

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2012-184

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████████████████████

FINAL DECISION

This proceeding was conducted 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 upon receiving the completed application on July 17, 2012, and assigned it to staff member ██████████ to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated April 11, 2013, 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, whose discharge form DD 214 shows that he was honorably discharged for "Unsuitability" on December 27, 2007, asked the Board to correct his record to show that he was not reduced from pay grade E-5 to E-4 before his discharge and by upgrading his separation and reentry codes, which are, respectively, JNC, which denotes an involuntary discharge for unacceptable conduct, and RE-4, which makes him ineligible to reenlist.

The applicant alleged that while in the Service, he suffered from sleep apnea, which caused daytime sleepiness, morning headaches, and low energy and made it very difficult to stay awake during late, independent watches. Although he underwent a sleep study and was diagnosed with sleep apnea prior to his discharge, no one in his command would listen to him, and he was discharged before he could get anyone to listen to him. His superior officers thought that his tiredness was his own fault and attributed his problems to ineptitude and apathy instead of his medical condition. The applicant alleged that he had "ample leave time" when he was discharged and so his discharge should be upgraded to one that indicates he was discharged after completing his enlistment.

In support of his allegations, the applicant submitted copies of reports of two sleep studies. The report of the first study, conducted on December 16, 2007—eleven days before the applicant's discharge—states that it was done because of his complaints of daytime tiredness, sleepiness, and snoring. The report shows that he was diagnosed with mild bruxism (teeth grinding) and "obstructive sleep apnea" with no cardiac dysrhythmia or leg movement. His sleep

efficiency was 92%, and during REM sleep, he had frequent apneas and hypopneas and a total of 51 disordered breathing events. His apnea-hypopnea index was 8.9, his REM RD index was 28.3, his PLM arousal index was zero, and his lowest oxygen saturation level was 86%. The applicant was advised to wear a CPAP mask while sleeping.

The second study was conducted on February 12, 2008, after the applicant's discharge from the Service. The report noted that the first study had showed "approximately 9 apneas and hypopneas per hour of sleep with "mild falls in the oxygen saturation and "no evidence of significant nocturnal myoclonus." The second study revealed that the applicant had excellent sleep efficiency of 93.4%, REM of 22%, and "no recorded deep sleep." The applicant had "very few respiratory events during the night" while using a CPAP machine—less than one per hour on average—and his lowest oxygen saturation was 90%. Mild pressures were sufficient to produce this result, and higher pressures did not reduce the number of such events.

The applicant applied to the Department of Veterans' Affairs (DVA) following these studies and received a 50% disability rating retroactive to his discharge from the Coast Guard.

SUMMARY OF THE EVIDENCE

The applicant enlisted on January 20, 2004, at age 27. After completing recruit training and "A" School, he received the [REDACTED]/E-4) rating and was assigned to a [REDACTED] cutter on September 24, 2004.

In July 2005, the applicant was counseled on a Page 7 about two incidents of poor performance. On July 7, 2005, after being instructed to continue to try to contact a parent command by phone until he reached it, the applicant left after 5 minutes without completing the task and without telling anyone his intentions. He was not located again until after the shift ended, when he was found in the berthing. And on July 8, 2005, he did not report for morning muster on time even though he had previously been counseled about being late.

On October 14, 2005, the applicant was counseled on a Page 7 about having been found in his rack asleep when he was supposed to have reported for duty as a radio watchstander.

Thereafter, the applicant advanced to [REDACTED]/E-5, but on June 2, 2006, he received an "unsatisfactory" conduct mark on his performance evaluation after he was punished at mast for disobeying an order by sleeping while on watch.

On October 27, 2006, the applicant received a Letter of Commendation for his performance of duty in assisting the Recruiting Command from November 29 to December 13, 2005.

On November 6, 2006, the applicant was counseled on a Page 7 about reporting for duty in "sweats and slippers." On the same day, he was counseled on another Page 7 about leaving the radio office without properly securing it in order to wake up the next member on watch and failing to return to conduct the on-site relief and inventory.

