

**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. 2015-002**



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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. After receiving the completed application on January 7, 2014, the Chair docketed the case and prepared the draft decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated September 18, 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 asked the Board to “[r]emove all felony charges on my federal record. Request a move to expunge if necessary.” The applicant explained that he was “[c]harged with [a] felony simply because [the] offense occurred on Federal property. Tried in Coast Guard Special Court Martial where I was never convicted of felony charges.” The applicant explained that because of a new Coast Guard policy, he would be prevented from reenlisting when his enlistment expires on February 2, 2015, because of his 2006 felony charges. The charges are unjustly preventing him from continuing his Coast Guard career.

The applicant alleged that he discovered this error in his record on July 20, 2014. He also alleged that it is in the interest of justice for the Board to consider his application because “[t]he felony on my record prevents me from pursuing certain occupations. Over 7 years have past [sic] and I have learned from my offenses. I respectfully request the opportunity to continue on my career paths unfettered by previous transgressions.”

In support of his allegations, the applicant submitted a copy of his October 31, 2014, performance evaluation, on which he received numerous excellent and superior marks in the twenty-five performance categories, as well as other documents that are included in the summary below.

### SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on December 18, 2002, at age 29, and earned the [REDACTED] rating. He had previously served in the U.S. Navy for four years.

In 2005, the applicant was assigned to the armory of a large Sector. In the early morning hours of February 21, 2005, the applicant drank alcohol, drove recklessly around a National Recreation Area adjacent to his base with two passengers, and drove his truck over a small tree. He was arrested by a park ranger and charged with DUI and several other offenses. He was issued Notices to Appear before a magistrate in a U.S. federal district court on April 13, 2005, on the following charges:

- Driving under the influence (DUI),
- Destroying a tree,
- Failing to comply with a law enforcement officer,
- Failing to yield to an emergency vehicle,
- Reckless driving,
- Failing to stop at a stop sign,
- Interfering with an agency function,
- Destroying government property,
- Refusing to take a breathalyzer test,
- Disorderly conduct,
- Leaving the scene of a vehicular accident, and
- Failing to report a vehicular accident.

Instead of being handled in federal district court, the charges were referred for trial by special court-martial. In a pretrial agreement, the applicant pled not guilty to two charge specifications—failing to report an accident and interfering with an agency function by resisting a government agent and fleeing in his vehicle—and pled guilty to five charge specifications: drunk and disorderly; reckless driving; interfering with an agency function by failing to follow the ranger's lawful orders with regard to his movements; failing to stop at a stop sign; and recklessly wasting government property by running over a tree worth \$200.

The applicant also signed a stipulation of facts in which he admitted drinking alcohol that night; driving recklessly in his truck with two other members as passengers; failing to stop at a stop sign; damaging a tree; ignoring the order of a park ranger to roll down the windows and put his hands in the air; ignoring another order to keep his hands in the air; failing to answer the ranger's question about whether there were weapons in the car; telling the ranger, "Come on man, professional courtesy, I work at the Armory at the Coast Guard," and "You don't have to be an asshole"; failing to keep his hands on the bed of the truck, as directed by the ranger, and putting them in his pockets instead; walking away from his truck, where the ranger was trying to arrest him, and toward the ranger's vehicle; using obscene, offensive, and abusive language toward law enforcement officials; refusing to take a breathalyzer test; and failing to pass a field sobriety test.

At trial on August 9, 2005, the applicant was sentenced to reduction in rank from E-4 to E-2; forfeiture of \$200 per month for three months; and confinement for ninety days. On February 7, 2006, the Convening Authority approved the sentence except that the forfeiture was suspended on condition of good behavior. Pursuant to the pretrial agreement, the applicant's confinement beyond sixty days was also suspended, and he was released after fifty-one days for good behavior. On April 7, 2005, following legal review, the JAG remanded the case to the convening authority because the Convening Authority had "approved the confinement without regard to the agreement's suspension requirement." (The JAG was apparently unaware that the applicant had been released after fifty-one days.) On May 3, 2006, the Sector Commander advised the JAG of the applicant's period of confinement. According to the Office of Military Justice, the case became final on June 9, 2006.

