

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

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Application for the Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2014-103**

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**FINAL DECISION**

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case on April 15, 2014, upon receipt of the completed application, and assigned it to staff member ██████████ as required by 33 C.F.R. § 52.61(c).

This final decision, dated February 12, 2015, 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 received a general discharge for misconduct due to drug abuse on December 31, 2008, asked the Board to correct his record to upgrade his discharge type and separation code to reflect an honorable discharge for paranoid schizophrenia.<sup>1</sup> The applicant also asked the Board to change the narrative reason for separation from "misconduct" to "convenience of government."

The applicant alleged that the Coast Guard obtained any statements he made or signed through coercion, badgering, exploitation of a disabled person, unlawful influence, and illegal

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<sup>1</sup> Paranoid Schizophrenia (a schizophrenia subtype) is a psychotic disorder primarily characterized by preoccupation with one or more delusions or frequent auditory hallucinations. Delusions are typically precursory or grandiose, or both, but delusions with other themes (e.g., jealousy, religiosity, or somatization) may also occur. The delusions may be multiple, but are usually organized around a coherent theme. Associated features include anxiety, anger, aloofness, and argumentativeness. Although the prognostic and treatment implications of the subtypes are variable, the Paranoid Type tends to be the least severe. American Psychiatric Association, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION, TEXT REVISION (2000) (DSM-IV-TR)*, p. 313 *et seq.* The Coast Guard relies on the DSM when diagnosing psychiatric conditions. See U.S. COAST GUARD, COMDTINST M6000.1B, *MEDICAL MANUAL Chap. 5.B.1. (Change 1, Feb 16, 2007)*. While onset of schizophrenia usually occurs at late teenage years or early adult years, paranoid schizophrenia tends to have a later onset than other schizophrenia subtypes, and the distinguishing characteristics may be more stable over time. *DSM-IV-TR*, at 314. Schizophrenia is a physical disability disqualifying for military service, and servicemembers who incur schizophrenia are normally processed under the physical disability evaluation system (PDES). *MEDICAL MANUAL Chap. 5.B.10.*

interrogations. He stated that he was randomly selected to undergo blood and urine tests, and several weeks after the tests were conducted a Chief Warrant and Chief Medical Officer interviewed him regarding his test results without reading his *Miranda* rights. He also claimed he was admitted to the VA Psychiatric Ward against his will and repeatedly interrogated while heavily sedated. It is the applicant's personal opinion that he developed adjustment disorder at the time of his divorce and that his condition became chronic and manifested as severe schizophrenia. He asserted that Coast Guard officials were well aware of his mental illness while he was still serving in the Coast Guard. He further asserted that he did not receive any documentation upon his discharge, such as a DD 214 or medical records as required by law and military policy.

The applicant filed applications with the Discharge Review Board (DRB) on March 9, 2009, and on July 27, 2009. The DRB convened on October 29, 2009 to review the applicant's requests for relief. The DRB notified the applicant of its decision to deny the applicant's requests in a letter dated April 30, 2010 addressed to the applicant's address of record. In a letter dated March 30, 2013, the applicant's attorney stated that he received formal notice of the DRB's April 30, 2010 decision to deny the applicant's request to upgrade his discharge characterization and discharge code on May 12, 2014, thereby starting the three-year statute of limitations at that time. The applicant's attorney stated that the applicant suffers from a severe mental health condition that rendered him totally disabled due to paranoid schizophrenia and which clearly impaired his ability to effectively represent himself *pro se* before the DRB as well as in subsequent communications with counsel. The attorney requested that the Board exercise its discretion and treat the limitations period for the applicant's petition as beginning with the date counsel was notified of the DRB decision, despite the date of the applicant's discharge from the Coast Guard. The attorney believes the applicant should have been processed for a medical board due to his severe psychiatric disorder. He asserted that this is particularly germane since the DRB focused upon the applicant's statements that he knowingly used controlled substances in order to be processed for administrative separation from the Coast Guard in issuing its adverse decision. The attorney acknowledged that administrative separation for misconduct typically terminates the processing of Physical Disability Evaluation System (PDES) cases. He asserted, however, that this is not the case when the discharge authority determines that the disability is the underlying or contributing cause to the misconduct and the circumstances merit processing through the PDES. The attorney claimed that the applicant was found to be totally disabled the day after his separation from the Coast Guard due to paranoid schizophrenia. He further claimed the materials the applicant provided to the DRB in support of his application for review of discharge logically raised the issue, but it was not addressed in the DRB decision. The attorney asserted that the applicant could not have become 100% disabled by reason of schizophrenia overnight and that evidence provided with the applicant's petition should be sufficient to support a finding that the applicant was totally disabled by reason of schizophrenia at the time of his separation.

In support of his allegations, the applicant submitted copies of medical records and related documentation which are included in the summary of the record below.



### SUMMARY OF THE RECORD

On February 9, 2004, at the age of 21, the applicant enlisted in the Coast Guard. While on active duty, the applicant was treated for various ailments. Only the medical records that concern his mental condition are included in the summary.

