

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2017-081

██████████
██████████

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case after receiving the completed application on January 13, 2017, and assigned the decision to staff attorney ██████████ to prepare for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated December 1, 2017, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, a former ██████████ who received a general discharge under honorable conditions on October 30, 2013, asked the Board to correct his general, administrative discharge for misconduct to a medical discharge or, in the alternative, to upgrade the character of service to honorable;¹ to change the separation code on his DD 214² from JKQ to JBK;³ to upgrade his reentry code from RE-4 to RE-1;⁴ and to correct the narrative reason for separation from Misconduct to Secretarial Authority.

The applicant, through counsel, claimed that he was unjustly discharged from the Coast Guard and that he received an erroneous and unjust characterization on his DD 214. Despite the

¹ There are five types of discharge: three administrative and two punitive. The three administrative discharges are honorable, general under honorable conditions, and under other than honorable (OTH) conditions. The two punitive discharges may be awarded only as part of the sentence of a conviction by a special or general court-martial. A special court-martial may award a bad conduct discharge (BCD), and a general court-martial may award a BCD or a dishonorable discharge.

² A DD 214 is prepared to document a member's release or discharge from a period of active duty.

³ According to the Separation Program Designator Handbook, the separation code JKQ denotes involuntary discharge due to the commission of a serious military or civilian offense, and the separation code JBK denotes involuntary separation due to completion of required active duty service.

⁴ The reentry code RE-4 denotes that a veteran is ineligible to reenlist, and the reentry code RE-1 denotes that a veteran is eligible to reenlist.

fact that the application was not filed within the three-year statutory time frame,⁵ he asked the Board to review his case “in the interest of equity and fairness and justice.”

In his brief, the applicant stated that he was an excellent Coast Guard member after he enlisted in 2006 and was selected as the Class Leader at [REDACTED] “A” School in 2009. He described his other accomplishments in the Coast Guard (summarized in the Summary of the Record) and spoke of his devotion to health and fitness and how he helped several of his shipmates with their fitness goals.

Regarding the events that led to his discharge, the applicant stated the following:

In October 2012, the [applicant] was driving off-base on a dirt road in the rural area near the base and misjudged the road condition and crashed his vehicle. In a moment of confusion and panic resulting from his high stress, the [applicant] succumbed to some very bad advice from a friend and decided to burn the car and report it as stolen to the...County Sheriff's Office.”

The applicant stated that on November 9, 2012, while he was performing equipment repairs using a drill, the drill bit shattered. Despite the fact that he had been wearing protective eyewear, a piece of the drill bit hit his cheek and ricocheted under his eyewear and “lodged in his right eye,” causing damage to his right cornea. He went to the hospital and received surgery “to repair the ruptured globe with corneo-scleral laceration.” The applicant stated that due to loss of vision in his right eye, he was placed on Temporary Limited Duty status on February 15, 2013, “while being processed for a Medical Discharge.”

In April 2013, the applicant stated, he was questioned by the local Sheriff's Office and the Coast Guard Investigative Service (CGIS) concerning the destruction of his vehicle. According to the applicant, he “admitted to wrecking the vehicle, setting it on fire, and filing a false police report.” As a result, he pled guilty to attempted reckless burning, which is a misdemeanor offense in that jurisdiction. He was sentenced to 240 hours of community service to be completed within one year, which he completed in eight months.

On September 27, 2013, the applicant stated, his Commanding Officer (CO) recommended that he be discharged due to misconduct with an Honorable Discharge based on his offense in October 2012. After a request from the Personnel Service Center (PSC) for an amended recommendation, the CO again recommended that the applicant be discharged with an Honorable Discharge. However, he was separated with a General Discharge, Under Honorable Conditions, on October 30, 2013.

The applicant then described his post-service life. He stated that he has remained close with his family, despite their disappointment regarding his actions that led to his discharge. He claimed that he has had a “very difficult time obtaining employment because of the discharge characterization.” After employers see his DD 214, they are no longer interested in hiring him. He stated that he was able to gain employment after he cashed in the last of his savings, although he is “barely able to meet minimum living expenses.” His relationship with his fiancé also ended after his discharge. He stated that since his discharge, he has had no further issues with law enforcement and is actively trying to better himself for his future.

⁵ 10 U.S.C. § 1552(b).

Argument One – Applicant was unfairly separated from the Coast Guard

In support of his requests, the applicant made three arguments regarding his separation. The first is that the “Separation Authority unfairly administratively separated the [applicant] from the United States Coast Guard.” The applicant argued that his performance while in the Coast Guard was “outstanding” and that the incident for which he was discharged was an isolated occurrence and a momentary lapse of judgment. Before his discharge, he sustained a severe eye injury in the line of duty. The injury required surgery and placement on a Temporary Limited Duty status due to his loss of vision. This injury also resulted in the commencement of “the process for a Medical Discharge.”

