


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

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2020-138**

  
MK1 (former)

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**FINAL DECISION**

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on August 20, 2020, and assigned the case to the Deputy Chair to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated November 5, 2021, 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 Machinery Technician first class (MK1/E-6) in the Selected Reserves who was honorably discharged, asked the Board to correct his record by upgrading his reenlistment code from RE-4 (ineligible to reenlist) to RE-1 (eligible to reenlist).

The applicant explained that he was discharged as the result of being arrested by civilian authorities for driving under the influence of alcohol. However, his charge for driving under the influence of alcohol was eventually dismissed, and his record was expunged.

The applicant argued that his reenlistment code is erroneous because he waived his right to an Administrative Separations Board (ASB) without consulting with counsel in violation of Coast Guard policy. Specifically, the applicant cited Article 1.B.23.b.1. of the Military Separations Manual, which states the following: "The member may waive his or her right to an administrative discharge board conditionally or unconditionally in writing; however, no member will be permitted to do so until legal counsel has fully advised him or her on this matter." He argued that because he never consulted with counsel, he was never advised that waiving an ASB could result in him receiving an RE-4 reenlistment code.

The applicant also argued that his reenlistment code is unjust because he was promised an RE-1 reenlistment code if he waived his right to an ASB. The applicant stated that the Officer in Charge (OIC) served as his point of contact during his discharge process. He alleged that he was

advised by the OIC that if he went to an ASB, he would likely receive a substandard discharge. However, he alleged that he was advised that he could waive his right to an ASB on the condition that he receive an RE-1 reenlistment code so that he could continue his career with another branch of the military. As such, he stated that he worked with his command to write a statement that conditioned his waiver of an ASB on the basis that he receive an RE-1 reenlistment code. He alleged that he was further advised that if he did not receive the conditions on which his waiver was based, he would be afforded an ASB.

Finally, the applicant argued that his reenlistment code is erroneous because his discharge lacked adequate due process. Specifically, he argued that he was subjected to rapid administrative paperwork without a chance to voice anything. He also argued that a defense was never mounted on his behalf.

To support his application, the applicant submitted three letters of reference from fellow Coast Guard members. The first letter was from BMC J who described the applicant as professional, patriotic and positive. BMC J stated that the applicant's good work throughout his career in the Coast Guard should bear weight in his request for an upgrade in his reenlistment code. The second letter was from BM1 H who described the applicant as persistent, thoughtful, and generous. BM1 H also praised the applicant's professional capabilities and stated that the applicant served as a mentor to him. The final letter was from BM2 S who stated that the applicant was a role model for members at the station because he lived by the coast Guard's core values of honor, respect, and devotion to duty. Additionally, BM2 S stated that the applicant was an extremely knowledgeable Machinery Technician who mentored junior members. He concluded by stating that the applicant was a very valuable and respected member of the Reserve community.

### **SUMMARY OF THE RECORD**

The applicant enlisted in the Coast Guard on December 1, 1998. The applicant first entered the Telecommunications Specialist rating before he lateralled to the MK rating.

On August 12, 2002, the applicant received an alcohol incident when alcohol consumption had left him unfit to fulfil his duty obligations. His CO noted that the applicant was scheduled to assume the radio watch and failed to meet this requirement. Once the applicant had been summoned to the Operations Center, it was clear that alcoholic beverage consumption from the previous night had left him unfit to fulfil his duty obligations.

On November 9, 2016, the applicant received a second alcohol incident when his abuse of alcohol was determined to be a significant and/or causative factor in his arrest for driving under the influence of alcohol. He was notified that he would be processed for separation in accordance with Chapter 2 of the Coast Guard Drug and Alcohol Abuse Program.

On April 26, 2017, the applicant received a memorandum that his CO had initiated action to discharge him from the Coast Guard. His CO cited the applicant's second alcohol incident as the reason and indicated that the least favorable characterization of service that could be approved for the applicant was under other than honorable conditions (OTH). The applicant was notified of several rights that he would be afforded during an administrative board proceeding. Specifically,

the applicant was notified that he could consult with a military lawyer at the Coast Guard's expense or with a civilian lawyer at his own expense. The applicant's CO encouraged him to exercise his right to consult with a lawyer. The applicant was also notified that regardless of whether or not he chose to consult with a lawyer, he would be required to decide to appear before an ASB or to waive that right. He was further notified that he could waive his right to an ASB on the condition that he receive a certain type of discharge and characterization of service. Finally, the applicant was encouraged to consider his options carefully and review his rights provided in the Enlisted Personnel Administrative Boards Manual.

