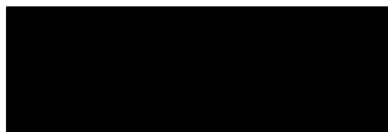


**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2017-248



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 August 18, 2017, and assigned it to staff attorney [REDACTED] to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated June 1, 2018, 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 [REDACTED] who was administratively discharged on November 23, 2015, asked the Board through counsel to correct his record by reinstating him on active duty with his previous rank and privileges. The applicant claimed that he was unjustly discharged from the Coast Guard by reason of unsuitability. He requested that the Board reinstate him into the Coast Guard as of November 24, 2015, and award him "all other appropriate relief."

The applicant gave a summary of his background before the Coast Guard and earlier in his Coast Guard career. He explained that in the time leading up to his performance probation he "was under a severe amount of stress with his family, as his youngest child was having behavior issues due to a medical condition and required to move his residence and change the child's school 3 times subject to an Individual Education Plan." The applicant was also diagnosed with anxiety and depression in March 2014, which he asserted directly caused him "to exhibit a high degree of stress and anxiety."

The applicant argued that an Administrative Separation Board (ASB) erroneously found that he met the threshold for an unsuitability discharge under the Military Separations Manual, COMDTINST M1000.4, Article 1.B.15.b.(1). He stated that the evidence cited to support this finding was "so weak and insufficient that the finding is clearly wrong and the great weight and preponderance of the evidence is so contrary to the finding that it is manifestly UNJUST."

According to the manual, an inaptitude discharge applies to members who are “best described as unfit due to lack of general adaptability, want of readiness of skill, clumsiness, or inability to learn.” A Commanding Officer (CO) is not to initiate an administrative discharge until he has afforded a member a reasonable probationary period to overcome the deficiencies. The applicant complained that there is “no clear explanation of what performance is sufficiently ‘inaptitude’ to warrant a discharge under this category.” He stated that the manual only contains a list of factors to consider “after the determination has already been made that there is a problem in performance.” The applicant asserted that a discharge under this section of the manual is unfair and ambiguous.

The applicant stated that he was counseled on February 5, 2014, that he was “in jeopardy” of not meeting the Operations Unit Search and Rescue (OU-SAR) watchstander qualification by April 21, 2014. On April 21, 2014, the applicant stated, he was placed on a performance improvement work plan to assist him in meeting his qualification goals. He was then counseled again on June 16, 2014, that failure to obtain the OU-SAR qualification by August 1, 2014, would result in performance probation. The applicant was placed on performance probation in August and, he alleged, given an untenable list of tasks to complete. When the applicant was notified that he was being processed for discharged, he prepared a statement noting that he had been in the Coast Guard for over twelve years and that he had never had any negative entries in his record. He pointed out his many awards and medals and explained that he was suffering from medically diagnosed conditions. The applicant noted that he was capable of learning, though, as evidenced by the fact that he had “numerous” qualifications and had completed several service schools over the course of his Coast Guard career.

The applicant complained about several of the ASB’s findings. The ASB had stated that the applicant had a lack of devotion to his duties. The ASB also found based on witness testimony that the average time to obtain an OU-SAR qualification was four to six months. The applicant vehemently claimed that this “conclusion is erroneous, not supported by the record evidence, and factually insufficient.” He pointed out that two witnesses testified that they would recommend not discharging the applicant because he would perform well in another billet. He stated that the ASB failed to consider his mental state given his psychiatric diagnoses and his doctor’s documented statements regarding his concentration and memory difficulties. The applicant argued that it was “clear and convincing that the record evidence overcomes the presumption of regularity and that the [ASB] failed to consider the overwhelming evidence that the Applicant’s inability to achieve the qualification as OU-SAR was due substantially or in part by the mental health conditions suffered by the Applicant.”

