

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2001-020

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 BCMR received the application for correction on December 10, 2000, and docketed the case on January 11, 2001, upon receipt of the applicant's military records.

This final decision, dated August 9, 2001, 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 seaman apprentice (SA; pay grade E-2) in the Coast Guard, asked the Board to correct his military record by upgrading the reenlistment code from RE-4 (ineligible for reenlistment) to RE-1 (eligible to reenlist) and to change the narrative reason for separation shown on his DD 214 (discharge form) from "unsuitability" to something else.

APPLICANT'S ALLEGATIONS

The applicant alleged that he was not unsuitable for military service. He alleged that he joined the Coast Guard after graduating from high school in XXXX because he thought his father wanted him to and because he "was young and did not know where [his] life was heading." He alleged that after he finished boot camp and was assigned to a cutter in XXXXXXXX, he and his fiancée "started having a lot of problems."

The applicant alleged that around Christmas 1993, he asked for leave but it was denied because he was not married. He alleged that he asked for leave because his girlfriend called and said she was pregnant. Therefore, he left his station without leave to visit his girlfriend, but she had a miscarriage soon after he arrived.

The applicant alleged that after he returned to his station, he was reprimanded, fined half a month's pay, and confined to ship for two weeks. He stated that he knew he "got off light and that they could have done worse" to him. The applicant alleged that he wrote a letter explaining his actions to his commanding officer but that the commanding officer did not receive it until after he was reprimanded.

The applicant alleged that a few weeks later, his fiancée phoned and said she was dating someone else and that she would only stay with the applicant if he left the military. Therefore, he "asked around" and was referred to the unit's chaplain. The chaplain told him that the only way to get out of his enlistment early was to get into serious trouble or be found unfit. The applicant alleged that he did not want to get into trouble, so when the chaplain gave him a Taylor-Johnson Temperament Test, he "answered the questions so it would look like [he] had problems." He alleged that he was then referred to a psychologist, who told him that he did not have any problems but that it would be good for him to get out of the military.

The applicant stated that he regrets his actions and would like to go into law enforcement but is unable to because of the RE-4 and "unsuitability" on his DD 214. He has worked as an internal investigator for XXXXX for four and one-half years and as a civilian undercover agent for a local narcotics unit for six months. He stated that his discharge was his own fault and that now he "would just like the chance to make up for [his] past with doing something good for [his] future."

The applicant alleged that he has previously tried to get his record corrected by writing to the Coast Guard and his senators, congressmen, and state representatives. However, he did not learn about the BCMR until recently, when he discovered it on the internet.

In support of his allegations, the applicant submitted three letters of reference. An assistant district attorney XXXXXXXXXXXX, wrote that the applicant is "a self-motivated individual who takes his job [XXXXXX] and responsibilities very seriously." He stated that the applicant continued to work despite having been slashed several times on the hand by a shoplifter he caught. He stated that the applicant had served very responsibly for local narcotics agents by observing "numerous purchases of meth[amphetamine] producing materials ... in bulk at

XXXXXX" and reporting the purchasers' physical descriptions and license plate numbers to the police. His efforts allowed the police to close several "meth labs" in the parish. He stated that the applicant "would be an excellent employee and a vigilant police officer He is an articulate, polite, and extremely hard working young man."

A sergeant in the Ouachita Parish narcotics unit wrote that on two occasions the applicant and another guard at the XXXXX had provided critical information about bulk purchases of ingredients that resulted in his unit closing down methamphetamine laboratories in the parish.

The applicant's supervisor wrote that as a guard at XXXXXXXX the applicant "has accomplished many duties with the highest professionalism." He described the applicant as a "very motivated self starter who would be a tremendous asset to any law enforcement agency. His ability to make decisions under pressure is unmatched in my division."

SUMMARY OF THE RECORD

On XXXXXXXX, the applicant enlisted in the Coast Guard for a term of four years and began boot camp. On XXXXXXXX, he was transferred to his first billet, which was on a cutter.

From XXXXXXXXXXXXXXXXXXXXXXXX, the applicant was absent without leave from the cutter. On XXXXXX, he was taken to mast for the unauthorized absence, fined one-half of one month's pay, and restricted to the ship and assigned extra duties for three weeks.