The applicant argued that as a matter of equity and fairness, he should have received a medical discharge based on the permanent eye injury he sustained; the fact that he was initially processed for a medical discharge; the fact that he was ultimately found guilty of only a misdemeanor offense; and his otherwise stellar service while on active duty.

Argument Two – Applicant was awarded an unjust discharge characterization

The applicant stated that discharge characterizations are to be based upon the quality of a member’s service, to include the reason for separation. According to the Department of Defense (DoD) Instruction 1332.14, paragraph 3(b)(1)(a), the quality of a member’s service is to be determined in accordance with the standards of acceptable personal conduct and performance of duty for military members. He alleged that these standards are to be determined in accordance with the DoD Instruction, Department of Homeland Security directives and regulations, and “time-honored customs and traditions of military service.” The applicant argued that generally characterization must be based on a pattern of behavior rather than one isolated incident. The applicant also acknowledged that there are circumstances in which the conduct outweighs the member’s overall performance of duties. According to DoD Instruction 1332.14, an honorable characterization is appropriate when the quality of service has met the standards of acceptable conduct and performance. A general characterization (under honorable conditions) is appropriate when the positive aspects of a member’s service outweigh negative conduct or performance. The applicant stated that Congress has recognized the importance of providing treatment for service-connected disabilities. In addition, the characterization of discharge can have important implications for a veteran’s ability to claim benefit entitlements, including health care.

The applicant claimed that according to the Military Separations manual, COMDTINST M1000.4, a member may receive an honorable discharge for misconduct if illegal drugs were not involved in the conduct that led to discharge. He argued that he clearly meets these criteria, as evidenced by the fact that his CO recommended to PSC *twice* that he receive an honorable discharge. The applicant did suffer from “a momentary lapse of judgment and listened to a friend who suggested reporting his car stolen and burning it,” but after considering all of the facts the applicant was only convicted of a misdemeanor offense. The CO followed the guidelines in COMDTINST M1000.4 in recommending an honorable discharge for the applicant, and the “fact that the separation authority based their characterization due to commission of a serious offense is patently false and has no merit and therefore **must** be corrected.” (Emphasis in original).

The applicant went on to highlight certain portions of the character statements provided in his favor (discussed below). He also discussed the Enlisted Evaluation Report (EER) that covered the period in which the incident occurred (discussed in the Summary of the Record). He acknowledged that he had a “rough start” to his time in the Coast Guard but asserted that he turned himself into a valuable asset during his service. He stated that “up to and after” the incident that gave rise to his discharge, he had an outstanding service record. Due to the applicant’s “superior performance of duty,” he argued that the “overwhelming evidence” shows that in the interest of equity, fairness, and justice, his discharge should be upgraded to Honorable.

Argument Three – Applicant was denied right to Administrative Separation Board

The applicant’s final argument was that he was denied his right to an Administrative Separation Board (ASB) which “materially and adversely affected his due process rights.” He claimed that his CO denied the applicant his right to have an ASB to present his case to remain in the Coast Guard or to be granted an honorable discharge. The applicant stated that 32 C.F.R. § 1⁶ states that if a member has six or more years of active military service, the member has the right to request an ASB. On the other hand, the Military Separations manual states that a member must have eight or more years of service to request an ASB. The applicant argued that this is in violation of the regulations created by Congress. The Coast Guard therefore wrongly discharged the applicant without affording him the opportunity to appear before an ASB. He therefore argued that the “only equitable and just relief that can be granted [to the applicant] is grant the [applicant] an Honorable discharge.”

Based on these three arguments, the applicant argued that he was unjustly discharged and that fairness and equity dictate that he should receive an honorable discharge. He claimed that his service met the standards of acceptable conduct and “therefore the obvious conclusion is for the [applicant] to receive this requested characterization upgrade if a Medical Discharge is not approved.” The applicant did not address his requests for an upgrade of his separation code, reentry code, or narrative reason for discharge.

Submitted Documents

In support of his allegations, the applicant submitted many documents with his application, most of included in the Summary of the Record below. He also submitted two affidavits. The first is from the applicant’s current supervisor, ██████ stated that he met the applicant when he interviewed for a position in May 2015, and the applicant began work at the company in June 2015. ██████ stated that the applicant is “smart and full of energy,” “he brings a positive attitude,” and “is a dedicated and hard worker.” ██████ stated that he works extra hours to ensure that the department’s needs are met. He also added that the applicant has a good relationship with his family and is working on achieving his goals.