The applicant emphasized that he had never been subject to any disciplinary proceedings before his probationary period or involuntary discharge. He had planned to make a life-long career out of the Coast Guard and he still would like to do so. He argued that the ASB’s decision was arbitrary and capricious and the overwhelming evidence “conclusively establishe[d] the opposite of the finding.” He stated that his discharge was unfair and unjust and asked to be reinstated with all of his previous rank and privileges and “to receive all other appropriate relief.” In support of his application, the applicant provided relevant documentation which is discussed below in the Summary of the Record.

SUMMARY OF THE RECORD

On June 16, 2014, the applicant received a negative Page 7.¹ Both he and his CO signed it on the same date. It states:

Effective this date you have failed to achieve your qualification of Operations Unit – Search and Rescue (OU-SAR) as required per ... Command Center Standard Operating Procedures, within the established timeframe of six months. You were previously counseled on 20 October 2013.

As an Operations Specialist First Class you are expected to perform as a Journeyman Level Watchstander in accordance with the U.S. Coast Guard Command Center Manual, COMDTINST M3120.20 but have failed to demonstrate the ability to do so. Most notably you have not shown the capability to improve your communication and briefing skills or the ability to maintain situational awareness during multiple cases.

OSCS [N] conducted mid-period counseling with you on 5 February 2014 to inform you of these deficiencies, offer extra help, and voice command concern. Additionally you were provided with peer feedback on watchstanding performance and the noted difficulties with delivering proper case briefs and lack of knowledge of Search and Rescue (SAR) policy and procedures. A course of action was implemented which resulted in you passing the written portion of the SAR test but you failed a SAR pre-board conducted by LT [H], OSCS [N] and OSC [T] on 16 April 2014.

In order to provide extra training, your new OU-SAR qualification deadline is 1 August 2014. Failure to achieve your qualification by that date may result in additional adverse administrative action, to include performance probation in accordance with Military Separations, COMDTINST M1000.4.

I encourage you to work towards the completion of your qualification and to seek the assistance of all Command Center personnel. We will continue to place at your disposal all the tools necessary for you to attain your qualification as OU-SAR. You should, in turn, show initiative, effort and enthusiasm in your endeavor to achieve your qualification as is a required competency code of the OS rating. If at any time, you need additional help, please do not hesitate to seek the advice and counsel of your Chiefs.

On August 28, 2014, the applicant received a negative Page 7. The applicant's CO signed it and the applicant signed it on September 2, 2014. It states:

Effective this date per article 1.B.15 of Military Separations, COMDTINST M1000.4, you are hereby notified that you are on performance probation. My memo 1616 of August 28, 2014 describes in detail the reasons you are being placed on probation.

Administrative discharge processing can and will be initiated at any time during your probation if you do not show significant improvement (as defined below) in overcoming your deficiency during this probationary period. You must perform the following by the end of your probation to remain on active duty: During the first month you will be assigned 12 hour day watches and not work active Coast Guard Search and Rescue (SAR) cases. On each watch, you will complete two open-book SAR scenarios and a ten question closed-book SAR test that comes from the Command Center (CC) STAN team's SAR question databank. You must demonstrate correct use of SAROPS [Search and Rescue Optimization Planning Tool], explain how SAR policy applies to each case, and demonstrate your retention of SAR policy. An OU-SAR qualified Chief Petty Officer, SAR Specialist, training officer, or any CDO, in that order of priority, may assess the two SAR scenarios and closed book exam using pass/fail criteria. Through weeks one and two, you are required to pass 50 percent of your scenarios and 50 percent of your tests to demonstrate improvement. In weeks three and four, you are required to pass 90 percent of all scenarios and tests to demonstrate significant performance

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.