On January 4, 2007, the applicant's command counseled him about failing to report an incident in which after drinking alcohol, he was a passenger in a vehicle with an impaired driver, who lost control of the vehicle, slid off the road, and damaged grass and shrubbery in a National Park.

From July 2007 through April 2010, the applicant served in the Safety and Security Branch of a large Sector office. He was awarded an Achievement Medal for this service. During this assignment, on December 3, 2008, the applicant reenlisted for six years, through December 2, 2014.

The applicant's next duty station was a cutter. According to a Report of Offense in his record, on November 10, 2010, the applicant was charged with two offenses under the UCMJ for his misconduct the day before:

- Article 92, Dereliction in the Performance of Duties: In that the accused did not perform proper PMS on ship's weapons. Member did not use appropriate PMS cards required when completing PMS. Several weapons were found in an unsatisfactory and unsafe condition.
- Article 107, False Official Statement: In that the accused logged PMS complete even though it was done incorrectly, if completed at all.

The cutter's law enforcement and security officer filed the report and two senior gunner's mates served as witnesses. With the applicant's consent, the charges were referred to a captain's mast, instead of court-martial. At mast on November 10, 2010, the captain of the cutter found that the charges were proven by a preponderance of the evidence and awarded the applicant restriction to the cutter with extra duties for thirty days.

On March 7, 2014, the Commandant issued ALCOAST 093/14, announcing the "Implementation of Additional Reenlistment Criteria" effective as of March 17, 2014. Under ALCOAST 093/14, to be eligible to reenlist, a member could "[h]ave 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 their current period of enlistment. Paragraph 4 of the ALCOAST stated the following:

Members must meet all eligibility requirements to reenlist/extend. Members who meet the eligibility criteria but are not recommended for reenlistment by their commanding officer who have less than eight years total active and/or reserve military service may submit an appeal to CG PSC-EPM-1 for active duty members or CG PSC\_RPM-1 for reserve members. Members who have eight or more years of total active and/or reserve military service are entitled to a reenlistment board. Additionally, members who do not meet the eligibility criteria, but are recommended for reenlistment/extension by their commanding officer, may also submit an appeal to CG PSC-EPM-1 for active duty members or CG PSC-RPM-1 for reserve members, regardless of total years of service.

On October 1, 2014, the staff judge advocate for the Personnel Service Center (PSC) sent a staff judge advocate in the General Law Division an email with the following information regarding how paragraph 4 of ALCOAST 093/14 was to be interpreted:

- 1) Eligible & recommended = reenlist
- 2) Eligible & not recommended = request a waiver/appeal from epm-1 (less than 8 years' service) or reenlistment board (over 8 years' service)
- 3) Not eligible & recommended = request a waiver/appeal from epm-1 regardless of years in service – no reenlistment board
- 4) Not eligible & not recommended = no reenlistment, no waiver/appeal

The record before the Board does not show whether the applicant's commanding officer recommended him for reenlistment, but because the applicant did not meet the new reenlistment eligibility criteria, he was not allowed to reenlist when his enlistment expired in December 2014. He apparently did not receive a reenlistment board.

Although the applicant's enlistment was scheduled to end on December 2, 2014, it was extended for two months, to February 2, 2015, to ease his transition to civilian life.

On February 2, 2015, the applicant received an honorable discharge with an RE-3 reenlistment code, a KBK separation code,<sup>1</sup> and a narrative reason for separation of "Completion of Required Active Service" under Article 1.B.11.A. of the Military Separations Manual, COMDT-INST M1000.4. He had served on active duty in the Coast Guard and Navy for a total of 16 years, 1 month, and 15 days.

On June 18, 2015, the Personnel Records Review Board (PRRB) issued decision 010-15 for another member's complaint about not being reenlisted under the new rules. The member was not eligible to reenlist under the rules but was recommended for reenlistment by his command. He appealed his ineligibility to reenlist, but his appeal was denied due to lack of Service need for members of his rating. The veteran's case was not considered by a reenlistment board.

