

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2012-018

**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 application upon receipt of the applicant's completed application on May 8, 2009, and subsequently prepared the final decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated August 3, 2012, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant asked the Board to correct his record by upgrading his general discharge under honorable conditions to an honorable discharge or in the alternative to correct his record to show that he was discharged for medical reasons (physical disability). The applicant alleged that he was being processed for a medical discharge prior to being processed for discharge due to misconduct. The applicant enlisted in the Coast Guard on July 6, 2004 for 6 years and was discharged on July 19, 2009 by reason of misconduct due to a pattern of misconduct.

APPLICANT'S ADMINISTRATIVE MISCONDUCT DISCHARGE

The document notifying the applicant of his commanding officer's (CO) intent to recommend him for discharge from the Coast Guard due to misconduct is not in the copy of military record that the Personnel Service Center provided to the Board. However, the applicant's April 20, 2009 statement objecting to the CO's recommendation for discharge is in the record. The applicant explained in his statement objecting to his discharge that on September 10, 2007, he was shot twice in the right leg and once in his right foot during an attempted robbery. He stated that he was hospitalized for two months during which he underwent multiple surgeries, physical therapy and rehabilitation. He stated that at that time he was still attending physical therapy to help with pain and strengthening, as well as receiving therapy for his depression. He stated that he has major nerve damage and is taking medication to help alleviate

the pain. Also, he stated that he was diagnosed with PTSD and is taking two anti-depressants. The applicant further stated:

I know if I am discharged with a general discharge I can go to the VA Office to continue to get medical treatment, but I think through what I have contributed to the Coast Guard is that I am entitled to more. I feel I am not being treated fairly and am trying to be pushed out the door with nothing to show for my time and effort that I put forth while serving, whether it be when I was healthy and at full strength or injured but still serving.

On April 24, 2009, we have a change of command ceremony where the current [CO] will be leaving and a new one coming in. My entire chain of officers . . . will be leaving and a new one coming in. My entire chain of command, whether it be from my immediate supervisor to the current CO, will all be transferring from as early as next week to as late as this current summer. I also have a situation where my primary doctor is transferring this summer and the secondary is retiring this fall. I feel I am trying to be run out due to my entire chain of command leaving soon and them not really being concerned with the severity of my situation, but the fact that my situation will be passed on to others after they are gone. Even though this may be bad timing, I still should be given fair treatment. I currently have a medical package that is waiting to be signed and sent up, but I feel is being sat on due to this situation.

I do have remorse and am truly sorry for the things that I have done wrong while in the Coast Guard and at this unit. I have expressed that and have been formally apologetic to many members in my command and I have been forgiven. I know that I'm not perfect and I know I should have been punished for the things that I did, but the thing is that I was punished and now that is all done with. I shouldn't be unfairly discharged for these things . . .

All I want is what is truly entitled to me from the United States Coast Guard. I don't feel my time and effort earned me solely a General Discharge and a letter out the door.

On April 30, 2009, the applicant's commanding officer (CO) recommended that Commander, Personnel Service Center (PSC) discharge the applicant from the Coast Guard by reason of misconduct "for displaying a pattern of misconduct through multiple and repeated violation of Articles of the Uniform Code of Military Justice (UCMJ)" over a two-year period. The CO noted the following incidents:

"(a) On 13 Feb[ruary] 2009, [the applicant] was the subject of non-judicial [punishment] (NJP) proceedings in which he was found guilty of violating Article 86 (unauthorized absence), Article 90 (willfully disobeying a superior commissioned officer), Article 91 (insubordinate conduct

towards a petty officer), and 107 (making a false official statement) of the UCMJ. [Forty-five] days Restriction and 45 days Extra Duty were imposed [as punishment].¹

“(b) On 18 [March] 2009, [the applicant] was the subject of [NJP] proceedings in which he was found guilty of violating Articles 86 and 92 [failure to obey order or regulation] of the UCMJ. [Thirty] days Restriction and 30 days Extra Duty were imposed [as punishment].²

“(c) In addition to the non-judicial punishments above, the following administrative remarks were issued to [the applicant]:

- a. 16 September 2006—CG-3307 (page 7) absent without leave, and
- b. 3 May 2005—CG-3307 documenting NJP Article 92.