improvement. If you fail to complete any assigned scenarios or tests by the end of your 12 hour watch, they will automatically be counted as failed. Your only priority and tasking while on watch the first four weeks is to complete the scenarios and tests. In week five, after successful completion of the previous milestone, you will start to prosecute all aspects of the SAR cases on the OU-SAR desk. You are expected to take all calls, present all briefs, and prosecute all aspects of the SAR cases during your watch. When not actively engaged in SAR operations, you are required to engage qualified watch standers and seek additional on-the-job training. The CDO and OU-SAR will complete a pass/fail evaluation sheet each watch to measure your performance according to the standard. Each SAR Mission Coordinator that works with you will also fill out an evaluations sheet to document your performance each week. These evaluations will be included in the two week assessment summaries. In weeks five and six combined, you will be required to receive a grade of pass in 50 percent of these performance categories. In weeks seven and eight combined, you must receive a grade of pass in 75 percent of these performance categories. From week nine until the end of your six-month performance probation, you are required to pass 90 percent of the evaluation categories in each subsequent two week assessment period. If you qualify as a D7 Command Center OU-SAR controller at any time during this six-month period, you will be removed from performance probation.

On December 4, 2014, the applicant was informed in writing that his CO was initiating an involuntary separation for unsuitability due to inaptitude pursuant to Article 1.B.15.b.(1) of the Military Separations manual. The CO explained that he was initiating this action based on the applicant's inability to qualify as an OU-SAR within the required six-month timeframe or the additional four months afforded him. The CO stated that during his subsequent performance probation, which was "designed to test [his] knowledge of SAR policy and use of SAROPs without the stress of working active Coast Guard SAR cases," the applicant had passed all of the tests during the first two weeks with a score of 50 percent or better, but he had completed one of ten SAR scenarios satisfactorily. The CO stated that the applicant's "continued poor performance on SAROPs, even after receiving remedial training, demonstrated a lack of significant improvement in [his] performance over the course of the first two-week performance period."

The CO stated that during weeks three and four of his performance probation, the applicant had "failed to pass the six SAR fundamentals tests and the 12 SAROPs scenarios" he was given. During this period he was also "observed taking multi-hour long breaks while on [his] 12 hour watch and modifying [his] answers in SAROPs prior to them being graded." Because of his lack of understanding of the SAR policy and his inability to effectively use the SAROPs during the first four weeks of his performance probation, the CO determined that the applicant did not have the aptitude to effectively prosecute SAR cases which was a required aspect in the next phase of the performance probation.

The CO explained the next steps of the discharge proceedings to the applicant and advised him that the least favorable characterization of service that could be approved was honorable. The CO highly recommended that the applicant review his rights, but he also highlighted a few, including his right to a military attorney at the Coast Guard's expense or a civilian attorney at the applicant's expense and the right to an ASB.

On December 29, 2014, the applicant acknowledged his CO's December 4, 2014, notification of initiation of involuntary separation. The applicant indicated that he read and understood the information in the memorandum. He indicated that he wished to consult with a military attorney and that he waived his right to make a statement on his behalf at that time.

On January 6, 2015, the applicant submitted another memorandum acknowledging an exercise of rights. He indicated that he had consulted with his military attorney on January 5, 2015. He stated that he was submitting his one-page written statement on his behalf.² He stated that he wished to appear before an ASB and that his military counsel represent him.

The ASB convened on February 11, 2015. The Board made fourteen findings of fact, including the proceedings leading up to the ASB discussed above. In addition, the ASB found that on February 5, 2014, the applicant had been counseled that he was in jeopardy of not meeting the OU-SAR watchstander qualification by April 21, 2014, as required by his unit. On April 21, 2014, the applicant was placed on a “performance improvement work-plan” and given three more months to obtain the OU-SAR qualification. The ASB found that on April 16, 2014, the applicant failed an OU-SAR pre-qualification board. The applicant’s employee evaluations had shown a “steady decline in performance” since May 31, 2012. The ASB noted that his command was concerned about multiple visits to the ER and absenteeism and so he was referred for a psychiatric assessment and diagnosed with anxiety and depression in May 2014. In accordance with the Military Separations manual, Article 1.B.15.c., the applicant’s “performance probation had been discontinued due to Command determination of [applicant’s] lack of progress and improvement.”

