

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2010-026

**XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX**

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 November 4, 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 August 12, 2010, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, who received an honorable discharge due to inaptitude on October 17, 2007, asked the Board to correct his record to show that he was discharged for "miscellaneous/general reasons," instead of inaptitude. The applicant also asked the Board to correct his separation code, JNC, which means "Unacceptable Conduct," and his reenlistment code, RE-4, which makes him ineligible for reenlistment. In addition, the applicant asked that the record of his non-judicial punishment (NJP) dated February 12, 2007, and a special performance evaluation he received as a result of the mast be removed from his record and that he be awarded the Good Conduct Medal he was denied because of the mast.

The applicant alleged that the narrative reason for his discharge, "Inaptitude," is inconsistent with his actual performance on active duty. He stated that during boot camp, he received the Seamanship Award, the Academic Award, and was one point away from being the Honor Graduate. At FS "A" School, he was the Assistant Class Leader. At his first assignment aboard the USCGC XXXX, he advanced to FS3 in October 2004 and to FS2 in January 2006. In addition, he received a Letter of Commendation (LOC) from the captain of the XXXX.

The applicant alleged that after advancing to FS2, he requested independent duty and was assigned to the USCGC XXXXX, but "everything started going down hill. I believe that only one other person on the CGC Xxxxx had an LOC. I started getting Page 7's that were not accurate."

The applicant alleged that his February 12, 2007, NJP should be removed from his record because he was a trainee at the time and not a qualified Officer of the Deck (OOD) and because he was accused unjustly. The applicant stated that as a trainee, he was sent to do rounds unaccompanied by a trainer and by mistake marked off the wrong item on the check list. The applicant alleged that he was “set up” because the bilge had been flooded with 18 inches of water “for training purposes” but he was sent to do rounds without a trainer.

The applicant alleged that he should have been given a training log, rather than an official log, and he should have been shadowed by the OOD. However, because of his erroneous mark, he was unjustly charged with making a false statement under Article 107 of the Uniform Code of Military Justice (UCMJ). The applicant noted that that offense requires that the member knowingly and intentionally make the false statement, but he did not intend to deceive anyone when he mistakenly marked off the wrong item on the check list and he did not know that it was an erroneous mark when he made it. The applicant alleged that any falsification was done by the OOD because a “trainee cannot make an entry on an official log sheet without approval of the qualified OOD.”

The applicant alleged that even though he was a trainee, he received the maximum punishment¹ that a senior chief can award as an Officer in Charge (OIC). He was fined \$197, restricted to the boat for 14 days, put on six months of probation, and awarded low marks on his performance evaluation with an unsatisfactory conduct mark, which caused his eligibility for a Good Conduct Award to be terminated just two months’ shy of the date he would have received his first award of that medal. The applicant alleged that the punishment he received is what would have been awarded to an OOD on watch and is therefore too harsh for a trainee.

The applicant alleged that after he was awarded NJP and put on probation in February 2007, he continued to receive inaccurate Page 7s. He tried to qualify as an OOD three times, but each time he failed because the Board asked him questions that were not in the OOD PQS.

The applicant alleged that at the end of his probationary period, the OIC gave him two options: a reduction in rate to FS3/E-4 or an honorable discharge. He was not offered a second chance under the Second Chance Program and his request for one was denied by officers who did not know him. Because he was not offered the opportunity to transfer to another unit or to gain more training and maturity, he chose the honorable discharge.

The applicant stated that after speaking with his mother, who has more than 30 years of service, he asked the Command Master Chief (CMC) for the Sector and was told that his reenlistment code “would probably be a 3 [RE-3].” Then he submitted a letter asking for a second chance under the Second Chance Program, but his OIC told him that his request had been denied by the District. After speaking to a lieutenant commander in the Personnel Command, he submitted a letter requesting reconsideration of his second chance request. Then he was told by the CMC that the District had denied his first request because when the District called the CMC to ask him if the applicant’s request should be granted, the CMC told the District, ““We gave him

¹ The applicant received 14 days of restriction and forfeiture of 3 days’ pay. Under the Military Justice Manual, the OIC could also have awarded the applicant 14 days of extra duties but did not do so.

what he wanted,' meaning a discharge." When the applicant asked the CMC for help with his second chance request, the CMC responded, "Do you know how much time I put in on your discharge package? Do you know how much my time is worth? At least \$50 an hour." However, with help from his mother's boss, he submitted his reconsideration request to his OIC. However, the District again denied his request.

The applicant also alleged that his DD 214 was prepared incorrectly because under the regulations, he should have received "Unsuitability" as the narrative reason for discharge but instead received the more specific "Inaptitude." Moreover, he alleged, his separation code is wrong because the code JNC is for an involuntary "Unacceptable Conduct" separation, but he was not discharged for unacceptable conduct and he did not object to the discharge, so it was voluntary. In addition, he stated, his discharge was improper because he was never diagnosed with inaptitude or screened by a medical officer for inaptitude, which, he alleged, is required for an inaptitude discharge.

