

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2018-028

██████████
██████████ MK1

FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case after receiving the applicant's completed application on November 2, 2017, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated October 26, 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 asked the Board to remove or replace a "Page 7" (CG-3307) dated June 9, 2016, in his record on which he acknowledged the following by signature:

09JUN2016: You agree to waive your rights to any future Administrative Separation Board for unsuitability and/or misconduct, where alcohol or drugs is a causative factor. You understand you must abide by my treatment plan for the remainder of my [sic] Coast Guard career and if you receive a properly documented alcohol or drug incident in the future, you will be separated from the Coast Guard with no entitlement to an Administrative Separation Board.

The applicant explained that he signed the Page 7 in order to be allowed to reenlist. He needed a waiver to reenlist because he had received two Unsatisfactory Conduct marks on EERs in his prior enlistment, which began on July 5, 2011. However, he alleged, he had "had no documented offenses related to alcohol or drugs nor have I been placed under a treatment plan. Two Unsatisfactory Conduct marks, neither of which were alcohol or drug related, required me to seek a reenlistment waiver from PSC (EPM)." To gain PSC's approval of his waiver request, he was required to waive his right to an ASB on a Page 7. The applicant stated that the repeated references to alcohol and drugs could negatively impact his career. To support his request, the applicant submitted a copy of the disputed Page 7 and copies of records that are included in the summary below.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on March 18, 2002. He advanced to MK1-E6 and reenlisted for five years on July 5, 2011.

A Page 7 dated April 4, 2007, states that the applicant had been involved in an “alcohol-related situation” on the evening of March 8, 2007, when he had behaved inappropriately toward hotel staff. The Page 7 states that the incident was not being documented as an “alcohol incident” because consumption of alcohol “was not considered a significant or causative factor” in his behavior. Another Page 7 states that as a result of the “alcohol-related situation,” the applicant was screened at a clinic and, based on his answers, was found not to meet the criteria for a diagnosis of alcohol dependence.

On April 19, 2007, the applicant was punished at mast for violating the Uniform Code of Military Justice (UCMJ) for being disorderly and failing to obey an order. The Court Memorandum states that he had been ordered to return to his room on or about March 9, 2007, but disobeyed the order and was “disorderly in ... his conduct towards the security guard [which] was of a nature to bring discredit upon the Armed Forces.” The applicant received five days of restriction with extra duties, which was suspended for six months on condition of good behavior.

On March 12, 2009, the applicant incurred his first “alcohol incident.” A Page 7 dated April 1, 2009, states that his abuse of alcohol had been a significant or causative factor in his arrest for disorderly conduct for fighting and that as a result of the arrest he had been absent without leave and missed the movement of his cutter. He was counseled and advised that any further alcohol incidents would result in his separation.

On March 31, 2009, the applicant received NJP for violating the UCMJ by being absent without leave and missing movement. He was restricted to the cutter for 45 days with extra duties.

A Page 7 dated June 23, 2009, states that the applicant was again screened but found not to meet the criteria for a diagnosis of alcohol abuse or dependence. He was required to undergo training and to submit updated fitness and Individual Development plans within two weeks.

On December 20, 2012, the applicant received NJP for violating the UCMJ by “selling or disposing of military property”¹ without proper authority. The Court Memorandum states that he “was selling a bullet proof vest and an expandable baton, at a value of \$300.00, to a private party on Craig’s List.” He was awarded restriction to his station for 7 days and forfeiture of \$300.00, which was suspended for six months on condition of good behavior. As a result of the NJP, the applicant received a disciplinary Enlisted Evaluation Report (EER) with an Unsatisfactory Conduct mark.

On January 7, 2013, the Sector Commander asked PSC-EPM to permanently relieve the applicant for cause as the Engineering Petty Officer of a boat station based on his unsatisfactory

¹ Article 108 of the UCMJ provides that it is punishable offense to sell or otherwise dispose of any military property without proper authority. The maximum punishment for this offense includes a punitive discharge.

conduct. He noted that an investigation had shown that the applicant had traded body armor and an expandable baton with a minor in exchange for a black powder rifle on Craig's List. He stated that the applicant's "actions do not reflect the level of responsibility, stewardship, and integrity that is expected of an EPO. While he has proven his strong technical abilities, I no longer have the confidence in his management skill or ability to serve as an example to those he leads."