“[The applicant] does not adhere to the core values of the Coast Guard and constantly fails to meet expectations of a Coast Guardsman. He has repeatedly lied to this command regarding his whereabouts and reasons for absence without remorse. He is disrespectful of Coast Guard policy and decisions, leaving base while knowingly restricted to base in order to enjoy local festivals

¹ The court memorandum for the February 13, 2009 NJP describes the applicant’s offenses as follows:

Art 90 (2 counts): Willfully disobeying superior commissioned officer on 11Dec08-17DEC08 [the applicant] willfully disobeyed a lawful order by LT [B] to inform his supervisor of his whereabouts and status in the event he is unable to report to work. Art. 91: Insubordinate conduct toward a petty officer. On 11DEC08-17Dec08, [the applicant] willfully disobeyed a lawful order by Master Chief [W] to inform his supervisors of his whereabouts and status in the event he is unable to report to work. Art.-86: Absence without leave. On 11DEC08 [the applicant] absented himself and remained absent until 0705 18 Dec08 (7days) from his unit which he was required to be at the time prescribed. Art. 107: False official statement. On 11Dec08-17Dec08 [the applicant] knowingly made false official statements to LT [B] in order to legitimize his unauthorized absence from his prescribed place of duty.

² Although the court memorandum for this NJP is not in the record, an earlier page 7 warning the applicant about his tardiness is in the military record. This page 7 entered into the applicant’s record on March 5, 2009 states the following:

You are being counseled for your inability to show up to work on time. You have been verbally counseled in the past not only by SCPO [S], your supervisor, but also by your command master chief and branch chief on ensuring you show up on time and if unable to, at a minimum, call with your whereabouts and situation. On 4 Mar 2009 you failed to report to work on time not call your supervisor to let him know. Your supervisor, called you at 0707 that morning to find out where you were. You informed him that you were getting breakfast. After a brief discussion you were ordered to report to work at that moment, which you did. You were verbally counseled once again by SCPO [S] about reporting to work NLT 0700. On 5 March 2009 you once again reported late to work appearing at 0705. You were once again counseled on reporting on time. Then, in the afternoon on 5 March 2009 you were to report by 1300, after icing your knee. On or about 1315 your supervisor once again had to call you about your whereabouts but was unable to reach you. You returned his call on or about 1325 stating that you had been in the rest room for the last 10-15 minutes. While you may have been in the rest room at that time that does not account for your lack of judgment in being back to work at 1300 or placing a call to alert your supervisor of your situation and that you would return to work late. If this pattern of tardiness and lack of communication continues expect harsher treatment.

and has no diligence in work assigned while constantly finding reasons not to perform. He is a burden on the service and his shipmates and only sets a poor example for others. I see no future for this individual within the service and do not think he would adjust to military life in any other branch of the military.”

On May 5, 2009, the applicant acknowledged the proposed discharge and objected to it. He acknowledged that he had attached a statement in his behalf (statement discussed above), that he had consulted with counsel, and that if he received a general discharge under honorable conditions, he could encounter prejudice in civilian life.

On June 2, 2009, the CO's superior in the chain of command recommended that CGPC approve the CO's request to discharge the applicant.

On June 8, 2009, CGPC directed that the applicant be discharged from the Coast Guard with a general discharge under honorable conditions by reason of misconduct due to discreditable nature with civil or military authorities under Article 12.B.18 of the Personnel Manual. CGPC directed that the applicant receive a JKA (pattern of misconduct) separation code.

