DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2016-023

[redacted]

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. After receiving the completed application, including the military records, on December 2, 2015, the Chair docketed the case and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated November 4, 2016, 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 was discharged from the Coast Guard due to alcohol rehabilitation failure on January 14, 2000, with 18 years and 9 months of active duty, asked to the Board to correct his record to show that he was retained on active duty and retired with 20 years of service on April 1, 2001, instead.

The applicant argued that it is in the interest of justice for the Board to consider his application on the merits because following his discharge from the Coast Guard, he completed both inpatient and outpatient treatment programs from 2003 through 2006, which included a year of mental health therapy, and has been able to maintain sobriety. He alleged that while in the Service he received only one-size-fits-all treatment for his condition, "which never was adjusted despite relapses."

The applicant also stated that since his discharge, "there has been a spike in substance abuse" due to the wars. He alleged that "there were dramatically favorable changes from 2011-2014 in regulations, policy and treatment science," which showed that laying the sole blame on the applicant for failing treatment is unjust. The applicant argued that "there is now substantial doubt [that he] would have [been] branded a rehab failure and booted shy of 20 years. He should have been treated differently and allowed to retire."

The applicant alleged that he became involved in the Navy's "established drinking culture" after he enlisted in the Navy at age 19 in 1979. He alleged that before he was discharged in 1983, he had become a heavy drinker and a binge drinker. While in the Navy, he alleged, he was arrested twice for being drunk and disorderly, but the Navy imposed no discipline and did not require treatment. The applicant alleged that because of his heavy drinking in the Navy he was at increased risk of "alcohol-induced brain impairment," which made him "vulnerable to later alcohol dependence." After his discharge, he served in the Naval Reserve until 1985.

The applicant stated that only in the late 1980s, after he enlisted on active duty in the Coast Guard in 1985, did the Services adopt policies and strategies to reduce substance abuse. From 1985 to 1995, he alleged, his drinking escalated and he repeatedly received low performance marks for sobriety as well as related performance categories, such as appearance, uniform, and grooming. In a 1989 Report of Medical History, he alleged, he admitted to ingesting the equivalent of about 12 drinks per week. He argued that this admission would today lead to screening for alcohol abuse or dependence but at the time, the doctor "made no comment, and found him qualified/fit for duty." The applicant alleged that his command tolerated his drinking.

The applicant stated that in 1991, he self-referred for Level II outpatient treatment, which involved motivational instruction and mandatory abstinence. The applicant alleged that this treatment was less sophisticated than the treatment members receive today because the instruction did not include "special intervention" or mention the possibility of neurocognitive changes or predisposition. The applicant alleged that despite treatment, he was unable to stop or reduce his drinking, and he began drinking the equivalent of 16 to 20 drinks per week. However, he alleged, his Coast Guard medical providers "did nothing" and continued to find him fit for duty. As a result, he "descend[ed] into a calamity of physically entrenched dependence, induced anxiety, emotional problems and conduct incidents."

The applicant stated that in 1995, he self-referred for Level III treatment. He initially admitted that he was ingesting the equivalent of 28 to 36 drinks per week but later acknowledged it was 48 to 64 drinks per week, which was at a level that would almost certainly harm his health. He was diagnosed as alcohol dependent and underwent a six-week inpatient treatment program. His aftercare plan included permanent abstinence, weekly group meetings for at least two years, motivational counseling for one year, and Antabuse "as prescribed." The applicant alleged that this was the "minimum" for a first aftercare plan, and it was not individually tailored to his needs as it would be today. In addition, he alleged, "[t]here was no referral for cognitive remediation or neuropsychological evaluation for impairment impacting a relapse potential. No referral for mental health evaluation. No referral for EAP [Employee Assistance Program] for the anxiety and stress accompanying withdrawal after 15 years."

