

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2004-158

XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX (former)

FINAL DECISION

Author: Hale, D.

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was docketed on July 29, 2004, upon the BCMR's receipt of the applicant's request for correction.

This final decision, dated March 31, 2005, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, who was discharged from the Coast Guard on August 1, 2003, asked the Board to correct his discharge form, DD Form 214, by upgrading his reenlistment code and separation code. He did not specify which reenlistment code or separation code he wanted in his record. The applicant argued that the codes should be upgraded because the alcohol problems that necessitated his discharge from the Coast Guard are "under control," and he would like to enlist in the U.S. Navy. In support of his application, the applicant submitted a letter from an employee of a medical center who stated that the applicant had recently completed an 11-day in-patient addiction program and that his alcohol abuse was currently "in remission and his return to active duty should not be delayed."

SUMMARY OF THE APPLICANT'S RECORD

On May 27, 2001, the applicant enlisted in the Coast Guard at the age of 18. On April 23, 2003, he was arrested for driving under the influence of alcohol. Although he

failed the field sobriety test, a subsequent blood test revealed a blood alcohol content (BAC) of 0.00. However, the applicant admitted that he had been drinking earlier that evening. At the time of his arrest, he was only 20 years old and under the legal drinking age (21) for the state in which he was driving.

On April 24, 2003, the Coast Guard Command Drug and Alcohol Representative (CDAR) for the applicant's unit counseled him and documented that counseling with a form CG-3307 (page 7)¹ entry. The page 7 noted that the applicant had been referred to the CDAR for evaluation following his arrest on April 23, 2003, for driving under the influence of alcohol. In addition, the page 7 noted that the applicant would be screened for alcohol use at the Naval Air Station, Pensacola, on June 4, 2003. The page 7 further noted that this was the applicant's first "alcohol incident" for documentation purposes, and that any further alcohol incidents or the consumption of alcohol as a minor might result in separation from the Coast Guard. The applicant was ordered to abstain from the use of alcohol.

On June 5, 2003, the applicant was counseled for arriving to work an hour late, and a page 7 was entered into his record to document that counseling. The supervisor who issued the page 7 noted that after speaking with the applicant upon his late arrival, it was apparent that "he was hung-over and possibly still under the influence of alcohol." Three hours after reporting to work, the applicant voluntarily submitted blood for a BAC test, and the level of alcohol in his blood was measured at 0.029.

On June 10, 2003, the applicant was once again referred to the CDAR for evaluation. On the subsequent page 7 to document the CDAR's counseling, the applicant was counseled that testing positive for alcohol use on June 5, 2003, was his second alcohol incident in two months. Moreover, the CDAR noted that the applicant admitted to underage drinking when his supervisor questioned him about his tardiness on June 5, 2003. The CDAR noted that this second incident showed the applicant's

blatant disregard of the Coast Guard's alcohol policy, along with the state and federal laws concerning underage drinking, and leaves this command with no choice but to process you for discharge under Chapter 20 of the [Coast Guard] Personnel Manual.

On June 19, 2003, the commanding officer (CO) of the applicant's unit recommended that he be discharged from the Coast Guard because of his second alcohol incident and total disregard for Coast Guard policy. On this date, the applicant signed an endorsement acknowledging receipt of his proposed discharge, that he did

¹ A CG-3307 (Administrative Remarks, or page 7) entry documents any counseling that is provided to a service member as well as any other noteworthy events that occur during that member's military career. Unless otherwise indicated, all page 7 entries in this case were acknowledged by the applicant with his signature.

not want to submit a statement on his own behalf, that he did not desire to speak to an attorney, and that he agreed with the recommendation for discharge.

On June 24, 2003, another page 7 was placed in the applicant's record that documented additional counseling by the CDAR. The entry indicated that the applicant had been screened by the Naval Addiction Treatment Facility Department (ATFD), Naval Air Station Pensacola, for his alcohol incident of June 5, 2003, was diagnosed with substance dependency for alcohol in accordance with the Diagnostic and Statistical Manual IV (DSM IV), and was being recommended for Level Three inpatient rehabilitation. The page 7 indicated that the applicant was to report to a local drug recovery center on June 30, 2003, to begin rehabilitation.²

On July 1, 2003, the District Commander recommended the applicant's discharge for unsuitability because his "poor performance clearly supports the recommendation for discharge."

On July 7, 2003, the CDAR counseled the applicant and entered into his record a page 7 to document his refusal to receive the in-patient treatment for alcohol dependency as recommended by the ATFD. The applicant was counseled once again that he would be processed for separation from the Coast Guard.

