

**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. 2022-040**

██████████ ██████████ ██████████  
SN (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 April 27, 2022, and assigned the case to a staff attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated January 18, 2024, 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 Seaman (SN/E-3) who received an Honorable discharge on March 14, 2016, for unacceptable conduct, asked the Board to correct his record by providing him with a medical retirement. The applicant alleged that his chain of command made an error in discretion when they discharged him for unacceptable conduct instead of providing him with a medical retirement for an ankle injury he suffered while in recruit training. The applicant explained that his discharge was clearly the result of a paper trail of negative CG-3307s (“Page7”) he received between May 2015 and September 2015, and a Captain’s Mast in October 2015, but these negative Page 7s and the subsequent Captains Mast were the result of an ankle injury he had suffered. The applicant claimed that this ankle injury was the perpetual cause of his misconduct because not only did he injure the ankle in basic training, but he re-injured it while in training in May 2015. Before his ankle injury, the applicant stated, he had no negative counseling in his record. The applicant explained that he was seen at medical clinics and placed on limited duty, which drew the ire of his new chain of command. According to the applicant, his new chain of command held a grudge against him and used negative Page 7s for minor incidents in order to establish a basis for the applicant’s eventual separation from the Coast Guard.

The applicant stated that his chain of command failed to consider his ankle injury as a mitigating factor for his inability to conform to the Coast Guard Weight and Body Fat Standards. The applicant alleged that his ankle injury prevented him from being able to perform

cardiovascular exercises in order to maintain fitness standards. The applicant claimed that he made his best efforts to conform to the Coast Guard's Weight and Body Fat Standards, but he was clearly and convincingly hindered by his lingering ankle injury that stopped him from running, walking, biking, or performing other meaningful exercises. The applicant contended that rather than recognizing that his failure to maintain fitness standards was the result of his injury, his command disregarded this obvious fact and chose to admonish the applicant for his fitness struggles. The applicant argued that this willful disregard for the truth is a *prima facie* example of a material error of discretion that prejudiced him because his failure to meet fitness standards was partially the basis for his separation from the Coast Guard.

The applicant explained that despite having his dream of serving in the Coast Guard prematurely terminated, he has continued to grow as an individual and is committed to proving to those around him that he is an individual of superb character. To support his claims, the applicant submitted multiple character references. These letters describe the applicant as being compassionate, loyal, hardworking, ethical, a trusted employee and loving family man. These letters also note how the applicant's overall quality of life has suffered as a result of the injuries to his ankle. The applicant alleged that he now has difficulties with standing and walking for extended periods of time, which in turn has caused him to limit activities that he once enjoyed, such as accompanying his wife when she vacations at Disney resorts. The applicant explained that rather than spending time with his wife during vacation, he remains at home and works because the rigors of walking around a Disney park would be unbearable to him and would only hinder his wife's experience. The applicant explained that this is just one example of how he has been rendered physically disabled due to his time in the Coast Guard. The applicant claimed that he constantly suffered from symptoms such as worsening pain, swelling, limited range of motion, and ambulatory difficulties. The applicant argued that these symptoms clearly warranted an evaluation through the Physical Disability Evaluation System (PDES) to determine if he was fit for continued service in the Coast Guard. The applicant stated that although his time in the Coast Guard was relatively short, the medical issues that arose from his service will remain with him for the rest of his life.

To support his application, the applicant submitted numerous character references and medical records.

### **SUMMARY OF THE RECORD**

On July 14, 2014, the applicant enlisted in the Coast Guard and began recruit training.

On July 20, 2014, the applicant sprained his ankle, and this condition hindered him on and off until he finally graduated from recruit training in October 2014.

On May 27, 2015, while assigned to a cutter, the applicant re-injured his ankle. The applicant was placed on light duty for two weeks, with a follow-up at the end of the two weeks. In addition, he was referred to a private clinic for physical therapy.

