

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-115

XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX

FINAL DECISION

This is a proceeding 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 after receiving the applicant's completed application on March 27, 2009, 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 December 4, 2009, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, a former machinery technician, third class (MK3/E-4), asked the Board to void his discharge and reinstate him on active duty. The applicant stated that he was erroneously and unjustly discharged without due process on January 28, 2008, because of an alleged "pattern of misconduct," which did not exist. If the Board will not void his discharge, the applicant asked, as alternative relief, that the Board correct the narrative reason for separation on his DD 214 ("Pattern of Misconduct"); his JKA separation code, which denotes an involuntary discharge "resulting from a pattern of misconduct of a discreditable nature with civil or military authorities"; and his RE-4 reenlistment code, which makes him ineligible to reenlist.

SUMMARY OF THE RECORD

On January 29, 2002, the applicant enlisted in the Coast Guard. He was assigned to the CGC MATINICUS and then attended MK "A" School and advanced to MK3/E-4. He was next assigned to a Maintenance Augmentation Team of a Naval Engineering Support Unit in San Juan, Puerto Rico.

Police reports show that near midnight on or about May 10, 2006, the applicant was driving a vehicle east on Route 26 past a public housing complex between downtown San Juan, Puerto Rico, and the San Juan airport. He was driving at a speed that exceeded the legal speed limit. His vehicle first struck the rear end of a car that was travelling in the far right lane of four east-bound lanes and then struck three other cars that were parked parallel to the road along the

sidewalk. The driver of the first car that was struck died of her injuries two months later, and someone else was also injured. After the accident, police measured the applicant's blood alcohol content (BAC) at .104, which was above the legal limit of .08.

The applicant was originally charged with negligent homicide in violation of Article 109 of the Penal Code of Puerto Rico; drag or speed racing in violation of Article 5.07 of the Traffic Code; and driving under the influence (DUI) of an intoxicating beverage in violation of Article 7.02 of the Traffic Code. However, the DUI charge was dropped when it was determined that the breathalyzer used to measure the applicant's BAC had not been calibrated.

At a bench trial on July 1, 2008, the applicant was convicted of violating Article 109 of the Penal Code (negligent homicide, third-degree, misdemeanor)¹ and Article 5.07 of the Traffic Code (drag or speed racing).

On September 4, 2008, the applicant was sentenced to serve a jail term of six months plus one day, with costs; to have his driver's license suspended for six months; and to pay a fine. However, the applicant's sentence was suspended upon several conditions, such as staying within the territorial boundary of Puerto Rico; visiting a social services technician; undergoing drug and alcohol tests; avoiding bars, gambling, and known criminals; and being employed or enrolled in school.

On September 23, 2008, the applicant's commanding officer (CO) informed him that he had initiated the applicant's discharge by reason of misconduct pursuant to Article 12.B.18.b.1. of the Personnel Manual based on his conviction for involuntary homicide and his suspended sentence and probation under the court's custody. The CO wrote that he had recommended that the applicant receive a General discharge. He also notified the applicant that he had the right to consult an attorney, to object to his discharge, and to submit a statement on his own behalf.

On September 30, 2008, the applicant acknowledged having consulted an attorney, objected to his discharge, and submitted a statement on his own behalf. The applicant stated that he was "extremely affected with what has happened" but hoped to put the past behind him and continue serving his country and the Coast Guard. He stated that he had received counseling and volunteered his time to serve at a soup kitchen and to sponsor movie nights for children in Coast Guard housing. He stated that his job performance had not declined since the accident and that he had even been recommended for advancement in 2008. He alleged that the accident was caused by someone who made an illegal stop in the middle of the freeway. He stated that his accident could have happened to anyone. He asked that, if he could not be retained on active duty, he receive an honorable discharge reflecting his years of good service without any negative performance feedback. The applicant attached to his statement several character references from other members, which are summarized below.