On August 1, 2003, the applicant was discharged from the Coast Guard pursuant to Article 12.B.12 of the Coast Guard Personnel Manual. His DD 214 indicates that he received a discharge under honorable conditions, a separation code of JKL,³ and narrative reason for separation of "misconduct." The DD 214 also indicates that the applicant received an RE-4 reenlistment code. He had served for 3 years, 8 months and 1 day on active duty.

On November 26, 2003, the applicant petitioned the Coast Guard Discharge Review Board (DRB). As a result of the applicant's petition to the DRB, his DD 214 was corrected as follows:

- Discharge changed to *Honorable*
- Authority changed to *PERSMAN Article 12.B.16*
- Separation code changed to *JPD*⁴
- Narrative reason changed to *Alcohol Rehabilitation Failure*

² Although the Coast Guard had already initiated the applicant's discharge, the Coast Guard referred him for additional counseling and rehabilitation to ensure that he was qualified to apply for future benefits with the Department of Veterans Affairs for the treatment of a chemical dependency.

³ JKL is used to denote an involuntary separation for misconduct. SPD Code Handbook, page 1-12.

⁴ JPD is used to denote an involuntary separation when the member failed through inability or refusal to participate in, cooperate in, or successfully complete a treatment program for alcohol rehabilitation. SPD Code Handbook, page 1-14.

VIEWS OF THE COAST GUARD

On November 16, 2004, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he adopted the findings of the Coast Guard Personnel Command (CGPC) and recommended that the Board deny the applicant's request. The JAG argued that the applicant failed to carry his burden of production and persuasion in proving that the Coast Guard committed any error or injustice when it discharged him.

The JAG noted that the applicant's only evidence in support of his application was a letter from a hospital indicating that he had completed an alcohol treatment program after his discharge and the applicant's assertion that his alcohol problems are now under control. While the JAG commended the applicant's efforts, the JAG nonetheless stated that the applicant did not show that that Coast Guard committed an error or injustice in discharging him for his alcohol incidents and his refusal to participate in a treatment program for his alcohol problem.

The JAG also alleged that the applicant has not overcome the strong presumption that "government officials ... have carried out their duties correctly, lawfully, and in good faith." *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979). The JAG argued that the applicant has failed to prove any factual error and that the Coast Guard was justified in discharging the applicant because it "has a significant interest in protecting the public and its members from injury or death at the hands of an individual who abuses drugs or alcohol."

The JAG included in his advisory opinion and adopted a memorandum on the case prepared by CGPC. CGPC stated that the applicant was twice found to be in violation of Coast Guard policy with respect to alcohol use. CGPC further noted that after his first alcohol incident, the applicant was disciplined but not processed for separation. Finally, CGPC stated that the applicant was properly processed for discharge following his second alcohol incident and that his "failure to adhere to the rules and regulations of the Coast Guard was of a serious enough nature for the unit to request separation."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 19, 2004, the Chair sent a copy of the views of the Coast Guard to the applicant and invited him to respond within 30 days. The applicant responded on December 19, 2004, and stated

I will start off[f] by saying I don't feel the Coast Guard committed an error or injustice in the manner of which my discharge was carried out. My behavior was a disgrace. I brought shame upon myself and the Coast Guard. I've made a huge mistake for disregarding the rules and regulations. But I feel I can still do some good things for the military. I know I've ruined my chance in the Coast Guard. I'm asking for a fresh start in a different branch. I hope that through some chance the Board might consider this application. To possibly set-up a date for me to come down there and we can meet face to face.

APPLICABLE LAW

Coast Guard Personnel Manual (COMDTINST M1000.6A)

Article 20 of the Personnel Manual contains the regulations regarding alcohol abuse by Coast Guard members. Article 20.A.2.d. states that an alcohol incident is "any behavior, in which alcohol is determined, by the commanding officer, to be a significant or causative factor, that results in the member's loss of ability to perform assigned duties, brings discredit upon the Uniformed Services, or is a violation of the Uniform Code of Military Justice (UCMJ), Federal, State, or local laws. The member need not be found guilty at court-martial, in a civilian court, or be awarded non-judicial punishment for the behavior to be considered an alcohol incident."

Article 20.B.2.g. of the Coast Guard Personnel Manual states that the first time a member is involved in an alcohol incident, except those described in Article 20.B.2.f., the commanding officer shall ensure counseling is conducted and recorded on a page 7 entry in the member's personal data record (PDR), acknowledged by the member, and a copy sent to CGPC.

