

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2006-142

XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX

FINAL DECISION

AUTHOR: Andrews, J.

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 June 30, 2006, upon receipt of the completed application and military records.

This final decision, dated February 28, 2007, 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 honorably discharged from the Coast Guard on March 14, 1990, for "unsuitability" after incurring his second "alcohol incident," asked the Board to correct his discharge form, DD Form 214, by upgrading his reenlistment code from RE-4 (ineligible to reenlist) to RE-1 (eligible to reenlist).

The applicant stated that prior to his discharge, he did not know what the RE-4 code meant and that if it had been explained to him, he "would've fought to stay in." He learned the meaning of the code when he consulted a recruiter for the Army National Guard a few weeks after his discharge. In support of his request the applicant further stated the following:

I have been working full-time and attending college since January of 2000. I first attended Springfield Technical Community College, Massachusetts, and graduated with an Associate Degree of Science in Law Enforcement, January 8th, 2003. I then took one semester OFF, and then transferred to Westfield State College, Massachusetts, and I will be GRADUATING this coming May of 2006. My Grade-Point-Average so far is: 3.11. My Major is Criminal Justice with a completed Minor in Political Science. I chose these 2

curriculums because I have a deep passion for History, Government, Law, and Politics, and that's exactly what I have studied for the last 5 1/2 school years. All you have to do is examine my transcripts. It takes GREAT discipline and maturity to work full-time and attend college and maintain a "B- Average." Please acknowledge and recognize that about me. I LOVE my country, and I want PERMISSION to serve it AGAIN.

The applicant submitted a letter from a current commander in the Coast Guard, who stated that following:

I recently had the opportunity to speak with [the applicant] regarding his discharge from the Coast Guard in March of 1990 while we both served in [the same station]. I was his Commanding Officer at the time of his discharge and wanted to write this letter to affirm all the positive changes he has made in his life since being discharged. He is now a mature, contributing member of society and has successfully attained a college degree from Westfield State with a degree in Criminal Justice while maintaining full time employment—a significant accomplishment!

At the time of his discharge he was diagnosed as being alcohol dependent and unfortunately was not taking the necessary steps to correct his behavior and as a result received multiple alcohol incidents and was eventually discharged in accordance with service procedures. [The station] was a small unit and as such we did not have a full time Yeoman on staff and received most of our administrative support from the Personnel Reporting unit at the Coast Guard Academy. I cannot say with any certainty whether or not the personnel at the Academy properly counseled [the applicant] on the ramifications regarding his RE code. I can say that it would not have mattered either way, as at that point in his life he seemed to be heading down a path that led my Executive Petty Officer to recommend the RE code 4.

He has completely changed his life for the better and I would gladly have him as part of the Coast Guard Team again and would recommend a change to his RE code to allow him to serve his country again in our Armed Forces. I think the events of September 11th changed the outlook of many Americans and the fervor to serve and help your country is greater than ever. He would be a welcome addition to any service given his dedication and energy.

The applicant also submitted a letter from his supervisor at the Wackenhut Security Corporation, who wrote the following:

I strongly recommend [the applicant] for re-instatement back into the U.S. Coast Guard. [He] has been a full-time employee of the Wackenhut Security Corporation (www.wackenhut.com) since September of 2003. Since the day he was hired he has always been a very reliable, honest, trustworthy, hard-working, and dedicated employee of the Wackenhut Corporation. ... Here at our job-site, we have a limited number of Security Officers for man-power. [The applicant] has volunteered numerous times for over-time when I was in dire need for a shift to be filled when one of the other Officers could not make it to work. If he is granted permission to re-enter the U.S. Coast Guard, he will be strongly missed by the Wackenhut Security Corporation.

The applicant also submitted a letter from his prior supervisor at the Arrow Security Company, who wrote the following:

[The applicant] has been a very honest, reliable, and trustworthy employee while on our payroll. His work attendance has been excellent. He has called in sick only once over a time period of 20 months. He is very punctual for all duty assignments. ... While [he] was assigned to the Bradley Airport Sheraton Hotel, he was required to PASS and FBI-NCIC computer background check before starting the assignment. He was assigned there for 8 months. ... [The applicant] also practices good sobriety and there is no record of any problem in relation to his sobriety while being a full time employee of our company.

In a letter dated April 6, 1990, the Executive Petty Officer (XPO) of the applicant's station wrote the following:

[The applicant] has shown great motivation towards the job and the service in general. While attached to [this station, he] has displayed a good attitude and a willingness to do the right thing. [The applicant] was an integral part of the ship's deck force which along with one other individual was tasked with all of the ship's upkeep. [He] also acted as Import Officer of the Day and qualified for all other duties assigned to him.

