

**DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2000-127

**DECISION OF THE DEPUTY GENERAL COUNSEL
ACTING UNDER DELEGATED AUTHORITY**

 I approve the Majority Opinion of the Board.

 I approve the Minority Opinion of the Board.

 I concur in the relief recommended by the Majority
of the Board.

Date: 1/11/02

Rosalind A. Knapp
Deputy General Counsel
as designated to act for the
Secretary of Transportation

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FINAL DECISION

ULMER, Deputy Chairman:

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was docketed on May 8, 2000, upon the Board's receipt of the applicant's complete application for correction of his military record.

This final decision, dated April 12, 2001, is signed by the three duly appointed members who were designated to serve as the Board in this case. One member of the Board dissented, in part, from the majority of the Board.

The applicant, a former quartermaster second class (QM2; pay grade E-5) in the Coast Guard, asked the Board to correct his DD Form 214¹ by removing "alcohol rehabilitation failure" as the narrative reason for his separation. He was honorably discharged by reason of alcohol rehabilitation failure, with an RE-4 (not eligible for reenlistment) reenlistment code and a JPD (alcohol rehabilitation failure) separation code.

SUMMARY OF RECORD AND SUBMISSIONS

The applicant alleged that his DD Form 214 is in error because it states that he was discharged due to alcohol rehabilitation failure. The applicant claimed that he never received alcohol rehabilitation treatment. He stated that his separation code and reason for discharge should be changed to "suit [his] situation"

Background

The applicant entered active duty on _____ and was discharged on _____. The reason listed on the DD Form 214 for the applicant's discharge was "alcohol rehabilitation failure." The events leading to the applicant's discharge are discussed below.

¹ A DD Form 214 is a certificate of release or discharge from active duty.

On _____, an administrative remarks (page 7) entry² was entered into the applicant's record documenting his first alcohol incident. The entry stated that on _____, the base police responded to a complaint of loud music coming from the applicant's room. When the police arrived, they found alcoholic beverages in the applicant's room and detected the odor of alcohol. The applicant's blood alcohol content (BAC) was .073. The applicant was warned that any further alcohol incidents of under age drinking could result in his discharge from the Coast Guard.

On _____, two page 7 entries were entered in the applicant's record this date. The first entry documented the fact that the applicant had received non-judicial punishment (NJP) for the _____ incident. He was not recommended for advancement. The second entry documented the fact that because of the alcohol-related incident and the NJP, the applicant was given a mark of 2 (1 to 7, with 7 being the highest) in the "health and well-being " category on a performance evaluation dated _____.

On _____, a page 7 entry was entered in to the applicant's record documenting another alcohol incident. While on liberty in a club in Aruba, the applicant was drinking alcohol and became belligerent and hostile to others in the club. He was ordered to return to the ship and was advised that upon the ship's return to homeport, he would be screened for alcohol dependency.

On _____, the applicant received a page 7 entry advising him that his on base driving privileges were suspended for one year, except when performing work-related/official functions.

On _____, the applicant was informed that the commanding officer (CO) had initiated action to discharge him from the Coast Guard because the applicant had incurred two alcohol-related incidents. The CO recommended that the applicant receive an honorable discharge. The applicant acknowledged the notification of proposed discharge, objected to it, and wrote a statement in his own behalf.

On _____, the applicant was screened at a military addictions rehabilitation clinic (ARC) by a licensed psychologist. The psychologist wrote in a report that the "[applicant] has been medically evaluated as not needing alcohol or drug rehabilitative treatment." He recommended, however, that the applicant receive "stress/anger management classes."

The applicant's statement, dated November 15, 1999, requested that he not be discharged. He stated that he had begun anger management classes and believed that

² An administrative remarks (page 7) entry documents any counseling that is provided to a service member as well as any other noteworthy events that occur during that individual's military career. Unless otherwise indicated all page 7 entries in this case were acknowledged by the applicant with his signature.

he could overcome his problems with alcohol. He stated that, due to a shortage of Coast Guard personnel in his rating, it would be in the best interest of the Coast Guard to retain him.

The applicant's CO recommended that the applicant be retained in the Coast Guard. He also recommended that the applicant be sent to a level II alcohol treatment facility, and he stated that the command was in the process of obtaining a second alcohol screening for the applicant. The CO stated that the applicant was currently undergoing anger management counseling. After completing these courses, the CO recommended that the applicant be given a six-month probationary period. The CO stated that the applicant was an above average performer and that the CO had been pleased with the applicant's performance as a quartermaster.