On January 10, 2007, the applicant was punished at mast for showing disrespect for a commissioned officer, insubordinate conduct toward a noncommissioned officer, and disobeying an order by sleeping while on watch during a drill. His punishment included a reduction in rate from E-5 to E-4 but the reduction was suspended for six months.

At a hearing on January 19, 2007, the applicant's CO vacated the suspension of his reduction in rate so that it went into effect. The CO did so because "in direct violation of the order of restriction letter [the applicant] had signed," on January 10th, the applicant had been a half hour late returning to the ship with no excuse; on January 11th, he was discovered making a personal telephone call in the Bos'n Hole; on January 16th, he was discovered making a personal call in civilian clothing in the forward lounge

Also on January 19, 2007, the Executive Officer (XO) of the cutter counseled the applicant on a Page 7 about being absent without leave on January 5, 2007. The XO noted that when the applicant was called about not showing up, he claimed that he had misread his leave chit.

On January 29, 2007, the CO placed the applicant on performance probation for six months due to inaptitude. The CO noted that the applicant was overweight, had failed to lose the weight, and had skipped the weigh-ins and appointments to measure his body fat. The applicant had a poor attitude about it and refused to change his eating and exercise habits. The CO stated that the applicant had a history of [REDACTED] on watch and had "a problem with [REDACTED] ority" in that he ignored orders and had to be given an order several times before he would comply. The CO noted the applicant [REDACTED] frequent infractions and his failure "to take responsibility" for his actions. The CO stated that his supervisor had reported that the applicant had "only minimal comprehension of concepts and tasks related to [his] rating" and did not trust him to perform the tasks associated with his rating. The CO noted that he had removed the applicant's access to classified information until he could prove that he was trustworthy. The CO temporarily reassigned the applicant to the Navigation Division and ordered him to complete all of the qualifications to be a Navigator of the Watch within three months to prove his ability to apply knowledge and skills, act responsibly, and "perform at the level of a petty officer."

On February 1, 2007, the applicant was punished at mast for disobeying an order by violating the terms of his restriction to the unit. He was reduced in rate from E-5 to E-4.

On March 3, 2007, the applicant was counseled by the CO about repeating hazardous conduct two days in a row during flight quarters despite being fully trained as a helicopter tie-down team member and despite having been personally counseled after the first incident. After being instructed to move immediately, the applicant left his assigned post on the flight deck without checking out or notifying his supervisor and so was unaccounted for. The CO noted that if the helicopter had crashed, the applicant would have been treated as a "man overboard," distracting the crew from its response and risking lives. The CO reminded the applicant that abandoning his post was also a violation of the Uniform Code of Military Justice and a bad example for junior personnel.

On April 16, 2007, the applicant was counseled on a Page 7 for being absent without leave. He had reported for duty three hours late and said he had overslept and missed his alarm.

The Page 7 notes that the applicant had already been counseled during his performance probation and that “[s]hould you have any future problems during your probationary period, you will be recommended for discharge from the Coast Guard.”

On July 19, 2007, an ensign reported to the CO that the applicant had been punished at mast three times during his enlistment: June 2, 2006, for sleeping while on watch; January 10, 2007, for showing disrespect toward a commissioned officer, insubordination toward a petty officer, and sleeping while on watch during a drill; and February 1, 2007, for violating the terms of his restriction following the prior mast.

On July 31, 2007, the applicant’s CO advised him that he was initiating the applicant’s discharge for unsuitability due to his “general inaptitude,” “lack [of] motivation and desire to acquire the skills necessary for your job,” and inability “to adjust and adapt to the military life-style.” The CO advised him that he had a right to object to the discharge and to submit a statement on his own behalf.

On August 6, 2007, the applicant responded to the CO’s notification. He objected to the proposed discharge and requested a “Second Chance Discharge Waiver.” The applicant noted the qualifications he had earned and acknowledged his “professional failings.” He stated that he had “already received sufficient punishment, embarrassment and humbling over the most regrettable circumstances. It is my stro[redacted] the opportunity to demonstrate the [redacted]ns that I have learned.” He asked for “the chance to prove my dedication and fortitude.”