On his first performance evaluation, dated XXXXXX, the applicant received one mark of 1 (out of a possible 7), three marks of 2, three marks of 3, and eight marks of 4. His conduct was rated unsatisfactory and he was not recommended for advancement. The cutter's operations officer noted that he had been absent without leave for nine days and that upon his return, he had "continually made known [his] desire to leave the Coast Guard." The operations officer also noted that the applicant had failed to adapt to the shipboard environment.

On January 11, 1994, the cutter's executive officer placed the applicant on six months' performance probation and made the following entry in his record:

On Thursday, XXXXXXXX, you departed [the cutter] without leave, and remained absent for a period of nine days. It is doubtful you would have returned if I had not alerted your parents to your disappearance. Worried, and concerned for your welfare, they searched for, found and convinced you to call me. After a long conversation with me you decided to voluntarily return to [the

cutter]. Your absence and mistrust place an unnecessary burden on your shipmates who had to perform your duties for you. As a result of this incident, you received NJP [non-judicial punishment]. In addition you have expressed a lack of interest in fulfilling your Coast Guard duties and have requested a release from your enlistment contract.

This is to inform you that I am contemplating administratively discharging you for unsuitability, specifically, inaptitude in demonstrating a general lack of adaptability, in accordance with section 12-B-16 of the USCG Personnel Manual, COMDTINST M1000.6A. ...

On January 18, 1994, the applicant's command referred him to a Navy psychologist for evaluation. The referral indicated that the applicant wanted to leave the Coast Guard and was being considered for an administrative discharge. The evaluation was necessary to determine whether the applicant was mentally responsible and fit for continued sea duty. The referral also noted that a chaplain had "administered a Taylor-Johnson Temperament Test and found the attitude scale to be 'extreme' with regards to low attitude. The Chaplain further felt that this member could slip into depression with suicidal ideations."

On February 7, 1994, the applicant's psychologist reported that he told her that he had joined the Coast Guard solely because his father had wanted him to join the military and because every male member of his family had been in the military. He "admitted to suicidal ideation" prior to going on unauthorized leave but stated that suicide was not an option for him because he did not want to kill himself and only wanted the situation to be different. The applicant told the psychologist that he suffered from frequent headaches, nervous stomach, dizziness, moodiness, shyness, trouble concentrating and sleeping, poor memory, over-sensitivity, and changes in appetite. He also reported feeling depressed, sad, confused, guilty, and anxious.

The psychologist found that he had a history of letting others make his decisions for him and diagnosed him with a dependent personality disorder.¹

¹ According to the fourth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), someone with a dependent personality disorder has a "pervasive and excessive need to be taken care of that leads to submissive and clinging behavior and fears of separation ... as indicated by five (or more) of the following: [the person]

1. has difficulty making everyday decisions without an excessive amount of advice and reassurance from others;
2. needs others to assume responsibility for most major areas of his or her life;
3. has difficulty expressing disagreement with others because of fear of loss of support or approval;
4. has difficulty initiating projects or doing things on his or her own (because of a lack of self-confidence in judgment or abilities rather than a lack of motivation or energy);

She reported that the applicant “manifest[ed] a longstanding disorder of character and behavior which is of such severity as to render [him] incapable of serving adequately in the Coast Guard. ... Although [he] is not presently considered suicidal or homicidal, he is judged to represent a continuing danger to self or others if retained in military service. [He] is deemed fit for return to duty for immediate processing for administrative separation, which should be initiated expeditiously by his command.”

On February 10, 1994, the cutter’s commanding officer (CO) informed the applicant that he had initiated action to discharge him for unsuitability due to a personality disorder. He further informed him that his poor performance marks supported a general rather than honorable discharge but that the type of discharge he received would be determined by the Military Personnel Command (MPC). The CO also informed him that he had a right to consult with an attorney and to submit a statement on his own behalf. However, the applicant signed an acknowledgment in which he waived his right to consult an attorney and to submit a statement and indicated that he did not object to the proposed discharge.