On December 31, 1999, CGPC approved the applicant's retention in the Coast Guard, provided that he "satisfactorily completes appropriate treatment and aftercare program." CGPC advised the applicant that any further alcohol-related incidents would result in a recommendation for his separation from the Service.

On _____, the applicant reenlisted in the Coast Guard for a period of six years.

On _____, a page 7 entry was entered into the applicant's record documenting his referral to the unit's collateral duty addictions representative regarding an alcohol incident that occurred on January 30, 2000 during a port call. The applicant was informed that this was considered his third alcohol incident and the CO was recommending that the applicant be honorably discharged from the Coast Guard. The page 7 entry further read as follows:

You also have documented AIs (alcohol incidents) dated _____ and _____. You were required to undergo alcohol screening on _____ at the Navy Counseling and Assistance Center (CAAC) in _____ in which it was determined that you do not appear to be alcohol dependent, but that you demonstrate poor judgment and irresponsibility in your drinking behavior. You were also required to attend personal Responsibilities & Values Education & training . . . Level I. On 99 Oct 22 you were again sent to the Navy Addictions Rehabilitation Clinic (ARC) . . . where you were screened for alcohol abuse & dependency. While the medical evaluation, based on your screening, was that you did not need alcohol rehabilitative treatment, it did recommend that you receive anger management counseling. Anger management counseling was arranged for you . . . which you failed to complete.

On _____, the applicant's CO informed him that he was being recommended for discharge from the Coast Guard because he had been involved in a third alcohol incident. The applicant acknowledged the notification of separation, acknowledged that

he could submit a statement in his behalf (but declined to submit a statement), and did not object to being discharged from the Coast Guard.

On _____, a page 7 entry was entered in the applicant's record documenting the fact that the applicant was taken to NJP on March 1, 2000, for being drunk and disorderly on _____. He did not receive punishment for this offense.

On _____, the applicant was advised in another page 7 entry that he was not being recommended for reenlistment due to his involvement in a third alcohol incident.

A third page 7 entry, dated _____, directed the applicant to attend anger management counseling and to advise the command if he could not make any of the scheduled meetings.

On _____, the applicant's CO wrote to CGPC that the applicant had been involved in his third alcohol incident and was being recommended for discharge. The CO further stated that the applicant was a slightly above average performer, but he had not taken the positive steps required to improve his condition and has failed to acknowledge that he has a problem with alcohol.

On _____, CGPC approved the applicant's honorable discharge from the Coast Guard because of unsuitability (Article 12.B.16 of the Personnel Manual). CGPC also stated that the applicant should be given a JPD (alcohol rehabilitation failure) separation code.

On _____, the applicant's CO sent a message to CGPC questioning the JPD separation code. He stated that the narrative reason associated with the JPD separation code and the reason for separation do not accurately reflect the member's situation. He requested advice on assigning a "suitable narrative reason for the applicant's discharge."

On April 17, 2000, CGPC told the applicant's former CO that another code could not be authorized for use on the applicant's DD Form 214. (The applicant had been discharged on April 11, 2000.) He stated that only the codes listed in the Separation Program Designator Handbook (SPD) could be used.

Views of the Coast Guard

On December 1, 2000, the Board received an advisory opinion from the Chief Counsel of the Coast Guard. He recommended that the Board deny relief to the applicant.

The Chief Counsel stated that the applicant failed to prove that his discharge by reason of alcohol rehabilitation failure was erroneous. He stated that the "applicant's 'alcohol rehabilitation failure' was his failure to remain uninvolved with alcohol after

his first incident and was not an evaluative comment based on the member's performance at a post-incident abuse program."

The Chief Counsel stated that the applicant was properly processed and discharged from the Service. Under the authority of Article 12.B.16.b.(5) and 20.B.2.h.2, a CO is required to process a member for separation after a second documented alcohol incident. The Chief Counsel noted that the applicant in this case was not discharged from the Service until after he had committed a third alcohol incident. He was given special consideration and retained in the Service after his second alcohol incident.

