

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2021-009

██████████ ██████████
SN (former)

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 December 15, 2020, and assigned the case to the Deputy Chair to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated February 11, 2022, 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 a general discharge under honorable conditions on February 6, 2017, for misconduct due to the commission of a serious offense, asked the Board to correct his record by upgrading his discharge to honorable.¹

The applicant stated that he was found guilty at a special court-martial² of several violations under the Uniform Code of Military Justice (UCMJ). Specifically, he stated that he was found guilty of driving under the influence (DUI), assault, and indecent language. The applicant argued that his general discharge is erroneous because that there was insufficient evidence to convict him.

¹ There are five types of discharge: three administrative and two punitive. The three administrative discharges are honorable, general under honorable conditions, and under other than honorable (OTH) conditions. The two punitive discharges may be awarded only as part of the sentence of a conviction by a special or general court-martial. A special court-martial may award a bad conduct discharge (BCD), and a general court-martial may award a BCD or a dishonorable discharge.

² There are three types of courts-martial: A summary court-martial consists of a single commissioned officer as the trier of fact, the decision does not constitute a criminal conviction, and the sentence is limited and cannot include a punitive discharge; a special court-martial consists of a military judge and (if a panel is requested by the accused) a panel of at least three members as the trier of fact, the decision constitutes a criminal conviction, and the sentence is less limited and may include a BCD and up to a year of confinement; a general court-martial includes a judge and a panel of at least five military members, and the sentence may include a lengthy confinement, BCD or dishonorable discharge, and death. At the time, in all courts-martial, the convening authority retained the power to set aside findings of guilty and reduce any sentence.

To support this assertion, he argued that there are several witnesses who could corroborate his story. However, the applicant did not provide any evidence to support his request. The applicant also argued that his general discharge is unjust because he was falsely accused of sexual assault.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on March 3, 1999. He ultimately selected the Machinery Technician rating.

On September 14, 2009, the applicant received an Administrative Remarks form (“Page 7”) that documented his first alcohol incident. The Page 7 stated that he received an alcohol incident because his abuse of alcohol was determined to be a significant and/or causative factor when he was arrested on suspicion of DUI. The applicant was advised that any further incident would result in him being processed for separation in accordance with Chapter 20 of the Coast Guard Personnel Manual.

On January 23, 2015, the applicant received a Page 7 that documented his second alcohol incident. The Page 7 stated that he received an alcohol incident because his abuse of alcohol was determined to be a significant and/or causative factor when he was accused of sexual assault against a female active duty member. Specifically, on October 29, 2014, after consuming an excessive amount of alcohol, the applicant inappropriately touched the buttocks of a female Coast Guard member.

On February 3, 2015, the applicant received a Page 7 that documented his third alcohol incident. The Page 7 stated that he received an alcohol incident because his abuse of alcohol was determined to be a significant and/or causative factor in his behavior at a Coast Guard sponsored baseball game where he was seen slapping a female member on the buttocks. Since this was the applicant’s third alcohol incident, he was advised that he would be processed for separation in accordance with Chapter 2 of the Coast Guard Drug and Alcohol Abuse Program.

On January 12, 2016, a special court-martial was convened regarding the applicant’s case. He was charged with seven violations of the UCMJ: one specification of drunken or reckless operation of a vehicle, aircraft, or vessel,³ five specifications of assault,⁴ and one specification of a general violation.⁵ The applicant’s charges were detailed as follows:

Charge I: Violation of the UCMJ, Article 111

Specification: [The applicant]... on or about 29 October 2014, did operate a vehicle while drunk.

Charge II: Violation of the UCMJ, Article 128

Specification 1: [The applicant]... did... on or about 10 September 2014, on divers occasions, attempt to unlawfully strike [the victim] on the buttocks with his hand.

³ Article 111, UCMJ.

⁴ Article 128, UCMJ.

⁵ Article 134, UCMJ.

