DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 1999-161

FINAL DECISION

ANDREWS, Attorney-Advisor:

This proceeding was conducted under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The application was received on August 11, 1999, and completed upon the BCMR's receipt of the applicant's military records on September 14, 1999.

This final decision, dated August 24, 2000, is signed by the three duly appointed members who were designated to serve as the Board in this case.

RELIEF REQUESTED

The applicant, a former xxxxxxx who was discharged on May 17, 199x, asked the Board to correct his record by eliminating the words "alcohol rehabilitation failure" as the narrative reason for separation shown on his discharge form (DD 214); by removing the JPD separation code, which indicates that he was involuntary discharged when he failed to successfully complete alcohol rehabilitation treatment; and by removing his RE-4 reenlistment code, which means he is not eligible for reenlistment. The applicant did not indicate which codes or narrative reason for separation he wants to be assigned instead. He asked to be paid "separation compensation and wages for [the] period he would have served but for his discharge."

APPLICANT'S ALLEGATIONS

The applicant alleged that he was wrongfully discharged after the Coast Guard determined that a "traffic infraction" for which he was stopped by police on February 11, 199x, constituted his second "alcohol incident." The applicant

alleged that the Coast Guard did not conduct its own investigation of the infraction but relied upon the reports of the xxxxxx police. Moreover, he alleged that the prosecutor did not find any evidence that he was impaired by alcohol at the time of the accident and that as punishment for his traffic violation he received only a $50 fine. He alleged that the report of the Coast Guard's investigation "consists of irrelevant or immaterial information and hearsay" and does not prove his involvement in an alcohol incident. He argued that the Coast Guard should not have discharged him for a second alcohol incident without hard evidence that he had been driving under the influence of alcohol. He argued that the Coast Guard should not have accepted the hearsay of the police without actual proof.

The applicant alleged that he was discharged without ever having a chance to defend himself or face his accusers. He alleged that as a result of the words and codes on his DD 214, he has been "branded" as an "alcohol rehabilitative failure" in the eyes of potential employers for he rest of his life.

SUMMARY OF THE RECORD

On January 19, 199x, the applicant enlisted in the Coast Guard for four years. He had previously served three years and nine months in the U.S. Navy. On January 26, 199x, he signed a document acknowledging that the Coast Guard's rules regarding drug and alcohol abuse had been fully explained to him. On March 11, 199x, he attended mandatory civil rights and sexual harassment prevention training.

On January 26, 199x, his commanding officer (CO) made a negative administrative entry (page 7) in the applicant's record warning him that a formal investigation had concluded he committed offensive conduct. The page 7 further warned him that sexual relations with a nonconsenting or incapacitated person constitute rape; that providing alcohol to minors is illegal; and that verbal comments, physical contact, and gestures of a sexual nature constitute sexual harassment if they are offensive, intimidating, or repeated despite being unwelcome. The CO ordered that he be evaluated for alcohol abuse and referred for training in social skills.

Also on January 26, 199x, the applicant's commanding officer entered a page 7 in his record documenting the applicant's involvement in an "alcohol related situation" and his subsequent counseling regarding Coast Guard policy with respect to alcohol.

On March 8, 199x, the applicant was screened for alcohol abuse. The screening revealed that he met the criteria for alcohol dependency. He was

advised to attend meetings of Alcohol Anonymous and referred for inpatient rehabilitative treatment. On April 7, 199x, the applicant was admitted to an alcohol rehabilitation center in San Diego. He completed treatment and began an aftercare program on May 5, 199x.

On March 28, 199x, a negative page 7 was entered in the applicant's record documenting an unauthorized overnight departure from his duty section. On April 11, 199x, a negative page 7 was entered in the applicant's record regarding his illegal possession of an unregistered "modified automatic weapon" and a machine pistol that constituted an "assault weapon" under the xxxxx Weapons Code. The page 7 noted that the matter was under criminal investigation. On June 1, 199x, a negative page 7 was entered in the applicant's record concerning his failure to support his dependents.

On June 8, 199x, the applicant's CO documented his "first alcohol incident" with a page 7 in his record. The page 7 states that on May 14, 199x, he was apprehended by police with a blood alcohol level of 0.18. The page 7 noted that the applicant had placed himself in an alcohol aftercare program on April 26, 199x, and that indefinite abstinence from drinking alcohol is part of that program. In the page 7, the CO also ordered the applicant placed in a second aftercare program and warned him that "[f]ailure to comply with this aftercare plan or involvement in any alcohol related incident will result in your separation from the U.S. Coast Guard."