With respect to the reason for separation and the separation code, the Chief Counsel offered the following:

All five Armed Services use DOD's SPD [separation program designator] handbook to assign SPD codes. The only SPD codes available where the discharge is related to the misuse of alcohol and disciplinary action or sufficient misconduct did not occur to warrant an OTH (other than honorable) discharge are "PD" codes. The narrative reason for all "PD" codes is "alcohol rehabilitation failure." In some cases, the narrative reason is exactly what transpired. However, in other cases, it is a general statement that serves a multitude of situations in which a member failed to adhere to Coast Guard policy with regard to the use of alcohol. In the instant case, Applicant alleges his "alcohol rehabilitation failure" SPD code was in error because his discharge was unrelated to his completion of a substance abuse program after his second alcohol incident. However, that is not the "alcohol rehabilitation failure" the SPD code refers to. Applicant's "alcohol rehabilitation failure" was his failure to remain alcohol free after his first and second incident and was not an evaluative comment based on the member's performance at a post-incident abuse program. . . . Therefore, the Board may properly conclude the assignment of the SPD "JPD" for "alcohol rehabilitation failure" is reasonable as applied to the facts in this case.

Moreover, these codes are for the internal use of the Coast Guard and the other Armed Forces. Applicant failed to complete his enlistment because of misconduct involving his misuse of alcohol. Because the statutes and implementing guidance related to SPD codes do not create individual entitlements or mandate procedures, Applicant has no basis for relief by the BCMR. Even if the Board found error in this case contrary to the Coast Guard's position, violations of agency procedural regulations do not create private rights not otherwise provided by statute or the Constitution. See, e.g. United States v. Caceres, 440 U.S. 741 (1979).

Applicant's Response to the Views of the Coast Guard

On January 29, 2001, the Board received the applicant's response to the views of the Coast Guard.

The applicant stated that he refused to accept a separation code that does not directly apply to him or his situation. He stated that the alcohol rehabilitation failure separation code does not apply to him because he did not refuse to participate in or fail to complete any alcohol rehabilitation program. Moreover, he stated that he did not and does not have a drinking problem. He stated that it did not make sense that the Coast Guard would reenlist him for six years in , if he had an alcohol-related problem.

The applicant stated that his life has been ruined and he can not join another branch of the service because he was given a RE-4 (not recommended for reenlistment) reenlistment code. He requested that his reenlistment code be upgraded. He claimed that he was not told of the effect that a discharge for alcohol rehabilitation failure would have on his life. In this regard he stated: "If I would have been remotely told of what could happen if discharged for alcohol related situations nobody in their right mind would take a chance on this happening and I didn't."

The applicant alleged that he was singled out for discharge because he was outspoken and he was not "one of the boys." With respect to his last alcohol incident, the applicant stated the following:

The last incident when I so called struck a shipmate in a club in Aruba we both were drinking and slap boxing. He struck me as well and nothing at all happened to him and I was discharged. The commanding officer took statements from six individuals who admitted to being drunk. This would never have stuck in a civilian court.

The applicant stated that he was an excellent quartermaster and an asset to the Coast Guard. He stated that 'an awful mistake and act has taken place and it must be resolved so [he] can have this code changed. Also, so [he] can join another branch of the service or maybe get back in the Coast Guard."

APPLICABLE REGULATIONS

Personnel Manual

Article 12.B.16.b.of the Personnel Manual states that the purpose of an unsuitability discharge is to free the Service of members considered unsuitable for further service because of: . . . 5. Alcohol abuse.

Chapter 20.A.2.d. of the Personnel Manual defines alcohol incident as "[a]ny 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. . . [T]he member must actually have consumed alcohol."

Chapter 20.B.2.h.2. of the Personnel Manual states that enlisted members involved in a second alcohol incident will normally be processed for separation in accordance with Article 12.B.16. (unsuitability) of the Personnel Manual.

Chapter 20.B.2.i. of the Personnel Manual states that "[e]nlisted members involved in a third alcohol incident shall be processed for separation from the Service."

Chapter 20.B.2.j. of the Personnel Manual states that underage drinking is considered an alcohol incident.

Separation Program Designator (SPD) Handbook

"This handbook is to be used in conjunction with the Certificate of Release or Discharge From Active Duty, DD Form 214 (COMDTINST M1900.4 (series)). The direction provided in that instruction refers to this handbook, which contains a comprehensive listing of the Separation Program Designator (SPD) Codes used in Block 26 of DD Form 214."

The Separation Program Designator (SPD) Handbook states that the JPD (alcohol rehabilitation failure) separation code is assigned when there is an "involuntary discharge directed by established directive (no board entitlement) when a member failed through inability or refusal to participate in, cooperate in, or successfully complete a treatment program for alcohol rehabilitation."