Specification 2: [The applicant]... did... on or about 10 September 2014, unlawfully strike [the victim] on the buttocks with his hand.

Specification 3: [The applicant]... did... on or about 10 September 2014, unlawfully grab [the victim] by the shorts with his hand.

Specification 4: [The applicant]... did... on or about 29 October 2014, attempt to unlawfully strike [the victim] on the buttocks with his hand.

Specification 5: [The applicant]... did... on or about 29 October 2014, unlawfully strike [the victim] on the buttocks with his hand.

Charge III: Violation of UCMJ, Article 134

Specification: [The applicant]... did... from on or about September 2014 to on or about October 2014, on divers occasions, orally communicate to [victim 1] and [victim 2], certain indecent language to wit: "Do you guys ever do scissoring... do you ever use dildos?" or words to that effect, such conduct being to the prejudice and good order and discipline in the armed forces.

On January 14, 2016, the applicant was convicted on all charges except specifications 1 and 3 of Article 128. The applicant was sentenced to restriction for two months, performance of hard labor without confinement for three months, reduction to E-3, and forfeiture of \$500 a month for six months.

On March 31, 2016, the applicant was notified that his CO had initiated action to separate him from the Coast Guard due to the commission of serious offenses. The CO cited the applicant's violations of the UCMJ, including Articles 111, 128, and 134, as the reason. The applicant was notified that in addition to committing serious offenses, he had also failed to comply with the Coast Guard's Drug and Alcohol policy and was eligible for discharge as a result of having three documented alcohol incidents. The applicant was further notified that the least favorable characterization of service he could receive was under other than honorable conditions. The applicant was advised of all of his rights afforded to him during an Administrative Separation Board (ASB) proceeding. He was also advised that he could conditionally or unconditionally waive his right to appear before an ASB, the former being done on the basis that he receive a certain type of discharge and characterization of service.

That same day, the applicant acknowledged that he received his CO's notice to separate him from the Coast Guard. He also acknowledged that he read and understood the information contained in the notice for separation. Specifically, the applicant acknowledged that he understood that if he received a general discharge, he could be deprived of some rights and privileges available to honorably discharged veterans, and that he could encounter substantial prejudice in situations in which the characterization of service has a bearing. The applicant elected to consult with a military lawyer and waived his right to make a statement at the time.

On April 8, 2016, the applicant submitted a memorandum regarding the notice to separate him from the Coast Guard. He indicated that he had consulted with a civilian lawyer and understood the rights he was about to exercise. The applicant further indicated that he wanted to appear before an ASB and requested that a military lawyer be detailed to represent him.

On May 24, 2016, the applicant's CO sent a memorandum to the Advancements and Separations Branch of the Personnel Service Center regarding the applicant's discharge. The CO recommended that the applicant be separated from the Coast Guard with a general discharge for the commission of a serious offense. Specifically, the CO cited the applicant's conviction at a special court-martial for violating Articles 111 and 128 of the UCMJ. The CO concluded by stating that the applicant was entitled to present his case before an ASB.

On November 8, 2016, a memorandum was issued regarding a summarized record of the applicant's ASB. At the hearing, he was represented by a lawyer. During voir dire,⁶ the applicant's lawyer asked questions to the voting members of the Board. Specifically, the applicant's lawyer asked the president of the Board to recuse himself due to his personal ties with the applicant's ex-wife and the person with whom she allegedly had an affair. The president of the Board paused the hearing in order to seek advice from the assigned Legal Advisor. During the recess, the recorder of the hearing and the applicant's lawyer agreed to present conditional discharge terms to the Convening Authority for review and action. As such, the applicant waived his right to the ASB pending approval of his discharge terms.

That same day, the applicant submitted a memorandum titled "Exercise of Rights—Involuntary Separation." In the memorandum, the applicant acknowledged that he had consulted with a civilian lawyer and understood the rights that he was about to exercise. Then, the applicant elected to waive his right to appear before an ASB on the condition that he receive a general discharge.