On February 25, 2013, Commander, PSC-EPM approved the applicant's relief for cause and directed that it be documented in his record on a Page 7 and a disciplinary or transfer EER.

A Page 7 dated February 25, 2013, states that the applicant was permanently relieved "for cause" as the Engineering Petty Officer of a station. He also received another disciplinary EER with an Unsatisfactory Conduct mark dated February 25, 2013.

A Page 7 dated March 4, 2016, states that the applicant was recommended for reenlistment by his commanding officer (CO) but was not actually eligible for reenlistment because he had received two Unsatisfactory Conduct marks "resulting from a NJP [non-judicial punishment] in 2012 and a relief from EPO duties." The Page 7 advised the applicant that he could request a waiver from Commander, PSC-EPM-1 within fifteen days.

On March 8, 2016, the applicant submitted a request for a waiver of the reenlistment eligibility criteria. He stated that after seeing the Craig's List posting for the rifle in September 2012, he "started looking through my garage ... [and] found an old body armor that was given to me by a friend years before when I was stationed in Florida and an expandable baton that had been damaged on the business end. Having no reason to believe that I was misusing government property I decided to try and make the trade. We made the trade and all was well for about 1 month," when he was called by a Coast Guard special agent. A commander at the Sector endorsed the applicant's request for the waiver and noted that his "stellar performance is indicative that he has overcome the deficiencies that probably led to his NJP on 20 December 2012 and ultimately his permanent removal for cause on 25 February 2013. For this very reason, this waiver request is submitted, to reveal that two 'Unsatisfactory' entries in his performance evaluations were for the same offense. These two entries rendered the member ineligible to reenlist."

On May 13, 2016, Commander, PSC-EPM-1 denied the applicant's request, and on May 20, 2016, PSC-EPM issued separation orders for July 4, 2016, when the applicant's five-year enlistment was due to end. However, two weeks later, on June 3, 2016, Commander, PSC-EPM-1 signed a memorandum stating that the applicant was authorized to extend his enlistment for two years provided he signed a Page 7 with the disputed text waiving his right to an ASB "for unsuitability and/or misconduct, where alcohol or drugs is a causative factor." The memorandum also advised him that he would need to submit another reenlistment waiver request six months before the date of his new expiration of enlistment if he wanted to continue serving.

On June 9, 2016, the applicant signed the disputed Page 7. On June 15, 2016, he extended his enlistment for two years, through July 4, 2018.

A Page 7 dated January 30, 2018, states that the applicant was recommended for reenlistment by his commanding officer (CO) but was not actually eligible for reenlistment

because he had received two Unsatisfactory Conduct marks “resulting from a NJP [non-judicial punishment] in 2012 and a relief from EPO duties.” The Page 7 advised the applicant that he could request a waiver from Commander, PSC-EPM-1 within fifteen days. The applicant was authorized to reenlist for six years, and he remains on active duty.

VIEWS OF THE COAST GUARD

On May 22, 2018, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion and recommended granting alternative relief. The JAG adopted the findings and analysis provided in a memorandum prepared by the Coast Guard Personnel Service Center (PSC).

Because neither alcohol nor drugs was a causative factor in the conduct that made the applicant ineligible to reenlist, PSC recommended that the text of the disputed Page 7 be replaced with the following:

You agree to waive your rights to any future Administrative Separation Board for unsuitability and/or misconduct. If you are processed for separation by reason of either unsuitability and/or misconduct in the future, you will not be entitled to an Administrative Separation Board and may be separated from the Coast Guard.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 25, 2018, the Chair sent the applicant a copy of the views of the Coast Guard to the applicant and invited a written response within thirty days. The applicant requested and was granted an extension of time to respond in accordance with 33 C.F.R. § 52.26 and submitted his response on August 7, 2018.

The applicant again asked that the Board remove or replace the disputed Page 7. He noted, that the language in the replacement text recommended by the Coast Guard “is broader by encapsulating all aspects of Unsuitability and Misconduct. If replacing were in order, I would offer the following” substitute:

You agree to waive your rights to any future Administrative Separation Board for any future Relief for Cause situations. If you are processed for separation due to Relief for Cause, you will not be entitled to an Administrative Separation Board and may be separated from the Coast Guard.