On Sunday, February 11, 199x, at 10:18 p.m., the applicant was stopped in his car by a police officer. The officer wrote on the citation that the applicant was driving "[w]hile subject to an impairing substance. x.S. 20-138.1" He further wrote that he was stopped for "display[ing] an expired license or registration plate on vehicle knowing same to be expired. x.S. 20-111(2)." The citation indicates that the applicant refused to submit to a breathalyzer test or to sign the citation. The applicant submitted a photograph of his license plate, which clearly shows that his car was registered through February 199x, and of his driver's license, which shows an expiration date of May 9, 199x.

On February 12, 199x, the applicant's CO documented his "second alcohol incident" with a page 7 in his record. The page 7 states that on February 11, 199x, he was cited by the xxxxxx police for driving while intoxicated and that he was therefore being processed for separation. The CO also suspended his driving privileges at all Coast Guard installations in accordance with the provisions of COMDTINST 5100.46, due to the applicant's "refusal to submit to an intoxilizer."

On February 14, 199x, the CO formally notified the applicant that he had initiated action to discharge him from the Coast Guard based on his continued abuse of alcohol. The applicant signed the notification and indicated that he wished to make a statement in his own defense. On March 4, 199x, the applicant submitted his statement. In the statement, he alleged that he was not guilty and he requested a hearing. The applicant included with his statement a note from his supervisor stating that he was "an exceptional worker" and that he "warrants further consideration" for retention in the Coast Guard. The supervisor noted that the applicant was burdened by the knowledge that his loss of driving privileges had caused extra work for the unit's personnel and had caused an additional member to be assigned to his duty section to drive the emergency vehicle.

On March 6, 199x, the CO sent the Military Personnel Command his recommendation that the applicant be discharged for unsuitability due to his "continued alcohol abuse which has led to two alcohol incidents." He attached to his recommendation copies of the page 7s in the applicant's record and copies of the applicant's statement and medical examination report.

On March 11, 199x, the same police officer who had arrested the applicant on February 11, 199x, obtained a warrant for the applicant's arrest for driving "while his driver's license was revoked" on February 11th. He was arrested and released upon posting bond.

On April 3, 199x, the Military Personnel Command ordered that the applicant be discharged within 30 days for unsuitability under Article 12-B-16 of the Personnel Manual, with a JPD separation code and the corresponding narrative reason for separation shown in the Separation Program Designator (SPD) Handbook.

On May 17, 199x, the applicant was honorably discharged from the Coast Guard with a JPD separation code, an RE-4 reenlistment code, and "Alcohol Rehabilitation Failure" as a narrative reason for separation. He signed a page 7 entry acknowledging that he had read and been counseled about Article 12-B-53 of the Personnel Manual and his rights upon separation. He also signed a page 7 stating that the provisions of Article 12-B-3, concerning the content and effect of various types of DD 214s, had been explained to him.

On June 3, 199x, an assistant district attorney for the State of xxxxxx signed a Misdemeanor Statement of Charges regarding the citation issued on February 11, 199x. The statement indicates that the applicant was charged with "failing to yield right of way in obedience to a duly erected (stop sign) (flashing red light) (yield sign) in violation of x.S. 20-158.1." At the bottom of this statement, the assistant district attorney wrote the following: "Very questionable

probable cause. Def. stopped for an expired plate which was not expired & no bad driving was observed. Def. refused test." A Magistrate's Order issued the same day indicates that the applicant pled guilty to "unsafe movement," instead of "driving while impaired," and paid a fine of $50. The charge of driving with an expired registration was dismissed. There is no document in the record indicating the outcome of the applicant's March 11, 199x, arrest for driving with a revoked license.

VIEWS OF THE COAST GUARD

On April 19, 2000, the Chief Counsel submitted an advisory opinion in which he recommended that the Board deny relief in this case.

The Chief Counsel stated that the Personnel Manual requires commanding officers to process members for separation after a second alcohol incident. Articles 12.B.16.b.(5) and 20.B.2.h.2. He argued that in making a decision regarding what constitutes an alcohol incident and whether to discharge a member, Coast Guard officers must be "accorded a presumption that they carry out their duties correctly, lawfully, and in good faith." *Arens v. United States*, 969 F.2d 1034, 1037 (1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979). He further argued that the Board should only grant relief if the applicant demonstrates by a preponderance of the evidence that his discharge resulted from a clear violation of a substantial procedural right, a clear error of material fact, or a clear abuse of the broad discretion accorded by law to the discharge authority."

The Chief Counsel alleged that the applicant failed to prove that the Coast Guard committed an error of material fact or abused its discretion when it documented his second alcohol incident. He alleged that a conviction for drunk driving was not required for the Coast Guard to document the February 11, 199x, traffic stop as an "alcohol incident" under Article 20.A.2.d. of the Personnel Manual.