The second affidavit is from the applicant’s father. He spoke highly of the applicant’s character and values. He described the applicant’s upbringing and many of the accomplishments

⁶ Title 32 contains the regulations for the Department of Defense. Section 1 of title 32 has no bearing on a member’s right to an ASB. However, paragraph 2.a.(7) of Enclosure 5 to DoDI 1332.14, which does not apply to the Coast Guard, states that if a member has 6 or more years of military service, the member must be informed of the right to request an ASB.

discussed in the brief. He stated that while he knew less about the applicant's time in the Coast Guard, he knew that the applicant loved serving his country and volunteering for duties beyond his rate. He spoke highly of the applicant's physical fitness abilities, his accomplishments in and out of the Coast Guard, and his positive character.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on October 24, 2006. A summary of the applicant's Enlisted Employee Evaluations (EER) shows that he received an unsatisfactory conduct mark and a mark of not recommended for advancement on his final EER, dated September 30, 2013. He received primarily marks of 4, with one low mark of 1, and several 3s and 5s.⁷ On the applicant's first three EERs, dated August 31, 2007, October 30, 2007, and August 31, 2008, respectively, he received an unsatisfactory mark in conduct and was not recommended for advancement. Between the first three EERs and his last EER, he received mostly average marks of 4s and 5s and a few 6s. He received two 7s on his March 31, 2012, EER and six 7s on his September 30, 2012, EER. The Coast Guard provided the following comments from the applicant's EERs:

- August 31, 2007, EER: “[The applicant] has brought discredit upon himself and the Coast Guard on the 15th of May by operating a motor vehicle at a speed of 115 MPH, the posted speed limit was 55. He was placed into hand cuffs but not arrested as the Sheriff's Deputy found out he was a member of the Coast Guard. He also failed to meet the standard of conduct, by bringing a air soft [sic] pistol on board the station, which violates the stations standing orders. When he was initially questioned about it, he lied to the XPO and was also trying to involve one of his shipmates, who did not condone bringing the pistol into the station.”
- “[The applicant] is not recommended for advancement. This recommendation will come only when he realizes the importance of team work, speaking the truth and following all laws, rules and regulations.”
- October 30, 2007, EER: “[The applicant] failed to meet the minimum standards of conduct by being awarded NJP for falling asleep on watch.”
- “[The applicant] is not capable of satisfactorily performing the duties and responsibilities of the next higher paygrade. In order to gain my recommendation, he must meet the requirements outlined in his performance probation and receive no other disciplinary actions.”
- August 31, 2008, EER: “This is an adverse supporting remark for UNSATISFACTORY conduct. [The applicant] displays reckless behavior while operation a motor vehicle [sic]. On two occasions, he received a summons for excessive and criminal speed bringing discredit to the Coast Guard, his Command and unit. His behavior off duty does not reflect the core values of the Coast Guard.”

⁷ Enlisted members are evaluated on a scale of 1 to 7, with 1 being the lowest and 7 being the highest, in twenty-three performance categories.

- “This is an adverse supporting remark for NOT RECOMMENDED. [The applicant] continually fails to display the maturity required of a Petty Officer. His off duty conduct and lack of integrity demonstrates poor decision making skills and does not meet the minimum requirements of a Third Class Petty Officer. In order for him to be recommended for advancement, he must continue to work hard at the unit, display impeccable integrity and stay out of trouble off duty.”

The applicant received a negative Page 7⁸ on May 15, 2007. It states:

On 13 May 2007 you were observed by a ... County Deputy operating your vehicle at a speed of 115 MPH. You operated your vehicle at twice the posted speed limit of 55MPH. You were placed in handcuffs and seated in the back of the Deputies car [sic]. The Deputy could have taken you to...County jail for operating so reckless while being observed by him. Being a uniformed member of the United States Coast Guard, the deputy granted you a misdemeanor summons to appear in court instead of going to the...county jail. Your negligent operation at this rate of speed could have proved to be disastrous to yourself, your passenger, and the general public. You also brought discredit upon the United States Coast Guard by being placed into custody of a fellow uniformed member of law enforcement. You will be counseled and further administrative action may follow.

The applicant received a negative Page 7 on September 24, 2007. It states:

You are being counseled today for being late. At 0710 your supervisor asked your immediate supervisor if you were excused from boat checks. His response was no and Petty Officer P... was then instructed to walk up the street and locate you to find out the reason why you were not at boat checks. At 0725, you were found just leaving your barracks room. Petty Officer P...then asked you why you were not at boat checks, and your response was “I do not know.” When asked what you meant by “I do not know” you said “I did not hear my alarm go off.” It was found that you were out until 0200, the Boat Operations and Training Manual Volume 2, CIM 16114.32A, page 2-46, states that you need a minimum of 06 hours of sleep to be operationally fit, this does not meet the requirements. This tardiness for boat checks is inexcusable, as relieving day boat checks are detrimental to the proper relieving process between sections and it is required for all personnel from both sections to attend. Your poor decision to stay out until 0200 on the day of reliefs is irresponsible and potentially dangerous. At this point, your behavior is being documented and you are being counseled on the importance of following set procedures. If the problem persists, more appropriate action will be taken to correct this behavior such as NJP and/or removal from an A-school list.