APPLICABLE LAW AND POLICY

Enlisted Accessions, Evaluations, and Advancements Manual

Article 1.A.5. of COMDTINST M1000.2A, the Enlisted Accessions, Evaluations, and Advancements Manual (hereinafter “Enlisted Manual”) states the following regarding reenlistments and extensions of enlistments:

The Coast Guard offers reenlistments and/or extensions only to those members who consistently demonstrate the capability and willingness to maintain high professional standards, moral character, and an adherence to the Coast Guard's core values. To be eligible for reenlistment, or extension of enlistment, a member must receive a positive recommendation from their commanding officer in accordance with Article 1.A.5.a. of this Manual, and meet the eligibility criteria listed in Article 1.A.5.b. of this Manual. ... Members who have eight or more years of total active duty and/or reserve military service that meet the eligibility criteria, but are not recommended for reenlistment by their commanding officer, are entitled to a reenlistment board, as outlined in reference (c), Military Separations, COMDTINST M1000.4 (series). However, members who do not meet the eligibility criteria are not entitled to a reenlistment board, even if they have eight or more years of total active and/or reserve military service. The procedures in Article 1.A.5.d of this Manual shall be followed for members who do not meet the eligibility criteria.

Article 1.A.5.b. of the Enlisted Manual states the following:

Each member must meet the basic eligibility requirements listed below during their current period of enlistment/reenlistment, including any extensions, unless an appeal is approved by Commander (CG PSC-EPM) or (CG PSC-RPM):



(4) Have no more than one unsatisfactory conduct mark during the current period of enlistment. However, if a member receives any unsatisfactory conduct mark during their current period of enlistment for any of the following reasons, that one unsatisfactory conduct mark will render the member ineligible for reenlistment/extension:

(a) A documented offense for operating a vehicle, or any other mode of transportation, under the influence of alcohol or controlled substances during the current period of enlistment.

(b) A documented offense as a perpetrator of sexual assault during the current period of enlistment.

(5) Have no documented offense for which the maximum penalty for the offense, or closely related offense under the UCMJ and Manual for Courts-Martial, includes a punitive discharge during the current period of enlistment. Use the following guidance to assist.

(a) This criteria is aimed at serious offenses, analogous to those warranting the "Commission of a Serious Offense" basis for discharge identified in reference (c), Military Separations, COMDTINST M1000.4 (series). Commission of a serious offense does not require adjudication by non-judicial or judicial proceedings. In some circumstances, military justice action is precluded due to state or federal court proceedings, but a commanding officer may remain convinced that credible evidence establishes, by a preponderance of the evidence, that the member has committed a serious offense. In these circumstances, if warranted by the particular facts of the case, Commander, (CG PSC-EPM) or (CG PSC-RPM), may determine that

a serious offense has been committed, even without a judicial adjudication, and deny the member the opportunity to reenlist.

Article 1.A.5.d.(1) provides that “[m]embers who do not meet the eligibility criteria, but are recommended for reenlistment/extension by their commanding officer, may submit an appeal via memorandum, to Commander, (CG PSC-EPM-1) ... via the chain of command.”

Article 4.C.2.c. of the Enlisted Manual lists the circumstances in which commands are required to prepare non-regular, “unscheduled” EERs. Receipt of NJP and “relief for cause” are both circumstances that require disciplinary EERs.

Military Separations Manual

Article 1.B.15.a. of the Military Separations Manual, COMDTINST M1000.4, authorizes the administrative discharge of members for “unsuitability.” The causes for discharge due to unsuitability listed in Article 1.B.15.b. are inaptitude; diagnosed personality disorders; apathy, defective attitudes, and adjustment disorders; unsanitary habits; alcohol abuse; and financial irresponsibility.

Article 1.B.17.a. authorizes the administrative discharge of members for misconduct. The causes for discharge due to misconduct listed in Article 1.B.17.b. are a civilian or foreign conviction for any offense that would warrant a punitive discharge under the UCMJ based on the maximum punishment authorized and Rule 1003, which allows increased punishment for multiple convictions; a pattern of misconduct, such as two or more NJPs in a two-year period; fraudulent enlistment; illegal drug abuse or possession, etc.; and “Commission of a Serious Offense.” Article 1.B.17.b.(3) states that a member may be discharged for “Commission of a Serious Offense” when a preponderance of the evidence shows that the member has committed an offense for which the maximum penalty under the UCMJ includes a punitive discharge and the circumstances warrant separation. Under the UCMJ, the maximum penalty for selling or disposing of military property without proper authority, regardless of value, includes a punitive discharge. MANUAL FOR COURTS-MARTIAL UNITED STATES (2012), part IV-48, para. 32.e.(1).