Article 12.B.2.h. of the Personnel Manual states that "[e]nlisted members involved in a second alcohol incident will normally be processed for separation in accordance with Article 12.B.16."

Article 20.B.2.j. of the Personnel Manual (Underage Consumption of Alcohol), states that "underage drinking is considered an alcohol incident. Should an incident occur, the CDAR shall counsel the member and initiate an alcohol screening. If this is not the member's first incident, discharge proceedings shall be initiated."

Article 20.A.2.e. states that "alcohol screening" is an "evaluation by a physician who has attended Addiction Orientation for Health Care Provider (AOHCP) training or who has equivalent training regarding substance abuse and chemical dependency, clinical psychologist, or a DoD civilian equivalent CAAC (Counseling And Assistance Center) counselor to determine the nature and extent of alcohol abuse. An evaluation

by a Collateral Duty Alcohol Representative [CDAR] does not satisfy the screening requirement contained in this manual.” The evaluation and recommendation for treatment are based on the answers provided by the member in an interview.

Article 20.B.2.k. of the Personnel Manual states that members refusing to undergo the treatment deemed necessary by the commanding officer and a competent medical authority are normally processed for separation.

FINDINGS AND CONCLUSIONS

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

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

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 applicant requested that the reenlistment code and separation code on his DD 214 be changed so he can enlist in the U.S. Navy. Notably, the applicant did not allege that the Coast Guard committed any error or injustice when it discharged him following two alcohol incidents and his refusal to participate in a treatment program. The applicant merely states that he has taken control of his alcohol problem and seeks correction of his record so he can enlist in the Navy.

4. The record indicates that after the applicant's first alcohol incident for underage drinking, he was properly counseled pursuant to Article 20.B.2.g. of the Personnel Manual. At the time of his arrest on April 23, 2003, the applicant admitted that he had been drinking earlier that evening. In accordance with Article 20.B.2.j., underage drinking is considered an alcohol incident, and the Board finds that the applicant's voluntary admission that he had been drinking is sufficient to warrant counseling for an alcohol incident. The page 7 that documented this alcohol incident indicates that he was referred for alcohol screening, as required under Article 20.A.2.e.

5. Approximately three months after the first alcohol incident, on April 23, 2003, the applicant was counseled for a second alcohol incident when he arrived late for work and his supervisor determined that he was either drunk or hung-over. Because this was his second alcohol incident, the Coast Guard initiated the applicant's discharge in accordance with Article 12.B.2.h., which states that “[e]nlisted members involved in a

second alcohol incident will normally be processed for separation in accordance with Article 12.B.16.”

6. Although the applicant’s discharge was initiated following his second alcohol incident, the Coast Guard had the applicant screened for alcohol abuse on June 24, 2003, in accordance with Article 20.A.2.e. The applicant was diagnosed with substance dependency for alcohol and recommended for inpatient rehabilitation. However, the applicant refused to enter the treatment program. Had the Coast Guard not previously initiated his discharge for the second alcohol incident, it would have been permitted to do so upon the applicant’s failure to participate in the treatment program in accordance with Article 20.B.2.k.

7. The JAG recommended that the Board deny relief, because the applicant failed to prove that he was erroneously discharged from the Coast Guard. Moreover, the JAG stated that the applicant failed to articulate any reason why the Coast Guard’s policy for separating members with an RE-4 reenlistment code for more than one alcohol incident should not apply to him. Furthermore, CGPC stated that the applicant’s separation was appropriate and that the applicant was afforded his right to due process during the separation process.

8. The Board finds that the applicant was properly discharged subsequent to his second alcohol incident AND his failure to participate in an alcohol treatment program. In accordance with Articles 12.B.2.h. and 20.B.2.k. of the Personnel Manual, the applicant’s CO had the authority to recommend discharge for any member who had a second alcohol incident or refused to undergo the treatment deemed necessary by the commanding officer and a competent medical authority.

9. The statement provided by the applicant from the employee of the medical center where he (the applicant) received treatment for his alcohol problem does not persuade the Board that his drinking problem has been resolved. Moreover, the applicant has not proved that either his separation code or his reenlistment code is erroneous or unjust. They accurately reflect the nature of his discharge, and the applicant’s desire to enlist in the Navy does not justify changing them.

10. Accordingly, relief should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

Bruce D. Burkley

Jordan S. Fried

George J. Jordan