The applicant received a negative Page 7 on October 1, 2007. It states:

In May 2007, you were placed on a modified duty rotation after you failed to complete your Boarding Team Member qualification by the required date of 12 May 2007. The modification of your duty allows more time and opportunity to attain this qualification. From time to time you are left on your own to study correspondence material with no direct supervision, but you are fully expected to hold yourself accountable and maximize your time in the stations classroom. On 01 Oct 2007, you were expected to be in the second deck training room studying, however you were found in your room at 1100 playing video games on your computer. This is not the first time you have done this and you have been verbally counseled about being in your room when you are supposed to be studying. Upon discovery of your whereabouts you were once again directed to go to the training room and study and your supervisor made very clear that you are not to be in your room during the workday. That very same day you were once again found in your room during the workday, at your computer and playing your guitar. You were asked what it was you were doing and you stated that you were creating a music CD for [FS3 U] and decided to play your guitar while you waited.

⁸ An Administrative Remarks record entry, form CG-3307, better known as a “Page 7,” is used to document a member’s notification of important information, achievements, or counseling about positive or negative aspects of a member’s performance in the member’s military record.

The truth is that [FS3 U] did not ask you to make a music CD and he certainly did not direct you to do so. It would seem you stretched the truth once again to justify your actions. You were directed by your supervisor not to be in your room until the end of the work day (1600). You blatantly disregarded your supervisor and returned to your room to do your own thing. This is a complete lack of both motivation to complete your tasks to help your unity, and more importantly a lack of integrity. This is not the first time your integrity has been questioned, you must remember that integrity is doing the right thing, even when no one is looking.

The applicant received another negative Page 7 on October 9, 2007. It states:

You are again being counseled for being in your room playing on your computer during the work day. You were counseled on 01 Oct 2007 for being in your room playing computer games during regular work hours. You were again observed in your room, after the lunch hour, playing computer games by the Station OOD [Officer of the Day] on 02 OCT 2007. When asked why you were in your room during the work day you replied that you were not aware of the time, you were then counseled by the OOD on the normal work hours and daily routine as published in the Station SOP.

This is the second time you are being counseled for disregarding Station work hours. The blatant lack of respect for Station SOP and rules and regulations that you continue to display will not be tolerated by this command. Further infractions of this nature will be documented and could result in NJP.

On October 12, 2007, the applicant was placed on performance probation. The applicant was informed that his performance during the previous six months was unsatisfactory and that his performance must improve over the following six months or he would be considered for discharge. The stated reason for the probation was the applicant's "attitude towards [his] qualifications and [his] lack of responsibility and integrity." The applicant was told that he was expected to follow the rules and to show integrity, and if his performance did not improve, he would be processed for separation from the Coast Guard. There is no documentation regarding an end to his probationary period.

On November 20, 2009, the applicant received a positive Page 7. It states:

Congratulations, you are ■-A Student of the Month for October 2009. You were selected by a panel of senior instructors based on your academic and military performance, the recommendations of your class advisor and instructors. Your selection as the student of the month speaks very well of you. You are an outstanding student and show excellent petty officer potential.

On February 25, 2010, the applicant received another positive Page 7. It states:

As the Honor Graduate you are commended for outstanding performance as an ■ "A" School student. Through your dedication and effort, you have distinguished yourself, and your overall academic average of 97.31% is truly noteworthy. Your dedication, motivation and effort over the last 28 weeks have been noted by your instructors and classmates.

On November 9, 2012, the applicant was seen by an ophthalmologist due to an injury that resulted from a drill bit breaking off, hitting the applicant's cheek and ricocheting off of his protective glasses to hit his right eye. The doctor concluded that the applicant had a ruptured globe and corneo-scleral laceration although no foreign body was retained in his eye. The laceration was surgically repaired.

On February 25, 2013, a Health Services Technician, HSC S, recommended via email that the applicant be entered into the Temporary Limited Duty (TLD) program due to his loss of vision in his right eye. HSC S stated that the applicant's TLD was approved and would expire on May 15, 2013. He added that if the TLD terminated in a Medical Evaluation Board, the medical clinic would have ninety days from the date of TLD termination to prepare the board's report for delivery to PSC.

At a follow-up examination on March 29, 2013, the applicant's vision was reported to be 20/400 in his right eye, which made him legally blind in that eye. Medical records from April 8, 2013, state that the applicant had a scheduled Medical Board Physical Examination. He was determined not fit for boat or sea duty due to the injury to his right eye. The applicant stated at this visit that he had "constant eye pain." The doctor noted that the applicant's "visual acuity [was] reported as worsening."

The applicant was seen again on April 10, 2013. The notes state that he was "pending medical board submission for open wound to the right eye... Since this injury which occurred 11NOV12 he has experienced broad range of emotions and has had frequent episodes of depression and low motivation. [The applicant] is very anxious about the medical board process." During this visit, he also complained of right shoulder pain, chronic right elbow pain "since blunt trauma – struck elbow in hard object while sweeping," chronic bilateral knee pain, and chronic left foot pain.

Medical records dated April 15, 2013, state that the applicant had a history "of open wound to right eyeball from drill bit in NOV12." The applicant was waiting to receive an MRI of his eye and the doctor requested a "CT of orbits to rule out metallic foreign body." He was referred to a radiology center to receive these tests.

