

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2017-140



FINAL DECISION

This is a proceeding under the provisions of section 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case after receiving the applicant's completed application on April 26, 2017, and assigned it to staff member [REDACTED] to prepare the decision 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, who was discharged from the Coast Guard on January 29, 2009, asked the Board to correct his DD 214 discharge form by upgrading his reentry code from RE-4 (ineligible to reenlist). He originally received an honorable discharge with a JPD separation code for "alcohol rehabilitation failure" and an RE-4 reentry code. Pursuant to a decision of the Discharge Review Board (DRB), on May 17, 2012, the Coast Guard issued a DD 215 to correct the applicant's separation code in block 26 and narrative reason for separation in block 28 of his DD 214 to JND and "separation for miscellaneous/general reasons," respectively. The applicant asked the Board to upgrade his reentry code so that he can reenlist in the military and serve his country honorably. He stated that he made an "immature decision" nine years ago when he was seventeen and that, since his separation, he has excelled in his career as a Merchant Mariner. The applicant did not provide a reason for his delay in submitting his application, but asked the Board to consider his application in the interest of justice because he has been "banned from re-enlistment for an alcohol incident in 2009."

To support his claims, the applicant submitted a copy of his Merchant Mariner credentials, Transportation Worker Identification Credential card, driver's license, and license to carry a handgun. He provided a letter dated April 26, 2017, verifying that he is subject to random drug testing and that the applicant has not failed or refused to participate in any tests. The applicant also provided four letters of recommendation. The first is dated May 5, 2017, and is from the Vice President of the company that has employed the applicant for the past five years. The Vice

President stated that the applicant has completed “well over 1,500 safe transfers of our pilots from pilot boat to ship” in “all manners of the sea state and at all times of the day and night.” He stated that the applicant is attentive, knowledgeable, and professional both on and off duty. He added that the applicant has been “a tremendous asset” to the company.

The applicant provided a letter dated April 28, 2017, from his supervisor at the job he held previously. The former supervisor stated that the applicant is “honest, dependable, and hard working.” He noted that the applicant “is a true team player” and was always “positive and helpful with the other employees.” The applicant provided a letter dated April 28, 2017, from a coworker from his previous position. The former coworker stated that the applicant had always “displayed proficiency and skill in his profession” and “always had a positive attitude, showed responsibility, respect, and punctuality.” He noted that the applicant quickly rose in the ranks due to his “knowledge and seamanship.” Lastly, the applicant provided a letter, also dated April 28, 2017, from a personal friend who works for U.S. Customs and Border Protection. The friend stated that he has known the applicant for more than three years and has had the opportunity to interact with the applicant in professional and social settings. He stated that the applicant has always “displayed himself as very professional, respectful, extremely knowledgeable and skillful in his position as a boat captain.” In social settings, the friend noted that the applicant “has displayed good judgment and good character.”

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard at age 17 on June 16, 2008, for a period of six years. On August 12, 2008, he signed an administrative entry stating that he had been advised of the Coast Guard’s policies against substance abuse.

On November 7, 2008, the applicant borrowed a shipmate’s car. Throughout the evening, he drank with a shipmate and two local high school students, all of whom were underage, and drove the car after consuming alcohol. He was arrested in the early morning of November 8, 2008, after driving erratically, nearly missing a parked car, and failing all field sobriety tests. A subsequent breathalyzer determined that the applicant’s BAC was 0.15.

On November 10, 2008, the applicant received a Page 7¹ regarding the driving under the influence (DUI) arrest. It states:

On 08NOV2008 you were involved in an alcohol incident when at approximately 0130 (local) you were pulled over and arrested by [county] Police Department for driving under the influence (DUI). You were administered a breathalyzer, and confirmed your BAC was 0.15%, grossly over the legal limit, in addition you are under the legal age to consume alcohol (17 years old). Actions such as these brings [sic] discredit to yourself and the Coast Guard, and will not be tolerated. You were counseled on USCG policies concerning alcohol use and abuse as well as the serious nature of this incident. The unit CDAR will arrange an appointment with a provider who will determine the nature of your relationship with alcohol. You are directed to abstain from the use of alcohol.

¹ 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.

On November 12, 2008, the applicant attended alcohol screening at a medical clinic. He was diagnosed as being an alcohol abuser. The report notes that he had been drinking alcohol regularly since he was thirteen and that he did not believe that he had a problem with alcohol.