APPLICANT'S MEDICAL RECORD

The applicant's medical record shows that in September 2007 he suffered gun shots to the right leg and foot and that he was treated with surgery and physical therapy. Subsequently, the applicant's primary care physician diagnosed him with PTSD on May 5, 2008, but stated that the diagnosis required confirmation by a psychiatrist. An October 6, 2008 medical report noted that the applicant had peripheral neuropathy but that he was stable enough for a fit for full duty status.

A January 15, 2009 medical note indicated that the applicant suffered from a painful right thigh. According to a January 23, 2009 medical report, a pain management specialist prescribed amitriptyline and recommended a TENS machine for the applicant's home use.

A February 19, 2009 medial note indicated that the applicant complained of increased pain in his thigh and knee. The primary care physician indicated that a medical board would be initiated. In a February 25, 2009 medical note, the physician stated that the applicant's increased pain was due to his increased work activity. The physician directed that from February 25 to March 25, 2009, the applicant be allowed one hour of rest with ice to the leg to control pain “for every 4 hours of work.” The medical note also indicated that the applicant had discontinued his counseling for depression due to distance that resulted from the applicant's move.

A March 4, 2009, medical note stated that the applicant reported to the primary care clinic “for increased stress and concern that he may hurt himself.” The applicant stated that the stress was due to his restriction to the base, money problems, and separation from his wife. The doctor wrote that he discussed the situation with the applicant and noted that the applicant did not want to hurt himself, but the applicant did not know what he would do if he had to remain restricted to the base. The doctor recommended that the applicant be sent to a military hospital

for a mental health evaluation and medication. A March 9, 2009 medical report noted that the applicant underwent a medical board interview and that an orthopedic referral was recommended to evaluate his peripheral neuropathy. The applicant was prescribed the drug Cymbalta.

On March 19, 2009, the applicant was evaluated by a psychiatrist who diagnosed the applicant with PTSD. The psychiatrist wrote the following:

[The applicant] does meet the DSM 4 criteria for PTSD related to his accident that occurred in 2007. His depressive symptomatology, although strong at times, does not meet the criteria for MDD [Major Depressive Disorder] but instead is most likely a product of PTSD combined with current marital stressor. Would recommend continued cognitive behavioral therapy combined with pharmacotherapy as research suggests that the combination of therapies is more effective than either alone. I do feel that both cymbalta and elavil are good choices in this case particularly due to the patient's pain issues. Would recommend titrating cymbalta to 60mg daily if needed. Would also recommend titrating elavil as tolerated. The increase of both of these medications should help improve both the mood symptoms as well as pain issues. If symptoms do not improve after an adequate trial then perhaps prolonged exposure therapy or eye movement desensitization and reprocessing therapy as well as a trial of a more researched selective serotonin reuptake inhibitor for PTSD such as zoloft should be considered. *This being said, his psychiatric symptoms are not severe enough to warrant disposition through military medical channels. He is mentally responsible for his behavior and possesses sufficient mental capacity to understand and cooperate intelligently as a respondent in any administrative proceedings that might involve him, if necessary. At the present time he has no disqualifying mental disease or defect that would prevent him from performing the duties of his grade.* [Empahsis added.]

A June 15, 2009 medical note indicates that the applicant came in for a separation physical. The medical note indicates that the applicant had been diagnosed with PTSD and treated with medications, with pain in a limb treated and with medications, with unspecified neuralgia, neuritis, and radiculitis, and with pain in his lower leg joint. The medical note stated that the applicant was being discharged and should follow up with the Department of Veterans Affairs.

VIEWS OF THE COAST GUARD

On February 1, 2012, the Board received an advisory opinion from the Judge Advocate General (JAG), of the Coast Guard recommending that the applicant's request be denied. The JAG adopted the facts and analysis provided by Commander, Personnel Service Center (PSC) as its advisory opinion.

PSC stated that the applicant's command recommended his discharge because he had committed several offenses in violation of the UCMJ, had not adhered to Coast Guard core values, and had consistently undermined good order and discipline at his unit. PSC noted that

the CO's recommendation was approved and the applicant was discharged with a general discharge under honorable conditions.