The applicant admitted that "[i]ndependent duty may have been somewhat premature for me. While I excelled in a large galley on the Xxxx, my performance on the CGC Xxxxx was less than I would desire." He noted that during his last month on active duty he was assigned to Sector Jacksonville and was told that he was doing much better than he had on the XXXXX.

In support of his allegations, the applicant submitted several letters of recommendation from his chain of command aboard the XXXX. The Executive Officer (XO) of the XXXX stated that the applicant met the challenges of serving meals to up to 150 people every day "quite well and without complaint" and was frequently cited by his division's senior chief as being "one of the bulwarks of a very hard working staff." The XO stated that based on the applicant's performance on the XXXX, he fully supports the applicant's request for a better reenlistment code.

A chief warrant officer, CWO3 T, aboard the XXXX stated that the applicant "was an instrumental part of a four-man team in the preparation of over 480 meals per day over a course of a six-month arduous North Pole trip. Due to lack of personnel, he was quickly thrown into the routine of being a duty cook; preparing menus and helping with jack of the dust duties, working from early morning hours through late evening hours." CWO3 T stated that the applicant "did his job with no complaints, [was] never late and as a junior cook [was] always eager to learn." He further noted that the command "had high hopes for [the applicant] and his Coast Guard career as the Command eagerly endorsed him for independent duty."

A senior chief food service technician aboard the XXXX, FSCS F, stated that the applicant was "an outstanding young chef with great potential. He was consistently looking to improve his skills, worked very hard to get all of his qualifications done for advancement and was an outstanding shipmate to his peers." FSCS F stated that when the applicant requested independent duty, he had no doubt whatsoever about the applicant's ability to handle it. FSCS F stated that the applicant deserves to have his RE-4 code reviewed and upgraded.

The applicant also submitted a statement from his mother, who described the applicant's successful and enthusiastic start in the Service. She alleged that during the applicant's six-month probation, he was treated with hostility and harassment by the OIC and all but two of his crew-

mates. She alleged that they prevented him from qualifying for Underway OOD by asking questions about things he had never heard of, had not been taught, and were not in the PQS for Underway OOD. She argued that her son should have been given a second chance. She alleged that the OIC's endorsement to the applicant's request for reconsideration for a second chance contains a false statement because how could the OIC reduce the applicant in rate without taking him to mast? In addition, she alleged that her son was never given the option of requesting a second chance until she herself told him about it. Because the applicant's mother had served as his recruiter, she submitted a copy of a letter she received from the commanding officer of the training center, stating that the applicant had successfully completed recruit training, received the Academic Award for maintaining the highest academic average and the Seamanship Award for having the highest standing during the seamanship phase of recruit training.

The applicant also submitted a statement from his mother's commanding officer, who stated that the applicant's evaluation marks were good before he reported to the XXXXX and that the applicant's precipitous fall from grace was "a quite tragic evolution within our human resources system."

SUMMARY OF THE APPLICANT'S MILITARY RECORD

The applicant's military records are incomplete. The Coast Guard sent the Board a scanned copy of the applicant's records, but several significant documents concerning his performance and discharge are missing. It appears that in scanning or photocopying certain documents, someone scanned or copied just every other page. Upon inquiry by the BCMR staff, the Coast Guard stated that once a veteran's record is scanned, the original paper record is shredded. The following is what can be gleaned from the records provided by the Coast Guard.

On April 13, 2004, at age 18, the applicant enlisted in the Coast Guard. Upon completing recruit training, he was assigned to the icebreaker USCGC XXXX, with berthing for about 140 crewmembers and scientists. While aboard the XXXX, the applicant received marks of 4, 5, and 6, on his performance evaluations, which use a scale of 1 (worst) to 7 (best). Upon leaving the XXXX in April 2006, the applicant received a Letter of Commendation from the captain of the USCGC XXXX, dated May 2, 2006, for his performance "with distinction as a member of the XXXX Food Service Division" from October 2004 to April 2006. The letter highly praises the applicant's skills, teamwork, and enthusiasm.

From the XXXX, the applicant was transferred to independent duty aboard the XXXXX, a tender with a crew of 15 members based in Sector XXXXXXXXXXXXX. On July 18, 2006, the applicant was counseled by the Watch Petty Officer on a Page 7 (form CG-3307) about disregarding the watch schedule and failing to serve as the break-in Officer of the Day and to notify anyone that he could not stand duty. The applicant was warned that his conduct was unacceptable and that further conduct of that sort would result in more serious actions.

On his first performance evaluation aboard the XXXXX, dated October 31, 2006, the applicant received all marks of 4 and 5.

On January 15, 2007, the XPO prepared a Page 7 for the applicant's record, which the applicant signed in acknowledgment, noting that he had

failed to pass the underway portion of the Inport Officer of the Deck qualification package. Member has been administered three qualification boards, and failed to accomplish the qualification in the time specified by the training board.

On (15 JAN 07) member has been instructed to perform the following tasks, until fulfillment of Inport Officer of the Deck qualification:

1. Complete the SEOPS Student Guide (LANTAREAINST 3502.2 (Series)).
2. Member has been allotted one hour per day in-port study and instruction, with the In-port Officer of the Day.
3. Member will remain Port and Starboard for duty while underway.