[The applicant] is a very motivated person and will give one hundred percent to any task or job assigned to him. I feel that he would be an asset to any firm that he seeks employment with. [He] is a dedicated and responsible person that knows the meaning of hard work and has the pride and ability to do a good job the first time around.

The applicant submitted copies of his diploma for his Associate's degree in Law Enforcement from Springfield Technical Community College; his diploma for his Bachelor of Science degree in Criminal Justice from Westfield State College; and his final transcript from Westfield State College, showing an overall 3.168 grade point average. He also submitted a copy of his Coast Guard performance evaluation, dated November 30, 1980, and signed by his CO and XPO, who assigned him five marks of 3, nineteen marks of 4, and five marks of 5 (on a scale of 1 to 7, with 7 being best) in the various performance categories.

SUMMARY OF THE RECORD

On July 2, 1984, the applicant enlisted in the Coast Guard as an E-1. During boot camp, the Coast Guard drug and alcohol abuse program was explained to him. Upon completing boot camp, he advanced to fireman apprentice (E-2) and was transferred to a cutter. He advanced to fireman (E-3) on July 8, 1985. On May 4, 1986, the applicant was counseled about his poor attitude, declining performance, and lack of responsibility and self-control.

In September 1987, the applicant was transferred to another cutter. On October 8, 1987, the applicant's new command made the following entry in his record, which the applicant acknowledged with his signature:

Member was counseled this date concerning first alcohol incident of 87 SEP 20, when he was arrested for DWI in Kilso, WA. Member has been warned that any subsequent alcohol incident will be grounds for separation from service. Additionally, member has been informed he will be screened by a medical facility to determine if alcohol dependency exists. If such dependency exists member will be enrolled in an approved rehabilitation program.

On October 20, 1987, the director of a Navy drug and alcohol abuse program reported to the applicant's command that screening had shown that the applicant "appears to be non-dependent. [He] appears to have abused alcohol and used bad judgement."

In 1988, the applicant unsuccessfully attempted to earn a petty officer rating by attending "A" School for electronics technicians (ETs). In November 1988, he was disenrolled from "A" School for "academic failure." Thereafter, he again attempted to earn a petty officer rating by "striking" (on-the-job training) to become a boatswain's mate, but he did not succeed prior to his discharge in 1990. While striking, his rating was changed from fireman (FN) to seaman (SN).

On November 30, 1989, the CO of the applicant's station made the following entry in his record, which the applicant acknowledged with his signature:

Member was apprehended on 17 NOV 89 by an officer of the Southwick MA Police Dept. for suspicion of driving while intoxicated. [He] refused to submit to sobriety tests and was placed under arrest. [He] was counseled by this command that this was his second alcohol incident and IAW COMDTINST M1000.6A Chap 20-B-2 and 12-B-16, member will be processed for separation by reason of unsuitability due to alcohol abuse.

On December 5, 1989, the CO informed the applicant that he was initiating the applicant's "honorable discharge by reason of unsuitability due to alcohol abuse." The CO informed the applicant that he was entitled to consult with an attorney and to submit a written statement in his own behalf. The applicant acknowledged the notification and indicated that he had declined the opportunity to consult an attorney but would submit a statement. In his statement, the applicant wrote that he had "a thorough understanding of why [he was] being discharged and [he had] no disagreements whatsoever." He wrote that he was proud of his service and good attitude. He thanked the Coast Guard for giving him "the opportunity to attend ET 'A' School not only once but twice. I honestly tried but could not make it through. So I decided to change rates from FN to SN and strike BM." He noted that he had passed the necessary course work for advancement and had good marks. He asked for an honorable discharge.

On December 6, 1989, the applicant was examined by a physician and found to be fit for separation.

On January 3, 1990, the CO forwarded his recommendation for the applicant's honorable discharge to the Commandant along with the applicant's statement and documentation of the alcohol incidents. The CO stated that the applicant was a very hard worker but "does not have the leadership ability to become a Petty Officer" or "to benefit the Coast Guard in other than a nonrated factor."

On January 22, 1990, the applicant again underwent screening and was found to be alcohol dependent since "he disclosed that his use of alcohol frequently results in blackouts, his inability to control the amount of alcohol he consumes before interference with his personal safety, his high tolerance for alcohol, and his characteristic alcohol withdrawal symptoms. Most of these symptoms have persisted for over one year. He is likely to abuse alcohol in the future unless he makes the necessary behavioral changes as a result of inpatient treatment."