On April 23, 2013, the applicant received a medical examination for a Medical Evaluation Board according to the doctor's notes. The notes state that the applicant was being seen "for Medical Board physical preliminary due [to] eye injury." The applicant failed a hearing test and after the audio booth was calibrated the applicant scored "slightly higher than the first test."

On May 6, 2013, the applicant was seen at a physical therapy and rehabilitation office. The notes of this visit state that the applicant had an injury at work six months prior when he "was drilling through a thick piece of metal and the bit bound up just prior to breaking through. A piece of metal bounced up underneath his safety glasses and went into his eye." The doctor stated that the applicant had lost 80% vision in his right eye due to the injury. During this visit, the applicant also complained that "the central part of his right wrist started to hurt, especially with grasping and turning things." The applicant also reported that he was in the process of being discharged due to his injuries and his inability to perform his job duties as a result.

The applicant was seen by a doctor on May 22, 2013. The notes of this visit state that the Medical Evaluation Board process was ongoing.

On August 28, 2013, the applicant received a Notification of Intent to Discharge memorandum from his CO. It states that action was initiated to discharge the applicant by reason of misconduct on the basis of commission of serious offense. Specifically, between "19 Oct 2012

and 06 Dec 2012, [the applicant] purposely set [his] 2002 Subaru Impreza ablaze and fraudulently filed a car insurance claim.” As a result, the applicant was civilly charged with Arson 1 and Fraud 2, both of which were felony charges, thus complying with the definition of “commission of a serious offense.”⁹ The CO recommended that he receive an Honorable Discharge, but noted that the character of discharge is a decision that lies with the Commander of PSC.

The memorandum informed the applicant that he had the right to submit a statement on his behalf and that if he chose to submit one, it would be forwarded through the chain of command with his discharge recommendation package. He was also informed that because he had less than eight years of total military service, he was not entitled to have his case heard by an ASB. On August 30, 2013, the applicant acknowledged the Notification of Intent to Discharge with his signature. He indicated that he attached a statement on his behalf and that he objected to discharge from the Coast Guard.

The applicant prepared a statement on his own behalf, dated September 6, 2013. He wrote that he understood that the civil charges against him were serious in nature and that his conduct was unacceptable. He then stated that he injured his eye in November 2012 and that a “Medical Evaluation Board [was] investigating the loss of [his] vision.” Because the Medical Evaluation Board (MEB) could lead to his discharge, he requested that he receive a medical discharge. If he was to be separated administratively, he requested to receive an honorable discharge “in light of the dedicated years of service prior to this situation.” The applicant stated that October 2013 would mark eight years of service with the Coast Guard.¹⁰ He stated that servicing his country has been profoundly satisfying and that he had developed a commitment to making a difference while in the Coast Guard. He pointed out his various accomplishments, including his designation as Class Leader at “A” School. He summarized his EERs and highlighted his high marks of 7.¹¹ The applicant concluded that he remained a dedicated member of the Coast Guard and that he would like nothing more than to remain on active duty.

With his personal statement, the applicant also provided an endorsement from the [REDACTED] of his assigned ship, [REDACTED]. [REDACTED] stated that he had worked with the applicant for three years, and during that time the applicant had “played a vital role in the shop’s organization.” [REDACTED] spoke of the applicant’s work ethic and his “exemplary” performance of his assigned duties. He stated that he had worked with many people in his 20 years with the Coast Guard, and the applicant was “one of the more stalwart members” with whom he had worked.

On September 27, 2013, the applicant’s CO sent PSC a recommendation to discharge the applicant by reason of misconduct due to the commission of a serious offense. The memorandum states that the applicant became the subject of the county Sheriff’s office after his car was reported stolen and later found “wrecked and completely burned” on October 22, 2012. During the investigation, several witnesses stated they had seen the applicant near the location of the vehicle before it was found. On April 30, 2013, the applicant admitted to the Sheriff’s office investigators that “he wrecked his vehicle and intentionally set it on fire. He also confessed to

⁹ COMDTINST M1000.4, Article 1.B.17.b.3.

¹⁰ October 23, 2013, marked seven years with the Coast Guard.

¹¹ The applicant received two marks of 7 on his March 31, 2012, EER, and six marks of 7 on his September 30, 2012, EER.

filing a police report and insurance claim where he received more than \$10,000 from his auto insurance company.” The applicant was charged with arson in the first degree and perjury in the second degree, both felony offenses in the local jurisdiction. The CGIS found by a preponderance of the evidence, due in large part to the applicant’s own admission, that he had committed two felony offenses and thereby met the definition of a commission of a serious offense.¹²

The CO’s memorandum also states that the applicant did not meet the eligibility requirements for the Commandant’s Second Chance Program. The applicant was not recommended for retention “despite his objection to being discharged” per his statement. The Uniform Code of Military Justice (UCMJ) offense most parallel to the applicant’s actions is Article 134, Intent to Defraud. The maximum punishment for UCMJ Article 134 is a dishonorable punishment, forfeiture of all pay and allowances, and confinement for ten years. The memorandum recommended, due to the applicant’s service record, that he receive an honorable discharge. At that time, the applicant had seven years and eleven months of service,¹³ and therefore was not entitled to an ASB.