The Chief Counsel stated that under xxxxxx law, any officer who has reasonable grounds to believe a person may be driving while impaired may administer a breathalyzer test. xxx x.S. § 20-16.2. He stated that if a person refuses to take the test, the officer may charge the person with any offense for which the officer has probably cause to believe the person has committed. *Id.* at § 20-16.2.(h)(I)(3). The Chief Counsel stated that in light of the police officer's decision to charge the applicant with driving while impaired and in light of the applicant's refusal to submit to a breathalyzer test, it was reasonable for his command to conclude that he had consumed alcohol and that this consumption had led to his arrest. The Chief Counsel also pointed out that although the applicant stated he is "not guilty," he never specifically denied driving while impaired

on February 11, 199x. The applicant, he argued, has not proved that his CO's conclusion that he had been driving while impaired was wrong.

The Chief Counsel argued that the State's decision to permit the applicant to plead guilty to "unsafe movement" instead of trying him for driving while impaired is "insufficient as a matter of law to overturn a federal administrative action especially where the federal action was predicated on a different standard of proof." The command's determination that an alcohol incident had occurred was sufficient to justify the applicant's discharge, and the lack of a civilian conviction for the underlying conduct is irrelevant, he alleged.

The Chief Counsel further argued that the applicant was afforded all due process he was owed prior to being separated. He stated that only members with eight or more years of military service are entitled to a hearing before an Administrative Discharge Board. Personnel Manual, Article 12.B.5. He alleged that on the day of his separation, the applicant had seven years and one month of military service.

Finally, the Chief Counsel argued that given his record, the applicant could have been discharged for "[f]requent, discreditable involvement with civil or military authorities" under Article 12.B.18. of the Personnel Manual.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On April 21, 2000, the Chairman sent the applicant a copy of the advisory opinion and invited him to respond within 15 days. The applicant requested a 40-day extension and responded on June 16, 2000.

The applicant responded at length, reiterating all of the arguments made in his original application. He denied that he had "committed a second alcohol incident" several times. He stated that he "had not been drinking and was not impaired." He also submitted a statement from his father, who wrote that he had personally investigated the circumstances of this case and could find no evidence that the applicant had been drinking prior to the traffic stop on February 11, 199x.

The applicant argued that he should have been presumed innocent by the Coast Guard and his case should have been investigated. Instead, he was presumed guilty based on the hearsay of the police. He also argued that no discredit was brought on the Coast Guard by the February 11, 199x, traffic stop.

The applicant also objected to the Chief Counsel's references to negative page 7 entries in his file that are "not relevant to the discharge, prejudicial and

self serving declarations." He alleged that he has been given no chance "to admit, deny, or refuse them."

The applicant alleged that he has rebutted the presumption that the Coast Guard acted lawfully and in good faith when it documented his second alcohol incident and discharged him.

APPLICABLE REGULATIONS

Article 12.B.16 of the Personnel Manual (COMDTINST M1000.6A) authorizes enlisted personnel to be discharged by reason of unsuitability at the direction of the Commandant for inaptitude, personality disorders, apathy, defective attitudes, inability to expend effort constructively, unsanitary habits, alcohol abuse, financial irresponsibility, or sexual harassment.

Article 12.B.18.b. authorizes the Commander of the Military Personnel Command to discharge an enlisted member for misconduct upon civilian conviction for an offense involving moral turpitude; for frequent involvement of a discreditable nature with civil authorities; or for sexual perversion, including indecent exposure.

Article 12.B.5. states that members being discharged who are not recommended for reenlistment have a right to a hearing before an Administrative Discharge Board if they have eight or more years of "total active and/or Reserve military service." Members with less than eight years of service have the right to submit a statement appealing their CO's decision.

Article 20 contains the regulations regarding alcohol abuse by Coast Guard members. Article 20.A.2.d. defines an "alcohol incident" as follows:

> Any behavior in which the use or abuse of alcohol is determined to be a significant or causative factor and which results in the member's loss of ability to perform assigned duties, brings discredit upon the Uniformed Services, or is a violation of the Uniform Code of Military Justice (UCMJ) or federal, state, or local laws. The member need not be found guilty at court martial, in a civilian court, or be awarded non-judicial punishment (NJP) for the behavior to be considered an alcohol incident. However, the member must actually consume alcohol for an alcohol incident to have occurred.

According to Article 20.B.2.e., "[a]ny member who has been involved in alcohol incidents or otherwise shown signs of alcohol abuse shall be screened in accordance with the Alcohol Abuse Treatment and Prevention Program . . . . The results of this alcohol screening shall be recorded and acknowledged on a [page 7] . . . ." According to Article 20.B.2.l., the commanding officer of any member

who drinks alcohol after being diagnosed and treated for alcohol dependence shall "reinstitute" the member's aftercare program and document this in a page 7. "A second episode of alcohol consumption after completing any aftercare program by members who have been diagnosed as alcohol-dependent will result in separation from the Coast Guard." Article 20.B.2.l.

According to Article 20.B.2.h.2., "[e]nlisted members involved in a second alcohol incident will normally be processed for separation in accordance with Article 12.B.16."