Upon enlisting, the applicant signed an Administrative Remarks (“Page 7”), which documents the applicant’s acknowledgment that the Coast Guard Recruiter advised him that “the illegal use or possession of drugs constitutes a serious breach of discipline which will not be tolerated in the United States Coast Guard.” He also completed a Record of Military Processing – Armed Forces of the United States Form DD 1966/1, JAN 2003, through which he acknowledged that he “experimented with marijuana” in February 2003.

On February 23, 2004, the applicant completed a Montgomery GI Bill Act of 1984 (MGIB) Basic Enrollment Form 2366, JUN 2002, through which he acknowledged receiving the “Substance Abuse Free Environment (SAFE) Awareness” course by the MLCLANT Addiction Prevention Specialist (APS), on March 30, 2004, in compliance with Article 2-E-4-C, Coast Guard Wellness Manual, COMDTINST M6200.1.

On August 2, 2007,<sup>2</sup> the applicant was seen at the VA Psychiatric Ward for a depression screening. The physician’s progress note reveals that “with his support and the good work of Work Life” the applicant had been “able to get some control and responded to medication.” The physician observed that “there was a little too much medication and [the applicant] was a bit sedated.” The physician recommended that the applicant be on leave during the week of August 6-10, 2007 and continue taking his medication. The applicant was diagnosed with adjustment disorder with anxiety and depression.

On August 16, 2007, the applicant was seen at the VA Psychiatric Ward due to acute situational stress. The physician’s report notes that the applicant’s dosage of Lorazepam was reduced and his prescriptions for Citalopram/Celexa in a low daily dose would continue until the stressors of his divorce were reduced.

On September 7, 2007, the applicant was seen at the VA Psychiatric Ward because he was experiencing a great deal of stress as a result of his divorce. He was prescribed Lorazepam to relax him without producing excess sedation. He was diagnosed with acute situational/adjustment reaction to reality oriented stress with anxiety and depression and a score of 55 on the global assessment of functioning (GAF) scale.<sup>3</sup>

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<sup>2</sup> The VA progress note with an entry date of August 15, 2007 makes a correction to the date of the progress note dated August 3, 2007. The correct date for this progress note is August 2, 2007.

<sup>3</sup> The Global Assessment of Functioning (GAF) is for reporting the clinician’s judgment of the individual’s overall level of functioning. This information is useful in planning treatment and measuring its impact, and in predicting outcome. DSM-IV-TR, at 32. A score ranging between 51 and 60 indicates moderate symptoms (e.g., flat affect and circumstantial speech, occasional panic attacks) or moderate difficulty in social, occupational, or school functioning (e.g., few friends, conflicts with co-workers or peers). DSM-IV-TR, at 34.

On December 5, 2007, as noted in the applicant's health record, the applicant made a follow-up visit to the VA Hospital, during which time he stated that the manner in which he found out his wife was seeing another man was upsetting. He stated that he was referred to the Coast Guard Employee Assistance Program (EAP) and from there to the VA Mental Health Department, where he saw a psychiatrist twice. He was prescribed Lexapro and Effexor, but admitted he stopped taking the medications as he felt he did not need them. The applicant had no suicidal or homicidal ideations. He was diagnosed with acute reaction to stress.

One January 4, 2008, as noted in the applicant's health record, the applicant visited the VA Hospital for referral and to speak with a doctor regarding personal issues. The applicant's presumed diagnosis was acute situational reaction with anxiety and depression. The applicant was referred to Camp Pendleton Mental Health for evaluation. He was released without restrictions.

On February 4, 2008, as noted in the applicant's health record, the applicant was referred to the VA Hospital for a psychiatric evaluation. It was determined that the applicant's adjustment was purely situational and had since resolved, and the applicant was fit for full duty. He was diagnosed with anxiety.

On July 18, 2008, the applicant was seen on an emergency basis at the VA Psychiatric Ward after he made threats toward his ex-wife's boyfriend. As noted in the applicant's health record, the applicant stated he wanted to get out the Coast Guard and was upset he was asking to get discharged. He was diagnosed with acute reaction to stress, episodic dyscontrol<sup>4</sup> and a score of 55 on the GAF scale.

On November 8, 2008, the applicant was randomly selected for a drug test. Several weeks later, a toxicology report was provided by Tripler Army Medical Center Forensic Toxicology Drug Testing Laboratory, which showed a positive result for the urine sample labeled with the applicant's Social Security number.

On December 4, 2008, the applicant was admitted to the VA Psychiatric Ward for evaluation, after expressing some homicidal and paranoid ideations. He was released on December 8, 2008, with a diagnosis of adjustment disorder and amphetamine psychosis.

On December 5, 2008, a health services technician (HS1) at the Integrated Support Command San Pedro, Health Services Division sent an email to the Preliminary Investigation Officer (PIO) stating that he had spoken with the physician, who had spoken with the attending physician for the applicant at the VA Hospital. The physician stated that the medications the applicant was taking would not affect his drug screening results. He also stated that further drug test results from a VA drug screen, taken when the applicant first entered the VA Hospital, were forthcoming and would be released to the PIO on the following Monday, December 8, 2008.