The CO’s discharge package included a narrative of the events that led to the applicant’s discharge, which was prepared by the ship’s Executive Officer (XO). The XO’s narrative is summarized below:

Date	Event
July 4, 2010	The applicant reported aboard the ship.
October 19, 2012	The applicant made a false report to the local county’s police department, “stating that his [REDACTED] was parked on his property near his driveway and was stolen from said location.”
October 22, 2012	The local county Sheriff’s Office found the applicant’s vehicle completely burned and notified the local police department.
November 23, 2012	The applicant filed an insurance claim with his auto insurance company reporting the loss of his vehicle as a theft/burglary.
December 6, 2012	The applicant received \$10,088.51 for his vehicle from insurance.
March 18, 2013	The county Sheriff’s Office notified CGIS of their investigation and requested assistance. CGIS opened a “monitor” case.
April 25, 2013	The applicant’s command was notified that he was being investigated with regard to the alleged arson and insurance fraud case. The command was asked to ensure the applicant’s presence at the CGIS office for an interview.
April 30, 2013	The applicant was interviewed by the Sheriff’s Office and agreed to take a polygraph at the local courthouse. The examination indicated that he had been deceptive. When applicant was confronted with the results, he “admitted to filing a false stolen vehicle police report and making a false

¹² Military Separations Manual, COMDTINST M1000.4, Article 1.B.17.b.3.

¹³ At this time, the applicant had six years and eleven months of service.

	insurance claim.”
May 2, 2013	The applicant’s command was notified by CGIS that he was the prime suspect in the arson and insurance fraud case.
May 21, 2013	The Sheriff’s office forwarded the court’s Certification of Determination of Probable Cause documents to CGIS, which stated that there was probable cause to believe that the applicant committed arson in the first degree and perjury in the second degree.
May 29, 2013	The Sheriff’s office completed the arson investigation and closed the case.
July 30, 2013	The applicant’s command received the CGIS Report of Investigation, which provided police reports and the written transcript in which the applicant admitted to filing a false police report, setting his car on fire, and submitting a false insurance claim. ¹⁴

The applicant’s command subsequently received an email from PSC regarding the applicant’s separation.¹⁵ The email states that the applicant may be a candidate for a separation under honorable conditions due to “the egregious nature of the offenses.” PSC noted that the applicant’s notification did state that PSC would determine the character of his discharge, but a general discharge could not be awarded unless the applicant “has been fully informed of the effects of a general [discharge] and been afforded the right to counsel.” PSC therefore requested that the applicant be sent an amended notification memorandum including the following language:

If you are awarded a general discharge, you may expect to encounter prejudice in civilian life.

As you are being considered for a general discharge, you have the right to consult with a lawyer as defined by Article 27(b)(1) of the Uniform Code of Military Justice.

PSC further stated that the applicant was required to acknowledge the effects of a general discharge and either elect or waive his right to counsel.

On October 15, 2013, the applicant received an amended Notification of Intent to Discharge memorandum. The memorandum was identical to the notification he received on August 28, 2013, except that it added the additional language required by PSC (quoted above). The applicant signed the acknowledgment of the amended notification. He indicated that he attached a statement on his behalf, that he intended to consult with an attorney, and that he objected to discharge from the Coast Guard. One of the listed acknowledgements stated, “I understand that if I receive a General Discharge under honorable conditions, I may expect to encounter prejudice in civilian life.”

The applicant later provided a second statement on his own behalf, dated October 21, 2013. He stated that while he deeply regretted his misconduct, he respectfully requested to remain in the Coast Guard or to receive an honorable discharge in light of his seven years of dedicated service. He restated much of the content from his first statement. He added that he was

¹⁴ These documents are not before the Board.

¹⁵ The email received by the Board is undated.

placed on Temporary Limited Duty following his eye injury and that a Physical Disability Evaluation Board (PDEB) might still find that he should be separated due to his disability. He stated that he will require ongoing treatment and will be unable to perform the technical jobs that he had been trained to do. He would need to train for a new career that he would be able to perform with his limited vision. He therefore requested an honorable discharge “with its medical and educational benefits” in order to assist him in his future endeavors.

On October 24, 2013, PSC authorized the applicant’s separation with an effective date of November 25, 2013. The applicant was to be separated pursuant to Article 1.B.17., Misconduct for the commission of a serious military or civilian offense. The separation code would be JKQ for misconduct with a general discharge under honorable conditions. The reenlistment code would be RE-4.

The applicant’s Coast Guard medical records show that in October 2013, before his discharge, his vision was still 20/25 in his left eye and 20/400 in his right eye.

The applicant was discharged from the Coast Guard on October 30, 2013. His net active service was seven years and seven days. The character of discharge is Under Honorable Conditions. The separation code is JKQ and the reentry code is RE-4. The narrative reason for separation is “Misconduct.”