On January 16, 2007, the applicant was charged with failing to obey an order or regulation by failing to perform proper rounds aboard the cutter, in violation of Article 92 of the UCMJ,² and making a false official statement by falsifying an entry to the round sheet, in violation of Article 107 of the UCMJ.³ The named witnesses were an MK2, a BM3, and an EM3. The OIC appointed a BM2 to investigate the charges. The applicant was advised of his rights and waived his right to consult a lawyer. The investigator reported the following:

Finding Facts:

On 15 JAN 2007, [the applicant] made an improper 2000 round of the tug and barge. Member did not check all of the required bilge spaces or the bilge alarm panel. [He] also recorded a false reading of the Lazarette compartment. The Lazarette bilge was filled with 18 inches of water. The water in that space was put there for training purposes due to [the applicant's] break-in status.

Opinions:

In my opinion, [the applicant] violated Article 92 – Failure to obey an order or regulation and Article 107 – False statements. [He] did not conduct a proper 2000 round. Member is aware of what a proper round consists of since he held an Inport OOD qualification prior to this evening. [He] recorded a false reading of the Lazarette space. In his attached statement, [he] claims he recorded the bilge water level for Shaft Alley in the designated area for the Lazarette. I believe the recording of both space[s] was done intentionally since both bilge level[s] were marked with a trace. A copy of the bilge log for the 15 JAN 2007 is attached.

Recommendations:

I recommend this case be disposed of at mast.

² Article 92 of the UCMJ, "Failure to obey order or regulation," is codified at 10 U.S.C. § 892 and states that "[a]ny person subject to this chapter who--

(1) violates or fails to obey any lawful general order or regulation;

(2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or

(3) is derelict in the performance of his duties;

shall be punished as a court-martial may direct.

³ Article 107 of the UCMJ, "False official statements," is codified at 10 U.S.C. § 892 and states that "[a]ny person subject to this chapter who, with intent to deceive, signs any false record, return, regulation, order, or other official document, knowing it to be false, or makes any other false official statement knowing it to be false, shall be punished as a court-martial may direct."

The applicant submitted a statement for the investigation in which he stated that he

had the Break-in OOD watch. At or around 2000, I proceeded to commence a 2000 Bilge round of the tug and barge. During the round, I accidentally recorded the amount of water for shaft alley in the location on the log for the Laz. I intended on returning to the fantail at the end of my round of the barge, to retrieve the reading of the Laz, and get a drink from the cooler on the fantail. I failed to return to the fantail, to retrieve the reading. I returned to the Bridge, where [the MK2] reviewed the log entries, and departed the bridge. [The EM3] called me on the bridge, requesting my presence on the fantail. [The MK2] had the hatch to the Laz open, and stated "that looks like a lot more than a trace". I replied that I did not check that space.

On February 12, 2007, the applicant was taken to mast by the OIC and punished with 14 days' restriction to the boat and forfeiture of 3 days' pay.⁴ The OIC prepared a Page 7 advising the applicant that he was

being placed on performance probation for unsuitability (Inaptitude, Apathy) as per section 12-B-16-b of the Personnel Manual. A pattern of substandard performance has been documented over the past several months and will no longer be tolerated. You reviewed the unit Standing Orders when you reported on board, included in these Standing Orders is the command's timeline for qualifications. To this date you have still not fully qualified as in-port OOD, this goal had an expected completion date of 2 months. You have sat before the qualification board 3 times and failed on each attempt to complete this qualification; your knowledge level even appeared to digress when you appeared before the last board. It was the recommendation of the board to rescind your interim qualification and have you complete another SEOPS student guide.

On numerous occasions you have been issued explicit orders which you fail to carry out, most recently documented in a 3307 dated 05FEB07. Several times you have failed to inform the command as to changes in meal schedules. You have failed to procure the necessary food stuffs to feed the crew for a scheduled deployment, even when reminded numerous times. You have been formally and informally counseled on your disregard for wearing the required uniform. You are reminded monthly to complete your credit card verification. These are examples of the simplest of routine tasks which are normally accomplished by members of lesser pay-grades.

You have been informally counseled numerous times by each member of the command on how you manage your time, yet you still appear to struggle staying focused on completing the task at hand. It is evident to each member of the command you are not willing to put forth the effort to become a responsible, productive and contributing member of the crew. You must take stock in your actions which generated this situation. You have six months to overcome the deficiencies which created this situation, or you will be processed for discharge. If you do not show significant improvement in overcoming the deficiencies during the probationary period an administrative discharge will be initiated.

In conjunction with the mast on February 12, 2007, the applicant received a special performance evaluation on which he received two very low marks of 2, seven low marks of 3, fourteen average marks of 4, two good marks of 5, and an unsatisfactory conduct mark.

On April 30, 2007, the applicant received a regular, semiannual performance evaluation with five marks of low 3, nineteen marks of 4, one mark of 5, and a satisfactory conduct mark.