The PRRB found that the denial of the applicant's appeal was proper due to the lack of Service need but that, because he had more than eight years of service, he had been improperly denied a reenlistment board based on paragraph 4 of ALCOAST 093/14.

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<sup>1</sup> Under the SPD Handbook, separation code KBK denotes a "voluntary discharge allowed by established directive upon completion of required service." The corresponding involuntary code is JBK.

The PRRB recommended that the member be granted a reenlistment board, noting that ALCOAST 093/14 “does not state that the eligibility requirements for reenlistment boards contain [REDACTED] supersede the entitlements addressed in COMDTINST M1000.4, Military Separations.” Article 1.B.5.c. of that manual states that members with eight or more years of total active and/or reserve military service have the right to a reenlistment board.

The PRRB also recommended that the Commandant clarify the policy regarding entitlement to reenlistment boards. The PRRB noted that ALCOAST 093/14 included a link to a webpage with answers to frequently asked questions about the new rules that were inconsistent with the provisions of paragraph 4 of the ALCOAST and in conflict with Article 1.B.5.c. of COMDTINST M1000.4.

The PRRB’s recommendations were approved. On July 6, 2015, the Commandant issued ALCOAST 274/15, “Amendment to ALCOAST 093/14 Reenlistment Criteria.” ALCOAST 274/15 stated the following in pertinent part:

1. [ALCOAST 093/14] remains valid.
2. Effectively immediately, paragraph 4 of [ALCOAST 093/14] is amended to include the following: Members who do not meet the reenlistment 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.
3. Members meeting criteria in [ALCOAST 093/14], but who are not recommended for reenlistment, and who have eight or more years total active and/or reserve military service, are entitled to a reenlistment board.
4. Final authority regarding the decision to approve reenlistments for members who do not meet the eligibility criteria in [ALCOAST 093/14] rests with CG PSC (epm) or CG PSC (rpm). Commands may recommend members for reenlistment even if they do not meet the criteria in [ALCOAST 093/14] ...

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

On July 23, 2015, the Judge Advocate General of the Coast Guard (JAG) submitted an advisory opinion in which he recommended that the Board deny relief in this case.

The JAG stated that under COMDTINST M5212.12A, Section II, Chapter 5, courts-martial case files for “Special Courts Martial other than those involving Bad Conduct Discharges” are authorized to be “[d]estroy[ed] 10 years after date of final action.” The JAG stated that because final action was taken on the applicant’s case on June 9, 2006, the case file is not authorized to be destroyed until June 9, 2016. Accordingly, the JAG argued, the applicant’s request to have those records removed from his file should be denied.

The JAG did not address the applicant’s complaint about being unjustly discharged pursuant to a new policy.

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

On July 27, 2015, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within thirty days. No response was received.

### APPLICABLE LAW AND POLICY

Title 10 U.S.C. § 1169 states the following regarding the separation of enlisted members:

No regular enlisted member of an armed force may be discharged before his term of service expires, except—

- (1) as prescribed by the Secretary concerned;
- (2) by sentence of a general or special court martial; or
- (3) as otherwise provided by law.

On March 7, 2014, the Commandant issued ALCOAST 093/14, announcing the “Implementation of Additional Reenlistment Criteria” effective as of March 17, 2014, which authorized additional eligibility criteria for reenlistment “[t]o ensure the Coast Guard retains a disciplined, high-performing workforce”:

2. In addition to the eligibility requirements listed in Articles 1.A.5. and 1.A.7. of REF A, all active and reserve members, regardless of duty status, must meet the following eligibility requirements during their current period of enlistment (to include any extensions):

- a. Achieve a minimum factor average of 3.5 on their enlisted performance evaluations,
- b. Have no more than one unsatisfactory conduct mark,
- c. Have no special or general courts-martial conviction,
- d. Have no conviction by a civil court equivalent to a felony-type offense,
- e. Have no documented offense for operating a vehicle, or any other motorized mode of transportation, under the influence of alcohol or controlled substances,
- f. 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,
- g. Have not had their personal-use government travel charge card permanently revoked for misuse or delinquency,
- h. Have no more than three weight probationary periods, and
- i. Have no documented incident as a perpetrator of sexual assault.