Following the notification of discharge, the applicant sought medical treatment for a variety of medical complaints. On September 10, 2007, he complained to a doctor of feeling very tired during the day and he sought medical treatment for sleep apnea. He stated that he had felt daytime fatigue for three or four years, had suffered increasing snoring, and was having difficulty staying awake while driving. The doctor noted that a sleep study should be conducted to determine whether the applicant had sleep apnea.

Also on September 10, 2007, the XO provided the CO with a memorandum that listed the occasions on which the applicant had been counseled on a Page 7:

1. 07 July 2005: [The applicant] failed to com[redacted] an assigned task as instructed by his supervisor and just walked out of his workspace without notifying anyone of his intentions and was not found until much later.
2. 08 July 2005: [He] was counseled for being late to quarters.
3. 14 Oct 2005: [He] was late for a scheduled OTAT. Member was found in his rack asleep rather than being on time for a work evolution.
4. 04 May 2006: Placed on probation for failure to make CG weight standards.
5. 15 Sept 2006: Member was taken off weight probation.
6. 06 Nov 2006: [He] reported to watch in sweatpants and slippers, despite the fact that all members must wear the prescribed uniform of the day when on watch.
7. 06 Nov 2006: [He] left radio, unmanned and not properly secured to wake up the next watchstander and did not return to the space for an onsite relief or to conduct the required watch to watch inventory.
8. 05 Jan 2007: [He] was absent without leave for a standard work day.
9. 10 Jan 2007: [He] was given time to return home to collect personal belongings prior to going on restriction, but returned to the boat ½ hour late with no excuse.

10. 11 Jan 2007: [He] was discovered making a personal call (violating the terms of his restriction) in the Bos'n hole.
11. 16 Jan 2007: [He] was again discovered making a personal call in civilian clothes in the forward lounge, and violating the terms of his restriction.
12. 29 Jan 2007: [He] was placed on performance probation for 6 months due to several specific issues (detailed in Enclosure 8 – performance probation letter).
13. 03 March 2007: Was counseled by [two officers] about poor performance and abandoning his post as a helicopter tie down member during a recovery evolution.
14. 16 April 2007: Absent without leave: member came into work over 3 hours late after being called at home by supervisor.
15. 27 June 2007: [He] was late to work without notifying his supervisor or CDO. Upon arriving to work, he stated he was stuck in traffic, but upon investigation, there was no traffic in the tunnel that morning.
16. In addition, member was verbally counseled on many occasions by his supervisors on his work performance and motivation.

On September 20, 2007, the applicant's CO submitted to the Area Commander his recommendation that the applicant be discharged for general inaptitude pursuant to Article 12.B.16. of the Personnel Manual. The CO noted the applicant's disciplinary problems "despite numerous warnings and second chances" and stated that the applicant was requesting a Second Chance Discharge Waiver. The Area Commander endorsed the CO's recommendation and forwarded it to the Commandant with a comment that he had disapproved the applicant's request for retention under the Second Chance Policy. [REDACTED]

[REDACTED] On November 28, 2007, the Personnel Service Center (PSC) issued orders to discharge the applicant on December 27, 2007. The orders state that the applicant would be discharged for inaptitude, pursuant to Article 12.B.16. of the Personnel Manual, and that his DD 214 should show JNC and "Unacceptable Conduct" as the narrative reason for separation.

On December 27, 2007, the applicant was honorably discharged pursuant to Article 12.B.16. of the Personnel Manual. His DD 214 shows JNC (unacceptable conduct) as his separation code and RE-4 (ineligible to reenlist) as the reentry code, but "Unsuitability" as his narrative reason for separation.

VIEWS OF THE COAST GUARD

On January 14, 2013, the Judge Advocate General (JAG) submitted an advisory opinion in which he recommended that the Board deny relief in this case. In so doing, he adopted the facts and analysis provided by the Personnel Service Center (PSC) in an attached memorandum.