On January 22, 1990, a psychiatrist following up on the applicant's screening for alcohol dependency certified that the applicant showed no evidence of any mental illness "other than alcohol abuse and dependency." The psychiatrist noted that the applicant had "no insight into his illness and denies an alcohol problem."

On February 22, 1990, the Commandant responded to the CO's recommendation by ordering that the applicant be discharged with separation code JMG within thirty days. On March 14, 1990, the applicant was honorably discharged for "unsuitability" with a JMG separation code (which denotes separation for alcohol abuse) and an RE-4 reenlistment code.

Following his discharge, the applicant applied to the Discharge Review Board (DRB) to have his reenlistment code upgraded. After the DRB denied his request, the applicant applied to the BCMR for the same relief. His application was docketed as BCMR Docket No. 1990-261. On February 21, 1991, the Chairman of the BCMR denied the applicant's request under 33 C.F.R. § 52.32(a)(1) of the Board rules at that time. This provision permitted the Chairman to deny an application if he determined that the applicant failed to submit sufficient evidence to demonstrate probable substantial error or injustice. However, in denying relief, the Chairman informed the applicant that under 33 C.F.R. § 52.32(b), the order was issued "without prejudice to further consideration by the Board if the applicant requests further consideration and submits evidence in addition to that contained in his or her complete application."

In March 2003, the Secretary of Transportation removed the provisions for Chairman's denial from the Board's rules so that the issuance of all decisions is now left to the Board. In April 2003, the applicant again asked the DRB to upgrade his RE code, but the DRB responded to him by stating that the applicant had already exhausted his administrative remedies via the DRB and the BCMR. On May 4, 2003, the applicant responded to the DRB by pointing out that in 1991 the Chairman of the BCMR had

stated that he could apply for further consideration. The applicant also wrote that although he "screwed up big time" while serving on active duty as a young man, he has now matured, is attending college, and "quit drinking back in March of 1998." He further wrote the following:

I got my police record in Massachusetts sealed in February of 2002, 10 months before graduation. I now have legally obtained a "license to carry" gun permit in Massachusetts, which is very hard to do nowadays due to the extremely controversial gun control legislation: Chapter 180, thanks to our "no good for nothing speaker of the House": Thomas (the communist) Finngran.

I have grown into a God fearing Christian and am a loyal member of the Protestant Church. I am a loyal member of the right-wing Republican Party, National Rifle Association, and Gun Owner's Action League of Massachusetts. I worked for the George W. Bush presidential campaign. I ran for office in Southwick for Library Board of Trustees against 2 Democrats and I won, and served for over 2 years. I am a relentless political patriot that is very anti-new world order conspiracy theorist. If I knew back in my early 20's what I know now, I would have quit drinking right then and there guaranteed!!! I am on a mission for God, country and honor!!!

I refuse to believe that the Discharge Review Board is powerless to upgrade my RE code on my DD-214. You big-wig commissioned officers in Washington D.C. can do anything if you feel [it] is right or truly justified to help a man who needs or deserves help. I was told by some friends who are very knowledgeable that the reason you guys don't want to help me is because I'm asking to go into another branch of military service. So my question is: If I pledge absolute loyalty to the U.S. Coast Guard, then will you help me???

I did study and pass the end of course tests for BM3, EM3, MRN-E4, and MRN-E5, which shows I did try very hard to work towards advancement. Just read the DD-214. ... I have taken good care of myself and am in good physical shape. I still lift weights, run and swim laps at the YMCA. I will volunteer to go to boot camp all over again, but I will not serve in any military or sign any enlistment without guaranteed school training right after boot camp.

My closing statement: I hope you men of power on the Discharge Review Board decide to help me and bring me back into the U.S. Coast Guard. If you all are hell bent on saying no, then I will just continue on going to college and build my education and you men can shake your heads and laugh at me all you want, but no matter what, "I am the one. I am the way. I am and will be the stone pillar that upholds the U.S. Constitution!!!" [Capitalization and underlining removed to improve readability.]

The DRB forwarded a copy of the applicant's correspondence to the BCMR. Because the applicant's original request had not received the full review on the merits by the Board that the applicant would be entitled to under the current rules, as a matter of equity, the Chair docketed his current application as BCMR No. 2006-142.

VIEWS OF THE COAST GUARD

On October 30, 2006, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the applicant's request. The JAG adopted the findings and analysis of the case provided in a memorandum by the Coast Guard Personnel Command (CGPC).