3. The commanding officers recommendation remains an integral part of the reenlistment process and provides commands an opportunity to clearly articulate a member’s suitability for continued service. ...

4. Members must meet all eligibility requirements to reenlist/extend. Members who meet the eligibility criteria but are not recommended for reenlistment by their commanding officer who have less than eight years total active and/or reserve military service may submit an appeal to CG PSC-EPM-1 for active duty members or CG PSC\_RPM-1 for reserve members. Members who have eight or more years of total active and/or reserve military service are entitled to a reenlistment board. Additionally, members who do not meet the eligibility criteria, but are recommended for reenlistment/extension by their commanding officer, may also submit an appeal to CG PSC-EPM-1 for active duty members or CG PSC-RPM-1 for reserve members, regardless of total years of service.

5. These updated reenlistment eligibility criteria are effective 17 March 2014. Article 1.B.4.b. of REF B requires commands to conduct a pre-discharge interview approximately six months prior to a member’s expiration of enlistment (EOE) to notify a member whether they are eligible to reenlist. ...

6. Members not eligible for reenlistment/extension of enlistment will be discharged from the active or reserve component, as applicable, upon the expiration of their enlistment in accordance with the provisions of Article 1.B.11. of REF B [Military Separations Manual] with an RE-3 reenlistment code. [Emphasis added.]

Article 1.B.11. of COMDTINST M1000.4, the Military Separations Manual, authorizes discharges due to expiration of enlistment. Article 1.B.5. provides the “Processing Procedures for Personnel Ineligible to Reenlist.” Under Article 1.B.5.c., a member with more than eight years’ of service who is not eligible to reenlist must be notified of his or her entitlement “to present the case and appear in person before a reenlistment board” and to be represented by counsel.

### FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant’s military record and submissions, the Coast Guard’s submission, and applicable law:

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

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>2</sup>

3. The applicant alleged that he was unjustly being discharged due to federal charges in his record from 2005 and asked the Board to remove the charges so that he would be allowed to reenlist when his enlistment ended on February 2, 2105. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant’s military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.<sup>3</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>4</sup>

4. The Board finds no grounds for removing the records of the 2005 court-martial from the applicant’s record. As the JAG noted, under COMDTINST M5212.12A, Section II, Chapter 5, courts-martial case files for “Special Courts Martial other than those involving Bad Conduct Discharges” are authorized to be “[d]estroy[ed] 10 years after date of final action.” Because final action on the applicant’s court-martial was taken on June 9, 2006, the case files with the charges and record of trial should remain in the applicant’s record until June 9, 2016.

5. Contrary to the applicant’s allegations, the 2005 charges did not cause him to be ineligible to reenlist because they did not occur during the enlistment period in effect in 2014. Under ALCOAST 093/14, only offenses occurring “during their current period of enlistment” could prevent a member from being eligible to reenlist, and the 2005 charges occurred during the applicant’s prior period of enlistment. The applicant reenlisted for six years on December 3, 2008, and so according to his records, only the offenses for which he was punished at mast on November 10, 2010, could make him ineligible to reenlist pursuant to the new criteria announced

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<sup>2</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>3</sup> 33 C.F.R. § 52.24(b).

<sup>4</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).

in ALCOAST 093/14. His November 2010 violation of Article 107, False Official Statement, made him ineligible to reenlist under the new criteria because the maximum punishment for that offense under the UCMJ includes a punitive discharge.

6. The applicant did not complain about the fact that he received no reenlistment board pursuant to Article 1.B.5.c. of the Military Separations Manual although he had performed more than sixteen years of active duty when he was discharged. With regards to this entitlement, paragraph 4 stated of ALCOAST 093/14 stated the following in pertinent part:

Members who meet the eligibility criteria but are not recommended for reenlistment by their commanding officer who have less than eight years total active and/or reserve military service may submit an appeal to CG PSC-EPM-1 for active duty members or CG PSC\_RPM-1 for reserve members. Members who have eight or more years of total active and/or reserve military service are entitled to a reenlistment board.