⁴ Under the Military Justice Manual, the maximum punishment an OIC can award at NJP is 14 days of restriction, 14 days of extra duties, and forfeiture of 3 days' pay.

On July 19, 2007, the XPO prepared a Page 7 for the applicant's record stating the following:

While standing the Junior Office of the Day watch from 2245 to 0545 you disobeyed a direct order from the units Engineering Petty Officer to make and record hourly rounds on the refrigerators, one of which had just been electrically repaired and required close attention. You also failed to sound and record the soundings for the cutters fuel tanks. Furthermore, you failed to properly maintain the ships material condition of readiness by closing but not dogging the Trim Tank and Lazarette hatches. These actions are not in compliance with proper watch-standing routine and will not be tolerated any further.

In August 2007,⁵ the OIC prepared a long Page 7 concerning the applicant's poor performance. However, only the second page of this Page 7, which was apparently three pages long, survives in his record, and the other pages were shredded. On this second page, the OIC described many deficiencies in the applicant's performance, stating that he had failed to take out the trash or to order non-rates to take out the trash; that he had to be reminded nearly every time he went shopping to remove the bags and boxes, which created a hazard; that he had failed to clean the grill even though the MAA had told him to and even though he had had plenty of time to do so; that the OIC had had "to constantly follow up behind you to ensure even the most routine tasks associated with your rating are accomplished"; that he routinely prepared meals late without warning the OIC or the XPO so that they could plan around the change in time; that he had allowed hundreds of dollars worth of food to rot through neglect despite having attended FS "A" School and "C" School and training by the Sector's HS1; that he had failed to purchase sufficient water or Gatorade for their last voyage and did not notify the XPO until the cutter was underway and then, after purchasing the drinks at their next stop, left them in a vehicle so that they only got on board because another member noticed them in the back of the vehicle; and that he had failed to prepare the galley for a bi-annual inspection in a timely manner despite having been notified the month before.

On August 17, 2007, the OIC notified the applicant in a memorandum, which the applicant also signed, that he had initiated the applicant's discharge for unsuitability "based on your unwillingness vice inability to conform/comply." He noted that the applicant had failed to meet the terms of his six-month performance probation for apathy and inaptitude but that his marks supported receipt of an honorable discharge. He told the applicant he had a right to consult a lawyer and gave the applicant contact information to do so. He also told the applicant that he could submit a statement on his behalf to agree or disagree with the recommendation and that any disagreement would be forwarded to the Personnel Command with the OIC's recommendation.

On August 22, 2007, the OIC sent a recommendation for the applicant's honorable discharge for unsuitability to the Personnel Command through the Sector and District commands. He stated that the applicant had been placed on performance probation for six months due to "unsuitability (Inaptitude, Apathy)" and that because the applicant failed to meet the terms of his performance probation, the OIC was recommending him for discharge. He noted that the applicant had been informed of the recommendation in the August 17, 2007, memorandum. He stated that in addition to being punished at mast on February 12, 2007, the applicant had been formally

⁵ According to the DRB, there were Page 7s dated August 13 and 14, 2007, in the applicant's record.

counseled on six other occasions “for repeated disregard of direct orders and/or written policy, enclosures (4, 5, 6, 7, 8 and 9).” (Enclosures 4, 6, and 8, which were apparently Page 7s counseling the applicant on his performance, are not in the record and have apparently been shredded.)

On September 10, 2007, a CWO2 acting on behalf of the District Commander forwarded the recommendation for discharge to the Personnel Command and noted that the applicant “is not recommended for the Second Chance Program.” (This was the “second endorsement” of the OIC’s recommendation for discharge. The first endorsement, which would have been prepared by the Sector command, is not in the record and has apparently been shredded.)

On September 18, 2007, the Personnel Command issued orders to discharge the applicant on October 17, 2007, with an honorable discharge “by reason of unsuitability due to inaptitude under Article 12.B.16. PERSMAN provided no disciplinary action pending. Indicate code JNC in block 26 of DD form 214CG. In accordance with COMDTINST M1900.4D, block 28 shall only indicate the narrative reason unsuitability.”

On October 4, 2007, the applicant submitted a request for reconsideration for a second chance. This document is not in the record and has apparently been shredded.

Also on October 4, 2007, the OIC of the XXXXX forwarded the applicant’s request for reconsideration for a second chance with an endorsement recommending that the request be denied. The OIC stated that he personally read to the applicant a Page 7 dated August 14, 2007, notifying him that his probationary period was complete, and that on August 17, 2007, he gave the applicant a memorandum notifying him of his intent to discharge him after reading the memorandum to him. The OIC stated that he had also discussed the applicant’s acknowledgement with him, and the applicant understood that he could ask to be retained or choose to be discharged. He advised the applicant of his options under the Personnel Manual if he requested retention and told the applicant that he could not say definitively whether the applicant would be retained if he requested it because the decision would be made at the District level. The OIC stated that he advised the applicant to think about it and defer his decision until the end of the next week and recommended that he contact his mother. In addition, he told the applicant that he could consult legal counsel and gave him telephone numbers to use. Two days later, the applicant told him that he had decided to get out of the Coast Guard. Therefore, the OIC gave him the acknowledgement form to complete, and the applicant elected not to object to his discharge and not to make a statement. (The completed acknowledgement form is not in the record and was apparently shredded.) The OIC denied ever telling the applicant that if he requested retention the OIC would take him to mast and reduce him in rate.⁶