That same day, the applicant submitted an endorsement to his CO's memorandum. The applicant acknowledged that he received and reviewed the notice for separation. He also acknowledged that he read and understood the information contained in the notice for separation. In his endorsement, the applicant waived his right to consult with a military or civilian lawyer and requested the opportunity to exercise his right to request or waive a board.

Also on that day, the applicant submitted a memorandum titled "Exercise of Rights—Involuntary Separation." In the memorandum, the applicant acknowledged that he had waived his right to consult with a military or civilian lawyer and understood the rights that he was about to exercise. Then, the applicant elected to waive his right to appear before an ASB on the condition that he receive an honorable discharge. The applicant submitted a three-page written statement attached to the memorandum. In his statement, the applicant acknowledged that he had made mistakes during his Coast Guard career. Specifically, he noted his two alcohol incidents. Regarding his first alcohol incident, the applicant stated that an outing was planned for his twenty-first birthday. He stated that it was his understanding that his shift for the following day would be covered by a fellow member. However, his shift was not covered, and he stated that he had learned a valuable lesson. Regarding his second alcohol incident, the applicant stated that he was charged by civilian authorities with driving under the influence of alcohol when he was not actively drilling or on orders. After his arrest, the applicant stated, he proactively took an alcohol drinking and driving deterrent class. The applicant requested to be retained in the Coast Guard and stated that he believed he could continue to bring value to the Coast Guard by using his experience to help other members. However, he stated the following if he could not be retained: "I will waive my right to an administrative separation board on the condition that I be granted an Honorable Discharge with a Reenlistment code of 01 (RE-1), so that I may not be inhibited to serve the military."

On June 14, 2017, the Coast Guard Personnel Command issued a Separation Authorization for the applicant. The separation information states the following: "Article/Law: 1-B-17 Misconduct; Sep/Ret Type: Commission of a serious military or civilian offense; DD214: JKQ Misconduct; Character of Service: Honorable." However, the language on the bottom of the form states that the type of discharge is general and the character of service is under honorable conditions.

On September 7, 2018, the applicant submitted an application to the Discharge Review Board (DRB) in which he requested that his discharge be upgraded from general to honorable and his reenlistment code be changed from RE-4 to RE-1.

On October 29, 2019, the DRB convened to review the propriety and equity of the applicant's discharge. The DRB stated that the applicant's Separation Authorization is inconsistent. In the heading, it states honorable as the characterization of service. However, the verbiage at the bottom shows a general discharge. The DRB stated that these inconsistencies are typical of an administrative input error in the Direct Access System. The DRB unanimously agreed to grant the applicant's request to upgrade his characterization of service to honorable. However, the DRB unanimously agreed to deny the applicant's request to upgrade his reenlistment code.

On December 18, 2019, the Assistant Commandant for Human Resources of the Coast Guard approved the proceedings and recommendations of the DRB.

### **VIEWS OF THE COAST GUARD**

On February 3, 2021, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC argued that the applicant failed to show that the Coast Guard committed an error or injustice regarding his reenlistment code. PSC argued that the applicant failed to show that he was not advised of his legal right to counsel before he waived his right to an ASB. In fact, PSC noted that the applicant submitted a memorandum in which he waived his right to consult with a military or civilian lawyer and requested the opportunity to exercise his right to waive an ASB. PSC also argued that the applicant failed to show that he was promised an RE-1 reenlistment code in exchange for waiving his right to an ASB. To support this allegation, PSC stated that according to the memorandum that the applicant submitted on April 26, 2017, titled "Exercise of Rights—Involuntary Separation," the applicant only conditioned his waiver of an ASB on receiving an honorable discharge.

The JAG reiterated that the Coast Guard did not commit an error or injustice regarding the applicant's reenlistment code. First, the JAG argued that the applicant did not provide any evidence that he was denied the advice of counsel in contravention of Article 1.B.23.b.1. of the Military Separations Manual. The JAG acknowledged that the memorandum titled "Exercise of Rights—Involuntary Separation" does not provide for a check box to annotate such consultation. However, the JAG argued that given the import of the matter and the fact that the applicant's separation continued, the evidence supports a finding that he was provided the advice of counsel.