The applicant alleged that he suffered a relapse in March 1996 when someone smelled alcohol on his breath. He alleged that he was sent to a Level I program and received the same aftercare plan—his second. The applicant alleged that his relapse should have been considered evidence that his aftercare plan was not working, rather than evidence that he was not sufficiently motivated or could not succeed. The applicant alleged that he was prescribed Antabuse through 1997, but in June 1997, his treatment counselor noted that the applicant seemed reluctant

to remain sober and to take his medication. The counselor recommended additional counseling through the EAP, but the applicant did not pursue it. He alleged that he did not pursue it due to the stigma and the risk it might pose to a security clearance and his career. He alleged that "EAP would open the door to disclosing or creating mental health conditions, such as personality, anxiety, or depression disorders." He argued that because of his attitude toward sobriety and medication, the counselor should have done more than recommend additional counseling. Instead, he argued, the counselor should have recommended to the command that it make a "mandatory referral" to EAP for further assessment.

The applicant alleged that although he completed his aftercare plan in 1997, he was not actually rehabilitated. Therefore, he was arrested for driving under the influence (DUI) in 1998. As a result of this DUI, his name was removed from an advancement list, and he was processed for separation as an alcohol rehabilitation failure. During his separation processing, he completed another Level II outpatient treatment program and received the same motivational instruction and aftercare plan, and he initially he remained sober.

The applicant stated that pursuant to his separation processing, his command recommended a conditional waiver of his discharge hearing, as long as he followed his aftercare plan, and retirement in 2001 when he would have twenty years of service. In February 1999, the applicant alleged, this conditional waiver was approved. However, he alleged, his aftercare plan was the same as before except he was not prescribed Antabuse. Nor was he required to seek EAP counseling. The applicant alleged that because of the weakness of his aftercare plan, he incurred a relapse in October 1999, when his supervisor suspected he was intoxicated at 7:30 one morning, and more than three hours later, his blood alcohol content (BAC) measured 0.38. As a result of this relapse, he was discharged on January 14, 2000, for alcohol rehabilitation failure.

The applicant stated that after his discharge, he lost his driver's license due to convictions for DUI. As required by the court to regain his license in 2003, he completed a year of psychotherapy. And in 2004, he completed Level III rehabilitation treatment through the Department of Veterans Affairs (DVA) and a 30-day residential program with prescriptions for "medications for anxiety and alcohol-related impairment to control epileptic-like seizures (Dilantin). The applicant alleged that this combination of treatment and medication were not like the "Coast Guard's inflexible approach of one-size-fits-all." He was treated for "the underlying reasons for continued alcohol abuse, including [an] interrelated anxiety condition with cognitive impairments." The applicant alleged that since this DVA treatment, he has maintained sobriety, which, he alleged, is confirmable by the fact that no alcohol may be consumed when one is taking Dilantin.

The applicant stated that the 1992 and 1997 versions of the EAP manual did not address the stigma, and members are required to report seeking mental health treatment for security clearance purposes, which contributes to the stigma and thus constitutes a barrier to care. The applicant alleged that only in the last ten years have the Services broadened the term "substance use disorder," or SUD, to include risky alcohol use "prior to abuse or dependence" and mandated screening and treatment.

The applicant alleged that in 2013 the Coast Guard acknowledged that it had the highest rate of underage drinking among the military services, at nearly 40%, and that it had not previously focused on them. The Coast Guard acknowledged that alcohol can alter someone's neurocognitive development and lead to anxiety, depression, and alcohol dependence. The applicant also noted that the Coast Guard has recently admitted in the EAP manual the need to destigmatize help-seeking behaviors.

The applicant argued that the "recent favorable changes to regulations, policy, and treatment … reveal the injustice of attributing total blame for the proffered 'rehab failure' solely onto [him]." The applicant claimed that in *Dickson v. Secretary of Defense*, 68 F.3d 1395 (D.C. Cir. 1995), veterans showed that the Army's policies regarding alcohol abuse had changed and that their own alcohol abuse would have been treated differently and they would likely have received honorable discharges. He alleged that "[t]he court found the BCMR denials were arbitrary because they did not 'take into account new standards for the treatment of alcoholism, [nor] indicate in any way its view of the relevancy of these new standards.'" *Id.* at 1405, n13.

