

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2005-041

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FINAL DECISION

AUTHOR: Andrews, J.

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case on December 29, 2004, upon receipt of the applicant's application and military records.

This final decision, dated September 22, 2005, is 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, who received a general discharge under honorable conditions from the Coast Guard on September 3, 1999, for unacceptable conduct, asked the Board to correct his record by upgrading his discharge to honorable.

The applicant alleged that he was scheduled for an honorable discharge on August 12, 1999, but instead he was taken to mast¹ by his commanding officer (CO) after being charged with violating the Uniform Code of Military Justice (UCMJ). After he pled guilty at mast and was sentenced to 60 days of restriction to the ship and to forfeiture of one-half his pay for two months, he appealed the sentence as being too harsh. Because the reviewing authority failed to act timely in reviewing his appeal, the appli-

¹ Under Article 15 of the UCMJ, COs may award members non-judicial punishment (NJP) by taking them to "mast," in lieu of court-martial, for minor violations of the UCMJ. Punishment at mast is limited to confinement on bread and water for not more than 3 days; correctional custody for not more than 30 days; reduction in pay grade; forfeiture of not more than one-half the member's pay for 2 months; extra duties for up to 45 days; and restriction to specified limits for not more than 60 days.

cant alleged, his non-judicial punishment (NJP) was “reversed.” The applicant alleged that his general discharge was a result of this NJP and that because the NJP was reversed, he should have received an honorable discharge instead of a general discharge. He alleged that a message dated August 16, 1999, from his command to the Coast Guard Personnel Command (CGPC) proves that the general character of his discharge was based upon the NJP that was reversed.

The applicant alleged that when CGPC authorized his general discharge on August 24, 1999, CGPC did not know that his mast appeal was pending review by the Commander of the Atlantic Area. He alleged that the wording and timing of CGPC’s messages prove that they were not aware of his appeal or of the reversal of the NJP. He alleged that if CGPC had known that his appeal was pending and that the NJP was reversed, he would not have received a general discharge.

The applicant further alleged that in violation of Article 12.B.16.d.3. of the Personnel Manual, he was not given an opportunity to consult with an attorney prior to his discharge. He alleged that there “is no documentation stating [that he] was given such an opportunity, or that he waived or accepted that right.”

The applicant also alleged that the report of the investigation for one of his prior NJPs and several page 7s (administrative entries) in his record prove that various members of his command were out to get him. He alleged that he was punished harshly for very minor infractions that were “hardly worth the effort of documenting.”

SUMMARY OF THE APPLICANT’S MILITARY RECORD

On July 14, 1998, the applicant enlisted in the Coast Guard for four years. Upon completing boot camp, the applicant was assigned to a cutter and advanced from seaman recruit (SR) to seaman apprentice (SA).

On December 28, 1998, the cutter’s weapons officer entered a page 7 in the applicant’s record to counsel him about being “disrespectful toward senior personnel.” The page 7 indicates that after being told by a supervisor to help clean the deck, he refused to do so. The applicant was advised that any future incidents would lead to disciplinary action.

On December 30, 1998, the weapons officer entered another page 7 in the applicant’s record to counsel him about his attitude and disregard for authority. The page 7 stated that when asked to relieve the lookout by a first class petty officer, the applicant “made an uncalled for facial gesture and answered coyly” and that such actions are punishable under the UCMJ as provoking speech and gestures. The applicant was advised that any future incidents would lead to disciplinary action.

On January 13, 1999, the weapons officer entered a page 7 in the applicant's record to counsel him about his failure to report for duty on time. The page 7 indicates that on December 22, 1998, the applicant was 30 minutes late to the watch and that despite counseling he was 30 minutes late to muster on December 23, 1998. The applicant was advised that any future incidents would lead to disciplinary action.

On January 26, 1999, the weapons officer entered a page 7 in the applicant's record to counsel him about his attitude and disregard for authority. The page 7 states that his "poor work habits and failure to comply with simple task directions are taxing your section leader. ... Your lackadaisical attitude toward your chain of command and assigned work projects is causing a drain on the system. Your Division Chief and Division Officer have counseled you on several occasions. ... Any future discord within your duty section as a result of your actions will result in disciplinary actions taken against you."