Read alone, the second sentence above appears to give the applicant a right to a reenlistment board because he had more than eight years of active duty. Read in conjunction, however, these two sentences appear to mean that members with less than eight years who are eligible but not recommended to reenlist may appeal, while such members with more than eight years are entitled to a reenlistment board. According to the JAG's email dated October 1, 2014, the latter is the interpretation the Coast Guard was applying in 2014.

7. In PRRB 010-15, the PRRB awarded an applicant a reenlistment board while noting the inconsistencies between ALCOAST 093/14, COMDTINST M1000.4, the FAQs on the Coast Guard webpage, and PSC's interpretation. The PRRB also recommended that PSC clarify the policy regarding entitlement to a reenlistment board. In response, on July 6, 2015, PSC issued ALCOAST 274/15 to amend ALCOAST 093/14 by specifying that "[m]embers who do not meet the reenlistment 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."

8. The applicant did not actually complain about not receiving a reenlistment board in his application and so the issue was not addressed in the Coast Guard's advisory opinion. Only research by the BCMR staff has revealed the policy that caused the applicant to be ineligible to reenlist and the two possible, different interpretations of the policy with respect to members' entitlement to reenlistment boards. Therefore, the Board finds that this issue is not ripe for decision by the Board because neither the applicant nor the Coast Guard has properly addressed it in their submissions.

9. Likewise, the applicant did not complain that his DD 214 reflects a voluntary discharge (separation code KBK), instead of an involuntary discharge (JBK), upon completion of his enlistment. Members discharged voluntarily are not entitled to full or half separation pay, but members discharged involuntarily may be entitled to full or half separation pay under the terms of COMDTINST 1910.1<sup>5</sup> and the Coast Guard Pay Manual. The applicant apparently did not

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<sup>5</sup> Under COMDTINST 1910.1, members who have more than 6 years of service and are fully qualified for retention but are either separated pursuant to a reduction in force or are not recommended for reenlistment when their enlistments end and are involuntarily, honorably discharged are entitled to full separation pay if they will sign an agreement to serve in the Ready Reserve for three years. (The Coast Guard does not actually have to enlist the member into the Reserve for the member to receive separation pay.) Members who have more than 6 years of



receive separation pay, and he did not complain about not receiving separation pay. Nor did the Coast Guard address the issue of separation pay or the applicant's separation code in its advisory opinion. Because neither the applicant nor the Coast Guard addressed these important issues in their submissions, the Board finds that they are not ripe for decision.

10. Although the applicant's request for removal of the 2005 charges from his record should be denied, his allegation that he was unjustly discharged under the separation policies in effect in February 2015 should be dismissed without prejudice so that the applicant may reapply to have the Board address the actual causes and circumstances of his discharge. If the applicant chooses to reapply, he should do so reasonably expeditiously, and he should address, at a minimum, the following matters in his application to the Board:

- Whether he was or should have been eligible to reenlist under ALCOAST 093/14;
- Whether he was recommended for reenlistment by his command in 2014;
- Whether he appealed his non-reenlistment to PSC;
- Whether he was or should have been entitled to a reenlistment board;
- Whether his discharge was voluntary or involuntary;
- Whether his discharge was in accordance with law and policy or improper/illegal;
- Whether his separation code on his DD 214 is correct; and
- Whether he should be entitled to full or half separation pay.

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service and are not fully qualified for retention when their enlistments end and receive an honorable or general discharge may receive half separation pay if they will sign an agreement to serve in the Ready Reserve for three years. Also, “[i]n extraordinary instances, Commandant may award full separation pay to members otherwise eligible for half separation pay when the specific reasons for separation and overall quality of the member's service have been such that denial of such pay would clearly be unjust.”

**ORDER**

The application of former [REDACTED] [REDACTED] USCG, for correction of his military record is denied, but his allegation that he was unjustly discharged under the separation policies in effect in February 2015 is dismissed without prejudice for the reasons stated in the findings above.

September 18, 2015