On November 21, 2008, the applicant received non-judicial punishment (NJP) for violating Article 86 of the Uniform Code of Military Justice (UCMJ) for being absent without leave, Article 92 for failing to obey an order or regulation in that he consumed alcohol as a minor, and Article 111 for the drunken operation of a vehicle. He pled guilty to all three and as a result he was awarded 45 days' restriction, 45 days' extra duty, and reduction in rank to E-2.

The applicant's Executive Officer (XO) prepared a narrative dated December 4, 2008, summarizing the events covering his unsuitability for service due to alcohol abuse. The summary included the pertinent events discussed above. In addition, the XO noted that the applicant's misconduct displayed "a pattern of behavior indicating that he has no respect for authority, and is either incapable of or simply resistant to learning any lessons from his mistakes." He provided several examples in addition to the applicant's DUI, including the fact that the applicant had been caught smoking on multiple occasions despite the fact that he had been counseled that Coast Guard policy prohibits members under the age of eighteen from smoking. The XO concluded that the "Coast Guard would be better served by discharging" the applicant.

On December 4, 2008, the applicant received Notification of Intent to Pursue Discharge. This memorandum notified the applicant that discharge actions had been initiated pursuant to Article 12.B.16.b.5. of the Personnel Manual due to alcohol abuse. Specifically, the applicant had been arrested on November 8, 2008, for driving under the influence of alcohol and for possessing alcohol as a minor. At the time of his arrest, the applicant had been in the Coast Guard less than five months. On November 12, 2008, the applicant's alcohol screening determined that he was an alcohol abuser as he had been drinking regularly since the age of thirteen. Because his abuse of alcohol started at age thirteen, it was determined to be a preexisting condition. The applicant was informed that because he had less than six months of service, his abuse of alcohol made him "physically unqualified for enlistment" and therefore subject to discharge. He was informed of his rights in conjunction with the discharge proceedings.

On December 5, 2008, the applicant acknowledged the discharge notification and his rights. He noted that he had attached a statement and that he objected to being discharged. His attached statement stated:

I'm not going to make any excuses for what I did. There are no excuses; I didn't "accidentally" get behind the wheel of a car while intoxicated.

I was diagnosed as alcohol abusive before six months of service, and I realize that that alone is reason enough for certain discharge from service, but I also got behind the wheel of a vehicle; endangering the lives of people I swore to defend... That doesn't mean nearly as much to me as the fact that I endangered the lives of my friends. For these things, I look at myself as a person who deserves to be discharged. That is something I will change, whether I am in the Coast Guard or not, however, I would like to stay in the Coast Guard.

On December 5, 2008, the applicant's commanding officer (CO) sent a Recommendation for Discharge memorandum to the Coast Guard Personnel Command (CGPC). The CO stated that the applicant was recommended for separation with an honorable discharge for unsuitability due

to being diagnosed as an alcohol abuser. The memorandum contains a summary of pertinent events and a description of the applicant's "poor attitude, poor work ethic and unwillingness to learn from his mistakes." On the same date, the Area Chief of Staff endorsed the Recommendation for Discharge and recommended approval of the discharge.

On December 30, 2008, CGPC authorized the applicant's separation effective no later than January 29, 2009. He was to be separated with an honorable discharge pursuant to Article 12.B.16. for unsuitability with the JPD separation code and reason as "Alcohol Rehabilitation Failure." There was no instruction regarding the reentry code.

The applicant was discharged on January 29, 2009. He had accumulated seven months and fourteen days of service. He received an honorable discharge with the JPD separation code and the corresponding narrative reason for separation, "Alcohol Rehabilitation Failure" in block 28. He received an RE-4 reentry code in block 27. The applicant signed the DD 214.

In 2010, the applicant petitioned the DRB to upgrade his reentry code, separation code, and narrative reason for discharge. The DRB found that the applicant's discharge with an RE-4 was proper and equitable based on his misconduct. However, the DRB found that the separation code and narrative reason were "inequitable based upon a subsequent change in policy, ALCOAST 125/10." The DRB recommended that the applicant's separation code and narrative reason for separation be changed to reflect Miscellaneous/General reasons as a more appropriate narrative reason given the lack of documentation regarding alcohol rehabilitation failure. On May 17, 2012, the DRB's recommendation was approved, correcting the applicant's separation code to JND and his narrative reason for separation to "separation for miscellaneous/general reasons." The DD 215 showing these corrections was issued on June 15, 2012.