¹ 33 L.P.R.A. § 4737 provides that any person who causes the death of another by reason of negligence will incur a misdemeanor, but a felony penalty in the fourth grade shall be imposed. However, when the death is caused while the person is driving under the influence of intoxicating beverages or controlled substances or with a clear disdain toward the safety of other people or while the person is firing a firearm toward an indeterminate target, the person will incur a felony in the third grade.

- A master chief petty officer stated that he had been the Executive Petty Officer of the applicant's unit, the CGC MATINICUS, from 2002 through 2004; that the applicant had been invaluable in migrant operations because he spoke Spanish and had show great respect for others; and that although he did not know the details of the applicant's pending discharge, he believed the applicant could still be an asset to the Coast Guard.

- MK2 B stated that he had known the applicant for three years and supervised him for one. He stated that the applicant was skilled, reliable, and dedicated to the Coast Guard. He stated that the applicant was respectful and "demonstrated a positive and can-do attitude."

- CWO Z stated that he served with the applicant on the MATINICUS in 2002 and 2003. the applicant treated everyone respectfully and showed interest in learning new skills and advancing. He heard similar reports from the applicant's superiors in San Juan.

- DC2 H stated that he met the applicant in July 2008 and found the applicant to be very friendly and helpful and a great shipmate.

- EM1 R stated that he had worked with the applicant for three years in San Juan. He described the applicant as "an excellent person, shipmate, and worker," who did not let personal problems affect his job performance.

- MK3 C stated that he had worked with the applicant for one and one-half years and "can say nothing but good things." He stated that the applicant was a responsible hard worker, good shipmate, and loyal friend.

- MKC M stated that while serving as the Engineering Petty Officer aboard a cutter homeported in San Juan from June 2006 to July 2008, he found that the applicant had a "tremendous work ethic" and was very loyal to his team and the cutters homeported in San Juan. He stated that the applicant "was routinely the first one to accept responsibility for tasking and held himself and his shipmates to the highest standards of ethical and professional conduct."

- EM3 H stated that the applicant is a great representative of the Coast Guard and a very knowledgeable MK3. He stated that the applicant deserved a second chance because he had "sweated blood" for the Coast Guard.

On October 31, 2008, the CO recommended that the applicant receive a general discharge under Article 12.B.18.b.1. of the Personnel Manual "for misconduct due to his conviction and sentence for involuntary homicide." He noted that the applicant was not entitled to an Administrative Discharge Board because he had less than eight years of military service. The CO noted that the Coast Guard's Second Chance program under Article 12.B.1.a. of the Personnel Manual did not apply. The CO forwarded with his recommendation the applicant's statement and attachments and documents from the court and police concerning his arrest, conviction, and sentence. The Commander of the Maintenance and Logistics Command for the Atlantic Area forwarded the recommendation to the Coast Guard Personnel Command (CGPC) but recommended that the applicant be retained on active duty despite the incident because his submissions showed that he was "truly remorseful and is committed to being of future benefit to the Coast Guard."

On December 29, 2008, CGPC ordered that the applicant receive an honorable discharge for misconduct on January 28, 2009, under Article 12.B.18. of the Personnel Manual because of his involvement of a “discreditable nature with civil or military authorities.” CGPC noted that the applicant’s DD 214 should specify separation code JKA and “Pattern of Misconduct” as the narrative reason for separation.

On January 16, 2009, an attorney for the applicant wrote to CGPC complaining that the applicant had not been notified that he would be discharged on January 28, 2009, until the week before. The attorney stated that there was no pattern of misconduct and that the applicant was being discharged without due process. He asked CGPC to delay the applicant’s discharge.

