⁹ *Id.* (citing *Wagner v. United States*, 365 F.3d 1358, 1364 (Fed. Cir. 2004)); see *Denton v. United States*, 204 Ct. Cl. 188, 199-200, *cert. denied*, 421 U.S. 963 (1975), *cited in Bliss v. Johnson*, 279 F. Supp. 2d 29, 35 (D.D.C. 2003) (holding that under 10 U.S.C. § 1552, an applicant is entitled to "nothing more than placement in the same position he would have been had no error been made."); *Kimmel v. United States*, 196 Ct. Cl. 579, 591 (1971) ("The injustice was removed by placing plaintiff in the same position he would have been had no error been made. This was all that plaintiff was entitled to receive."); *Hamrick v. United States*, 120 Ct. Cl. 17, 25, 96 F. Supp. 940, 943 (1951) (holding that "full correction of the error would require plaintiff's being put in the same position he would be in had the erroneous determination not been made"), *cited in Ramsey v. United States*, 123 Ct. Cl. 504, 506 (1952), *cert. denied*, 345 U.S. 994 (1953).

²⁰ *Texas v. Lesage*, 528 U.S. 18, 21 (1999) ("[W]here a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting relief"); *Hary v. United States*, 618 F.2d 704, 707-09 (Ct. Cl. 1980) (finding that the plaintiff had to show that the proven error "substantially affected the decision to separate him" because "harmless error ... will not warrant judicial relief.").

²¹ See note 14 above (allegations of misconduct against the applicant that could constitute "serious offenses" as defined in Article 12.B.18.b.3. of Change 41 of the Personnel Manual because the maximum punishment for that offense under the UCMJ includes a punitive discharge).

²² *Boyle*, at 600.

²³ See BLACK'S LAW DICTIONARY, 4th Rev. Ed. (1979), p. 656-57.

15. From Change 39 to Change 41 of the Personnel Manual, the potential reasons for an administrative discharge for conduct were reduced and consolidated. Under Change 39, the applicant was subject to discharge for drug abuse; discreditable involvement with civil or military authorities; abuse of a family member; and sexual perversion, including lewd and lascivious acts, indecent exposure, “other indecent acts or offenses,” and involvement in a prohibited romantic relationship (adultery). Under Change 41, the only potentially applicable reasons for discharge were drug abuse and commission of a serious offense. However, the applicant was advised of the necessity to make arguments about drug abuse. And whether an act of misconduct constitutes a “serious offense” depends upon whether “the circumstances of the offense warrant separation,” which is the obvious, fundamental argument anyone must make to an ASB, and whether the maximum punishment for the offense under the UCMJ includes a punitive discharge, which is not subject to argument because the maximum punishment for each offense is published in a table.²⁴ Moreover, the applicant’s counsel had the opportunity to submit arguments—in essence, a new closing statement—in response to the revised ASB report. He had the opportunity to address any new issues he felt were raised by the new regulations in Change 41 in his response. Therefore, the Board is not persuaded that the erroneous use of Change 39 of the Personnel Manual when the ASB convened in open session in October 2007 prevented the applicant or his counsel from presenting his best defense and making his strongest arguments on the issues that determined the outcome of the ASB.

16. The twist in this case lies in the fact that although Commander, PSC approved the applicant’s discharge for “commission of a serious offense” on April 8, 2009, the very next day the PSC issued orders for the applicant to be discharged for a “pattern of misconduct.” The orders and resulting DD 214 are clearly erroneous given Commander, PSC’s final action on the case and the peculiar requirements for a “pattern of misconduct” discharge under Article 12.B.18.b.2. of the Personnel Manual. However, the applicant did not ask the Board to correct the narrative reason for separation on his DD 214 from “pattern of misconduct” to “commission of a serious offense,” and such a correction is not clearly in the applicant’s favor.²⁵

17. The record shows that the ASB made some extraneous findings of fact and opinions that were not foreseen by the Recorder. In addition, after the ASB convened in open session, it met in closed session twice and considered whether the facts warranted a recommendation for discharge under Article 12.B.18., first as it appears in Change 39 and then as it is written in Change 41. The ASB recommended a General Discharge for the applicant under both versions of the Personnel Manual. The Board is satisfied that the applicant had notice of the bases for his separation processing before the ASB convened and that he had ample opportunity to present arguments about whether he could be discharged for commission of a serious offense. The Board finds that the applicant has not proved by a preponderance of the evidence that his General Discharge for misconduct resulted from a denial of substantive due process.

18. Accordingly, the applicant’s requests for relief should be denied.

²⁴ Personnel Manual (Change 41), Article 12.B.18.b.3.; MANUAL FOR COURTS-MARTIAL UNITED STATES (1995), App’x 12 (Maximum Punishment Chart).

²⁵ See *Friedman v. United States*, 141 Ct. Cl. 239, 252-53 (1958) (holding that the correction boards were established to review military records to consider making corrections of errors or injustices *against* members upon application, not to correct errors that are in their favor).

ORDER

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

Reid Alan Cox

Jeffrey E. VanOverbeke

Darren S. Wall