VIEWS OF THE COAST GUARD

On September 21, 2017, the Judge Advocate General of the Coast Guard recommended that the Board deny relief in this case. In so doing, he adopted the findings and analysis provided in a memorandum submitted by the Personnel Service Center (PSC).

PSC first noted that the application is not timely because the applicant was discharged in 2009, over eight years ago. PSC stated that Coast Guard policy in ALCOAST 125/10 requires use of an RE-4 "for cases involving DUI, associated alcohol related misconduct, or members who fail to complete or refuse treatment." PSC argued that the applicant provided no evidence that an error or injustice occurred, nor did he deny the actions that led to his discharge. Therefore, PSC stated, the applicant's reentry code should not be upgraded.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 25, 2017, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to submit a response within 30 days. No response was received.

APPLICABLE REGULATIONS

Under the Separation Program Designator (SPD) Handbook, a member involuntarily discharged for “miscellaneous/general reasons” with a JND under Article 12.B.12. of the Personnel Manual may receive either an RE-4 or RE-1 (eligible to reenlist) reentry code.

Chapter 1.L. of COMDTINST M1900.4D states that when correcting a DD 214, the DD 214 should be reissued, in lieu of issuing a DD 215, under five circumstances, including when the character of service is being changed and when a derogatory narrative reason for separation in block 28 is being changed.

ALCOAST 125/10, which was released on March 18, 2010, states that the JND separation code may also be used for unsuitability discharges under Article 12.B.16. of the Personnel Manual and that an RE-3 may be assigned for members separated as a result of two alcohol incidents but that an “RE-4 is prescribed for cases involving DUI, associated alcohol-related misconduct,” or failure or refusal to complete treatment.

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, or reasonably should have discovered, the alleged error or injustice.² The applicant was discharged in 2009. Therefore, the preponderance of the evidence shows that the applicant knew of the alleged error in his record in 2009, 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. The applicant provided no justification regarding the delay of his application. He asked the Board to consider his application in the interest of justice because he has been “banned from re-enlistment for an alcohol incident in 2009.” The Board finds that the applicant's explanation for his delay is not compelling because he failed to show that anything prevented him from seeking correction of the alleged error or injustice more promptly.

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 (D.C. Cir. 1995).

5. A cursory review of the merits of this case indicates that the applicant was discharged due to unsuitability after less than six months of service after he drank with three other underage people, one of whom was a Coast Guard member, and then proceeded to drive under the influence of alcohol. The applicant asked the Board to upgrade his reentry code so that he can serve in the military. However, his misconduct fully supports the decision to award him an RE-4, and the RE-4 is correct pursuant to the SPD Handbook and subsequent ALCOAST 125/10. The record contains no evidence that the applicant's military record is erroneous or unjust, and it is presumptively correct.⁶ The Board notes that an RE-4 is not a legal bar to reenlistment but may prevent the applicant's reenlistment based on the military services' current recruiting policies, which may be waived by their recruiting commands or changed. Although the applicant's post-discharge employment record is commendable, the Board is not persuaded that it should bypass the recruiting commands' discretion by upgrading his reentry code to RE-1. Based on the record before it, the Board finds that the applicant's request for an RE-1 cannot prevail on the merits.

6. The Board notes, however, that PSC erred in executing the DRB's order by issuing a DD 215 to correct the applicant's DD 214 in 2012. The DRB directed PSC to correct his narrative reason for separation from "Alcohol Rehabilitation Failure," which is clearly derogatory, to "Miscellaneous/General Reasons." Because the original narrative reason for separation was derogatory, PSC should have reissued the applicant's DD 214 to incorporate the corrections made by the DRB, as provided in Chapter 1.L. of COMDTINST M1900.4D.

7. Accordingly, the applicant's request for an RE-1 should be denied due to its untimeliness and apparent lack of merit, but alternative relief should be granted by directing the Coast Guard to issue him a new DD 214 incorporating the corrections made by the DRB.

[ORDER AND SIGNATURES APPEAR 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, but alternative relief is granted: The Coast Guard shall reissue his DD 214 and shall incorporate in it the corrections made on the DD 215 issued on June 15, 2012, pursuant to the decision of the Discharge Review Board.

December 1, 2017