On January 27, 2009, CGPC sent an email to the attorney stating that the applicant would receive an honorable discharge for misconduct in accordance with Article 12.B.18.b.3. of the Personnel Manual. He stated that there were three criteria for this type of discharge. First, the alleged offense must carry the potential for a punitive discharge under the Uniform Code of Military Justice (UCMJ). Under Article 119 of the UCMJ, the maximum punishment for involuntary manslaughter included a punitive discharge.² Second, the member’s conduct must warrant separation, and CGPC had determined that the applicant’s conduct did. Third, although the member did not have to be convicted or awarded non-judicial punishment for the misconduct, the preponderance of the evidence should support a finding of misconduct. The applicant’s conviction showed that this criterion was met. CGPC concluded that the applicant’s discharge was therefore “correct by policy”; that there had been “no procedural errors”; and that the applicant’s discharge on January 28, 2009, would stand.

On January 28, 2009, the applicant was honorably discharged under Article 12.B.18. of the Personnel Manual. The separation code on his DD 214 is JKA, the reenlistment code is RE-4 (ineligible), and the narrative reason for separation is “Pattern of Misconduct.”

VIEWS OF THE COAST GUARD

On August 19, 2009, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion and recommended that the Board grant partial relief in this case. In so doing, he adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

The PSC stated that the applicant received all due process under Article 12.B.18. of the Personnel Manual prior to his discharge. The PSC stated that although Article 12.B.18.b.3. of the Personnel Manual authorizes discharges when members commit serious offenses, the Separation Program Designator (SPD) Handbook does not contain an exactly equivalent SPD code. Therefore, in most such cases, the Coast Guard uses separation code JKA for a “Pattern of Misconduct.” However, the PSC stated that the applicant’s assertion that his SPD code is inaccurate and incorrect is true. The PSC stated that the applicant should have received SPD code JKB, which denoted an involuntary discharge due to conviction by civilian authorities, and “Miscon-

² The maximum allowed punishment for involuntary manslaughter under the UCMJ is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for ten years.

duct,” rather than “Pattern of Misconduct,” as his narrative reason for separation. The PSC argued, however, that the applicant’s RE-4 code is correct and should not be changed. The PSC stated that the Coast Guard should issue a DD 215 reflecting the recommended corrections.

RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 1, 2009, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 days. No response was received.

APPLICABLE REGULATIONS

Article 12.B.18.b. of the Personnel Manual states that Commander, CGPC may direct the discharge of a member for misconduct in any of these cases:

1. Civilian or Foreign Conviction. Conviction by foreign or domestic civil authorities or action taken tantamount to a finding of guilty, e.g., adjudication withheld; deferred prosecution; entry in adult/juvenile pretrial intervention programs, or any similar disposition of charges which includes imposition of fines, probation, community service, etc., of any offense which could warrant a punitive discharge if prosecuted under the Uniform Code of Military Justice (UCMJ). Whether a civilian offense could warrant a punitive discharge shall be determined by examining the maximum authorized punishment for the same or the most closely related offense under the UCMJ and the Manual for Courts-Martial (including Rule for Courts-Martial 1003(d)). A member subject to discharge because of conviction by civil court may be processed for discharge even though an appeal of that conviction has been filed or intent to do so has been stated.

2. Pattern of Misconduct. Members may be separated 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;
- f. a pattern of shirking.

3. Commission of a Serious Offense. Commission of a serious offense 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. The escalator clause of Rule for Courts-Martial 103(d) shall not be used in making this determination.

Article 12.B.18.e. states that when initiating the discharge of a member with fewer than eight years of military service for misconduct, a commanding officer must inform the member in writing of the reason for the proposed discharge; afford the member an opportunity to submit a

written statement; and, if a general discharge is contemplated, afford the member an opportunity to consult an attorney.

Under the SPD Handbook, the following separation codes, reenlistment codes, and narrative reasons for separation could apply to the applicant's separation:

SPD Code	Narrative Reason for Separation	RE Codes	Explanation of SPD Code
JKA	Pattern of Misconduct	RE-4	Involuntary discharge by directive resulting from a pattern of misconduct of a discreditable nature with civil or military authorities
JKB	Misconduct	RE-4	Involuntary discharge by directive when a member is convicted by civilian authorities
JKQ	Misconduct	RE-4	Involuntary discharge by directive when a member has committed a serious military or civilian offense

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 alleged that he was erroneously and unjustly discharged for an alleged pattern of misconduct without due process. 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.³ 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."⁴

3. The record shows that after the applicant was convicted of negligent homicide and drag racing on July 1, 2008, he was notified of the reason for his proposed discharge under Article 12.B.18.b.1. of the Personnel Manual and afforded an opportunity to consult counsel and to submit a statement on his own behalf. The CO submitted the applicant's statement and the attachments with his recommendation for discharge. Therefore, the preponderance of the evi-

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

⁴ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

dence shows that the applicant received all process due under Article 12.B.18.e. of the Personnel Manual.