On May 29, 2015, the Officer in Charge (OIC) of the applicant's cutter, a Master Chief Petty Officer, gave the applicant a negative Page 7 for failing to obey a lawful order earlier that

morning, after the applicant was ordered to remain at the mooring station until 1500 hours, while the cutter was underway on a training exercise. When the applicant was asked what time he left, he responded with “sometime between 1300 hours and 1400 hours.” The Page 7 stated that the applicant’s early dismissal was a violation of a direct order that was given to the applicant by a Senior Petty Officer. In addition, the applicant was cited for disobeying a standing order to clean up after himself after mealtime and for disobeying an order of the Master Chief to stop playing on his cell phone during quarters. The Page 7 stated that the applicant’s action were not becoming of a Seaman and did not uphold the Coast Guard’s Core Values of Honor, Respect, and Devotion to duty.

Between June 4, 2015, and July 9, 2015, the applicant visited a civilian rehabilitation center approximately 15 times for his sprained ankle. During this time the applicant was placed on Naproxen, given a walking boot, and placed on light duty. On July 10, 2015, the applicant was given a Fit for Full Duty status after he reported only having increased pain after prolonged ambulation.

On July 10, 2015, the applicant received a negative Page 7 for failing to meet his qualification timeline as Engineer of the Watch. The Page 7 stated that the applicant had been given 12 weeks from the day he qualified as Officer on Deck, which was April 7, 2015. The Page 7 further stated that on May 28, 2015, the applicant had been put on six weeks of light duty, limited to desk work, but the applicant was told by a Machinery Technician Second Class (MK2) that once he was found fit for full duty, he would be given his Engineer of the Watch boards. The Page 7 stated that the applicant was given sufficient time during this period to study and ask questions, but failed to do so. The applicant was admonished for his lack of effort in preparing for his boards.

On July 10, 2015, the applicant was placed on a six-month performance probationary period through January 10, 2016. The applicant was told that during the probationary period, he would be observed, counseled, and mentored to ensure he had the necessary tools available to successfully complete his probation. The applicant was informed that if he failed to successfully complete the probationary period, he would be subject to administrative separation for Unsuitability – Inaptitude. Finally, the applicant was told that in order to successfully complete his probationary period, he had to (a) pass on oral board for Engineer of the Watch by August 10, 2015; (b) complete all other required qualifications within the required timeline, pending any unforeseen circumstances preventing his qualification; and (c) receive no additional negative Page 7s or violate any article of the Uniform Code of Military Justice (UCMJ).

On July 20, 2015, the applicant received a negative Page 7 for failing to meet the Coast Guard’s Weight and Body Fat Standards in violation of COMDTINST M1020.8. The applicant was determined to be 27 pounds overweight, with a 29% body fat. The applicant was told that he had to lose 27 pounds or drop to at least a 22% body fat before February 20, 2016.

On July 22, 2015, the applicant visited his clinic for a check up on his ankle. The medical notes indicate that the applicant was ready to start working out and cleared to return to full duty and begin an exercise program.

On September 24, 2015, the applicant received a negative Page 7 for lying to another Master Chief and Chief Petty Officer on September 21, 2015. The Page 7 stated that during the applicant's watch, the bilge alarm sounded and when the Master Chief and Chief Petty Officer responded and asked the applicant if he had checked the space during his round, the applicant responded in the affirmative and stated that there was not that much water. After investigating the rudder seal, the Master Chief determined that the known leak had not gotten any worse and then asked the applicant again if he made his rounds as required. At this point, the applicant admitted that he had not made his round and that he had lied when previously asked. The applicant was admonished and was told that his actions and inactions gave his commanding officer reason to believe that the applicant could not be trusted to act in the capacity of Engineer of the Watch. The applicant's qualifications were rescinded. Finally, the Page 7 stated that the applicant's actions were in direct violation his previous Page 7, dated July 10, 2015, wherein he was warned that he was not to receive any additional negative Page 7s during his probationary period.

On October 9, 2015, the OIC of the cutter, issued a memorandum, "Recommendation for Discharge..." to Coast Guard Enlisted Personnel Management (EPM), wherein he recommended that the applicant be separated from the Coast Guard with an Honorable characterization of service for Unsuitability due to inaptitude. The BMCM acknowledged that the applicant was eligible for the Commandant's "Second Chance Program,"<sup>1</sup> but did not recommend the applicant for the program.