Based on these findings, the ASB “perceived a lack of integrity on [the applicant’s] part based on numerous unexcused absences which ended once the Command directed him to Medical for evaluation.” The ASB also cited the applicant initially denying that he changed his SAROPS answers before turning it in but then later admitted “to accessing the files to ensure it was correct.” The ASB also “perceived a noticeable lack of devotion to duty on [the applicant’s] part based on witness testimony that the average qualification time to attain OU-SAR ranges from four to six months.” The applicant was stated to have not displayed a minimal amount of initiative in seeking assistance with the qualification process, and it was noted that during this time he had been relieved of all collateral duties. The ASB acknowledged the applicant’s diagnosed medical conditions but stated that his primary care manager had ruled him fit for full duty. The ASB stated that it was their opinion that “his medical condition did not pose an insurmountable obstacle to his progress towards qualification.” The ASB stated that it was their opinion that the applicant did “not possess the technical acumen or the requisite knowledge based proficiency necessary to operate the [SAROPS].” They also noted that the applicant’s unit went “above and beyond” in attempting to ensure that the applicant was afforded “every reasonable accommodation to facilitate qualification.” The ASB concluded that the applicant was “unfit for continued service due to a lack of general adaptability, want or readiness of skill, and inability to learn. The [applicant] does not demonstrate the desire to improve or increase his abilities.” Therefore, the ASB recommended that the applicant be honorably discharged for unsuitability due to inaptitude because this basis was supported by a preponderance of the evidence presented at the hearing.

On April 1, 2015, the applicant’s military counsel submitted rebuttal comments to the ASB’s report. He requested that the additional comments be attached to the ASB record and that the record be modified by the authority in Article 7.D. of the Enlisted Personnel Administrative Boards Manual. The applicant specifically requested that the ASB recommend that he be “granted

² The document indicates that there are a total of three pages, but only two pages were submitted to the Board. Presumably the third page was his statement.

an extended probationary period and allowed to remain in service for an additional six months while on probation.”

The applicant, through his military counsel, made several complaints about specific statements within the ASB’s report. For example, the applicant acknowledged that the ASB noted that he was diagnosed with anxiety and depression but argued that they did not point out that he had “difficulty with concentration and memory” as stated by his therapist. He emphasized that these conditions were a contributing factor in his inability to obtain his OU-SAR qualification in a timely manner. The applicant also made several proposed additions to the ASB’s findings, including that he had no negative administrative entries in his record before the events at issue here, he struggled with public speaking which made his briefs difficult, and he did qualify as Situation Unit Watch on time. The applicant also rebutted the ASB’s recommendation for separation. He strongly felt that the ASB should recommend that he be retained on probation for an additional six months. He asked that the ASB consider that his “failure to qualify took place during a period of intense personal upheaval, including marital issues, diagnosis of his child with a severe learning disability prompting the need to change schools three times, and a diagnosis [of the applicant] of anxiety and depression disorder [sic] which affected his memory and ability to concentrate.” He therefore requested that the ASB recommend an extended probationary period in lieu of separation, and the applicant stated that he was willing to waive his right to any future ASB that he would be entitled to as a result.

On October 15, 2015, the Final Reviewing Authority (FRA) acted on the ASB’s recommendation. She stated that she approved of the ASB’s recommendation to discharge the applicant for unsuitability due to inaptitude. She stated that while the applicant’s “performance and apparent devotion to the Coast Guard ha[d] been admirable at some points during his service, the totality of the evidence presented in the record” did not persuade her that he could continue to service without additional performance problems, particularly in his current billet. She noted that his unit had attempted to accommodate him and offered him multiple opportunities to “remediate his failure to achieve required qualifications.” She noted his instances of questionable integrity as well.