On February 15, 1994, the CO asked MPC to discharge the applicant for unsuitability due to his personality disorder based on the psychologist’s diagnosis and the CO’s own observations. The CO stated that despite numerous oral counseling sessions, the applicant had failed to adjust to military life and sea duty. The CO recommended that the applicant receive a general discharge based on his poor marks and an RE-4 reenlistment code.

On March 3, 1994, MPC ordered that the applicant receive a general discharge by reason of unsuitability, in accordance with Article 12-B-16 of the Personnel Manual, and a JFX separation code.

On March 29, 1994, the applicant received his second and final performance evaluation. He earned four marks of 1, four marks of 2, five marks of 3, and two marks of 4. His conduct was rated unsatisfactory and he was not recommended for advancement.

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5. goes to excessive lengths to obtain nurturance and support from others, to the point of volunteering to do things that are unpleasant;
 6. feels uncomfortable or helpless when alone because of exaggerated fears of being unable to care for himself or herself;
 7. urgently seeks another relationship as a source of care and support when a close relationship ends;
 8. is unrealistically preoccupied with fears of being left to take care of himself or herself .”

On April 5, 1994, the operations officer made an entry in the applicant's record documenting the fact that he had been taken to mast and awarded NJP for sexual harassment because of a "sexually explicit, demeaning, and inappropriate note" that he left on a female crewmember's rack. The operations officer wrote that the applicant's "callous disregard for the feelings of [his] shipmates has been indicative of [his] performance onboard [the cutter]."

On XXXXXXXXXX, the applicant received a general discharge "under honorable conditions" with an RE-4 reenlistment code, a JFX separation code, and a narrative reason for separation of "unsuitability." His average evaluation marks were 3.3 for military bearing, 3.2 for work performance, and 2.0 for professionalism.

VIEWS OF THE COAST GUARD

On May 10, 2001, the Chief Counsel of the Coast Guard submitted an advisory opinion recommending that the Board deny the requested relief for untimeliness, failure to exhaust administrative remedies, and lack of merit.

The Chief Counsel argued that relief should be denied for untimeliness because the applicant knew or should have known about the alleged errors on his DD 214 when he signed it at the time of his discharge. Therefore, his application arrived approximately four years after the Board's three-year statute of limitation expired. The Chief Counsel further argued that the applicant provided "no valid reason for his delay" in applying to the Board and so his application should be dismissed.

The Chief Counsel also argued that the applicant had failed to exhaust his administrative remedies as required under 33 C.F.R. § 52.13(b) by applying to the Discharge Review Board (DRB). He alleged that under 10 U.S.C. § 1553 and 33 C.F.R. §§ 51.3 and 51.4, the DRB could upgrade the applicant's reason for discharge and reenlistment code.

The Chief Counsel further argued that, should the Board decide not to dismiss the case or deny it for untimeliness, the applicant's request should be denied because he failed to prove that the Coast Guard committed any error or injustice in discharging him or issuing his DD 214. The Chief Counsel stated that both the Personnel Manual and the Medical Manual provide that members rendered unfit for duty because of a personality disorder should be administratively discharged. He alleged that the applicant received all due process required under Article 12.B.16.d. of the Personnel Manual and that the JFX separation code, RE-4 reenlistment code, and "unsuitability" on his DD 214 were properly

assigned in accordance with the Separation Program Designator (SPD) Handbook.

The Chief Counsel alleged that the applicant had not proved that the psychologist's diagnosis was erroneous or that he no longer had a personality disorder. He distinguished the applicant's case from other cases in which the Board has corrected JFX separation codes by pointing out that this applicant was diagnosed with an actual personality disorder (as opposed to an adjustment disorder) and that his disorder had "repeatedly led to inappropriate behavior which was not in conformity with military expectations." The Chief Counsel also alleged that, in light of the applicant's poor performance and misconduct, his CO acted within his discretion in making him ineligible for reenlistment.

Finally, the Chief Counsel argued that "while Applicant appears to have found an avocation of his liking, the evidence he presents of his job skills in that profession has no direct relevancy addressing his ability to perform the duties and responsibilities of a member of the Armed Forces."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 11, 2001, the Chairman sent the applicant a copy of the views of the Coast Guard and invited him to respond within 15 days. No response was received by the Board.