On October 9, 2015, the OER issued a memorandum, "Notification of Intent to Discharge," wherein he informed the applicant that he had initiated discharge proceedings against the applicant as a result of the applicant failing to successfully complete his six-month probationary period. The applicant was told of his right to consult with an attorney and that he might be considered for a General—Under Honorable Conditions discharge and that if given a General discharge, he should expect to encounter prejudice in his civilian life. The applicant was also informed of his eligibility for the Commandant's "Second Chance Program" and his right to submit a statement on his own behalf within five working days. This same day the applicant acknowledged receipt of the OIC's notification. He objected to his discharge, acknowledged his understanding that he might receive a General discharge, acknowledged that he had been provided the opportunity consult with an attorney, requested to be considered for the Commandant's "Second Chance Program," and elected to submit a personal statement on his own behalf.

On October 21, 2015, the applicant underwent Non-Judicial Punishment (NJP) and was punished by his Commanding Officer (CO) for failing to obey a lawful general order or regulation and making a false official statement. The applicant was advised of his right to confer with counsel and voluntarily consented to the proceedings. At mast, the applicant was ordered to pay \$60.78 for one month and to work an additional 10 days of duty.

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<sup>1</sup> Article 1.B.1.a. of the Military Separations Manual, COMDTINST M1000.4, states, "In an effort to retain good, solid first-term performers with potential, but who have made a youthful mistake that would otherwise result in their discharge, the Commandant has established a "Second Chance Program". The Second Chance Program authorizes the first Flag Officer/SES in the chain-of-command of the first-term performers to waive all policy discharge authorities (except as noted below) contained in Articles 1.B.9., 1.B.12., 1.B.15., and 1.B.17. of this Manual."

On December 9, 2015, the applicant's CO issued a First Endorsement, wherein he concurred with the OIC that the applicant should be discharged for unsuitability. The CO further stated that although the applicant was eligible for the Coast Guard's "Second Change Program," he did not recommend that the applicant be allowed to continue under this program.

On January 25, 2016, the applicant's District Commander submitted a Second Endorsement, wherein he found that it was not in the best interest of the Coast Guard to waive the consequences of the applicant's actions and agreed with the applicant's unit that he should be discharged from the Coast Guard.

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

On November 22, 2022, 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).

The JAG argued that the applicant failed to submit a timely application and failed to show why it was in the interest of justice to excuse the delay. The JAG stated that here, the applicant was discharged in 2016 and was provided with a DD-214 reflecting his characterization of service and the reason for his discharge as "Unacceptable Conduct." The JAG argued that the applicant's DD-214 should have put the applicant on notice of the error and/or injustice in his record, namely that he was not separated for medical reasons. The JAG stated that the applicant provided no legitimate reason to account for untimely request for relief. Finally, the JAG explained that turning to a cursory review of the merits, while the applicant has provided evidence that he incurred an ankle injury while serving on active duty, the applicant has not proven that the injury was of a nature that would have entitled him to a medical separation or retirement, nor has he proven that the Coast Guard erred in separating him for unacceptable conduct. Accordingly, the JAG argued that the applicant has failed to provide good cause for his failure to timely file his application for relief, and it is not in the interest of justice to waive the statutory three-year filing deadline.

The JAG further argued that even if the Board were to find good cause to waive the statute of limitations, the applicant still failed to overcome the presumption of regularity afforded to the Coast Guard. The JAG argued that the applicant bears the burden of proving error, and here, he has failed to offer any evidence that the Coast Guard committed an error or injustice. The JAG explained that the sole criteria for being referred to the PDES is the individual's ability to perform the duties of his office, grade, rank or rating due to an injury incurred or aggravated through military service. In addition, the JAG stated that additionally, the PDES manual states that a member must be referred to a Medical Evaluation Board (MEB) by an authorized authority, of meet one of the situations enumerated in Article 3.D. of the PDES manual. In the applicant's case, the JAG explained that while the applicant provided medical documentation showing he had an impairment, it was not of a permanent nature and he responded to treatment and was returned to full duty. In addition, there is no evidence that the applicant was referred to an MEB by an authorized authority as required by policy, nor did the applicant's injury fall under one of the situations enumerated in Article 3.D. of the PDES manual. Finally, the JAG explained that members being processed for separation or retirement for reasons other than physical disability, like the applicant, shall not be referred for disability evaluation unless their physical condition

reasonably prompts doubt that they are fit to continue to perform adequately in their assigned duties.