Under the Military Rules of Evidence, Rule 304(h)(4), if a member refuses a lawful order to submit to a breathalyzer test, the "evidence of such refusal may be admitted into evidence on … [a]ny other charge on which the results of the chemical analysis would have been admissible."

The Separation Program Designator (SPD) Handbook states that persons involuntarily discharged after failing alcohol rehabilitation shall be assigned a JPD separation code, an RE-4 reenlistment code, and "alcohol rehabilitation failure" as the narrative reason for separation shown on their DD 214s.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code.

2. The applicant requested an oral hearing before the Board. The Chairman, acting pursuant to 33 C.F.R. § 52.31, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. An application to the Board must be filed within three years after the applicant discovers the alleged error in his record. 10 U.S.C. § 1552. The record indicates that the applicant signed and received his discharge papers on May 17, 199x, but he did not submit his application to the Board until August 9, 1999. Therefore, his application was not filed until after the Board's three-year statute of limitations expired.

4. Pursuant to 10 U.S.C. § 1552, the Board may waive the three-year statute of limitations if it is in the interest of justice to do so. To determine

whether it is in the interest of justice to waive the statute of limitations, the Board should conduct a cursory review of the merits of the case. *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

5. A cursory review of the applicant's record indicates that he was discharged on May 17, 199x, after his commanding officer determined that he had been involved in two alcohol incidents. The first incident was documented after the applicant's apprehension by police on May 14, 199x, with a blood alcohol level of 0.18. The second incident was documented after the applicant was stopped by police on February 11, 199x, and cited for driving while impaired. According to Article 20.B.2.h.2., "[e]nlisted members involved in a second alcohol incident will normally be processed for separation in accordance with Article 12.B.16."

6. The applicant argued that the only evidence of his impairment is the hearsay of the officer who stopped his car on February 11, 199x. He also argued that his refusal to take a breathalyzer test cannot be considered an admission of guilt. The applicant's command was not bound by the Military Rules of Evidence in determining whether the traffic stop constituted an alcohol incident. However, under the Military Rules of Evidence, a member's refusal to take a breathalyzer test can be considered evidence that he was driving while impaired in a court martial. *See* Military Rules of Evidence, Rule 304(h)(4). Although the applicant was not being court martialed, the Board finds this rule instructive as to the reasonableness of the documentation of the applicant's second alcohol incident by his command.

7. The applicant alleged that the police officer had no probable cause to stop his car and that the State's failure to convict him of driving while impaired proves he was not actually driving while impaired by alcohol. The Board finds that whether the police had probable cause to stop his car is immaterial as to whether he was in fact driving while impaired and is therefore irrelevant to the correctness of the Coast Guard's actions. In addition, the Board finds that the State's failure to convict the applicant of driving while impaired does not prove that Coast Guard erred in concluding that he had driven while impaired.

8. Any arrest by local police is likely to bring discredit upon the Coast Guard. In addition, the applicant's refusal to take the breathalyzer test caused his driving privileges on Coast Guard installations to be revoked. Therefore, the incident prevented him from performing his assigned duties because other members had to drive the unit's emergency vehicle in his stead. In light of these facts and findings 6 and 7, above, the Board finds that the applicant has not proved by a preponderance of the evidence that his command erred in concluding that he had driven while impaired or in documenting the traffic stop on February 11,

199x, as his second "alcohol incident" as defined in Article 20.A.2.d. of the Personnel Manual.

9. The record indicates that the applicant was properly referred for alcohol rehabilitation treatment by the Coast Guard but failed to abstain from drinking alcohol in accordance with the terms of his aftercare program. Moreover, under Article 20.B.2.l. of the Personnel Manual, any consumption of alcohol at that time made him subject to separation for rehabilitation failure because the applicant had been diagnosed as alcohol-dependent and had already failed one aftercare program and had his aftercare program reinstituted on June 8, 199x.

10. The applicant alleged that the Coast Guard should have granted him a hearing. However, the applicant was not entitled to a hearing because he did not have eight or more years of military service. Personnel Manual, Article 12.B.5. He had a right to submit a statement on his behalf. The record shows that he did submit a statement and that statement was forwarded by his command to the Military Personnel Command for consideration.

11. The applicant has not proved by a preponderance of the evidence that the Coast Guard committed any error or injustice in documenting his alcohol incidents or in discharging him with an RE-4 reenlistment code, a JPD separation code, and "alcohol rehabilitative failure" as his narrative reason for separation.

12. Accordingly, the applicant's request should be denied both on the basis of its untimeliness and for lack of merit.

[ORDER AND SIGNATURES APPEAR ON THE NEXT PAGE]

ORDER

The application of XXXXXXXX, USCG, for correction of his military record is hereby denied.

Gareth W. Rosenau

Coleman R. Sachs

Mark A. Tomicich