On October 5, 2007, the Sector command forwarded the applicant’s second chance request to the District Commander with a recommendation that the request be denied. He stated that the applicant had been given a chance to request a second chance when he was notified of the command’s intent to discharge him, but instead the applicant had “waived his right to submit a statement on his behalf and did not object to the proposed discharge, enclosure (1).” He also stated that the applicant “was provided numerous opportunities to correct his work performance

⁶ As the applicant noted, reduction in rate is a punishment that was beyond the OIC’s authority to impose.

and behavior during a 6-month probationary period before the command eventually recommended him for discharge on 22 August 2007.”

On October 15, 2007, the District Commander informed the applicant that his request for reconsideration for a second chance waiver had been considered and denied after reviewing the endorsements of the OIC and the Sector Commander and after consulting with the Command Master Chief for the District, the District Deputy Staff Judge Advocate, and the District Chief of Personnel.

On October 17, 2007, the applicant received an honorable discharge under Article 12.B.16. of the Personnel Manual, with a JNC separation code, an RE-4 reenlistment code, and “Inaptitude” as his narrative reason for separation.

On February 26, 2009, the Discharge Review Board (DRB) notified the applicant that his request for correction had been denied and that his discharge by reason of inaptitude with an RE-4 reenlistment code would stand as issued. The DRB found that the applicant’s discharge was equitable and proper, that the separation code JNC was appropriate, and that “the narrative reason matches the circumstances that led to this member’s discharge.” The DRB listed as evidence in his record negative Page 7s dated July 13 and 18, 2006; December 19, 2006; January 15, 2007; two dated February 5, 2007; two dated February 12, 2007; July 19, 2007; and August 13 and 14, 2007. However, only four of these Page 7s and one page of a fifth appear in his record and the rest were apparently shredded.

VIEWS OF THE COAST GUARD

On March 12, 2010, the Judge Advocate General (JAG) submitted an advisory opinion in which he recommended that the Board deny relief. In so doing, he adopted the facts and analysis provided in an enclosed memorandum submitted by Commander, Coast Guard Personnel Service Center (PSC), who recommended that no relief be granted. Commander, PSC stated that he concurs with the findings of the DRB and alleged that the applicant had “failed to substantiate any error or injustice with regards to [his] record.”

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 4, 2010, the Board received the applicant’s response to the views of the Coast Guard. The applicant stated that when he received his OIC’s memorandum he was verbally told that he had two options, which were taking a reduction in rate to FS3 or agreeing to an honorable discharge. He stated that he “was never told how the reduction in rate would take place.” However, he felt he would never have a chance to succeed on the XXXXX because he “had been singled out and harassed so much.” He stated that he agreed to the discharge and waived his right to submit a statement because he felt depressed due to the harassment. He did not contact the legal counsel because he did not know what an attorney could do for him. He assumed his OIC was telling the truth and it was not until he consulted his mother that he knew the OIC was not. The applicant stated that neither the Command Master Chief nor the OIC warned him that he would receive an RE-4 code. He also repeated his allegations that his NJP at mast was unjust

and that his OIC never mentioned the Second Chance Policy to him before he agreed to be discharged.

APPLICABLE REGULATIONS

Under Article 12.B.16.a. of the Personnel Manual in effect in 2007, Commander, CGPC had authority to discharge members for unsuitability. Article 12.B.16.b. lists the causes for an unsuitability discharge as

- (1) inaptitude, which is described as “unfit due to lack of general adaptability, want or readiness of skill, clumsiness, or inability to learn”;
- (2) personality disorders “as determined by medical authority” and listed in Chapter 5 of the Medical Manual;
- (3) “[a]pathy, defective attitudes, adjustment disorders as listed in the Medical Manual, COMDTINST M6000.1 (series), Chapter 5, inability to expend effort constructively, or other observable defect for which a separation designator code (SPD code) exists that renders a member unsuitable for further military service”;
- (4) unsanitary habits;
- (5) alcohol abuse; and
- (6) financial irresponsibility.

Article 12.B.16.c. states that before initiating the administrative discharge of a member for inaptitude, apathy, defective attitudes, unsanitary habits, or financial irresponsibility, a commanding officer must provide the member with a formal probationary period of at least six months, which will be documented on a Page 7 stating that administrative discharge processing will be initiated unless the member shows significant improvement in overcoming the deficiency during the probationary period.

Article 12.B.16.d. states that a member being recommended for discharge for unsuitability must be notified of the reason for the pending discharge and of his right to object and to submit a statement agreeing or objecting to the discharge.