VIEWS OF THE COAST GUARD

On July 14, 2017, the Judge Advocate General of the Coast Guard submitted an advisory opinion in which he adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC) and recommended denying relief.

PSC stated that the application is not timely because it was not submitted within three years of the applicant’s discharge, and no justification was provided for the untimeliness. As to the merits of the applicant’s request, PSC stated that according to the Military Separations Manual, COMDTINST M1000.4, Article 1.B.1.e., the disability statutes do not preclude disciplinary separation. If a member is being processed for a disability while the member is simultaneously being evaluated for an involuntary administrative separation for misconduct or for disciplinary proceedings which could result in a punitive discharge, the disability evaluation will be suspended while disciplinary action is considered. If a punitive or administrative discharge for misconduct does not occur, then the disability case will resume. If a punitive or administrative discharge does occur, the medical board record will be filed with the member’s record. Article 1.B.17.a. also notes that disability evaluation processing is terminated for members who are being discharged for misconduct.

PSC stated that the applicant’s Command initiated action to discharge him by reason of misconduct for commission of a serious offense after he was found to have wrecked his vehicle, intentionally set it on fire, and filed a false police report and insurance claim to receive over \$10,000. PSC stated that it was unable to find any record that it ever convened a PDEB for the applicant in its files. Regardless, evaluation by a PDEB “does not preclude a member’s separation for misconduct as noted in Articles 1.B.1.e. and 1.B.17.a.” of the Military Separations manual. Regarding the character of discharge, PSC stated that character assignment is based on the

reason for discharge and the member's military record per Article 1.B.2.a. of the manual. PSC conceded that the applicant's record suggests that he performed well during certain periods of his military career, but there are also "many documented incidents of negative performance." In light of these incidents and the severity of the actions that led to his separation, PSC argued that the applicant was properly assigned the character of Under Honorable Conditions.

PSC argued that the fact that the felony charges against the applicant were later reduced to a single misdemeanor charge is not justification to upgrade the applicant's character of service. The applicant was processed for separation due to misconduct for commission of a serious offense based on a finding by a preponderance of the evidence that he had committed the charged offenses. PSC noted that the applicant admitted to committing the offenses during an interview with the local Sheriff's office, and he "does not contest any of the offenses he was accused of in either his statement upon separation or within his request to the BCMR."

With regards to the applicant's argument that he was denied due process in that his separation was not reviewed by an ASB prior to his discharge, PSC stated that 10 U.S.C. § 1169 states that each Service Secretary may authorize specific policy regarding military member separations. The Enlisted Administrative Separations instruction, DoDI 1332.14, authorizes enlisted members with over six years of service to present their case to an ASB; however this instruction is applicable only to the Army, Navy, Air Force, and the Marine Corps. According to Coast Guard policy, as found in the Military Separations manual and Enlisted Personnel Administrative Boards manual, only members with *eight* years or more of total military service may present their case to an ASB. The applicant did not have eight years of total military service prior to his separation, and he was therefore not eligible to appear before an ASB. For these reasons, PSC recommended denying the applicant's requests.

RESPONSE TO THE VIEWS OF THE COAST GUARD

On July 24, 2017, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to submit a response within thirty days. After requesting multiple extensions, no response was received.

APPLICABLE LAW & REGULATIONS

Title 10 U.S.C. § 1169 states that no "enlisted member of an armed force may be discharged before his term of service expires except (1) as prescribed by the Secretary concerned; (2) by sentence of a general or special court martial; or (3) as otherwise provided by law."

The Military Separations manual, COMDTINST M1000.4, Article 1.B.1.e. states that the disability statutes do not preclude a disciplinary separation. The separations described in this Article "supersede disability separation or retirement." If a member is being processed for a disability separation while simultaneously being processed for an involuntary administrative separation for misconduct or disciplinary proceedings which could result in a punitive discharge, the disability evaluation is suspended. If disciplinary action does not include a punitive or administrative discharge for misconduct, the disability case resumes. If disciplinary action does include a punitive or administrative discharge for misconduct, the medical board report is filed in the member's medical record. Article 1.B.2.a. states that the Coast Guard will discharge members

with “the type and character of service as determined by the reason for discharge, military record, and certain other conditions.”

Article 1.B.2.f.(1) states that a member is eligible for an honorable discharge for one of the following reasons: enlistment expires; service obligation is fulfilled; convenience of the government; dependency or hardship; minority (age); unsuitability; misconduct (except involvement with illegal drugs or obstructing drug urinalysis testing by tampering); or the Commandant so directs. According to Article 1.B.2.f.(2), a member is eligible for a general discharge if a member is eligible for discharge for one of the reasons listed in section (1) of this Article and when “based on the individual’s overall military record or the severity of the incident(s) which results in discharge, Commander (CG PSC-EPM-1) directs issuing a general discharge.”