Progress notes from the VA Psychiatric Ward, dated December 5, 2008, reveal that the "physician on base" felt the applicant should be seen by a psychiatrist, so he sent the applicant to

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<sup>4</sup> Dyscontrol or Episodic Dyscontrol Syndrome (EDS) is a pattern of abnormal, episodic, and frequently violent and uncontrollable social behavior in the absence of significant provocation.

the VA for an evaluation. The applicant admitted to feeling paranoid and felt that people talked about him and read his mind. The applicant denied suicidal, homicidal, or paranoid ideations or audiovisual hallucinations. The records also note that the applicant was prescribed medication for management of psychiatric illness, including Celexa (20 mg. per day) and Ativan (1 mg. every 6 hours for “anxiety and agitation”).

On December 8, 2008, the commanding officer (CO) of enlisted personnel for the applicant’s unit issued a memorandum designating a junior officer as the PIO for the investigation of allegations of misconduct by the applicant. The investigation, conducted in accordance with CG Administrative Investigation Manual (AIM), COMDTINST M5830.1 (series) and Military Justice Manual, COMDTINST M5810.1C, investigated all the circumstances surrounding the allegations that the applicant, while on active duty, failed a random urinalysis by allowing a controlled substance to enter his body. Given the nature of the allegations and possible violation of provisions of the Uniform Code of Military Justice, the memorandum instructed the PIO to advise the applicant of his rights under Article 31b, UCMJ, and included a reference to locate the format for recording the Article 31b rights advisement.

The PIO interviewed the applicant concerning his drug test results. The PIO informed the applicant that he was being investigated for the positive test result from a random urinalysis held on November 8, 2008, in which the applicant tested positive for methamphetamine, methylenedioxymethamphetamine, and methylenedioxyamphetamine. The record contains the first page of a two-page Miranda/Tempia form on which the applicant was advised that he was suspected of violating Article 112A – wrongful use of a controlled substance while on active duty.

Following the interview with the applicant, the PIO completed a written report in which the following notes were provided:

After reading the applicant his Miranda/Tempia rights, [the applicant] decided to make a statement. [The applicant] stated that he did not know for sure if he had taken an illegal substance. He had gone to a strip club in downtown LA sometime in October 2008 and, after a lot of drinking and spending upwards of \$1, 200, a stripper took him to the VIP room and offered him 8-9 pills. [The applicant] claims he did not know what they were or what they looked like, but he took the pills. He said he wanted to get out of the Coast Guard after his divorce and had filed for a hardship discharge a couple of months prior, but his request was denied. He said that after everything (i.e., the expensive divorce), he just wanted to get out of the Coast Guard. [The applicant] said that the medications he had been prescribed were not taking away his pain, and the strip clubs offered were a way to feel better. He said he was under too much stress. [The applicant] also indicated that he had suspected a drug test would be coming up since they were hinting that way at the Station due to the various drug sweeps. He said that because he figured he was bound to be called for the urinalysis (since it had been a couple of years) he took the unknown pills with the intention of getting discharged. When asked how often he had taken unknown pills, [the applicant] said only a handful of times.

Later on December 8, 2008, during a follow-up visit to the VA Hospital for diagnosis of amphetamine psychosis, the applicant’s drug screening was negative and he stated that he was doing much better on Seroquel (150 mg HS) and Celexa (10 mg QD). The applicant stated that he came up positive on a recent drug screening, but denied taking any amphetamines. He was diagnosed with anxiety.



On December 10, 2008, the PIO sent a memorandum to the CO that detailed the findings of the investigation surrounding the applicant's failed drug test. Among other Findings of Facts, he wrote:

1. Sometime between October-November 2008, [the applicant] requested discharge from the CG based hardship. The request was denied.
2. Approximately one month ago [the applicant] went to a strip club in Downtown Los Angeles. After spending \$1,200 [the applicant] was taken into the VIP room with the strippers and given 8-9 pills. [The applicant] took the pills and did not know what they were.
3. On the morning of 14 Nov 2008 [the applicant] was chosen at random to participate in a urinalysis conducted by USCG Sector – LA. All procedures and protocols were maintained in strict accordance with COMDTINST M1000.6 Chapter 20.
4. On 04 Dec 2008 the results of the 14 Nov 2008 urinalysis came back from Tripler Army Medical Center Forensic Toxicology Drug Testing Laboratory. Of the twelve samples received, eleven samples were negative and one was positive. The positive sample belonged to [the applicant].

As noted in the applicant's health record, dated December 10, 2008, the applicant admitted to "self-medicating with drugs to feel better." He denied suicidal and homicidal ideations and said he planned to continue taking the Seroquel. He was diagnosed with acute reaction to stress.