Article 12.B.16.h.2. states that members being discharged for unsuitability must undergo a physical examination and “[i]f psychiatric considerations are involved (i.e., cases involving conditions dealing with the mind, mental processes, feelings, desires, behavior, personality traits, thoughts, attitudes, etc) a psychiatrist shall describe the condition in terminology set forth in section 5.B. of the Medical Manual, COMDTINST M6000.1 (series).”

Article 12.B.16.a. ends with the instruction to “[s]ee Article 12.B.1 [regarding the Second Chance Program] when recommending the discharge of a first-term performer for unsuitability.” Article 12.B.1.a. describes the Coast Guard’s Second Chance Program as follows:

In an effort to retain good, solid first-term performers with potential, but who have made a youthful mistake that would otherwise result in their discharge, the Commandant has established a “Second Chance Program”. The Second Chance Program authorizes the first Flag Officer/SES in the chain-of-command of the first-term performers to waive all policy discharge authorities (except as noted below) contained in Article 12.B.9. (Unsatisfactory Performers), Article 12.B.12.

(Convenience of the Government), Article 12.B.16. (Unsuitability), and Article 12.B.18. (Misconduct). The first Flag Officer/SES with assistance from their units shall define the internal processes for forwarding waiver requests to them.

Under Article 12.B.9. of the manual, “unsatisfactory performers” who “cannot or will not contribute to supporting the Coast Guard’s missions may be discharged” after a probationary period of at least six months. If the probationary period is unsuccessful, the member must be notified of the pending discharge and of his right to object and submit a statement agreeing or objecting to the discharge.

Article 1.E. of the Coast Guard instruction for completing discharge forms, COMDTINST M1900.4D, states that a member’s DD 214 should show a separation code “as shown in the SPD Handbook or as stated by [the Personnel Command] in the message granting discharge authority,” and that the reenlistment code should be one of those authorized for the separation code under the SPD Handbook. It also states that the Personnel Command “will specify entries to be made in this item [block 28 for the narrative reason for separation] by pertinent letter or orders issued.” The SPD Handbook includes the following combinations of codes and narrative reasons for separation which might apply to the applicant’s case:

SPD Code	Narrative Reason for Separation	RE Code	Separation Authority	Explanation
JNC	Unacceptable Conduct	RE-4	12.B.16.	“Involuntary discharge ... when member performs acts of unacceptable conduct (i.e., moral and/or professional dereliction) not otherwise listed.”
JHJ	Unsatisfactory Performance	RE-3Y or RE-4	12.B.9.	“Involuntary discharge ... when a member fails to perform duties and assignments satisfactorily.”
JND	Miscellaneous/ General Reasons	RE-1 or RE-4	12.B.12.	“Involuntary discharge ... when a Service component does not have a Service reporting requirement for specific reasons and desires to identify reasons collectively “All other reasons” which qualify a member for separation.”

On November 17, 2008, a year after the applicant’s discharge, the Commandant issued ALCOAST 562/08 in which it was noted that units had been completing DD 214s inconsistently in that some used the specific reasons listed in the SPD Handbook and others used the general reasons as directed by COMDTINST M1900.4D. The ALCOAST states that consultation with the Department of Defense had determined that only the narrative reasons for separation shown in the SPD Handbook should be used, rather than the more general ones, such as “Unsuitability.”

On March 18, 2010, the Commandant issued ALCOAST 125/10, which makes the RE-3 reenlistment code the default for the separation codes for which an RE-3 is an authorized option.

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 under 10 U.S.C. § 1552(a). The application was timely filed.

2. The applicant alleged that his NJP dated February 12, 2007, and the JNC separation code, RE-4 reenlistment code, and narrative reason for separation (“Inaptitude”) on his DD 214 are erroneous and unjust.⁷ He also alleged that he was unjustly denied a second chance under the Second Chance Program. 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.⁸ 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.”⁹

3. Regarding the NJP, the applicant alleged that because he was in training on January 15, 2007, he should not have been charged with disobeying an order and making a false official statement. He alleged that the trained OOD on duty should have accompanied him on rounds to ensure that he did not make the mistakes he made and that he should have been given a training log to mark, rather than the real log, in which case, he alleged, his mark would not have been considered a false official statement. The record supports the applicant’s claim that he was training as an OOD. However, the investigator found that the applicant was “aware of what a proper round consists of since he held an inport OOD qualification prior to this [January 15, 2007] evening.” Therefore, the preponderance of the evidence shows that the applicant knew what he was supposed to do on rounds and knew how to mark the round sheet. The record shows that on January 15, 2007, he was counseled about needing to qualify as an OOD and advised, in particular, to study emergency procedures and receive instruction from the OOD. The Lazarette on the tender was partially flooded that evening just to help him practice an emergency procedure. However, the investigation showed that he failed to check the Lazarette, the aft rake, and the trim tank but nevertheless marked the round sheet as if he had checked them and told the OOD and an MK2 when he returned to the bridge that everything was satisfactory as if he had fully completed the rounds.