Also on that day, the Convening Authority, the Coast Guard Service Center, and the first flag officer endorsed the applicant's request and recommended that he be separated from the Coast Guard with a general discharge.

On February 6, 2017, the applicant was discharged in accordance with Article 1.B.17. of the Military Separations Manual. His DD-214 shows "under honorable conditions" as the character of service; "misconduct" as the narrative reason for separation; RE-4 (ineligible for reenlistment) as his reenlistment code; and HKQ (misconduct) as his separation code.

On January 28, 2020, the applicant submitted an application to the Discharge Review Board (DRB) in which he requested that his discharge be upgraded from general to honorable.

On May 7, 2020, the DRB convened to review the propriety and equity of the applicant's discharge. The DRB stated that in his application, the applicant argued that he was falsely accused of sexual assault that led to an ASB to push him out. The DRB considered the documentation provided by the applicant, but found no evidence of an error or inequity. The DRB voted unanimously to deny the applicant's request.

On September 23, 2020, the president of the DRB approved the proceedings and recommendation of the DRB.

⁶ According to Article 5.F. of the Enlisted Personnel Administrative Boards Manual, the respondent and recorder may question the voting members of the board to determine their fitness to serve on the board.

VIEWS OF THE COAST GUARD

On April 29, 2021, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC argued that the applicant failed to provide evidence that an error or injustice occurred regarding his general discharge. PSC stated that the applicant was found to have violated Articles 111, 128, and 134 of the UCMJ. Further, PSC stated that although the applicant was entitled to appear before an ASB, he elected to conditionally waive his right on the basis that he receive a general discharge.

The JAG reiterated that the applicant failed to show evidence that the Coast Guard committed an error or injustice. Specifically, the JAG argued that the applicant failed to support his allegation that there was insufficient evidence to convict him at special court-martial. In fact, the JAG argued that the applicant received adequate due process at his special court-martial. The JAG also argued that the Coast Guard's approval of the applicant's voluntary, knowing, and intelligent waiver of an ASB was neither erroneous nor unjust. The JAG stated that at the applicant's ASB, with advice from counsel, he offered to conditionally waive his right to a board on the basis that he receive a general discharge.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On April 22, 2021, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. In his response, the applicant reiterated that his discharge should be upgraded because his conviction at special court-martial was erroneous.

The applicant first argued that his violations of the UCMJ were erroneous because they were based on hearsay. The applicant also argued that the special court-martial lacked sufficient evidence to convict him. He addressed each violation in turn. Regarding his violation of Article 111, the applicant argued that there was no evidence from military or civilian authorities to show that he had been driving under the influence of alcohol. Notably, the applicant argued that there was no field sobriety test conducted to determine whether he was intoxicated. Regarding his violations of Article 128, the applicant argued that many servicemen who were in attendance at the events in which the assaults occurred were not interviewed by the Coast Guard Investigative Service. Further, the applicant argued that there was no medical or photographic evidence of an assault. Finally, regarding his violation of Article 134, the applicant argued that the parties involved failed to provide substantial evidence of indecent language.

APPLICABLE LAW AND POLICY

Article 1.B.17. of the Coast Guard Separations Manual, COMDTINST M1000.4, states the following regarding separating a member for misconduct in relevant part:

- a. Policy

Except as specifically provided here, only Commander (CG PSC) 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. (See Article 1.B.2. of this Manual.)

...

b. Reasons to Discharge for Misconduct

...

(3) Commission of a Serious Offense. Commission of a serious offense does not require adjudication by non-judicial or judicial proceedings. An acquittal or finding of not guilty at a judicial proceeding or not holding non-judicial punishing proceeding does not prohibit proceedings under this provision. However, the offense must be established by a preponderance of the evidence. Police reports, CGIS reports of investigation, etc. may be used to make the determination that a member committed a serious offense.