On December 12, 2008, a chief warrant officer (CWO), by direction, drafted an XO's Narrative, which stated that the applicant was sent to Sector after his positive urinalysis. And, during that time, the applicant displayed many episodes of bizarre behavior that culminated in him spending the weekend in the VA Psychiatric Ward. Following a review of the behavioral incident, the applicant was offered treatment for a possible drug issue and he declined. During "several evolutions" the applicant stated his desire to exit the Coast Guard to take care of some business. The CWO stated that it was his belief that the applicant swallowed the pills when he knew his name was called for the urinalysis and thus was receiving the discharge he had been wanting.

A typewritten note in the applicant's medical records, signed by a certified physician's assistant and also dated December 12, 2008, reveals that based on the VA Hospital discharge summary it was recommended that the applicant undergo rehabilitation treatment. The applicant declined any type of rehabilitation treatment.

On December 15, 2008, the CO sent an email to Headquarters with the subject line "[the applicant] Drug Discharge." Attached to the email was the drug discharge package for the applicant. In the email, the CO stated, "We would like to get this guy out with expeditious speed." He further stated, "We won't be sending the original 4910 since we need that for our unit punishment log, plus it needs the XO's original signature. He is currently on leave, so getting his signature would only delay the process."

On December 17, 2008, the applicant received another Page 7, which addressed the applicant's counseling session with the CO. The Page 7 stated that the applicant was screened



by a physician at the ISC San Pedro Medical Clinic and determined to be poly drug abusive as per Diagnostic and Statistical Manual of the American Psychiatric Association (DSM IV) and recommended for residential substance abuse treatment as an outpatient. Page 7 further stated that the applicant indicated that he did not want to receive treatment as recommended and was advised that by doing so he waived all rights to any future benefits under the Department of Veterans Affairs program for treatment of chemical dependency. The applicant was also informed that he would be processed for separation per Chapter 20 of the Personnel Manual COMDTINST M1000.6 (series).

On December 18, 2008, the applicant received a memorandum from the CO with the subject line "Notification of Intent to Discharge by Reason of Misconduct". The memorandum informed the applicant that the CO had initiated action to discharge the applicant from the Coast Guard because of his involvement with drugs as evidenced by a positive urinalysis conducted on November 14, 2008. The CO recommended that the applicant be discharged with no higher than a General Discharge. The memorandum advised the applicant of his right to object to the discharge in writing within (5) five working days from the date of the memorandum and that he had a right to consult with an attorney as defined by Article 27(b)(1), UCMJ. A contact number for the local Navy Legal Servicing Office was provided.

On December 27, 2008, the applicant was readmitted to the VA Psychiatric Ward. He stated that he had been incarcerated in the Orange County Jail on December 26, 2008 for being under the influence. Reportedly, during his incarceration, the applicant admitted to using ecstasy and drinking alcohol. He yelled for his medications, stated he had nothing to live for as his wife left him, and that he was going to get the guy who messed with his wife. At the time of readmission to the Psychiatric Ward, the applicant reported feeling hungry and denied any suicidal or homicidal ideations or audiovisual hallucinations. The applicant stated that he just wanted to get out of the military. Contrary to what was noted on the applicant's transfer paperwork, he denied using illegal drugs. The applicant was released on December 29, 2008 with a diagnosis of adjustment disorder with depressed mood and alcohol abuse.

On December 31, 2008, the applicant was discharged from the Coast Guard. He received a discharge characterization of General, Under Honorable Conditions with a JKK separation code with a narrative reason of "misconduct" under Article 12.B.18 of the Personnel Manual. The separation action was authorized pursuant to CGPC-EPM written decision and was issued by the Assistant Branch Chief, Advancement and Separation Branch, by the direction of the Commander, Coast Guard Personnel Command.

On March 9, 2009, the applicant submitted an Application for the Review of Discharge from the Armed Forces of the United States. He noted on the application that he was not able to locate his medical records at the time the application was submitted. He stated that he was applying to college and requested an honorable discharge and medical separation.

On July 27, 2009, the applicant submitted an Application for the Review of Discharge from the Armed Forces of the United States, requesting to have his RE-4 rating changed to RE-3, separation code JKK (drug abuse) removed, and upgrading his discharge characterization to

Honorable. He noted on his application that he had an adjustment disorder and alleged that he was not provided legal counsel at the time of his discharge.

On August 10, 2009, the applicant received a letter from the NPRC notifying him that his medical records had not been retired to the Center; and, the military service department now sends medical records to the Department of Veterans Affairs (VA) Records Management Center (RMC) or, if a VA claim was filed, to the VA Regional Office that serves the veteran's local area. The letter also suggested that the applicant contact the VA to obtain copies of his records and provided contact information. On the same date, the applicant also received a letter from the Coast Guard Discharge Review Board (DRB) acknowledging receipt of his application for a Review of Discharge.

On October 29, 2009, the DRB reviewed the applicant's service record and related documentation for the period of service ending December 31, 2008. The DRB had authority to recommend changes to the Character of Service (Under Honorable Conditions), Separation Authority (PERSMAN Art. 12-B-18), Separation Code (JKK), Reentry Code (RE-4), and Narrative Reason (Misconduct).