On February 3, 1999, following an investigation, the applicant's CO took him to mast for having been absent without leave (AWOL) from 8:45 a.m. January 23 to 10:40 p.m. January 24, 1999. The CO dismissed the charge with a warning.

On February 18, 1999, following an investigation, the CO took the applicant to mast for dereliction of duty and treating superiors with contempt and disrespect. The CO sentenced the applicant to 30 days of "correctional custody" at a Navy Brig and forfeiture of one-half his pay for two months. However, the forfeiture was suspended for four months. The applicant also received a performance evaluation with very low marks.² On a scale of 1 to 7, with 7 being best, he received two marks of 1, five marks of 2, five marks of 3, and two marks of 4 in the various performance categories; an unsatisfactory conduct mark; and a mark of "not recommended" for advancement. The page 7s that document the low marks criticize the applicant's failure to adapt to a military lifestyle at sea, failure to qualify for basic skills, failure to follow rules and regulations, lack of respect for senior personnel, arguing with supervisors about work assignments, refusal to obey orders and perform duties, below standard work, failure to wear required safety gear, use of racial slurs and curses against seniors and peers, lack of integrity, lack of loyalty, etc. The page 7s indicate that the applicant had been assigned mentors, but that he cursed and insulted them and did not respond to their efforts.

On May 14, 1999, following an investigation, the CO took the applicant to mast for failure to obey an order to perform certain duties, insubordinate conduct, and use of provoking speech and gestures. The CO sentenced the applicant to reduction in pay grade to SR/E-1, 45 days of extra duties and restriction to the cutter, and forfeiture of one-half pay for two months. However, the reduction in pay grade and forfeiture were

² Article 10.B.5.b.4.a. of the Personnel Manual requires that an enlisted member receive a performance evaluation whenever he is awarded NJP.

suspended for four months. The applicant also received a performance evaluation with five marks of 2, five marks of 3, and five marks of 4 in the various performance categories; an unsatisfactory conduct mark; and a mark of "not recommended" for advancement. The page 7s that document the low marks criticize his lack of respect for his crewmates and supervisors, his use of foul and disrespectful language, his apathy and shirking of duties, the poor quality of his work, and his lack of integrity and honesty.

On May 19, 1999, the Executive Officer (XO) of the cutter placed the applicant on performance probation for six months. The applicant was advised that if his performance did not greatly improve by the end of the period, he would be discharged.³

On June 11, 1999, the weapons officer placed a page 7 in the applicant's record to document his not being in proper uniform as the cutter was preparing to moor in Cuba.

On June 12, 1999, following an investigation, the CO took the applicant to mast for failure to obey an order, dereliction of duty, disrespectful conduct, and lying. The CO sentenced him to 14 days of extra duties. The applicant also received a performance evaluation with two marks of 1, one mark of 2, eight marks of 3, and four marks of 4 in the various performance categories; an unsatisfactory conduct mark; and a mark of "not recommended" for advancement. The page 7s documenting the low marks criticize his failure to wear the proper uniform on numerous occasions, the poor quality of his work, the slowness of his work, and dishonesty. One states that he "cannot be relied upon to do even the simplest of tasks without very close supervision."

On July 8, 1999, the XO, who was Acting CO, informed the applicant in a letter that he was initiating his administrative discharge for "unsuitability"⁴ due to his "demonstrated inability to work and perform in a constructive manner, poor attitude, and failure to adhere to the Coast Guard's core values of honor, respect, and devotion to duty." The XO noted in his letter to the applicant that the type of discharge he would receive "rests with Commander (CGPC-epm-1)" and that he had a right to submit a statement in his own behalf. The applicant acknowledged the XO's notification in writing, declined to exercise his right to counsel, waived his right to submit a statement

³ Article 12.B.16.b. of the Personnel Manual states that a member may be discharged for unsuitability due to "apathy, defective attitudes, and inability to expend effort constructively." Article 12.B.16.c. states that COs "will not initiate administrative discharge action for inaptitude, apathy, defective attitudes ... until they have afforded a member a reasonable probationary period to overcome these deficiencies. When commands contemplate discharging a member for these reasons, they shall counsel the member that a formal probationary period of at least six months has begun and make an appropriate Administrative Remarks, CG-3307, entry in the member's [military record] that administrative discharge processing will be initiated unless the member shows significant improvement in overcoming the deficiency during the probationary period. The member must acknowledge this entry in writing."