APPLICABLE LAW

Article 12.B.16. of the Coast Guard Personnel Manual 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.16.b. of the Personnel Manual authorizes unsuitability discharges for members diagnosed with one of the "personality behavior disorders ... listed in Chapter 5, CG Medical Manual"

Chapter 5.B.2 of the Medical Manual lists personality disorders that qualify a member for administrative discharge pursuant to Article 12 of the Personnel Manual. The list includes dependent personality disorders. Chapter 3.F.16.c provides that personality disorders "may render an individual administratively unfit [for duty] rather than unfit because of a physical impairment. Interference with performance of effective duty will be dealt with through appropriate administrative channels (see Section 5-B)."

The SPD Handbook provides that members who are discharged because of a personality disorder that does not amount to a disability shall be assigned a separation code of JFX, a narrative reason for separation of "Personality Disorder," and a reenlistment code of RE-4 or RE-3G. An RE-3G code means the discharged member is eligible for reenlistment except for a "condition (not a physical disability) interfering with performance of duty."

Article 12.B.2. of the Personnel Manual provides that, to receive an honorable discharge, a member must have a final average of 2.5 in each evaluation category. Members being discharged for unsuitability whose final averages do not meet this standard may be awarded a general discharge under honorable conditions.

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 Chief Counsel argued that the case should be dismissed for failure to exhaust administrative remedies by applying to the DRB for a change of discharge. Under 33 C.F.R. § 51.3, veterans "may apply to the DRB for a change in the character of, and/or the reason for, the discharge." However, the applicant has asked primarily for a change in his RE code. RE codes are not mentioned in either the DRB's enabling statute or Coast Guard implementing regulations. Although a change in the character of discharge ordered by the DRB may result indirectly in a change of RE code and the BCMR sometimes revises discharges along with RE codes, veterans currently need not apply to the DRB before applying to the BCMR when their requests concern their RE codes.

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(b). The record indicates that the applicant signed and received his DD 214 in April 1994. He knew or should have known the nature of his separation and non-eligibility for reenlistment at that time. Thus, his application was untimely by more than three years.

4. The Board may waive the three-year statute of limitations if it is in the interest of justice to do so. 10 U.S.C. § 1552(b). To determine whether it is in the interest of justice to waive the statute of limitations, the Board should con-

sider the reasons for the delay and conduct a cursory review of the merits of the case. *Dickson v. Secretary of Defense*, 68 F.3d 1396, 1405 (D.C. Cir. 1995); *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992). The applicant stated the he did not apply to this Board earlier because he did not learn of its existence until recently. The Board finds that the applicant's reason for delay is not compelling. Nevertheless, the merits of his case must also be reviewed.

5. The record in this case indicates that the applicant was diagnosed with a dependent personality disorder by a psychologist in February 1994 and was properly discharged for unsuitability pursuant to Article 12.B.16. of the Personnel Manual and Chapter 5 of the Medical Manual. He was informed of the nature of his pending discharge and waived his right to consult with an attorney and to submit a statement in his own behalf. The RE-4 reenlistment code, JFX separation code, and narrative reason for separation of "unsuitability" shown on the applicant's DD 214 were fully supported by the applicant's psychological diagnosis and history of misconduct and inaptitude for military service. His general discharge under honorable conditions was also correct in light of his poor performance evaluations. The Board finds that the applicant has not proved that the Coast Guard committed any error or injustice in awarding him a general discharge under honorable conditions due to unsuitability with a JFX separation code and an RE-4 reenlistment code.

6. The applicant alleged that his RE-4 code has prevented him from beginning a career in law enforcement. The Coast Guard has no control over what uses civilian employers make of the coded information on a DD 214. Even if the applicant is now fit for a career in law enforcement, as he alleged, this does not mean that the military reenlistment code and reason for separation entered on his DD 214 are incorrect or unjust. Therefore, the Board finds that it is not in the interest of justice to waive the statute of limitations in this case.

7. Accordingly, the applicant's request should be denied based both on its untimeliness and on the lack of merit in his claim.

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

ORDER

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

Laura A. Aguilar

James K. Augustine

Dorothy J. Ulmer