On January 25, 2010, the DVA granted the applicant service connection for schizophrenia, paranoid type with adjustment disorder and depressed mood with a disability rating of 100 percent, effective January 1, 2009, and proposed a finding of incompetency. The VA decision notes that service treatment records were unavailable for review and that efforts to obtain the records from all potential sources were unsuccessful. The decision further notes that VA treatment records from Long Island Beach VA Medical Center shows the applicant was treated for psychiatric symptoms on August 2, 2007. He was seen at the emergency room following an argument with his wife. He was given Lorazepam and told to come back for re-evaluation. Diagnosis at the time was adjustment disorder with anxiety and depression, acute. Records show the applicant was admitted on December 4, 2008 and discharged December 8, 2008 for treatment of psychiatric symptoms. Diagnosis at the time of discharge was adjustment disorder. VA treatment records from West Los Angeles VA Medical Center show a diagnosis of schizophrenia, either paranoid or undifferentiated type, on June 26, 2009. The decision further notes that evidence in VA treatment records establishes the diagnosis of a psychiatric disorder, which manifested while the applicant was on active duty. The VA also determined that the evidence showed total occupational and social impairment, due to symptoms of: gross impairment in thought processes; intermittent inability to perform activities of daily living (including maintenance of minimal personal hygiene); and disorientation to time or place.<sup>5</sup>

On April 23, 2010, the DRB reviewed the applicant's service record and related documentation for the period of service ending December 31, 2008 and recommended that the appli-

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<sup>5</sup> An evaluation of 100 percent is assigned whenever there is evidence of total occupational and social impairment, due to symptoms such as: gross impairment in thought processes or communication; persistent delusions or hallucinations; grossly inappropriate behavior; persistent danger of hurting self or others; intermittent inability to perform activities of daily living (including maintenance of minimal personal hygiene); disorientation to time or place; memory loss for names of close relatives, own occupation, or own name. Title 38 of the Code of Federal Regulations, Pensions, Bonuses and Veterans' Relief contains the regulations of the Department of Veterans Affairs which govern entitlement to all veteran benefits.



cant's DD 214 should stand as issued. The DRB President approved the DRB's recommendation. On April 30, 2010, the Chief of Staff of the Coast Guard reviewed the recommendations of the DRB. He directed that the applicant's DD 214 stand as issued. The decision was sent to the applicant on April 30, 2010.

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

On July 24, 2014, Commander, Personnel Service Center (PSC) sent a memorandum to the Judge Advocate General (JAG) of the Coast Guard in which PSC concluded that the applicant's application was submitted timely and should be considered by the Board. PSC further concluded that the applicant tested positive for illegal drugs during a urinalysis conducted November 14, 2008; that during an investigation the applicant admitted to taking these illegal drugs; and that the Coast DRB determined that the applicant was processed for discharge in accordance with Coast Guard policy in which a discharge for misconduct takes precedent over a medical board. PSC further stated that the DRB did not uncover any administrative oversights or failures in processing of the discharge and the Coast Guard never recommends upgrades for discharges involving drug use. Based on these conclusions, PSC recommended that no relief be granted to the applicant.

On August 24, 2014, the JAG submitted an advisory opinion adopting the facts and analysis in PSC's memorandum. The JAG stated that the VA evaluated the applicant on September 28, 2009, nine months after the applicant's separation from the Coast Guard. The VA did not review the applicant's service treatment records and that the VA determined on the date of the applicant's medical examination, the applicant was 100 percent disabled, and found that the condition was service connected because he had been treated for a psychiatric condition (depression and adjustment disorder, not schizophrenia) in 2007 while on active duty. In the absence of medical records, the VA made the applicant's disability rating effective as of his separation from the Coast Guard. The JAG stated that there is no evidence, nor did the VA find any, that the applicant had been 100 percent disabled while on active duty, or that he suffered from schizophrenia at the time of the misconduct that led to his discharge or at the time of discharge. The JAG further stated that none of the applicant's treatment records or his VA evaluation suggests that an inability to distinguish right from wrong has ever been a symptom of his medical condition. The JAG recommended that the Board deny relief to the applicant.

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

On September 11, 2014, the Chair sent the applicant's attorney a copy of the views of the Coast Guard and invited him to submit a response within 30 days. On October 7, 2014, the applicant's attorney sent a letter to the Chair seeking a 30-day extension in responding to the views of the Coast Guard regarding the applicant's case. The extension was needed to allow for more time to obtain additional medical evidence for the Board's review of the applicant's case. On October 8, 2014, the Chair sent an email to the applicant's attorney granting his request for a 30-day extension. The Chair rescheduled the applicant's due date for his response to the views of the Coast for November 10, 2014.



On November 18, 2014, the applicant's attorney sent an email to the Chair informing her that his attempts to obtain additional medical records were unsuccessful and would not be provided in a timely manner. Therefore, his only response to the views of the Coast Guard is to note that the severity of the applicant's disability as adjudicated by the VA would militate against the position taken by the Coast Guard in its advisory opinion. The applicant's attorney further stated that if the applicant's medical records were obtained at a later date, he would file a motion for reconsideration of any adverse decision, but understands that the Board's governing regulations requires it to proceed with adjudication of the applicant's case.