4. Under Article 12.B.18.b.1. of the Personnel Manual, Commander, CGPC may order the separation of a member for misconduct if the member is convicted in a civilian court of an offense that under the UCMJ could result in a punitive discharge. The regulation further states that “[w]hether a civilian offense could warrant a punitive discharge shall be determined by examining the maximum authorized punishment for the same or the most closely related offense under the UCMJ and the Manual for Courts-Martial.” The applicant was convicted of negligent homicide and drag racing. Under the UCMJ, the most closely related offense is negligent homicide under Article 134.⁵ The maximum punishment for this offense includes a punitive, dishonorable discharge.⁶ Therefore, the Board finds that the applicant’s discharge was authorized, and he is not entitled to have his discharge voided or to be reinstated on active duty, as he requested. The Board notes that the applicant alleged that the accident could have happened to anyone, as if the accident was not attributable to his negligent driving. However, he submitted nothing to support this allegation.

5. The documentation of the applicant’s discharge on his DD 214 appears to be erroneous, however, because the narrative reason in block 28 cites a “Pattern of Misconduct,” as if the applicant had been discharged under Article 12.B.18.b.2. rather than Article 12.B.18.b.1. Article 12.B.18.b.2. does not apply to the applicant’s case because there was only one incident of misconduct documented his military record (assuming the homicide and drag racing occurred in a single incident).

6. The SPD Handbook provides a separation code for a conviction by civilian authorities (JKB) and another for committing a serious offense (JKQ), either of which could apply to the applicant’s case under Articles 12.B.18.b.1. and 12.B.18.b.3. of the Personnel Manual. Because the applicant was convicted by a civilian authority and because his CO cited Article 12.B.18.b.1. in notifying the applicant of his pending discharge and in recommending the discharge to CGPC, the Board agrees with the PSC that his discharge should have been documented on his DD 214 with the JKB separation code and “Misconduct” as the narrative reason for separation.

7. The RE-4 is the only reenlistment code authorized for a member discharged due to misconduct, and the applicant has not shown that his RE-4 is erroneous or unjust given his convictions.

⁵ MANUAL FOR COURTS-MARTIAL UNITED STATES, part IV-128 (2008). The Board notes that in the advisory opinion, the PSC compared the applicant’s offenses to involuntary manslaughter under Article 119. Under the UCMJ, the difference between negligent homicide and involuntary manslaughter is whether the homicide resulted from “simple negligence”—an absence of reasonable due care—or “culpable negligence”—a negligent act which might foreseeably result in the death of another person even if death is not a probable consequence of the act. *Id.* at parts IV-129 and IV-65. Although the police report states that the applicant was exceeding the speed limit at the time of the homicide, and the applicant was also convicted of drag racing, it is not perfectly clear in the record before the Board whether the homicide occurred during a drag race.

⁶ *Id.* at parts IV-66 and IV-129 (stating that the maximum punishment for negligent homicide is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for three years, while the maximum punishment for involuntary manslaughter is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for fifteen years).

8. Accordingly, partial relief should be granted by correcting the applicant's DD 214 to show that he was discharged with a JKB separation code and "Misconduct" as the narrative reason for separation.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of former xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is granted in part. His DD 214 shall be corrected to show separation code JKB in block 26 and "Misconduct" in block 28.

All other requested relief is denied.

Nancy L. Friedman

Patrick B. Kernan

George A. Weller