CGPC pointed out that the application was untimely and could be denied on that basis. CGPC alleged that the applicant received all due process during his discharge and that the record shows that the Coast Guard committed no error or injustice in processing him for discharge and in assigning him the RE-4.

CGPC pointed out that, for members discharged for unsuitability due to alcohol abuse, the Separation Program Designator (SPD) Code Handbook authorizes the assignment of no other reenlistment code except the RE-4.

Regarding the applicant's post-discharge academic progress and job performance, CGPC stated that he "was not discharged due to discipline or performance issues, rather due to unsuitability for alcohol abuse. These factors do not address any error or injustice and do not negate the Applicant's suitability determination at the time of discharge."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 6, 2006, the applicant responded to the views of the Coast Guard. The applicant complained that the Coast Guard acknowledged that he had received an Associate degree but did not mention his Bachelor's degree in the advisory opinion. He stated that this failure shows that the Coast Guard did not review his application thoroughly and so did not appreciate the effort he has made in working full time while attending college. He stated that the Coast Guard ignored his proven "serious work ethic" and maturity. The applicant pointed out that his DUIs occurred more than sixteen years ago and asked for a second chance to serve his country.

APPLICABLE REGULATIONS

Article 12-B-16.b.(5) of the Personnel Manual in effect in 1990 authorized the discharge of personnel for "unsuitability" due to alcohol abuse. Article 12-B-16.d. provided that before a commanding officer recommended a member for discharge for unsuitability, the member had to be (1) informed in writing of the reason for the discharge, (2) given an opportunity to submit a written statement in his own behalf, and (3) given an opportunity to consult with an attorney if a general discharge might be awarded.

Article 12-B-4.a. stated that "a member who meets the standards for an honorable discharge set forth in Article 12-B-2.f. should be eligible for reenlistment, except where the reason for discharge precludes reenlistment, such as physical disqualification, disability, unsuitability, misconduct, ... "

Article 20-A-3.b. defined "alcohol incident" as "[a]lcohol abuse to the extent that it has an outward detrimental effect on the abuser, or others, such as involvement in any injury, loss of duty status, inability at any required time to properly perform duties due to alcohol consumption, damage or loss of property, or violation of the UCMJ, Federal, State, or local laws."

Article 20-B-2.c. stated that after a member's first "alcohol incident," the member was to be medically screened, informed of the results of the screening, and, if necessary, placed in an appropriate program. In addition, the member was to be warned that "any subsequent alcohol related incidents or situations may result in the member being processed for discharge." The counseling was to be documented in the member's record.

Article 20-B-2.d. stated that "members involved in a second alcohol incident will normally be processed for separation by reason of unsuitability due to alcohol abuse under Article 12-B-16. In those cases where the commanding officer/officer in charge feels that an exceptional situation warrants consideration for retention, the enlisted member will be screened and a letter request for retention and treatment (including the medical screening results, treatment plan, and CO's recommendation) shall be forwarded via the chain of command to Commandant (G-PE) who shall consult with Commandant (G-KOM) and direct the appropriate action regarding retention."

The Separation Program Designator Handbook in effect in 1990 provided that a member being discharged for unsuitability due to alcohol abuse under Article 12-B-16 of the Personnel Manual should be assigned only a JMG separation code and an RE-4 reenlistment code.

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 over this matter pursuant to 10 U.S.C. § 1552.
2. The applicant timely applied to the BCMR for correction of his reenlistment code in 1990. The Chairman denied the case without prejudice, pursuant to 33 C.F.R. § 52.32 of the Board's rules at that time, based on the applicant's failure to submit substantial evidence of error or injustice in his military record. The Chairman informed the applicant that he could resubmit his application if he provided additional evidence of error or injustice. The applicant waited about fifteen years to do so. Since the application was never reviewed by a designated Board, as all such applications are today, the Board concurs with the Chair's decision to docket the application. Under 10 U.S.C. § 1552(b), however, an application to the Board must be filed within three years of the date the applicant discovers the alleged error in his record. Because the applicant clearly knew about his RE-4 reenlistment code when he applied to the Board in 1990, his latest application was not timely filed.
3. Pursuant to 10 U.S.C. § 1552(b), the Board may excuse the untimeliness of an application if it is in the interest of justice to do so. In *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992), the court stated that to determine whether the interest of justice supports a waiver of the statute of limitations, the Board "should analyze both the reasons for the delay and the potential merits of the claim based on a cursory review." The court further instructed that "the longer the delay has been and the weaker the reasons are for the delay, the more compelling the merits would need to be to justify a full review." *Id.* at 164, 165. See also *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).
4. The applicant did not provide a compelling explanation for his long delay in seeking further consideration of his request for an upgraded reenlistment code. The Board notes, however, that the evidence the applicant has submitted in support of his allegation of injustice is new and was not available to him within three years of his discharge.
5. The applicant's record indicates that he was discharged as a result of two arrests for DUI, both of which constituted "alcohol incidents," under Article 20-A-3.b. of the Personnel Manual in effect in 1990. Under Article 20-B-2.d., a member's second alcohol incident "normally" resulted in his discharge for unsuitability under Article 12-B-16, but a member's commanding officer could ask the Commandant for permission to retain the member in exceptional situations. This same policy remains in effect today under Articles 20.B.2.h.2. and 12.B.16. of the current Personnel Manual. In his letter to the Commandant dated January 3, 1990, the applicant's CO noted that apart from the