Certificate of Release or Discharge from Active Duty (DD Form 214)

COMDTINST M1900.4D states that "[t]he DD Form 214 provides the member and the service with a concise record of a period of service with the Armed Forces at the time of the member's separation, discharge or change in military status. . . . In addition, the form is an authoritative source of information for both governmental agencies and the Armed Forces for purposes of employment, benefit and enlistment eligibility, respectively."

This instruction further states that it is to be used in conjunction with the Separation Program Designator Handbook. In completing block 26 (separation code) on the DD Form 214, the instruction states that an appropriate separation code associated with a particular authority and reason for separation as shown in the SPD handbook or as stated by the military personnel command in the message authorizing discharge should be entered in this block.

FINDINGS AND CONCLUSIONS

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

1. The BCMR has jurisdiction over this matter pursuant to section 1552 of title 10, United States Code. The application is timely.

2. This case involves two separate but related matters: the first is whether the basis for the separation itself is in accord with the regulation; and the second is whether the DD Form 214 fairly and accurately describes the reason for the applicant's separation from the Coast Guard. The applicant was processed for separation because of his involvement in a third alcohol incident. Section 20.B.2i. states that an enlisted member involved in a third alcohol incident will be processed for separation from the Coast Guard. The applicant's alcohol incidents consisted of underage drinking, which Chapter 20 of the Personnel Manual classifies as alcohol incidents, and two instances of drunken and disorderly conduct, each occurring at a bar in a foreign country.

3. The applicant was advised after his first alcohol incident that a second alcohol incident could result in his separation from the Service. On September 5, 1999, a page 7 entry in the applicant's record documented a second alcohol incident and advised the applicant that he was subject to administrative separation. Administrative discharge proceedings were begun against the applicant and he requested to be retained in the Coast Guard. Based on the CO's favorable recommendation regarding the applicant's request, CGPC ordered the applicant to be retained in the Service on Approximately 30 days later, on, the applicant was involved in a third alcohol incident, while the ship was in On, the applicant was taken to NJP for being drunk and disorderly on The CO began mandatory administrative discharge proceedings against the applicant because of his involvement in a third alcohol incident. The applicant declined to make a statement in his behalf and did not object to the discharge. Accordingly, the Board finds that the applicant was processed for separation in accordance with the Personnel Manual. The Board further finds that he was properly discharged from the Coast Guard for committing a third alcohol incident.

4. The applicant states that he was singled out and treated unfairly because he was not "one of the boys." However, the fact that the applicant's CO stood by him after recommending his discharge after the applicant's second alcohol incident contradicts the applicant's assertion that somehow the CO was prejudiced against him. There is persuasive evidence that the applicant was disorderly when he drank alcohol.

5. The applicant argues that if he had such a "bad" problem why would the Coast Guard permit him to reenlist in The Board finds no contradiction here. The applicant asked to be retained in the Coast Guard after discharge processing began against him for being involved in a second alcohol incident. His CO and CGPC treated him with leniency and he was permitted to remain in the service. The applicant

brought about his discharge by committing his third alcohol incident after being advised that such conduct would result in his separation. There is no regulation that states that a member cannot be discharged at the beginning or at the end of an enlistment or reenlistment. Moreover, the restriction on the number of alcohol incidents allowed under Chapter 20 of the Personnel Manual is for an entire career and not for each period of enlistment.

6. The next question is whether the reason for separation (alcohol rehabilitation failure) and the corresponding JPD separation code that are listed on the applicant's DD Form 214 accurately and fairly describe the reason for his separation. The Board is persuaded that the Coast Guard committed an error or injustice by listing alcohol rehabilitation failure as the reason for the applicant's separation from the Coast Guard. The reason for the applicant's separation was his involvement in a third alcohol incident, not "alcohol rehabilitation failure." These two terms are not synonymous. The SPD Handbook makes this distinction clear when it states that the alcohol rehabilitation failure separation code (JPD) is assigned "when a member failed through inability or refusal to participate in, cooperate in, or successfully complete a treatment program for alcohol rehabilitation." (Emphasis added.)

7. There is no evidence in the record that the applicant failed through inability or refusal to participate in, cooperate in, or successfully complete a treatment program for alcohol rehabilitation.

8. After the applicant's second alcohol incident, he was screened for alcohol abuse. Although he was not determined to be alcohol dependent at that time, the clinician determined that the applicant would benefit from stress and anger management classes. From the CO's comments in one of the page 7 entries, the applicant failed to complete these classes. No evidence has been presented that stress/anger management classes are the equivalent of an alcohol rehabilitation program. Therefore, the Board finds that the reason listed on the applicant's DD Form 214 for his separation - "alcohol rehabilitation failure" - is either in error or unjust. Nowhere on the DD Form 214 does it state that the applicant was discharged because of an involvement in a third alcohol incident. A reading of the DD Form 214 suggests that the applicant was treated for alcohol abuse/dependency but incurred a relapse. This is simply not the case.