SUMMARY OF THE RECORD

The applicant served in the U.S. Navy from November 29, 1979, to November 21, 1983, when he was honorably separated and transferred to the Naval Reserve. On March 18, 1985, the applicant enlisted in the Coast Guard. On March 21, 1985, the applicant signed a CG-3307 ("Page 7") acknowledging that he had received a full explanation of the Coast Guard's drug and alcohol abuse program. He became a machinery technician (MK3/E-4), and received performance evaluations with marks that gradually improved from mediocre to good. He advanced to MK2/E-5 in 1987 and at that pay grade his marks continued to gradually rose so that he was receiving primarily above standard and excellent marks in 1992.

On a Report of Medical History dated March 6, 1989, the doctor noted the applicant's alcohol consumption as "ETOH: 1 PINT/WK." On the Clinical Record dated March 6, 1989, the doctor noted that the applicant drank 16 ounces (one pint) of "liquor" per week, but no wine or beer.

In 1993, the applicant advanced to MK1. A medical record dated April 9, 1993, shows that when the applicant was asked about his alcohol consumption, he reported having "3-4 drinks last p.m.," and a Clinical Record dated June 21, 1993, shows that he reported drinking "16 – 20 oz." of liquor per week. As an MK1, the applicant's marks gradually increased, but he received a below-standard mark of 3 (on a scale of 1 to 7) in the category "training others" in his evaluations dated May 31, 1995, and May 31, 1996.

A medical record and Page 7 dated April 26, 1995, show that the Command Drug and Alcohol Representative (CDAR) noted that the applicant had reported that he thought he had "a drinking problem" and "was eager for help." The applicant was counseled about the Coast Guard's alcohol policy in Chapter 20 of the Personnel Manual and referred for screening. On May 2, 1995, the CDAR noted that the applicant had been diagnosed as alcohol dependent and would undergo Level III treatment. A report from the screening center dated May 3, 1995, states that the applicant had "volunteer[ed] that his normal consumption has been to drink a pint or

more of vodka two – three times a week. [He] disclosed that he usually drinks to intoxication when he drinks. He acknowledged going to Level II treatment as a self-referral … in 1991." Other medical records show that the applicant reported symptoms of dependency, including occasional shaking, increasing consumption ("Drinks a pint to a 5th of vodka 4x/wk"), failed attempts to stop drinking, continued drinking despite arrests for being drunk and disorderly in 1982 and 1983, and arguments with his wife. Before beginning treatment, the applicant was advised on a Page 7 dated May 24, 1995, that refusing treatment or violating an alcohol rehabilitation aftercare plan would normally result in separation from the Coast Guard.

On June 28, 1995, the applicant completed Level III inpatient rehabilitation treatment. He was advised in writing on June 30, 1995, that his involvement in an alcohol incident or failure to satisfactorily complete any part of his aftercare program would be grounds for administrative separation from the Coast Guard "as a rehabilitation failure." On July 18, 1995, the applicant's aftercare plan was documented on a Page 7, which he signed. The aftercare plan required him to abstain from alcohol indefinitely, attend weekly meetings with the CDAR, attend Alcoholics Anonymous meetings at least four time per week for two years, attend a formal aftercare group for two hours per week for at least one year, to take Antabuse as prescribed, and to attend follow-up counseling through the Family Service program as recommended by the rehabilitation clinic. The Page 7 states, "Failure to comply with this aftercare plan or involvement in any alcohol related incident will result in your separation from the U.S. Coast Guard." A medical records show that the applicant went to the clinic in July, August, and September 1995 for prescriptions for Antabuse.

A medical record dated April 23, 1996, states that the applicant had had an "alcohol dep relapse" and that a "new aftercare plan [was] written." A clinic report dated May 7, 1996, states that the applicant had been referred for assessment by the command's CDAR because he had had the smell of alcohol on his breath. The report states that the applicant had admitted that he had resumed drinking alcohol in March 1996 and that "his normal consumption has been three – four drinks of vodka and coke per sitting, three – four times a week. [He] realizes that he cannot abstain from drinking, and has obtained a prescription for Disulfiram (Antabuse) from a private physician."

On a Page 7 dated May 15, 1996, the applicant was counseled on a Page 7 about having failed to remain abstinent in accordance with his aftercare plan. The Page 7 renewed the provisions of the aftercare plan but required him to attend five meetings of Alcoholics Anonymous per week. The Page 7 stated that "[f]ailure to comply with this aftercare plan or involvement in any alcohol related incident will result in your separation from the U.S. Coast Guard."