Assignments Manual

Article 1.F.1.a. of the Assignments Manual, COMDTINST M1000.8A, states that a “relief for cause (RFC) is the administrative removal of a commanding officer (CO), officer in charge (OIC), executive petty officer (XPO), engineer petty officer (EPO), or a designated full-time command master/senior chief (CMC/CSC) from their current duty assignment before the planned rotation date.” Article 1.F.1.d. states that members in these positions may be relieved for cause due to misconduct or poor performance, such as gross negligence. Article 1.F.1.b.(1) states the following about RFC:

The need to relieve for cause may arise when a CO/OIC’s, XPO’s, EPO’s, or CMC/CSC’s performance or conduct adversely affects their unit’s morale, good order and discipline, and/or mission performance. One of the most severe adminis-

trative measures taken against a member in command, an RFC usually has a significant adverse impact on the member's future Coast Guard career, particularly on their promotion, advancement, duty and special assignments, and selection for schools. Therefore, the relieving officer must carefully consider the circumstances' gravity and the potential outcome's total implications before initiating the process.

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 over this matter under 10 U.S.C. § 1552, and the application was timely filed within three years of the applicant's discovery of the alleged error.

2. The applicant alleged that a Page 7 he was required to sign to be allowed to reenlist is erroneous and unjust because it mentions alcohol and drugs and a treatment plan, but the misconduct that rendered him ineligible to reenlist was not related to alcohol or drugs and he does not have a treatment plan. In considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed documents in an applicant's military record are correct and fair, and the applicant bears the burden of proving by a preponderance of the evidence that the documents are erroneous or unjust.² Absent specific evidence to the contrary, the Board presumes that Coast Guard officers and other Government officials have carried out their duties "correctly, lawfully, and in good faith."³

3. When his enlistment was ending in 2016, the applicant was ineligible to reenlist under Article 1.A.5.b. of the Enlisted Manual, COMDTINST M1000.2A. He was ineligible under Article 1.A.5.b.(4) because he had received two Unsatisfactory Conduct marks on EERs in 2012 and 2013. In recommending his retention, his command noted that the applicant had been relieved for cause in 2013 because of his misconduct in 2012 and so in accordance with the Enlisted Manual received two disciplinary EERs because of one act of misconduct. As the EPO, however, the applicant held a leadership position and knew or should have known that his misconduct could result not only in NJP but in RFC and the associated disruption at his unit. Moreover, the applicant was also ineligible for reenlistment under Article 1.A.5.b.(5) of the Enlisted Manual because at mast on December 20, 2012, he was found to have violated Article 108 of the UCMJ, which constitutes a "serious offense," as defined in Article 1.B.17.b.(3) of the Military Separations Manual, COMDTINST M1000.4. He violated Article 108 by "selling or disposing of military property" without proper authority,⁴ and his violation—trading military body armor and an expandable baton to a minor in exchange for a firearm—is a "serious offense" in light of the circumstances and under the regulations because the maximum punishment for this offense under the UCMJ includes a punitive discharge.⁵

² 33 C.F.R. § 52.24(b).

³ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁴ Article 108 of the UCMJ provides that it is punishable offense to sell or otherwise dispose of any military property without proper authority. The maximum punishment for this offense includes a punitive discharge.

⁵ MANUAL FOR COURTS-MARTIAL UNITED STATES (2012), part IV-48, para. 32.e.(1).

4. Only misconduct committed during the current period of enlistment may render a member ineligible for reenlistment.⁶ Members who, like the applicant, are ineligible to reenlist but are recommended for reenlistment by their CO may appeal to Commander, PSC-EPM-1 to request a waiver of the reenlistment eligibility criteria as the applicant did.⁷ In deciding whether to waive the criteria and allow a member to remain on active duty, Commander, PSC-EPM-1 is not limited to considering only the member's performance and conduct during the current enlistment, however. Nothing in the Enlisted Manual prevents Commander, PSC-EPM-1 from considering the member's entire record when making the decision, and nothing prevents him or her from imposing conditions based on the member's entire record before allowing a member to reenlist or extend an enlistment. Therefore, although PSC recommended removing the references to alcohol and drugs from the disputed Page 7, the Board finds that the applicant has not proven by a preponderance of the evidence that limiting his ASB waiver to misconduct related to alcohol or drug abuse was prohibited by regulation even though the misconduct that rendered him ineligible to reenlist was not related to alcohol or drug abuse.