With regard to the applicant's claim that he should have received a medical discharge, PSC stated that Article 1.B.1.e.1. of the Military Separations Manual clearly dictates that a disciplinary separation shall prevail in such circumstances. Furthermore, the applicant did not provide evidence of an error or injustice in his military record to justify upgrading his discharge from general to honorable. PSC stated that the applicant's administrative separation was warranted and executed in accordance with established policy

APPLICANT'S REPOSENSE TO THE VIEWS OF THE COAST GUARD

In March 2012, the Board received the applicant's response to the views of the Coast Guard.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction of this case pursuant to section 1552 of title 10 United States Code. The application was timely.

2. The applicant requested that his general discharge under honorable conditions be upgraded to an honorable discharge, or in the alternative that his reason for discharge be changed from misconduct to physical disability (medical). He alleged that he was in the process of "getting a medical discharge before [he] was [discharged]."

3. With respect to his request for an honorable discharge, the Board finds that the applicant has not proved by a preponderance of the evidence that his discharge under honorable conditions was erroneous or unjust. Article 12.B.18.b.2.a. of the Personnel Manual (2007) states that "members may be separated when they have . . . two or more non-judicial punishments . . . within a 2-year period." The applicant was punished at NJP on February 13, 2009 and March 18, 2009, for violations of the UCMJ. The evidence shows that the CO and his superior recommended that the applicant receive a discharge under honorable conditions because of his pattern of misconduct and lack of respect for Coast Guard core values. The applicant was provided with due process and notified of the proposed discharge and the recommendation for a general discharge under honorable conditions, and he was given the opportunity to make a statement. Despite the applicant's objection to the proposed misconduct discharge, PSC approved the CO's recommendation for the applicant's discharge under honorable conditions. The applicant has presented no evidence, except for his own statement, that his general discharge under honorable conditions is erroneous or unjust.

4. With respect to the applicant's alternative request for a discharge by reason of physical disability because he was being processed for a medical discharge at the time he was administratively discharged for misconduct, there is no evidence that the applicant was ever

processed for a discharge by reason of physical disability under the Physical Disability Evaluation System (PDES).³ There is evidence in a medical note that the applicant was interviewed for a potential medical board, but there is no evidence that any such medical board was held. Nor is there any record of the medical opinions formed during that interview.

5. However, even if the applicant had been undergoing PDES processing to determine whether he had a disabling condition that caused him to be unfit for continued duty simultaneously with his administrative processing for misconduct, PSC had the authority to discontinue the PDES processing while continuing to process the applicant for misconduct. According to Article 12.B.1.e. of the Personnel Manual (2007), disability statutes do not preclude disciplinary separation. This provision states that if Commander, PSC is processing a member for physical disability while simultaneously evaluating the member for an involuntary administrative separation for misconduct, Commander PSC suspends the disability evaluation while the disciplinary action is being considered. Furthermore, this provision states that if the action taken does not include punitive or administrative discharge for misconduct, Commander PSC returns the case for PDES processing. In this case, the applicant was undergoing involuntary separation processing for misconduct. Therefore, if PDES processing was underway, it would have been proper to suspend it while the involuntary administrative processing continued. Since the applicant's administrative discharge for misconduct was approved and he was discharged due to misconduct, any PDES processing would have been terminated. The action taken by the Coast Guard was authorized by the Personnel Manual and the applicant has not proved that it was in error or unjust.

6. According, the applicant's request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

³ The PDES is a Coast Guard structure composed of administrative boards and reviewing and approving authorities whose common purpose is evaluating members for their physical ability to continue the required performance of their duties and the equitable application of the laws relating to separation or retirement of members because of physical disability. Article 2-A-39 of the PDES Manual (2006).

ORDER

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

Troy D. Byers

Francis H. Esposito

Donna A. Lewis