### APPLICABLE POLICY

Article 12.B.1.e.1. of the Personnel Manual, COMDTINST M1000.6A, in effect in 2007, entitled "Cases Involving Concurrent Disability Evaluation and Disciplinary Action," stated the following:

Disability statutes do not preclude disciplinary separation. The separations described here supersede disability separation or retirement. If Commander, (CGPC-adm) is processing a member for disability while simultaneously Commander, (CGPC-epm-1) is evaluating him or her for an involuntary administrative separation for misconduct or disciplinary proceedings which could result in a punitive discharge or an unsuspended punitive discharge is pending, Commander, (CGPC-adm) suspends the disability evaluation and Commander, (CGPC-epm-1) considers the disciplinary action. If the action taken does not include punitive or administrative discharge for misconduct, Commander, (CGPC-adm) sends or returns the case to Commander, (CGPC-adm) for processing. If the action includes either a punitive or administrative discharge for misconduct, the medical board report shall be filed in the terminated member's medical personnel data record (MED PDR).

Article 12.B.18. of the Personnel Manual entitled "Misconduct," under Article 12.B.18.a., entitled "Policy," stated the following:

Except as specifically provided here, only Commander CGPC may direct a discharge for misconduct and the type of discharge (under other than honorable, general, or honorable) as warranted by the particular circumstances of a given case. Article 12.B.2. Disability evaluation processing will be terminated as described in Article 12.B.1.e. for members discharged for misconduct. See Article 12.B.1, when recommending the discharge of a first-term performer for misconduct.

Article 12.B.18.b.4.a. of the Personnel Manual entitled "Reasons to Discharge for Misconduct," stated the following:

Commander, CGPC may direct discharging a member for misconduct in any of these cases:

...4. Drugs.

a. Involvement with Drugs. Any member involved in a drug incident or the illegal, wrongful, or improper sale, transfer, manufacture, or introduction onto a military installation of any drug, as defined in Article 20.A.2 k., will be processed for separation from the Coast Guard with no higher than a general discharge. Commanding Officer, Training Center Cape May is delegated final discharge authority for members assigned to recruit training or prior service training program under this Article in specific cases of drug use before enlistment (as evidenced by a positive urinalysis shortly after entering training). New inductees shall sign an Administrative Remarks; CG-3307 entry acknowledging the presence of drugs in their bodies is grounds for a general discharge for misconduct.



Article 12.B.18.e. of the Personnel Manual entitled “Discharging Members with Fewer than 8 Years Service for Misconduct,” stated the following:

Commanding officers shall process members with fewer than eight years of total active and inactive military service recommended for honorable or general discharge for misconduct as follows:

1. Inform the member in writing of the reason(s) for being considered for discharge (specifically state one or more of the reasons listed in Article 12.B.18.b. supported by known facts).

2. Afford the member an opportunity to make a written statement. If the member does not desire to do so, the commanding officer sets forth that fact in writing over the member’s signature. If the member refuses to sign a statement his or her commanding officer will so state in writing.

3. Afford the member an opportunity to consult with a lawyer as defined by Article 27(b)(1), UCMJ, if contemplating a general discharge. If the member requests counsel and one is not available, the commanding officer must delay discharge proceedings until such time as counsel is available.

4. Send the case containing a recommendation and these documents to Commander (CGPC-epm-1) for action:

a. The reason(s) for processing (include reason such as repeated military offenses, drug abuse, indebtedness, etc.)

b. If the reason(s) is (are) civil conviction(s), include ...

c. Summary of Military Offenses. List in chronological order all disciplinary action during current enlistment, including:

(1) Dates of non-judicial punishment or court-martial by type.

(2) Description of offense(s).

(3) Non-judicial punishment or sentence as approved and approval date.

(4) All violations of regulations during current confinement with action taken.

(5) The commanding officer’s comments, including information on the counseling requirement for cases processed for a pattern of failure to contribute adequate support to dependents (see Art. 8.M.), a pattern of failure to pay just debts, or shirking.

(6) The commanding officer’s recommendation.

d. These enclosures:

(1) The copy of the letter notifying the member of the reason(s) for the processing and information on the member’s rights and privileges.

(2) The member’s signed statement of awareness of rights and privileges and request to exercise or waiver of these rights.

(3) The member’s signed statement, or member’s written, signed statement declining to make a statement.

(4) A copy of the closed-out form CG-3306 dated 30 June 1983 showing average Proficiency, Leadership, and Conduct marks and a copy of the current Enlisted Employee Review showing factor marks.

(5) Other pertinent documents such as psychiatric or medical evaluations, statements of any witnesses (Chapter 12.E. for homosexual conduct policy), police reports, etc.

(6) A copy of the chain of custody test results form and the appropriate page from unit’s drug urinalysis sampling ledger (applicable in cases of recommendations for discharge resulting from a urinalysis indicating drug abuse).