5. The record shows that the applicant had not been diagnosed as alcohol dependent and was not subject to a treatment plan. Therefore, the reference to a treatment plan in the second sentence of the Page 7 is erroneous and could be amended by removing the first part of the second sentence—"You understand you must abide by my treatment plan for the remainder of my Coast Guard career and"—so that the second sentence would start with "If you receive a properly documented ..."

6. The applicant argued that the references to alcohol and drugs are unjust because the misconduct that rendered him ineligible to reenlist was not related to alcohol or drugs. He argued that the references might lead selection board members to believe erroneously that his misconduct during the enlistment was related to alcohol or drugs. The applicant's conduct during the current enlistment and relief for cause were not related to alcohol or drug abuse, but the record shows that he had incurred both an alcohol incident and an alcohol-related situation during his prior enlistment. These earlier incidents could reasonably have persuaded Commander, PSC-EPM-1 at the time to limit the scope of the applicant's ASB waiver in this way, instead of requiring him to sign a broader waiver of ASB proceedings due to *any* misconduct or unsuitability.

7. The propriety of the alcohol and drug limitation in the disputed Page 7 is strong, moreover, because those are the actual terms that the applicant agreed to in order to remain on active duty. He did not agree to waive an ASB under *any* of the circumstances that can lead to a discharge for unsuitability or misconduct under Articles 1.B.15. and 1.B.17. of the Military Separations Manual—only those circumstances related to alcohol or drug abuse. Therefore, in response to the advisory opinion, the applicant reasonably objected to the broadening of the language of his waiver to include all of the circumstances that can lead to discharge for unsuitability or misconduct. The applicant's proposed language for the Page 7 is absurdly narrow, however, and so virtually meaningless; it would limit his waiver to a second RFC, but RFC is a term of art that applies to only a few leadership assignments that the applicant might never again hold.

⁶ COMDTINST M1000.2A, Article 1.A.5.b.

⁷ COMDTINST M1000.2A, Article 1.A.5.d.(1).

8. In light of the applicant's reasonable belief that the references to alcohol and drugs in the Page 7 could be prejudicially misinterpreted, however, the Board finds that in the interest of justice he should be given the choice of having his ASB waiver remain limited to unsuitability or misconduct related to alcohol or drug abuse with no mention of a treatment program or having his ASB waiver limited to misconduct with no mention of unsuitability or alcohol or drug abuse. Therefore, the Board finds that within 120 days of this decision, the applicant should be offered the chance to have the text of the disputed Page 7 corrected to reflect either of the texts below—Option A or Option B—at his discretion, and if he fails to inform PSC in writing of which of the two texts he is choosing within 120 days, PSC should correct the disputed Page 7 to show the text in Option A:

Option A:

09JUN2016: You agree to waive your rights to any future Administrative Separation Board for unsuitability and/or misconduct, where alcohol or drugs is a causative factor. If you receive a properly documented alcohol or drug incident in the future, you will be separated from the Coast Guard with no entitlement to an Administrative Separation Board.

Option B:

09JUN2016: You agree to waive your rights to any future Administrative Separation Board for misconduct. If you are processed for separation by reason of misconduct in the future, you will be separated from the Coast Guard with no entitlement to an Administrative Separation Board.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of MK1 [REDACTED], USCG, for correction of his military record is granted in part as follows:

Within 120 days of the date of this decision, he shall be offered the opportunity to have the text of the CG-3307 dated June 9, 2016, in his record corrected to show either of the two texts below—Option A or Option B—at his discretion, and if he fails to inform the Coast Guard Personnel Service Center in writing of which of the two texts he is choosing within 120 days, the CG-3307 shall be corrected to show the text in Option A:

Option A:

09JUN2016: You agree to waive your rights to any future Administrative Separation Board for unsuitability and/or misconduct, where alcohol or drugs is a causative factor. If you receive a properly documented alcohol or drug incident in the future, you will be separated from the Coast Guard with no entitlement to an Administrative Separation Board.

Option B:

09JUN2016: You agree to waive your rights to any future Administrative Separation Board for misconduct. If you are processed for separation by reason of misconduct in the future, you will be separated from the Coast Guard with no entitlement to an Administrative Separation Board.

October 26, 2018