The JAG also argued that the applicant did not provide any evidence that he was promised an RE-1 reenlistment code in exchange for waiving his right to an ASB. The JAG stated that as a matter of form, the memorandum titled "Exercise of Rights—Involuntary Separation," does not offer a conditional waiver option based on reenlistment code. A member's character of service is the only negotiable term. While the applicant included the condition of receiving an RE-1 reenlistment code in his written statement that he submitted with his memorandum, the JAG argued that the term played no role in the chain of command's decision.

### **APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD**

On February 12, 2021, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. In his response, the applicant asked the Board to upgrade his reenlistment to RE-1 so that he can have an opportunity to serve in another branch of the military.

The applicant reiterated that he did not have legal counsel when he completed his waiver form. Instead, he stated that his sole contact regarding the waiver process was the OIC who told him that an ASB would not rule in his favor. The applicant alleged that the OIC told him to waive his right to an ASB in exchange for an honorable discharge with an RE-1 reenlistment code so that he could continue his service in another branch. He further alleged that the OIC told him that if he did not receive an honorable discharge with an RE-1 reenlistment code, he would be entitled to an ASB.

The applicant also argued that he received both of his alcohol incidents in error because neither was established to have occurred by the preponderance of the evidence. The applicant argued that his first alcohol incident was an error because it was based on one person's judgment. He stated that he received his first alcohol incident when his CO determined that his consumption of alcohol from the previous night had left him unfit to fulfil his duty obligations. However, he argued that many other members asserted that he was not unfit to fulfil his duty obligations that day. The applicant argued that his second alcohol incident was an error because it was based solely on a police report. However, the applicant maintained that he never exceeded the state's legal Blood Alcohol Content limit of .08.

### APPLICABLE LAW AND POLICY

Article 1.B.23.b. of the Military Separations Manual, COMDTINST M1000.4, discusses procedures for discharging a member under other than honorable conditions in relevant part:

Use the procedures described in Reference (q), Enlisted Personnel Administrative Boards Manual, PSCINST M1910.1 (series), for members being considered for a discharge under other than honorable conditions.

- (1) The member may waive his or her right to an administrative discharge board conditionally or unconditionally in writing; however, no member will be permitted to do so until legal counsel has fully advised him or her on this matter.

Chapter 2.D. of the Enlisted Personnel Administrative Boards Manual, PSCINST M1910.1, discusses notice and consultation with a lawyer:

#### 2.D.1. Acknowledging Notice.

The respondent shall acknowledge receipt of the convening authority's notice of intent to take administrative action without delay by completing the acknowledgement of rights and election of counsel portion of the convening authority's notice of administrative action.

A sample of the respondent's acknowledgement is included in Appendix 2-2 as the first endorsement to the convening authority's notice of intent to take administrative action.

#### 2.D.2. Consulting a Lawyer.

a. The respondent may consult with a lawyer before deciding whether to request or waive his or her right to go before a board.

See Articles 1.C.1.c. and 1.C.1.d. of this Manual.

b. The respondent shall indicate whether he or she wants to consult with a lawyer by completing the endorsement to the convening authority's notice of administrative action, which includes an option to request military counsel.

c. Defense Service Office (DSO). If the respondent elects to consult with a military lawyer, the convening authority shall schedule a consultation through the nearest Defense Service Office. A DSO locator is found at [http://www.jag.navy.mil/legal\\_services/legal\\_services\\_locator\\_dso.htm](http://www.jag.navy.mil/legal_services/legal_services_locator_dso.htm).

d. Coast Guard Judge Advocate. If the respondent asks to consult with a Coast Guard judge advocate or if the nearest DSO cannot assist the respondent, then the convening authority shall contact Chief, Office of Legal and Defense Services, Commandant (CG-094M), who will provide pre-board advice.

e. Civilian Lawyer. If the respondent elects to consult with a civilian lawyer at his or her own expense, then he/she is not entitled to also consult with a military lawyer at the Coast Guard's expense.

Chapter 2.E. of the manual discusses how an enlisted member can either exercise or waive the right to appear before an administrative board:

2.E.1. Deadline – Five Days.

a. The respondent shall be permitted five calendar days from the day he or she is given notice of intent to take administrative action to consult with a civilian lawyer, if he or she so elects, and to exercise the rights described in this article.

b. If the respondent elects to consult with a military lawyer, then he/she shall be permitted five calendar days from the date of consultation to exercise his or her rights under this article.

See Article 2.D.2. of this Manual regarding the respondent's right to consult with a lawyer.

2.E.2. Failure to Act Before the Deadline.