On a Report of Medical History dated September 2, 1996, the applicant indicated that he was taking Antabuse. A medical report dated December 10, 1996, states that the applicant received a refill of his Antabuse prescription and reported that he was doing well, meeting with his CDAR weekly, and attending Alcoholics Anonymous meetings four or five times per week.

On June 12, 1997, the CDAR noted in the applicant's medical record that he had continued to meet the requirements of his aftercare program. The CDAR wrote that they talked "about maintaining sobriety [with] medication which [the applicant] seem[s] reluctant because of

various home problems/stressors etc. Maybe should consider counseling through EAP Program, which I will suggest next visit. A: Con[tinue] Antabuse & aftercare as directed."

On July 23, 1997, the applicant was counseled on a Page 7 that he had successfully completed his second aftercare program and advised to "continue your aftercare program which will go far in helping to ensure your success."

On August 18, 1998, the applicant was arrested for DUI and driving with an open container of alcohol. The applicant failed field sobriety testing, and an open bottle of vodka, two-thirds empty, and an empty beer bottle were found in his vehicle. Three Breathalyzer test results showed his BAC to be 0.23, 0.21, and 0.24.

On September 29, 1998, the applicant was advised on a Page 7 that because he had been arrested for DUI and driving with an open container of alcohol in his vehicle on August 18, 1998, he had incurred another "alcohol incident" and violated his aftercare plan. The Page 7 states that the applicant had been referred for evaluation and counseled about policies and his failure to follow his aftercare plan. The Page 7 states that because of his failure to comply with the aftercare plan, he would be processed for separation due to continued alcohol abuse.

Also on September 29, 1998, the applicant's commanding officer (CO) notified him in a memorandum that he was initiating the applicant's honorable discharge because he had failed to comply with his aftercare plan in 1996 and had incurred an alcohol incident on August 18, 1998. The CO advised him that he had a right to present his case to an Administrative Separation Board (ASB) and to be represented by counsel and that he could waive the right to an ASB conditionally or unconditionally after being fully counseled by an attorney.

On October 30, 1998, the applicant acknowledged his CO's notification and submitted a conditional request to waive his right to a hearing before an ASB. The only condition specified in this request is that he be allowed to retire.

A Page 7 dated November 2, 1998, states that the applicant had completed a six-week Level II treatment program on October 14, 1998. The Page 7 established a new aftercare program that "shall remain in effect until your separation from the Coast Guard." It required him, *inter alia*, to abstain from drinking alcohol indefinitely. The Page 7 stated, "Failure to comply with this aftercare plan, consumption of alcohol, or involvement in any alcohol related incident will result in your separation from the U.S. Coast Guard."

On November 23, 1998, the CO informed the Personnel Command that the applicant had "requested a conditional waiver of his hearing before a discharge review board provided he is allowed to retire. The member will reach 20 years' service on 24 March 2001. I am forwarding this request recommending your approval. I will also impose conditions on the member if he is allowed to reach retirement eligibility." The CO explained that the applicant had been an excellent performer, "providing valuable engineering expertise and leadership," and that he was "approach[ing] his aftercare program with enthusiasm." The CO stated that the two conditions he would impose on the applicant to allow him to remain in the Service until he was eligible to retire were that he abstain from all consumption of alcohol and remain in his aftercare program

until separation from the Service. The CO stated that failure to meet either condition would result in the applicant's immediate discharge. The CO stated that the applicant had already acknowledged the conditions for his retention.

On December 10, 1998, the Personnel Command informed the applicant's CO that a waiver of discharge proceedings would only be granted if it stated that the applicant "fully understands that if an alcohol incident or alcohol related situation occurs before his date of retirement, 1 April 1002, he will be recommended for discharge without further entitlement" to a hearing.