PSC noted that the applicant was not recommended for advancement on four of the six performance evaluations he received while in the Service, that he incurred multiple military offenses and was punished at most twice within one month, and that he was reduced in rate only after he violated the terms of his restriction multiple times. PSC recommended that the Board deny relief because the applicant

does not substantiate how a sleep condition could have been the cause of most of his negative documentation and military offenses. Only two of his military offenses and one of his negative CG-3307s [Page 7s] were sleep related. None of the other offenses, which included but were not limited to insubordination, failure to follow orders, absence without leave, violating restriction,

leaving his post without proper relief, and reporting to watch wearing sweatpants and slippers, were in any way related to sleep problems. The applicant's command was fully justified in its decision to discharge the applicant due to unsuitability and inability to adapt to a military lifestyle.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 24, 2013, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to submit a response within thirty days. No response was received.

APPLICABLE REGULATIONS

Article 12.B.16.b. of the Personnel Manual in effect in 2007 authorizes discharges for unsuitability for military service for various reasons, including inaptitude, which it described as being "unfit due to lack of general adaptability, want or readiness of skill, clumsiness, or inability to learn."

Article 12.B.16.c. of the Personnel Manual in 2007 states the following:

Commanding officers will not initiate administrative discharge action for inaptitude, apathy, defective attitudes, unsanitary habits, or financial irresponsibility until they have afforded a member a reasonable probationary period to overcome these deficiencies. When commands contemplate discharging a member for these reasons, they shall counsel the member that a formal probationary period of at least six months has begun and make an appropriate Administrative Remarks, CG-3307, entry in the member's PDR that administrative discharge processing will be initiated unless the member shows significant improvement in overcoming the deficiency during the probationary period. The member must acknowledge this entry in writing. Commanding officers are authorized to recommend discharge at any time during probation if the member is not attempting to overcome the deficiency.

Under Article 12.B.16.d. of the Personnel Manual, a member being honorably discharged for unsuitability for military service is entitled to notification of the specific reason for discharge under Article 12.B.16.b. and an opportunity to submit a written statement."

Under the Separation Program Designator (SPD) Handbook, which lists the possible codes and reasons for discharge entered on a DD 214, members being involuntarily discharged pursuant to Article 12.B.16. of the Personnel Manual when they "perform acts of unacceptable conduct (i.e., moral and/or professional dereliction)" may be discharged with an RE-4 reentry code, a JNC separation code, and "Unacceptable Conduct" as the narrative reason for separation. "Unsuitability" is not an authorized narrative reason for separation under the SPD Handbook.

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. The Board notes that the applicant did not apply to the Discharge Review Board, but that board does not have the authority to reverse the reduction of the applicant's grade.

2. Under 10 U.S.C. § 1552(b), an application to the Board must be filed within three years after the applicant discovers the alleged error or injustice in his record. The applicant was discharged for unsuitability and signed his DD 214 on December 27, 2007, and thus knew the terms of his discharge on that date. Therefore, his application is not timely.

3. Pursuant to 10 U.S.C. § 1552(b), the Board may excuse the untimeliness of an application if it is in the interest of justice to do so. In *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992), the court stated that to determine whether the interest of justice supports a waiver of the statute of limitations, the Board “should analyze both the reasons for the delay and the potential merits of the claim based on a cursory review.” The court further instructed that “the longer the delay has been and the weaker the reasons are for the delay, the more compelling the merits would need to be to justify a full review.” *Id.* at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

4. Regarding the delay of his application, the applicant argued that it is in the interest of justice for the Board to excuse his delay because he enlisted with the desire to serve honorably but, while he was on active duty, no one would listen to him, and after his discharge he had to create his own appeal instead of hiring an attorney. The Board does not find this explanation compelling because the applicant failed to show that anything prevented him from submitting his application to the Board more promptly.