Regarding the applicant's claims that his ankle injury was the actual basis for his separation because his placement on light duty "drew the ire" of this chain of command and that his documented misconduct was the result of his command holding a grudge against him, the JAG argued that the applicant failed to provide any evidence to substantiate his claims. In addressing the applicant's claim that his separation for unsuitability was erroneous because his weight probation was partially the basis for his separation, the JAG stated the applicant's arguments fail because the applicant's nonconformity to weight standards was not the basis for his discharge and was never mentioned as a basis in the recommendation for discharge.

The JAG argued that the applicant's discharge was also procedurally proper. According to the JAG, following documented deficiencies, the applicant was placed on performance probation and then failed to abide by the terms of that performance probation when he committed misconduct. The JAG explained that following the applicant's failure to satisfy his probation, the applicant's command notified him of their intent to initiate separation proceedings against him and then processed the separation paperwork in accordance with policy.

Finally, the JAG argued that the applicant's arguments of his growth as an individual, supported by numerous character references, is insufficient to support claims that his discharge was erroneous or unjust. In addition, the applicant's separation for unsuitability as a result of documented misconduct is not the sort of action that shocks the sense of justice. For the reasons outlined above, the JAG argued that the applicant's request for relief should be denied.

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

On November 25, 2022, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. The Chair received the applicant's response on January 24, 2023.

The applicant alleged that due to his ankle injury he was unable to work out and was subsequently placed on weight probation when he received his NJP, due to his ankle injury. The applicant contended that the advisory opinion overlooked entirely that the underlying basis for the applicant's probationary status was because of his failure to maintain weight standards while he rehabilitated his ankle. In fact, the applicant stated that he was not cleared to return to an exercise regimen until July 22, 2015, one week after his failure to maintain height and weight body standards. The applicant stated that although his failure to meet weight and body fat standards was not cited as a basis for his separation proceedings, the fact remains that he would not have been recommended for separation if he had not violated his weight probation in the first place. Accordingly, the applicant claimed that the JAG completely failed to address the material error that the applicant presented in his supplemental brief to this Board.

The applicant contended that his command made a material error of discretion when they failed to have the applicant evaluated for a medical separation. The applicant argued that medical professionals would have been best suited to determine if the applicant should have been processed

through the PDES, but instead the applicant was robbed of this opportunity. In light of these facts and the arguments presented, the applicant requested that he be processed through the PDES to determine if he was fit for duty at the time of his discharge.

### APPLICABLE LAW AND POLICY

Article 1.B. of the Military Separations Manual, COMDTINST M1000.4, provides the following guidance on separating enlisted members of the Coast Guard:

**Article 1.B.1.a. Discharge Authority.**

(1) Commander, Coast Guard Personnel Service Center is the Discharge Authority in all cases of administrative separation except in those cases specified in Articles 1.B.7, 1.B.9, 1.B.11, 1.B.14, 1.B.15, and 1.B.19. of this Manual in which the district commander, logistics/service center commands, or commanding officer, as appropriate, may be the Discharge Authority.

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**Article 1.B.1.e. Cases Involving Concurrent Disability Evaluation and Disciplinary Action.**

(1) Disability statutes do not preclude disciplinary separation. The separations described here supersede disability separation or retirement. If Commander (CG PSC-PSD-mr) is processing a member for disability while simultaneously Commander (CG PSC-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 (CG PSC-PSD-mr) suspends the disability evaluation and Commander (CG PSC-EPM-1) considers the disciplinary action. If the action taken does not include punitive or administrative discharge for misconduct, Commander (CG PSC-EPM-1) sends or returns the case to Commander (CG PSC-PSD-mr) 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).

(2) Notwithstanding subparagraph 1.B.1.e.(1) of this Manual, disability evaluation in a member's case may proceed if Commander (CG PSC) or the Commandant (CG-00) so direct. In such a case, the Commandant decides the ultimate disposition.

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**Article 1.B.15.b. Causes for Discharge for Unsuitability.** The purpose of discharges for unsuitability is to free the Service of members considered unsuitable for further service because of:

(1) Inaptitude. Applies to members best described as unfit due to lack of general adaptability, want or readiness of skill, clumsiness, or inability to learn.