4. The Board finds that the OIC did not err in finding at mast that the preponderance of the evidence¹⁰ showed that the applicant had disobeyed an order and made a false official statement on January 15, 2007. The record shows that the applicant disobeyed an order because he was directed to perform rounds, which he knew how to do, and failed to complete them. The record also shows that he made at least three marks on the round sheet as if he had checked spaces that he did not actually check and then returned to the bridge and informed the OOD and the MK2 that everything was satisfactory as if he had properly completed the rounds. In arguing that he should have been given a training log to mark, instead of the real round sheet, the Board

⁷ For purposes of the BCMRs under 10 U.S.C. § 1552, “injustice” is “treatment by military authorities that shocks the sense of justice.” *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)).

⁸ 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)).

⁹ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

¹⁰ The standard of proof at mast under Article 15 of the UCMJ is the preponderance of the evidence.

notes that even a mark on a training log is a false official statement if it is made with the intent to deceive. Whether statements are “official” is determined by whether the statement—either written or verbal—relates to the official duties of either the speaker or the hearer.¹¹ The statement must concern a governmental function and be made by someone carrying out a military duty.¹² Training to be OOD is a military duty as is performing rounds. The applicant’s written and verbal statements that he had completed the rounds, even training rounds, clearly related to the official duties of the applicant, the OOD, and the MK2. Although the applicant alleged that he simply made a mistake in marking off the Lazarette on the round sheet and did not intend to deceive anyone, the investigation showed that he also marked off the aft rake and the trim tank without checking them and that when he returned to the bridge he pretended to have fully completed the rounds.

5. Because the applicant has not proved by a preponderance of the evidence that the OIC erred by awarding him NJP at mast for violating Articles 92 and 107 of the UCMJ, the Board finds no grounds for removing the NJP from his record or for awarding him the Good Conduct Medal he was denied because of the mast.

6. Regarding the applicant’s discharge, the Board finds that it was conducted in accordance with policy but was incorrectly documented on his DD 214. The record shows that the applicant’s command acted in accordance with Article 12.B.16. of the Personnel Manual by affording the applicant a six-month probationary period and by initiating his discharge when his performance did not improve to an acceptable level during the period. Although some of the Page 7s documenting his poor performance have been accidentally shredded by the Coast Guard since the DRB reviewed his record, enough remain to substantiate the OIC’s claim that the applicant’s discharge for inaptitude was warranted. In addition, although the acknowledgement form for the discharge notification did not survive the Coast Guard’s shredding of his paper records, the preponderance of the evidence shows that he was notified of the pending discharge and of his right to submit a statement on his own behalf. In this regard the Board notes that his signature appears on the OIC’s notification memorandum, dated August 17, 2007, and that memorandum advised the applicant of his rights. In addition, the OIC’s memorandum dated October 4, 2007, states that after the applicant agreed to be discharged just two days after the OIC read him a Page 7 about his performance probation dated August 14, 2007, the applicant completed the acknowledgement form and elected not to object to his discharge or to make a statement.

7. The applicant argued that under Article 12.B.16.h.2. of the Personnel Manual, he should have been evaluated by a psychiatrist because he was discharged for apathy and inaptitude for his military duties. However, apathy and inaptitude are not listed as psychiatric conditions in the Chapter 5.B. of the Medical Manual. The Coast Guard relies on the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR) when diagnosing psychiatric conditions. Unlike personality and adjustment disorders, which are diagnosable psychiatric conditions that may result in unsuitability discharges under Article 12.B.16., neither apathy nor inaptitude for military duties is listed as a diagnosable psychiatric condition in the DSM-IV-TR. The Board finds that the Coast Guard did not err by failing to have the applicant evaluated by a psychiatrist before discharging him for inaptitude.

¹¹ *United States v. Day*, 66 M.J. 172, 174 (CAAF, 2008).

¹² *United States v. Cummings*, 3 M.J. 246, 246 (CMA, 1977).

8. The applicant alleged that he was coerced into accepting the discharge without objection because the OIC told him he would otherwise be reduced in rate. However, the OIC did not need the applicant's agreement before initiating his discharge for inaptitude. Members can be and often are discharged pursuant to Article 12.B.16. of the Personnel Manual despite their objections. The applicant also alleged that the only way the OIC could have reduced him in rate was to take him to mast, but as the applicant himself noted, a reduction in rate was beyond the OIC's mast authority. The OIC denied having threatened to take the applicant to mast for a reduction in rate. However, the OIC could legitimately have initiated the applicant's reduction in rate under Article 5.C.38. of the Personnel Manual, which allows administrative, rather than disciplinary, reductions in rate for incompetence following a three-month probationary period. Therefore, reduction in rate was a legitimate option for the applicant.

9. The applicant alleged that his discharge was mischaracterized as involuntary because he did not object to it. However, voluntary discharges are those initiated by the member himself. The fact that the applicant opted not to object after the OIC initiated his involuntary discharge did not render it voluntary. The involuntariness of the applicant's discharge is further proved by his repeated requests for a second chance.