A respondent who fails to exercise the rights described in this article before the deadline waives and forfeits his or her right to appear before a board. The convening authority shall:

a. Document the respondent's waiver on an administrative board supplemental page, a sample of which is shown at Appendix 2-3.

Downloading Supplemental Pages. The convening authority may locally prepare a memo or other form that includes the same information as Appendix 2-3. Templates (both Word and fillable Adobe versions) of the supplemental page may also be downloaded for use from the PSC-psd website: <http://www.dcms.uscg.mil/PSD/fs/Admin-Sep-Boards/>.

b. Proceed as if the respondent has affirmatively waived his or her right to appear before a board.



### 2.E.3 Form of Respondent's Exercise of Rights.

The respondent shall complete an Exercise of Rights memorandum and submit it to the convening authority.

See Appendix 2-4 for a sample Exercise of Rights memo for an administrative separation board.

Downloading Respondent's Exercise of Rights. The Exercise of Rights memo may be prepared locally by or for the respondent. Templates of the memos (both Word and fillable Adobe versions) for each type of board controlled by this Manual may also be downloaded for use from the PSC-psd website: <http://www.dcms.uscg.mil/PSD/fs/Admin-Sep-Boards/>.

The respondent may exercise his or her rights to do any of the following.

- a. Submit a written statement.
- b. Request a hearing before an administrative board.
- c. Unconditionally waive a hearing.
- d. Conditionally waive a hearing as follows:

(1) Type of Discharge and Characterization of Service. The respondent may submit a board waiver conditioned on receiving a specified, or more favorable, type of discharge and characterization of service. The conditional board waiver shall be submitted to PSC-epm-1/PSC-rpm-1 (as applicable) through the convening authority and the first flag officer in the respondent's chain of command.

## FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions based on 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.
2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.<sup>1</sup>
3. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice.<sup>2</sup> Although the applicant in this case filed the application more than three years after he knew of the alleged error on his Separation Authorization, he filed it within three years of the decision of the Discharge Review Board, which has a fifteen-year statute of limitations. Therefore, the application is considered timely.<sup>3</sup>
4. The applicant alleged that his RE-4 reenlistment code in his military record is erroneous and unjust. When considering allegations of error and injustice, the Board begins its

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<sup>1</sup> *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

<sup>2</sup> 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.

<sup>3</sup> *Ortiz v. Secretary of Defense*, 41 F.3d 738, 743 (D.C. Cir. 1994).

analysis by presuming that the disputed information in the applicant's military record is correct as it appears in the military record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.<sup>4</sup> 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."<sup>5</sup>

5. The applicant argued that his reenlistment code is erroneous because he waived his right to an ASB without consulting with counsel in violation of Article 1.B.23.b.1. of the Military Separations Manual. However, this article is prefaced by stating that the procedures described in the Enlisted Personnel Administrative Boards Manual are applicable for members being considered for discharge under other than honorable conditions. Since the applicant was being considered for discharge under other than honorable conditions, the Enlisted Personnel Administrative Boards Manual applied to him. According to Article 2.D.2. of the manual, a member may consult with counsel before deciding whether to request or waive his right to go before a board. Thus, contrary to the applicant's assertion, a member has the right to consult with counsel, but the member can waive that right and the decision to do so does not violate Coast Guard policy.

In this case, the applicant was properly given the opportunity to consult with counsel. On April 26, 2017, the applicant was notified via memorandum that his CO had initiated action to discharge him from the Coast Guard. In the memorandum, the CO stated that the applicant could consult with a military lawyer at the Coast Guard's expense, or he could consult with a civilian lawyer at his own expense. In fact, the CO encouraged the applicant to exercise his right to consult with a lawyer. However, the applicant affirmatively waived his right to consult with counsel on two separate documents that he submitted to his command. The first document was the applicant's endorsement to his CO's memorandum to initiate action to discharge him from the Coast Guard. In the document, the applicant acknowledged that he had read and understood the information contained in his CO's memorandum, and he waived his right to consult with a military or civilian lawyer. The second document was a memorandum titled "Exercise of Rights—Involuntary Separation." In that memorandum, the applicant again acknowledged that he waived his right to consult with a lawyer and that he understood the rights he was about to exercise. Therefore, the Board finds that the applicant failed to show by a preponderance of the evidence that the Coast Guard committed an error in allowing him to waive his right to consult with a lawyer.