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The Coast Guard Physical Disability Evaluation System's Manual, COMDTINST M1850.2C, provides the following guidance about "Cases Involving Disability Evaluation and Disciplinary Action Concurrently":

**Article 2.C.2. Fit For Duty (FFD) and Not Fit for Duty (NFFD).** The following policies relate to fitness for duty.

a. The sole standard in making determinations of physical disability as a basis for retirement or separation shall be unfitness to perform the duties of office, grade, rank, or rating because of disease or injury incurred or aggravated through military service. Each case is to be considered by relating the nature and degree of physical disability of the evaluatee concerned to the requirements and duties that a member may reasonably be expected to perform in his or her office, grade, rank, or rating. In addition, before separation or permanent retirement may be ordered:

(1) there must be findings that the disability

(a) is of a permanent nature and stable; and

(b) was not the result of intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence.

**Article 2.C.11. Cases Involving Disability Evaluation and Disciplinary Action Concurrently.**

a. Disability statutes do not preclude disciplinary or administrative separation under applicable portions of the Personnel Manual, COMDTINST 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 the Commander, Coast Guard Personnel Command. (see Article 12-B-1.e., Personnel Manual, COMDTINST M1000.6 (series)).

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 based on the applicant's military record and submissions, the Coast Guard's submission and applicable law:

1. The Board has jurisdiction over this matter under 10 U.S.C. § 1552(a) because the applicant is requesting correction of an alleged error or injustice in his Coast Guard military record. The Board finds that the applicant has exhausted his administrative remedies, as required by 33 C.F.R. § 52.13(b), because there is no other currently available forum or procedure provided by the Coast Guard for correcting the alleged error or injustice that the applicant has not already pursued.

2. The application filed by the applicant was not timely. To be timely, an application for the correction of a military record must be submitted to the Board within three years after the alleged error or injustice was discovered or should have been discovered.<sup>2</sup> The record shows that the applicant signed and received his DD-214 on March 14, 2016. Therefore, the preponderance of the evidence shows that the applicant knew of the alleged error in his record in March 2016, and his application is untimely.

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

3. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.<sup>3</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 “analyzing both the reasons for the delay and the potential merits of the claim based on a cursory review”<sup>4</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>5</sup> Pursuant to these requirements, the Board finds the following:

a. Regarding his delay in filing his application, the applicant failed to explain what caused his delay in applying to the Board for relief. The Board finds that the applicant’s request for consideration is not persuasive because he has failed to show that anything prevented him from seeking correction of the alleged error or injustice more promptly.

b. A cursory review of the merits of this case shows that the applicant’s claim lacks potential merit. Not only has the applicant failed to submit evidence sufficient to overcome the presumption of regularity afforded to the Coast Guard’s records and its officials, but the record shows that after being placed on performance probation, the applicant received a subsequent negative Page 7 for failing to obey an order and making false official statements, which was in violation of the terms of his performance probation. This misconduct also led to the applicant being punished at Captain’s Mast. The applicant alleged in his response to the advisory opinion that his separation was due to his weight probation not his performance probation, but this is clearly rebutted by the record in this case. Yes, the applicant was placed on weight probation, but this probation was separate and distinct from the applicant’s performance probation and from the misconduct that led to the applicant’s failure to satisfactorily complete his performance probation.

Although the applicant’s record does show that he suffered an ankle sprain while he was in recruit training, the record also shows that the applicant recovered, graduated from recruit training, and thereafter continued to perform his duties despite the injury. There is no evidence that the applicant’s ankle condition caused any of the performance problems for which he received Page 7s and was punished at mast. Therefore, there is no evidence that his ankle condition caused or contributed to his discharge. Moreover, an inability to perform one’s assigned duties is the sole standard in making determinations of physical disability under Article 2.C.2. of the Coast Guard Physical Disability Evaluation System’s Manual, COMDTINST M1850.2C. The applicant’s record is presumptively correct and the applicant has failed to show why it is in the interest of justice to waive the statute of limitations in his case to do a more thorough review of the record and evidence.

4. Accordingly, the Board will not excuse the applicant’s untimeliness or waive the statute of limitations to conduct a more thorough review of the merits. The applicant’s request should therefore be denied.

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<sup>3</sup> 10 U.S.C. § 1552(b).

<sup>4</sup> *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

<sup>5</sup> *Id.* at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

**ORDER**

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

January 18, 2024

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