5. The Board’s cursory review of the merits of this case indicates that the applicant’s request that his rate be restored to [REDACTED]/E-5 lacks merit. The record shows that his CO reduced him in rate at most only after the applicant repeatedly violated the restrictions placed on him on January 10, 2007, as non-judicial punishment for several earlier offenses. Moreover, he was placed on performance probation in January 2007 because he had “only minimal comprehension of concepts and tasks related to [his] rating” and could not be trusted to perform the tasks associated with his rating. The Board finds no evidence to support that the applicant’s claim that his reduction in rate was erroneous or unjust.

6. The applicant submitted evidence showing that he had sleep apnea while in the Service, and he argued that his separation and reentry codes and narrative reason for separation should be upgraded because his disciplinary and performance problems were caused by his sleep apnea. The record shows that two of the offenses for which the applicant received punishment involved him falling asleep while on watch, and at least two of the numerous occasions on which he was counseled but not punished involved him oversleeping. However, the applicant’s military record contains documentation of many incidents of poor conduct and performance that were not sleep-related, such as walking away from his workspace, creating a hazard and abandoning his post on the flight deck, wearing sweatpants and slippers to work, violating restrictions, ignoring orders, skipping weigh-ins and appointments, and insubordination. In light of these numerous non-sleep-related incidents of poor performance and conduct, the Board is not convinced that the applicant’s sleep apnea caused his discharge or that his discharge for inaptitude under Article 12.B.16. of the Personnel Manual was erroneous or unjust.

7. The applicant’s discharge for inaptitude was authorized under Article 12.B.16. of the Personnel Manual, COMDTINST M100.6A, but DD 214s are completed in accordance with

COMDTINST M1900.4D, and there is no separation code in the SPD Handbook, which is an enclosure to this manual, that denotes a discharge for inaptitude *per se*. Under the handbook, the applicant's separation code, JNC, is paired with the narrative reason for separation "Unacceptable Conduct"—not "Unsuitability"—and is defined as an involuntary discharge "when member performs acts of unacceptable conduct (i.e., moral and/or professional dereliction) not otherwise listed." The assignment of separation code JNC is not clearly erroneous in light of the evidence that the applicant showed a propensity to ignore orders and walk off the job,¹ but under the SPD Handbook, the narrative reason for separation shown on his DD 214 should be "Unacceptable Conduct" rather than "Unsuitability." This correction was not requested by the applicant, however, and because making the correction is not clearly in the applicant's interest, the Board will not order it made unless the applicant requests it.²

8. The applicant asked the Board to upgrade his RE-4 reentry code so that he may reenlist. However, the RE-4 is the only reentry code authorized for members discharged with the JNC separation code for unacceptable conduct.

9. Although the applicant claimed that no one would listen to him, the record shows that he received due process under Article 12.B.16.c. of the Personnel Manual in that he was notified of the reason for his pending discharge and allowed to submit a statement objecting to it. The record shows that the Area Commander reviewed the applicant's statement requesting a "second chance" but denied it.

10. Based on the evidence of record, the applicant's claims cannot prevail on the merits. Therefore and given the lack of a compelling explanation for his delay in applying to the Board, the Board will not excuse the untimeliness of his application or waive the statute of limitations. His application should be denied, but if within six months of the date of this decision, he submits a new application requesting that the narrative reason for separation on his DD 214 be corrected from "Unsuitability" to "Unacceptable Conduct," the Board will consider that request on the merits.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

¹ See, e.g., final decisions in BCMR Docket Nos. 2011-144, 2005-041, 2009-197, and 2010-026, in which the applicants had been discharged and assigned the JNC separation code after being counseled about lackadaisical attitudes, poor performance, failing to obey orders, etc., as young non-rates and petty officers.

² See *Friedman v. United States*, 141 Ct. Cl. 239, 252-53 (1958) (holding that "[t]he Correction Boards were established for the purpose only of reviewing, on application of a member of the military personnel, a military record to correct errors or injustices *against* such personnel and not to review and reverse decisions of other established boards *favorable* to such personnel).

ORDER

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