On January 12, 1999, the applicant signed a "Conditional Waiver of a Hearing Before an Administrative Discharge Board." The applicant acknowledged his right to appear before a board, to submit a statement, and to be represented by counsel. He acknowledged having consulted an attorney, and he waived his right to a hearing "provided I am allowed to retire on my approved retirement date of 1 April 2001. Pursuant to this conditional waiver, I additionally waive all rights to any future hearings before an administrative discharge board for any subsequent alcohol incidents or alcohol related situations that may occur before my date of retirement. … I explicitly understand that if I am involved in a future alcohol incident any time before my approved retirement date, I will be recommended for discharge without further entitlement to another administrative discharge board." The Group Commander forwarded the CO's memorandum with the applicant's waiver to the Personnel Command and recommended approval. He noted that the conditions "provide[d] the ability to hold the member accountable expeditiously for any lapses in the aftercare program, future alcohol incidents or alcohol related situations."

On February 2, 1999, Command, Personnel Command approved the applicant's conditional waiver of the hearing and advised him that he could submit a request for retirement on April 1, 2001.

On October 29, 1999, the applicant acknowledged having been advised that he was suspected of consuming alcohol in violation of his aftercare program, and he voluntarily consented to undergoing field sobriety, alcohol sensor, and blood tests for alcohol consumption. According to a test report, the applicant's BAC measured 0.38.

On November 19, 1999, the applicant's CO notified him that he was initiating the applicant's honorable discharge because of his involvement in a third alcohol incident on October 29, 1999, when he violated the terms of his agreement to a conditional waiver of a hearing before an Administrative Discharge Board. The CO noted that the applicant had a right to disagree and to submit a statement in rebuttal. In the applicant's rebuttal, dated December 2, 1999, he requested retention until his retirement date based on his contributions during his more than eighteen years of service. The applicant summarized his achievements, his recognition of his problem with alcohol and self-referral for treatment, his regular attendance at counseling sessions and Alcoholics Anonymous meetings, and the financial hardship it would cause his family not to receive separation or retirement pay.

A Page 7 dated December 2, 1999, advises the applicant that after his supervisor noticed that the applicant had difficulty standing, slurred speech, and the odor of alcohol on his breath on October 29, 1999, he had initially denied drinking alcohol but then consented to testing, which showed a BAC of 0.38 about 3.5 hours later. The Page 7 states that based on the applicant's failure to following his aftercare plan and to abstain from alcohol, he would be processed for discharge without a hearing pursuant to the conditional waiver memorandum he had signed on January 12, 1999. The Page 7 notes that the incident on October 19, 1999, was the applicant's third "alcohol incident for documentation purposes." It advised him that he was eligible for further treatment through the DVA.

On December 10, 1999, the Group Commander sent the Personnel Command a memorandum requesting the applicant's honorable discharge based on his third alcohol incident. He noted that following his second alcohol incident, the applicant had waived his right to a hearing in order to be retained on condition that he abstain and that, since his third alcohol incident, the applicant had "been frequently showing up at work with alcohol on his breath." The applicant's rebuttal statement was forwarded with this request.

On December 15, 1999, the Personnel Command issued orders for the applicant to be honorably discharged no later than January 14, 2000, pursuant to Article 12.B.16. of the Personnel Manual, with a JPD separation code, which denotes an involuntary discharge due to "alcohol rehabilitation failure." The orders note that the applicant was entitled to half separation pay.

On January 14, 2000, the applicant was honorably discharged for "alcohol rehabilitation failure" with an RE-4 reenlistment code (ineligible to reenlist) pursuant to Article 12.B.16. of the Personnel Manual.

A State Bureau of Motor Vehicles print-out dated January 16, 2004, indicates that the applicant had been cited for DUI on October 15, 2001, and March 18, 2002; that his license had been suspended; and that he would have a conditional license until July 11, 2004.

A letter from a DVA case manager to a State court dated February 5, 2004, states that the applicant had been accepted into a four-week residential substance abuse treatment program, in which he could explore the reasons for his alcohol abuse and "ways to deal with these triggers without relapsing."

VIEWS OF THE COAST GUARD

On April 21, 2016, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the applicant's request.