The FRA stated that the ASB’s report does not specifically indicate that it considered the applicant’s counsel’s rebuttal. However, she noted, one of the paragraphs had been amended in accordance with the rebuttal’s request. The FRA therefore assumed that the ASB reviewed and considered all of the comments and requests that were submitted. The FRA decided that the applicant would be separated from the Coast Guard in accordance with Article 1.B.15. of the Military Separations manual with an honorable discharge for unsuitability due to inaptitude.

The applicant was discharged on November 23, 2015. He received an honorable discharge with a net total of twelve years, six months, and eleven days of active duty service. He received a GNC separation code,³ an RE-4 reenlistment code (ineligible to reenlist), and his narrative reason for separation was “unacceptable conduct.”

³ According to the Separation Program Designator, this code denotes a “service initiated discharge approved recommendation of a board when a member performs acts of unacceptable conduct (i.e., moral and/or professional dereliction) not otherwise listed herein.”

VIEWS OF THE COAST GUARD

On February 20, 2018, the Judge Advocate General of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case. In doing so, he adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC stated that the application is timely and therefore should be considered on the merits. PSC stated that between the initial six months and then the extensions the applicant was given to qualify, the applicant had over a year to qualify as an OU-SAR and failed to do so. PSC argued that no error or injustice occurred. The ASB report and evidence was reviewed by the FRA, who found that the evidence supported the recommendation to discharge the applicant for inaptitude. Therefore PSC recommended that no relief be granted.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 20, 2018, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within 30 days. No response was received.

APPLICABLE REGULATIONS

The Military Separations manual, COMDTINST M1000.4, Article 1.B.15.b.(1), states that the "purpose of discharges for unsuitability is to free the Service of members considered unsuitable for further service because of Inaptitude. Applies to members best described as unfit due to lack of general adaptability, want or readiness of skill, clumsiness, or inability to learn."

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 submission and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely.

2. The applicant alleged that his discharge was erroneous and unjust. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.⁴ Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."⁵

⁴ 33 C.F.R. § 52.24(b).

⁵ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

3. The applicant argued at length that his discharge was erroneous and unjust but did not provide evidence or even make substantive claims to support this position. The record shows that the applicant had over a year to qualify as an OU-SAR at his unit. It also shows that he was counseled on multiple occasions and put on a performance plan with very specific learning objectives to stay on track. The applicant stated that he had been diagnosed with anxiety and depression in May 2014, but the only documentary evidence of his condition in the record is that the ASB noted that his primary care doctor had ruled that he was fit for full duty. The applicant did not provide any medical evidence showing that he was mentally unfit for duty. The applicant has failed to prove by a preponderance of the evidence that the Coast Guard erred in discharging him, and his discharge was presumptively correct.⁶

4. The applicant had many complaints regarding the ASB. However, he has not shown that the ASB failed to provide due process or that its decision is not an accurate reflection of that board's proceedings and decision. Therefore, the Board finds no grounds for removing the decision of the ASB.

5. The Board notes that pursuant to the ASB, the applicant received an honorable discharge due to inaptitude and his DD 214 states "Unacceptable Conduct." Discharges for inaptitude are authorized by the Military Separations Manual, but in preparing a DD 214, there is no "Inaptitude" narrative reason for separation in the SPD Handbook, and so the applicant's DD 214 shows "Unacceptable Conduct." The explanation for this term in the SPD Handbook states that it includes "moral and/or professional dereliction." Given that the applicant reportedly took hours-long breaks when he was supposed to be on watch and was caught "modifying [his] answers in SAROPs prior to them being graded," assigning him "Unacceptable Conduct" as a narrative reason for separation is not clearly erroneous, although "Unsatisfactory Performance" seems more in accord with "inaptitude." The applicant, however, did not complain about the narrative reason for separation shown on his DD 214, so the Board will not address it.

6. Accordingly, the applicant's request for relief should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

⁶ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

ORDER

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

June 1, 2018