9. The Coast Guard argues that the codes in the SPD handbook, which is used by all five armed services, will match the basis for separation in some cases, but in others "it is a general statement that serves a multitude of situations in which a member failed to adhere to Coast Guard policy with regard to the use of alcohol." This may well be true, but the issue is whether the applicant is entitled to have a DD Form 214 that describes the reason for his separation in a fair and accurate manner. It is unfair to list the applicant as a alcohol rehabilitation failure when there is no evidence that he was ever entered into a alcohol rehabilitation treatment program. There is nothing in the record that suggests that the applicant refused to participate in, cooperate in, or

successfully complete such treatment program. Being labeled an alcohol rehabilitation failure carries with it a certain stigma, which is even more reason that the DD Form 214 should fairly depict the circumstances under which the discharge occurred.

10. The Chief Counsel argues that the alcohol rehabilitation failure mentioned in the applicant's case is the failure to remain alcohol free after his first alcohol incident. This interpretation by the Chief Counsel appears to be contrary to the explanation provided in the SPD Handbook for alcohol rehabilitation failure. As stated above, this explanation clearly states the alcohol rehabilitation code is assigned when "a member failed through inability or refusal to participate in, cooperate in, or successfully complete a treatment program for alcohol rehabilitation." (Emphasis added.)

11. The Board notes that when the applicant was informed that he was being processed for separation, he was told that the basis for his separation was his involvement in a third alcohol incident. He was never told that he was being discharged because of "alcohol rehabilitation failure."

12. Chapter 20 of the Personnel Manual states that a member involved in a third alcohol incident will be discharged in accordance with Article 12.B.16 (unsuitability) of the Personnel Manual. However, since unsuitability is not listed in the SPD handbook as a narrative reason for separation, it has no corresponding separation code. Therefore, unsuitability cannot be assigned as the reason for the applicant's separation on the DD Form 214. The only other separation code in the SPD Handbook that will fit the applicant's situation is the JND separation code. The narrative reason that corresponds to JND is "separation for miscellaneous/general reasons" and the separation authority is 12.B.12 (convenience of the government) of the Personnel Manual. Either an RE-1 (eligible for reenlistment) or an RE-4 (ineligible for reenlistment) reenlistment code may be assigned with this separation code. Therefore, the Board will not change the applicant's RE-4 reenlistment code. There is ample justification in the record for discharging the applicant from the Coast Guard and for not recommending him for reenlistment.

13. The Board notes the Chief Counsel's argument that the Coast Guard's violation of agency regulations would not create a private right of action on the part of the applicant. However, 10 U.S.C. 1552 gives the applicant the right to request the correction of errors or injustices that may exist in his record.

14. Accordingly, relief should be granted to the applicant.

ORDER

The application of _____ for correction of his military record is granted. His DD Form 214 shall be corrected in the following manner:

Block 25 shall be corrected to show Article 12-B-12, Personnel Manual as the separation authority.

Block 26 shall be corrected to show JND as the separation code.

Block 28 shall be corrected to show "separation for miscellaneous/general reasons" as the narrative reason for separation.

All other relief is denied.

*see dissenting opinion

James K. Augustine

Coleman R. Sachs

Edmund T. Sommer, Jr.

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BOARD FOR CORRECTION OF MILITARY RECORDS**

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DISSENTING OPINION

Deputy Chairman Ulmer:

While I agree with the underlying rationale adopted by the Board that the SPD Code JPD should not be utilized in cases where alcohol rehabilitation programs are not involved, and where all that is involved is one or more alcohol incidents, I respectfully dissent from application instead of the SPD Code JND, as determined by the Board today. As noted by Attorney-Advisor Andrews in Application of xxxxxxx, Docket No. 98-047, I feel that the SPD Code JNC, Unacceptable Conduct, RE-4, 12-B-16 (Involuntary discharge directed by established directive) would be more appropriate. I recognize that in xxxxxxx application of that SPD Code was not "contested", and that the JND Code may also not be a precise fit, but I respectfully submit that, at least for this matter, it is the better alternative to the JND Code.

James K. Augustine
(electronically submitted)