Article 1.B.17.a. states that only Commander, PSC can direct a discharge for misconduct and the type of discharge “as warranted by the particular circumstances of a given case.” A disability evaluation will be terminated for members who are discharged for misconduct. Article 1.B.17.b.(3) states that the commission of a serious offense does not require adjudication by either non-judicial or judicial proceedings. A finding of not guilty or an acquittal “at a judicial proceeding or not holding non-judicial punishment proceeding does not prohibit proceedings under this provision.” However, the commission of a serious offense must be established by a preponderance of the evidence. Police reports and CGIS reports may be used to make this determination. A member may be separated based on the commission of a serious offense when the circumstances of the offense warrant separation and the “maximum penalty for the offense or closely related offense under the UCMJ and Manual for Court-Martial includes a punitive discharge.”

Article 1.B.17.d. discusses discharging members with more than eight years of service. Members must be processed for discharge in accordance with Article 1.B.23. Article 1.B.17.e. states that when a general discharge is contemplated for a member with fewer than eight years of service, the member must be afforded the opportunity to consult with a lawyer. Nowhere in this subparagraph is an ASB mentioned.

The Enlisted Personnel Administrative Boards manual, PSCINST M1910.1, Article 1.B.1., states that members with eight or more years of military service are “entitled to a board before they are involuntarily administratively separated or denied reenlistment.”

The Department of Defense Instruction, DoDI 1332.14, entitled Enlisted Administrative Separations states that the instruction applies to the military department and organization entities within the Department of Defense. “The term ‘Military Services,’ as used in this instruction refers to the Army, the Navy, the Air Force, and the Marine Corps.”

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 of the discovery of the alleged error or injustice in the record.¹⁶ The applicant's medical records show that before his discharge in 2013, he knew that his vision in his right eye was 20/400. The applicant did not provide any compelling explanation for his failure to timely dispute his lack of a medical separation or his general discharge for misconduct. He asked that the Board consider his application in the interest of justice. Thus, the application is untimely.

3. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.¹⁷ In *Allen v. Card*, 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"¹⁸ 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."¹⁹

4. The applicant did not justify his delay in challenging his discharge, and the Board's cursory review of the merits shows that his claim cannot prevail. The records indicate that although the applicant was injured and became legally blind in his right eye before his discharge and medical personnel prepared for a Medical Evaluation Board, a PDEB was either never requested by his command or never convened by PSC based on his pending discharge for misconduct. Articles 1.B.1.e. and 1.B.17.a. of the Military Separations manual make clear that the disability separation process is suspended if a member is expected to be discharged for misconduct and terminated if a misconduct discharge is approved. The applicant also complained that his discharge characterization was unjust due to his years of honorable service. His record shows that after repeated misconduct in 2007 and 2008, which culminated in performance probation in 2009, the applicant performed well in 2010, 2011, and the early part of 2012. However, the applicant was found to have committed serious offenses in October, November, and December 2012 and made false official statements when questioned by authorities in April 2013, and he was discharged in accordance with Articles 1.B.2. and 1.B.17. of the Military Separations [REDACTED] [REDACTED]iousness of his crimes [REDACTED] re [REDACTED] of his record, the Board cannot conclude that the applicant was entitled to a medical separation because of his eye injury. Nor does the fact that the [REDACTED] ultimately pled guilty to only a single misdemeanor charge persuade the Board that his command or PSC erroneously concluded that he had committed the felonies as charged: He had admitted to committing arson and fraud and confessed to his having lied about it after failing a polygraph test. Article 1.B.17.b.(3) of the Military Separations manual specifically notes that a judicial conviction or non-judicial punishment is not required for a member to receive a misconduct discharge. Nor was the applicant entitled to an ASB because he did not have more than eight years total of military service. The policy and law he depended on in his brief apply to the Armed Forces under the Department of Defense, and not the Coast Guard. The Coast Guard has its own policy on this subject, and Article 1.B.17.d. of the Military Separations manual and Article 1.B.1. of the Enlisted Personnel Administrative Boards manual state that a member must have at least *eight* years, not six, of total military service to present his case before an ASB. The discharge package sent to PSC shows that the severity and circum-

¹⁶ 10 U.S.C. § 1552(b).

¹⁷ *Id.*

¹⁸ *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

¹⁹ *Id.* at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

stances of the events that led to the applicant's discharge, his medical status, and the rest of his record were reviewed and considered by PSC before his separation orders were issued. The record shows that he received due process under Article 1.B.17. because he was notified of his pending discharge, allowed to consult an attorney, and allowed to submit statements on his own behalf for consideration by PSC. This cursory review of [REDACTED] therefore, that the applicant's claims of error and injustice are not supported in his records, which are presumptively correct.²⁰ The Board finds insufficient grounds for excusing the untimeliness of his application.

5. Accordingly, the Board will not excuse the untimeliness of the application or waive the statute of limitations. The applicant's request should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

²⁰ 33 C.F.R. § 52.24(b).

ORDER

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

December 1, 2017