Chapter 5.B.3. of the Medical Manual, COMDTINIST M6000.1C, in effect in 2007 stated that adjustment disorders are generally treatable and not usually grounds for separation. However, when these conditions persist or treatment is likely to be prolonged or non-curative, (e.g., inability to adjust to military life/sea duty, separation from family/friends) process in accordance with Chapter 12, Personnel Manual, COMDTINIST M1000.6 (series) is necessary.

Chapter 5.B.5. of the Medical Manual stated that psychoactive substance use disorders (e.g., 304.40 Amphetamine dependence) are disqualifying for appointment, enlistment, or induction under Section 3-D-32 of this Manual or shall be processed in accordance with Chapter 20, Personnel Manual, COMDTINIST M1000.6 (series).

Chapter 5.B.6. of the Medical Manual stated that schizophrenia disorders are disqualifying under Section 3-D-30 of this Manual or shall be processed in accordance with Physical Disability Evaluation System, COMDTINIST M1850.2 (series).

Article 2.C.7. of the Physical Disability Evaluation System (PDES) Manual, COMDTINIST M1850.2D, in effect in 2006 stated the following:

Line of Duty and Misconduct. The IPEB, FPEB, and PRC must make line of duty and misconduct findings and recommended disposition on each case, based on the information of record. The Board members should refer to chapter 5, Administrative Investigations Manual, COMDTINIST M5830.1 (series), for specific guidance. In making their determinations, physical evaluation boards should review any board of investigation, or administrative report which is available, even if final reviewing authority action on the line of duty investigation has not been taken. Physical evaluation boards are bound by final line of duty determinations which are available at the time the physical evaluation board considers the evaluatee's case and which, if adverse to the evaluatee, were made after the right to a hearing and representation by counsel were provided. However, the IPEB, FPEB, or PRC may include an explanatory statement and recommendations for consideration by the final approving authority in cases where board members feel, based on the facts presented, the final line of duty determination was inappropriate.

Article 2.C.11. of the PDES Manual in effect in 2006 stated the following:

a. Disability statutes do not preclude disciplinary or administrative separation under applicable portions of the Personnel Manual, COMDTINIST M1000.6 (series). If a member is being processed for a disability retirement or separation, and proceedings to administratively separate the member for misconduct, disciplinary proceedings which could result in a punitive discharge of the member, or an unsuspended punitive discharge of the member is pending, final action on the disability evaluation proceedings will be suspended, and the non-disability action monitored by Commander, Coast Guard Personnel Command.

b. If the court martial or administrative process does not result in the execution of a punitive or an administrative discharge, the disability evaluation process will resume. If a punitive or administrative discharge is executed, the disability evaluation case will be closed and the proceedings filed in the member's official medical record.



## 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 section 1552 of title 10 of the United States Code.

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>6</sup>

3. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice in his record.<sup>7</sup> The applicant filed his application with the Board on August 12, 2013, more than three years after his discharge date of December 31, 2008. The application was also filed more than three years after the DRB notified the applicant of its decision to deny his request for relief in a letter dated April 30, 2010, which was mailed to the applicant. The applicant's attorney asserts that the statute of limitations should toll from May 12, 2014, the day he received a copy of the DRB's decision. Given that the applicant challenged his discharge *pro se* before the DRB in 2009, however, the Board finds that he knew of the alleged error when he filed his DRB application and received the DRB's decision. Therefore, his application to the BCMR is untimely.

4. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.<sup>8</sup> 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"<sup>9</sup> 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."<sup>10</sup> In this case, the application was filed only a few months after the statute of limitations expired in April 2013,<sup>11</sup> and the record shows that the applicant has been diagnosed with schizophrenia, which may have prevented him from seeking legal assistance and applying to the BCMR in a timely manner. Therefore, and in light of the applicant's medical record, the Board will excuse the untimeliness of the application and waive the statute of limitations in the interest of justice.

5. The applicant alleged that he was erroneously and unjustly discharged from the Coast Guard for misconduct when Coast Guard officials were aware of his psychiatric illness,

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<sup>6</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>7</sup> 10 U.S.C. § 1552(b); 33 C.F.R. § 52.22.

<sup>8</sup> 10 U.S.C. § 1552(b).

<sup>9</sup> *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

<sup>10</sup> *Id.* at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396, 1405 n14, 1407 n19 (D.C. Cir. 1995).

<sup>11</sup> *Ortiz v. Secretary of Defense*, 41 F.3d 738, 743 (D.C. Cir. 1994) (holding that the BCMR's statute of limitations begins to toll upon the issuance of a DRB decision).

and that he should have been evaluated for discharge under the PDES because his schizophrenia caused his misconduct. The Board begins its analysis in every case by presuming that the disputed information is correct as it appears in the applicant's record. The applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.<sup>12</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>13</sup> In this case, the Board presumes that the following information is correct as it appears in the applicant's records:

The applicant was not diagnosed with schizophrenia while a member of the Coast Guard. He was diagnosed with this disability several months after his discharge. The applicant was examined by doctors, including at least one psychiatrist, a few times while on active duty, and was diagnosed with poly drug abuse, alcohol abuse, depression, and an adjustment disorder following his divorce from his wife—not schizophrenia.