The JAG summarized the facts of the case and noted that the applicant had been directed to abstain from alcohol and warned that failure to abstain from alcohol would result in separation processing. Then, after his arrest for DUI in 1998, he had been authorized to remain on active duty until eligible for retirement on condition that he abstain from alcohol, not incur an alcohol incident, and waive his right to a hearing before an administrative discharge board and any future hearing. The JAG noted that the applicant was explicitly warned that he would be separated

without further entitlement to a hearing if he incurred another alcohol incident before he became eligible for retirement. However, on October 29, 1999, the applicant reported for duty with the smell of alcohol on his breath and his BAC measured 0.38, which was his third alcohol incident. The JAG stated that the applicant was given many chances to correct his behavior but "now wants to place the blame for his own actions on the Coast Guard."

The JAG argued that the application was not timely filed. He noted that no reason for the applicant's delay was specified and that the applicant offered only vague references to "dramatically favorable changes from 2011 – 2014 in regulation, policy, and treatment science" without identifying any new or relevant changes in Coast Guard policy to justify his delay. The JAG stated that the applicant bears the burden of proving the alleged error or injustice and he has failed to assert or prove any errors in the Coast Guard's execution of its policies and procedures.

Regarding the applicant's *Dickson* argument, the JAG stated that the applicant misquoted the decision "to make it appear to support his argument that the BCMR should consider new standards in the treatment of alcoholism. In *Dickson,* the BCMR had refused to waive the three-year limitations period for several applicants' petitions for upgrades to their discharge classification. The court in *Dickson* held that it was arbitrary for the Board to deny a waiver without providing adequate reason. [Footnote omitted.] The footnote cited by the applicant … goes on to say '[a]lthough we do not rule here on whether the Board must take into account new standards for the treatment of alcoholism, we note that the Board has failed to indicate in any way its view of the relevancy of these new standards.'"

Regarding the applicant's claim that the Coast Guard's approach to his rehabilitation was inflexible and ineffective, the JAG argued that the record shows that his rehabilitation and treatment were repeatedly evaluated and adjusted over the years and that his aftercare plan was adjusted to including additional types of counseling after his relapse in 1996 and adjusted again to include weekly meetings with his tour supervisor after his relapse in 1998, increased attendance at Alcoholics Anonymous meetings, and a recommendation to adopt a "home group" and get a sponsor. The JAG noted that the applicant successfully maintained long periods of sobriety while in treatment and aftercare programs and that the Coast Guard continues to use the same or similar multi-level treatment programs and tailored aftercare plans today. The JAG stated that the applicant "had access to all currently required aftercare components." The JAG argued that the evidence shows that "the Coast Guard tried to help him overcome his addiction to alcohol so he could remain in service." The JAG also noted that the applicant did not submit any evidence that he suffered from any stigma for seeking treatment for his alcohol abuse.

Regarding the applicant's claim that the military is responsible for his alcohol dependence, the JAG noted that the applicant "offered no evidence other than his own self-serving statements that he began drinking underage due to the Navy's drinking culture." The JAG argued that if the applicant's alcohol dependence did arise during his service in the Navy, then it was a preexisting condition when he joined the Coast Guard.

The JAG stated that the 2013 Flag Voice cited by the applicant would not have changed the outcome of the applicant's case if it had been issued prior to his discharge because it did not establish a new policy and only reinforced the established drinking age of 21.

The JAG argued that the record shows that the applicant "was fairly processed under both old and new policies and procedures." The JAG stated that the applicant failed to show that any injustice occurred even if reviewed in light of current policies. The JAG stated that the applicant's self-referral for treatment in 1991 was not held against him and that his first alcohol incident was documented only after his relapse in 1996. The applicant was afforded treatment and counseled about Coast Guard policy but incurred a second alcohol incident in 1998, which made him subject to discharge. The JAG stated that the applicant was granted another chance to remain on active duty and earn a retirement in 1998 and that the Coast Guard acted well within its authority when it separated him after his third alcohol incident in 1999.