(a) Members may be separated based on commission of a serious military or civilian offense when:

- (1) The specific circumstances of the offense warrant separation; and
- (2) The maximum penalty for the offense or closely related offense under the UCMJ and Manual for Courts-Martial includes a punitive discharge. The escalator clause of Rule for Courts-Martial 103(d) shall not be used in making this determination.

Article 2.E.3.d. of the Enlisted Personnel Administrative Boards Manual, PSCINST M1910.1, discusses a respondent's rights in relation to an ASB in relevant part:

- (1) Type of Discharge and Characterization of Service. The respondent may submit a board waiver conditioned on receiving a specified, or more favorable, type of discharge and characterization of service. The conditional board waiver shall be submitted to PSC-epm1/PSC=rpm1 (as applicable) through the convening authority and the first flag officer in the respondent's chain of command.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552.
2. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice.⁷ Although the applicant in this case filed the application more than three years after he knew of the alleged error on his discharge form, DD-214, he filed it within three years of the decision of the Discharge Review Board, which has a fifteen-year statute of limitations. Therefore, the application is considered timely.⁸
3. The applicant alleged that his general discharge is erroneous and unjust and should be upgraded. 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

⁷ 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.

⁸ *Ortiz v. Secretary of Defense*, 41 F.3d 738, 743 (D.C. Cir. 1994).

in the military record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.⁹ 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.”¹⁰

4. The applicant argued that his discharge should be upgraded because his conviction at special court-martial was erroneous. First, he argued that his violations of the UCMJ were based on hearsay. However, according to 802 of the Rules for Courts-Martial, hearsay is not admissible at special court-martial unless an exception applies. In this case, the applicant has not provided specific statements of hearsay for which his violations were allegedly based. Next, the applicant argued that the special court-martial lacked sufficient evidence to convict him. Regarding his conviction of DUI, the applicant argued that there was no evidence to show that he had been driving under the influence of alcohol. Specifically, the applicant argued that a field sobriety test was not conducted. Regarding his conviction of assault, the applicant argued that many witnesses were not interviewed and that there was no medical or photographic evidence of an assault. Regarding his conviction of indecent language, the applicant argued that the prosecution failed to provide substantial evidence of such language. However, the applicant did not provide any evidence. Notably, the applicant did not provide any records related to a Coast Guard Investigative Service’s investigation or trial documents of the special court-martial to support his claims. Instead, the records that are available in the applicant’s military record show that the special court-martial found beyond a reasonable doubt that he had operated a vehicle while drunk on October 29, 2014, that he had struck the victim on the buttocks with his hand on two occasions, and that he had communicated indecent language to two members of the Coast Guard. Therefore, the Board finds that the applicant failed to show by a preponderance of the evidence that his conviction at special-court martial was erroneous.

5. The applicant also argued that his discharge should be upgraded because he was falsely accused of sexual assault. While the applicant was charged with five specifications of assault involving either striking or grabbing a female Coast Guard member, the applicant was never charged with sexual assault. According to the Manual for Courts-Martial, sexual assault is charged separately under Article 120 of the UCMJ. The only document in the applicant’s record that mentions sexual assault is a Page 7 dated January 23, 2015, which documented his second alcohol incident. However, the applicant did not explain how his second alcohol incident effected his general discharge. The applicant’s conviction of DUI, assault (not sexual), and indecent language were more than sufficient to justify a general discharge.

6. Finally, the applicant’s record shows that he requested a general discharge. According to Article 2.E.3.d. of the Enlisted Personnel Administrative Boards Manual, a member can waive his right to an ASB on the condition that he receive a specific character of discharge. The applicant could have conditioned his waiver of an ASB on the basis that he receive an honorable discharge. However, the applicant, with advice from counsel, waived his right to an ASB on the condition that he receive a general discharge. The Coast Guard accepted his conditional waiver, and the applicant was properly awarded a general discharge. Therefore, the

⁹ 33 C.F.R. § 52.24(b).

¹⁰ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

applicant has not proven by a preponderance of the evidence that his general discharge is erroneous or unjust.

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

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

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

February 11, 2022

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