Between October and November 2008, the applicant applied for a hardship discharge from the Coast Guard after his divorce from his wife because he no longer wanted to serve in the Coast Guard. His request for a hardship discharge was denied. Following denial of his request, the applicant took illegal drugs and tested positive for illegal drugs during a random urinalysis conducted on November 8, 2008.

The applicant was admitted to the VA Psychiatric Ward on December 4, 2008, and diagnosed with adjustment disorder and amphetamine psychosis. Under the DSM IV TR, which the Coast Guard relies on to diagnose psychiatric conditions,<sup>14</sup> illegal substance abuse can cause psychosis.<sup>15</sup> Upon his release on December 8, 2008, the applicant met with the PIO for an interview concerning his November 8<sup>th</sup> drug test results. The applicant was read his Miranda/Tempia rights before the interview. The applicant apparently admitted to taking illegal drugs and claimed that he had done so in an effort to cause his discharge from the Coast Guard.

The applicant was readmitted to the VA Psychiatric Ward on December 26, 2008, and diagnosed with adjustment disorder with depressed mood and alcohol abuse. The record contains ample evidence of poly drug abuse but no evidence that he suffered from schizophrenia prior to his discharge or that schizophrenia caused the illegal drug abuse that resulted in his discharge. To the contrary, there is evidence that his drug abuse has caused amphetamine psychosis.

None of the applicant's treatment records or his VA evaluations indicate that an inability to distinguish right from wrong has ever been a symptom of his medical condition. Additionally, the preponderance of the evidence shows that the applicant was afforded due process under Article 12.B.18. of the Personnel Manual in effect in 2008 because he was notified of his pending general discharge for drug abuse and of his right to object and to consult counsel.

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<sup>12</sup> 33 C.F.R. § 52.24(b).

<sup>13</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).

<sup>14</sup> See Coast Guard Medical Manual, Chap. 5.B.1.

<sup>15</sup> DSM-IV-TR, at 338.



6. The applicant alleged that his diagnosis and disability rating from the DVA prove that he suffered schizophrenia while on active duty and should have been processed under the PDES. However, the preponderance of the medical evidence in the record shows that the applicant did not suffer from schizophrenia while he was a member of the Coast Guard and that his non-medical discharge for misconduct was neither erroneous nor unjust. During the period between August 2, 2007, and December 27, 2008, the applicant's health records show that he was seen at the VA Psychiatric Ward on several occasions, but his diagnoses during that time period included adjustment disorder, acute situational/adjustment reaction to reality-oriented stress, anxiety, depression, and amphetamine psychosis—not schizophrenia. The fact that the DVA later diagnosed him with schizophrenia and backdated his disability rating to his date of discharge from the Coast Guard does not prove that he was misdiagnosed or suffered from schizophrenia while on active duty. Furthermore, there is no evidence that the applicant's psychiatric condition caused his illegal drug use or prevented him from distinguishing right from wrong and from adhering to the right.

7. The applicant stated that he should have been discharged for disability, not misconduct. Under 10 U.S.C. § 1203, a disability rating is “based upon accepted medical principles...is or may be of a permanent nature.” Only members who are rendered permanently unfit for duty while on active duty are entitled to PDES processing. The evidence in the record indicates that the applicant's mental condition at the time of his discharge was not considered permanent by any of the physicians and psychiatrists who examined and treated him. As stated in the Chapter 5.B.3. of the Medical Manual, adjustment disorders are generally treatable and not usually grounds for separation. Furthermore, in accordance with Article 12.B.18. of the Personnel Manual, when a member is discharged for misconduct, disability processing will be terminated as described in Article 12.B.1.e. for members charged for misconduct. Therefore, the Board finds that the applicant has not proved by a preponderance of the evidence that he was entitled to PDES processing and a disability rating under 10 U.S.C. § 1203 or its implementing regulations.

8. The applicant alleged that his mental illness caused him to self-medicate in order to feel better. The existence of a mental illness does not per se excuse a member from liability for his misconduct. Instead, the deciding factors are whether the member lacked substantial capacity to appreciate the criminality of his conduct and to conform to the requirements of law.<sup>16</sup> The applicant's health records dated August 2, 2007, through December 27, 2008, reveal that the applicant suffered from acute anxiety and stress brought on by his divorce, but nothing in the records indicates that the applicant was not aware that his actions were illegal and inconsistent with Coast Guard policy. To the contrary, it is well documented in the applicant's health and personnel records that the applicant was highly stressed but alert during interviews and repeatedly stated that he wanted to get out of the Coast Guard. Furthermore, on each occasion that the applicant visited the VA Hospital for evaluation and treatment, physicians noted that he was aware of the instructions provided to him and he was deemed “fit for duty,” despite his adjustment disorder, stress, and anxiety.

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<sup>16</sup> Rule 706 of the Rules for Courts-Martial, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.)

9. Accordingly, the applicant has not proven by a preponderance of the evidence that his lack of PDES processing for a medical separation constitutes an error or injustice in his record. Therefore, his request for relief must be denied.

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



**ORDER**

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

February 12, 2015