The JAG concluded that the applicant's request to void his discharge and grant him a twenty-year retirement with back pay and retired pay should be denied. The JAG argued that the applicant "has not offered a single piece of evidence to demonstrate any sort of error or injustice committed by the Coast Guard, and while it is a shame that the applicant nearly reached retirement before being discharged, he only managed to stay in the Coast Guard as long as he did because the Coast Guard repeatedly attempted to help him overcome his alcohol dependency and correct his behavior."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On July 1, 2016, the applicant responded to the views of the Coast Guard. The applicant argued that the Board should grant relief in recognition of the historical injustice that occurred in the 1980s and 1990s, when binge drinking was condoned, when members "were left with feeble options to simply abstain and mind-games to mitigate cravings," when there was a "culture of career-stigma from mental health," and before "dramatic scientific improvements in treatment finally improved outcomes" and "young or hazardous drinkers were flagged for early and mandatory intervention."

The applicant argued that an opinion of the Attorney General, 41 Op. Att'y Gen. 35 (1954), found that under the Board's statute the injustices that may be removed by correction boards are not limited to those caused by the military services. He argued that the BCMRs are supposed to be the "great equalizers," as well as "honest brokers"[1] between the Services and the applicants.

The applicant argued that under current policy a member who admitted, as the applicant did in 1989, that he drank 16 ounces of liquor per week, would be considered a "hazardous" drinker and referred for screening and treatment. He argued that the treatment he would have received today is improved and more effective. He asked the Board to act "as the great historical equalizer to recognize that under current favorable policies [he] would have received the benefit of improved science in alcohol abuse treatment and rehabilitation, and more likely than not completed 20 years of active duty."

[1] Committee Report, Sec. 555 NDAA 1996, Pub L. 104-112 (noting that the correction boards "are to be the honest broker, the forum for adjudication of claims from the service members who allege errors in military records. If these boards become extensions of the military staffs, they will have lost their sole reason for existence").

The applicant argued that if the requested relief is not granted, his narrative reason for separation should be changed to "convenience of the government" and his record should be corrected to show that he was transferred to the Reserve and qualified for a Reserve retirement.

APPLICABLE REGULATIONS

Article 20 of the Personnel Manual (PM) contained the regulations regarding alcohol abuse by Coast Guard members while that applicant was on active duty. Article 20.B.2.d. defined an "alcohol incident" as "[a]ny behavior in which the use or abuse of alcohol is determined to be a significant or causative factor and which results in the member's loss of ability to perform assigned duties, brings discredit upon the Uniformed Services, or is a violation of the Uniform Code of Military Justice (UCMJ) or federal, state, or local laws. The member need not be found guilty at court martial, in a civilian court, or be awarded non-judicial punishment (NJP) for the behavior to be considered an alcohol incident. However, the member must actually consume alcohol for an alcohol incident to have occurred." Article 20.B.2.c. stated that "[s]elf-referral to alcohol treatment is not considered an alcohol incident."

PM Article 20.B.2.g. provided that a CO should ensure that, after a first alcohol incident, the member is counseled about the Coast Guard's policies in Article 20 and that the counseling is recorded on a Page 7.

PM Article 20.B.2.h.2. provided that "[e]nlisted members involved in a second alcohol incident will normally be processed for separation in accordance with Article 12.B.16." However, subparagraph a. states that "[i]n cases involving enlisted members whose commanding officer feels that an exceptional situation warrants consideration for retention, a letter request for retention and treatment, including the medical screening results, treatment plan, and commanding officer's recommendation concerning treatment shall be forwarded via the chain of command to Commander (CGPC-epm) who shall consult with Commandant (G-WKH) and direct the appropriate action regarding retention."

PM Article 20.B.2.i. stated that "[e]nlisted members involved in a third alcohol incident shall be processed for separation from the Service."

PM Article 20.B.2.k. stated that members who "violat[e] an alcohol rehabilitation aftercare plan normally are processed for separation."

PM Articles 20.B.2.e. and 20.A.2.e. provided that any member involved in an alcohol incident should be screened by a "physician, clinical psychologist, or a DoD or civilian equivalent CAAC counselor to determine the nature and extent of alcohol abuse." Article 20.B.3.b. provided that "[c]ommanding officers shall seek appropriate treatment for members who have abused alcohol or been diagnosed as alcohol dependent. . . . Members shall be treated for alcohol abuse or dependency as prescribed by competent medical authority. However, if they are otherwise qualified, their scheduled separation or release to inactive duty for any reason shall not be delayed for the sole purpose of completing alcohol treatment."