applicant's alcohol abuse, his unsuccessful attempts to advance showed that the applicant did "not have the leadership ability to become a Petty Officer" or "to benefit the Coast Guard in other than a nonrated factor," despite being a very hard worker. The record also shows that the applicant received all due process under Article 12-B-16 prior to his discharge. Under the SPD Handbook in effect in 1990, as well as under current regulations, an RE-4 is the only reenlistment code authorized for members separated due to alcohol abuse. There is no evidence that the Coast Guard committed any error or injustice by assigning the applicant an RE-4 in 1990.

6. The applicant, however, alleges not that the RE-4 was undeserved in 1990 but that his reenlistment code is now unjust because he has matured over the past sixteen years, no longer abuses alcohol, and deserves another chance to join the military. In support of his request for an upgraded reenlistment code, the applicant submitted evidence showing that he has recently earned Associate's and Bachelor's degrees while working full time as a security guard. This feat indicates that the applicant is still a very hard worker, as his CO stated in 1990. This same officer—the applicant's CO in 1990—recently spoke to the applicant at length and concluded that he "would gladly have him as part of the Coast Guard Team again and would recommend a change to his RE code to allow him to serve his country again." The applicant also submitted references from two recent supervisors, who indicate that he has been a reliable, hard-working, and sober employee. In light of this compelling new evidence, which could not have been submitted earlier, the Board finds that it would be in the interest of justice to excuse the application's untimeliness and to consider the applicant's request on its merits.

7. The applicant's ability to earn his Associate's and Bachelor's degrees while working full time as a security guard shows fortitude and determination. However, his ability to work hard was never in question. Even in the recommendation for discharge dated January 3, 1990, the CO acknowledged that the applicant was a very hard worker. The CO's recommendation indicates that, in addition to the applicant's abuse of alcohol, the CO had found that the applicant had no capacity for leadership. The Board notes that while members entering the Coast Guard as E-1 recruits usually advance to a third class petty officer rating within two or three years, the applicant served for more than five and one-half years without earning a rating.

8. Moreover, the Board cannot ignore the applicant's response to the letter of the DRB informing him that he had already exhausted his administrative remedies. The applicant's letter dated May 4, 2003—written with all capital letters, much underlining, and many exclamation points—indicates that he strongly believes that his political and religious views ought to make him eligible for reenlistment. He also described himself as "very anti-new world order conspiracy theorist. If I knew back in my early 20's what I know now, I would have quit drinking right then and there guaranteed!!! I am on a mission for God, country and honor!!! ... I am the one. I am the way. I am and will be the stone pillar that upholds the U.S. Constitution!!!!" He addressed the DRB as "big-

wig commissioned officers” and suggested that they might be prejudiced against him because he was considering joining a different branch of the military. The strident tone and anti-authoritarian statements in the applicant’s letter contradict his claim of having acquired the maturity and character needed to succeed in the Coast Guard or any other branch of the Armed Forces.

9. In light of all the evidence of record, the Board finds that the applicant has failed to prove by a preponderance of the evidence that his RE-4 reenlistment code is erroneous or unjust.¹

10. Accordingly, the applicant’s request should be denied.

¹ See *Sawyer v. United States*, 18 Cl. Ct. 860, 868 (1989), *rev’d on other grounds*, 930 F.2d 1577 (citing *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976)) (holding that for purposes of 10 U.S.C. § 1552, “injustice” is “treatment by military authorities that shocks the sense of justice but is not technically illegal”).

ORDER

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

William R. Kraus

Dorothy J. Ulmer

Thomas H. Van Horn