6. The applicant argued that his reenlistment code is unjust because he was promised an RE-1 reenlistment code if he waived his right to an ASB. To support this allegation, the applicant alleged that his OIC informed him that he could condition his waiver of an ASB on receiving an RE-1 reenlistment code. However, the applicant did not provide any evidence that his OIC so advised him. The applicant also cited a written statement that he submitted along with his memorandum titled "Exercise of Rights—Involuntary Separations." In the memorandum, the applicant waived his right to an ASB on the condition that he receive an honorable discharge. However, the written statement further conditioned his waiver of an ASB on receiving an RE-1 reenlistment code. According to Chapter 2.E.3.d. of the Enlisted Personnel Administrative Boards

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<sup>4</sup> 33 C.F.R. § 52.24(b).

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



Manual, the applicant could only condition his waiver of an ASB on the basis that he receive a certain type of discharge and characterization of service. Any further condition set forth by the applicant was impermissible. Therefore, the Board finds that the applicant failed to show by a preponderance of the evidence that he was promised an RE-1 reenlistment code.

7. The applicant implied that because the Coast Guard rejected his conditional waiver, he should have received an ASB. However, the Board finds that the Coast Guard did not reject the applicant's conditional waiver. As discussed above, the applicant could only condition his waiver of an ASB on the basis that he receive a certain type of discharge or characterization of service. In this case, the applicant waived his right to appear before an ASB on the condition that he receive an honorable discharge. The Coast Guard accepted the applicant's conditional waiver and he received an honorable discharge. The fact that the applicant included language in his written statement about conditioning his waiver on the impermissible basis of receiving an RE-1 reenlistment code did not entitle him to an ASB. In fact, according to Article 2.E.2. of the Enlisted Personnel Administrative Boards Manual, the right to an ASB is an affirmative right that must be exercised. A member who fails to exercise such right forfeits his right to appear before a board. As such, had the Coast Guard rejected the applicant's conditional waiver, he would have been processed for final action in the same manner as a Coast Guard member not entitled to a board. Therefore, the Board finds that the applicant has not proven by a preponderance of the evidence that the Coast Guard rejected his conditional waiver and that he was entitled to an ASB.

8. The applicant argued that his reenlistment code is erroneous because his discharge lacked adequate due process. Specifically, the applicant argued that he was subjected to rapid administrative paperwork and that a defense was never mounted on his behalf. However, as discussed above, the applicant waived his right to an ASB on the condition that he receive an honorable discharge. Had the applicant objected to his administrative separation, he should have affirmatively requested a hearing by the ASB. At that point, the applicant would have had the opportunity to present evidence, including physical evidence, witness testimony, and making a statement on his behalf. However, the applicant chose to waive his right to an ASB and cannot now allege that he was not afforded the rights of a respondent appearing before a board.

9. In his response to the JAG's advisory opinion, the applicant argued that his two alcohol incidents were erroneous because the Coast Guard lacked sufficient evidence. The applicant received his first alcohol incident when alcohol consumption had left him unfit to fulfil his duty obligations. The applicant argued that several members could attest to the fact that he was not unfit to fulfil his duty obligations. However, the applicant did not provide any evidence to support his allegation. In fact, in his statement to the separation authority, the applicant acknowledged that the night before he received his first alcohol incident, he went out for his twenty-first birthday. He further acknowledged that he was mistaken that his shift was covered the next day. He stated that he learned a valuable lesson and accepted responsibility for his actions. The applicant received his second alcohol incident when his abuse of alcohol was determined to be a significant and/or causative factor in his arrest for driving under the influence of alcohol. The applicant argued that he was not driving under the influence of alcohol because his BAC did not exceed the state limit of 0.08. To support his allegation, the applicant noted that his criminal case was dismissed and the record of his arrest was expunged. However, the absence of a criminal conviction is not evidence that the applicant was not driving under the influence of alcohol. Criminal cases are dismissed for a variety of reasons other than innocence. Further, in his statement

to the separation authority, the applicant stated that he took immediate action to own his mistake after his second alcohol incident. For instance, he stated that he completed an alcohol drinking and driving deterrent class and voluntarily completed an alcohol assessment. Therefore, the applicant has not proven by a preponderance of the evidence that the Coast Guard committed an error in issuing him either alcohol incident.

10. Accordingly, the applicant's request should be denied.

**(ORDER AND SIGNATURES ON NEXT PAGE)**

ORDER

The application of former MK1 [REDACTED] [REDACTED] USCG, for correction of his military record is denied.

November 5, 2021

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