10. The applicant alleged that he should have received a second chance pursuant to Article 12.B.1.a. of the Personnel Manual and that his OIC failed to offer him one. Under Article 12.B.1.a., "good, solid first-term performers with potential, but who have made a youthful mistake" may be transferred to a new unit for a second chance. Although the applicant's performance was very good aboard the XXXX, his months-long record of poor performance aboard the XXXXX cannot reasonably be characterized as "a youthful mistake." Moreover, the record shows that he requested a second chance prior to his discharge and that it was denied by the District command. Based on the record, the Board finds that the applicant has not proved by a preponderance of the evidence that the Coast Guard erred in denying him a second chance under Article 12.B.1.a.

11. The record shows that the applicant was involuntarily discharged with a JNC separation code for professional dereliction. "Professional dereliction" seems slightly overblown as a term applied to someone who was discharged, essentially, for being a 21/22-year-old habitual goof-off, but it has been used before in similar circumstances.¹³ Nor is the term technically incorrect since FS2s clearly have professional duties/responsibilities.

12. When ordering the applicant's discharge, the Personnel Command prescribed "unsuitability" as the narrative reason for discharge on his DD 214 in accordance with the provisions of COMDTINST M1900.4D. Under the SPD Handbook, the narrative reason should have been "unacceptable conduct." The command, however, used "inaptitude," which is not a proper narrative reason under either authority. "Unsuitability" and "unacceptable conduct," though correct under the regulations, are not corrections that could be deemed to be in the applicant's favor since both could be construed as broader and potentially more prejudicial terms than "inapti-

¹³ See, e.g., final decisions in BCMR Docket Nos. 2005-041 and 2009-197, in which the applicants, who were prior non-rates, were discharged and assigned the JNC separation code after being counseled about lackadaisical attitudes, poor performance, failing to obey orders, etc., as young petty officers.

tude.” The Board does not correct matters that are in an applicant’s favor for the worse.¹⁴ However, the term “inaptitude” is unacceptable under the regulations and so needs to be corrected.

13. The Board finds that the applicant’s record should be corrected to show that he was discharged for “unsatisfactory performance” with a JHJ separation code under Article 12.B.9. of the Personnel Manual.¹⁵ This correction is in the applicant’s favor because while it accurately describes the cause of his discharge, it does not negatively reflect on his attitude and abilities in the way the term “inaptitude” does; it does not suggest that he was unable to learn how to do his job. In addition, members discharged with the JNC separation code may receive only an RE-4 reenlistment code and so are barred from reenlisting, whereas with the JHJ separation code, members may receive an RE-3Y reenlistment code, which allows a recruiter to reenlist them with a waiver. In fact, under ALCOAST 125/10, issued on March 18, 2010, the RE-3Y is now the default reenlistment code for members discharged for “unsatisfactory performance.” The applicant claimed that his poor performance was due to his being immature and unready for the responsibility of independent duty as an FS2, and his fine performance as part of a team aboard the XXXX suggests that this assessment may be accurate. Therefore, the Board finds that the applicant’s reenlistment code should be corrected to RE-3Y so that he is not barred from reenlisting.

14. The Board notes that the applicant requested a discharge for “miscellaneous/general reasons” with an RE-1 code. However, in light of his record of dereliction of duty and unsatisfactory performance aboard the XXXXX, the Board is not persuaded that he is entitled to such changes simply because the Coast Guard documented the narrative reason for separation erroneously on his DD 214.¹⁶

15. The applicant made numerous allegations with respect to the actions and attitudes of his chain of command and other officers involved in his discharge. Those allegations not specifically addressed above are considered to be not dispositive of the case.¹⁷

16. Accordingly, relief should be granted by correcting the separation authority in block 25 of the applicant’s DD 214 to Article 12.B.9. of the Personnel Manual, the separation code in block 26 to JHJ, the reenlistment code in block 27 to RE-3Y, and the narrative reason for separation in block 28 to “unsatisfactory performance.” Moreover, these corrections should be made on a newly issued DD 214 so that he will not be prejudiced by the information on his old DD 214.

¹⁴ *Friedman v. United States*, 141 Ct. Cl. 239, 252-53 (1958) (holding that the BCMRs were established to correct errors and injustices against applicants and not to correct errors favorable to them).

¹⁵ Article 12.B.12. of the Personnel Manual authorizes discharges for “substandard performance,” but this term is usually applied to members who are deemed to be not apathetic or unwilling but unable to produce work of standard quality for reasons beyond their control.

¹⁶ 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.” *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); *see 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.”)

¹⁷ *See Frizelle v. Slater*, 111 F.3d 172, 177 (D.C. Cir. 1997) (noting that the Board need not address arguments that are frivolous or could not affect the Board's ultimate disposition of a case).

ORDER

The application of former FS2 xxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is granted in part as follows:

The Coast Guard shall issue him a new DD 214 (rather than a DD 215) showing the following:

- The separation authority in block 25 shall be Article 12.B.9. of the Personnel Manual.
- The separation code in block 26 shall be JHJ.
- The reenlistment code in block 27 shall be RE-3Y.
- The narrative reason for separation in block 28 shall be “Unsatisfactory Performance.”

In addition, the following notation may be made in Block 18 of the DD 214: “Action taken pursuant to order of BCMR.”

Thomas H. Van Horn

Darren S. Wall

George A. Weller