PM Article 12.B.16.b.5. authorized the administrative discharge for unsuitability of members who have abused alcohol in accordance with Article 20.B.2. Article 12.B.16.d. provided that a member being processed for an administrative discharge for unsuitability is entitled to (a) notification of the reason for discharge, (b) an opportunity to make a written statement on his own behalf, and (c) "if the member's character of service warrants a general discharge," an opportunity to consult with a lawyer, but a member with more than eight years of service is entitled to an ASB.

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 concerning this matter pursuant to 10 U.S.C. § 1552.

2. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice.[2] The applicant was discharged, rather than retired, in January 2000. Therefore, the preponderance of the evidence shows that the applicant knew of the alleged error in his record in 2000, and his application is untimely.

3. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.[3] In *Allen v. Card*, 799 F. Supp. 158 (D.D.C. 1992), the court stated that the Board should not deny an application for untimeliness without "analyz[ing] both the reasons for the delay and the potential merits of the claim based on a cursory review"[4] to determine whether the interest of justice supports a waiver of the statute of limitations. The court noted that "the longer the delay has been and the weaker the reasons are for the delay, the more compelling the merits would need to be to justify a full review."[5]

4. Regarding the delay of his application, the applicant argued that it is in the interest of justice for the Board to excuse the untimeliness of his case because of recent developments in the medical understanding and treatment of alcohol dependence and in Coast Guard policies. The Board is not persuaded that improvements in treatment for alcohol abuse, if proven, would justify voiding an applicant's discharge for alcohol abuse and retiring him. Nor has the applicant shown that the Coast Guard's understanding and treatment of alcohol dependence were so different or poor in the 1990s that the untimeliness of his application should be excused. A comparison of Coast Guard policies regarding alcohol abuse in Article 20 of the Personnel Manual then in effect and in COMDTINST M1000.10, which is currently in effect, shows no significant changes in how members are treated following first, second, and third alcohol incidents or after they are diagnosed as alcohol dependent, complete rehabilitative treatment, and are ordered to abstain from drinking alcohol indefinitely. Under both manuals, enlisted members are screened and afforded the level of treatment and types of counseling

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[2] 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.

[3] 10 U.S.C. § 1552(b).

[4] *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

[5] *Id*. at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396, 1405 n14, 1407 n19 (D.C. Cir. 1995).

recommended by medical authorities; under both manuals, they are normally processed for discharge following a second alcohol incident and must be processed for discharge following a third alcohol incident; and under both manuals, violation of an aftercare plan by drinking alcohol after one has been ordered to abstain is cause for discharge. Although the applicant alleged that under current policies and treatment, he would likely have been retired, the Board finds no substantial evidence to support that claim.

5. The Board's cursory review of the merits of this case indicates that the applicant received all due process provided in the Personnel Manual then in effect. After he was diagnosed as alcohol dependent, he underwent repeated rehabilitation treatment as prescribed and repeatedly relapsed despite being warned that he would be discharged if he failed to abstain. Following his arrest for DUI in 1998, he voluntarily waived his right to a hearing or future hearing before an ASB to avoid discharge, and he did so knowing that if he failed to abstain or incurred an alcohol incident before he became eligible for retirement in 2001, he would be discharged without a hearing. Although the applicant claimed that the military services had previously condoned binge drinking, the policies in the old Personnel Manual indicate otherwise. Although he alleged that the stigma of treatment prevented him from seeking treatment, the record shows that he did seek treatment. The applicant's discharge for alcohol rehabilitation failure is presumptively correct,[6] and the record contains insufficient evidence substantiating his allegations of error and injustice to warrant a more thorough review. The Board finds that the applicant's claim lacks potential to prevail on the merits.

6. Because this cursory review has shown that the applicant's claim cannot prevail on the merits and he has not justified his delay in applying to the Board, the Board will not excuse the application's untimeliness or waive the statute of limitations. The applicant's request should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

[6] 33 C.F.R. § 52.24(b); *see Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992) (citing *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979), for the required presumption, absent evidence to the contrary, that Government officials have carried out their duties "correctly, lawfully, and in good faith.").

ORDER

The application of former [redacted] USCG, for correction of his military record is denied.

November 4, 2016

[redacted]