⁴ Article 12.B.16.b. of the Personnel Manual also states that COs "are authorized to recommend discharge at any time during probation if the member is not attempting to overcome the deficiency."

in his own behalf, and indicated that he did not object to being discharged.⁵ Also on July 8, 1999, the XO sent CGPC his recommendation that the applicant be discharged.

On July 16, 1999, CGPC notified the XO that the applicant should be discharged with a JNC separation code (for "Unacceptable Conduct") pursuant to Article 12.B.16. of the Personnel Manual no later than August 13, 1999, provided no disciplinary action was then pending. CGPC also ordered that the type of discharge should be honorable or general,⁶ based on the applicant's performance evaluation marks,⁷ in accordance with Articles 12.B.2.f.1. and 12.B.2.f.2. of the Personnel Manual.⁸

On August 4, 1999, following an investigation, the XO, as Acting CO, took the applicant to mast for failing to obey an order by not appearing for his scheduled discharge physical examination on July 20, 1999. The applicant pled guilty and the XO awarded him 60 days of restriction to the cutter and forfeiture of one-half pay for two months. The applicant also received a performance evaluation with very low marks, including four marks of 1 and six marks of 2. His final average factor mark for "Professional Qualities," such as integrity, human relations, and respecting others, was 2.4.⁹

On August 5, 1999, the applicant appealed the NJP to the Commander of the Atlantic Area. He stated that although he pled guilty, the punishment was too harsh.¹⁰ He stated that he missed the physical examination because he had to go home due to

⁵ Article 12.B.16.d. of the Personnel Manual states that before initiating a discharge for unsuitability, a CO must "1. Advise the member in writing, using the letter and endorsement described in Article 12.B.9., to inform the member of the reason(s) he or she is being considered for discharge. ... 2. Afford the member the opportunity to make a written statement on his or her own behalf. ... 3. Afford the member an opportunity to consult with a lawyer as defined in Article 27 (b) (1), UCMJ, if the member's character of service warrants a general discharge."

⁶ Article 12.B.16.f. of the Personnel Manual indicates that if the Commander of CGPC authorizes a discharge for unsuitability, he may direct either an honorable or general discharge.

⁷ Article 12.B.2.f.1.d. of the Personnel Manual provides that to receive an honorable discharge a member "must have a minimum characteristic average of 2.5 in each factor over the period of the enlistment. Article 12.B.48.b. contains directions for determining the final characteristic average."

⁸ Article 12.B.2.f.1.a. lists all of the reasons why a member may be discharged, including unsuitability. Article 12.B.2.f.2. states that a "member's commanding officer or higher authority may effect a separation with a general discharge if the member is subject to discharge and a general discharge is warranted under the standards prescribed in this paragraph. ... A general discharge applies in these situations: ... b. The member is eligible for discharge for one of the reasons listed in Article 12.B.2.f.1.a. and (1) The member's final average marks are less than those shown in ... Article 12.B.2.f.1.d ... , or (2) When based on the individual's overall military record or the severity of the incident(s) which results in discharge, Commander, (CGPC-epm-1) directs issuing a general discharge."

⁹ Article 12.B.2.f.1.d. of the Personnel Manual provides that to receive an honorable discharge a member "must have a minimum characteristic average of 2.5 in each factor over the period of the enlistment."

¹⁰ Under Article 1.F.1. of the Military Justice Manual, a member may appeal his NJP "if he or she considers the punishment imposed 'unjust' or 'disproportionate' to the acts of misconduct for which punished. ... The appeal must be submitted in writing within 5 calendar days of the imposition of the punishment."

his mother having had an affair and having been arrested for driving while intoxicated and due to his father feeling suicidal. The applicant stated that 10 to 15 days of restriction would be more just. The same day, the applicant's command informed CGPC that he could not be discharged on August 13 due to the pending disciplinary action.

On August 10, 1999, the CO, who had just returned to the cutter, forwarded the applicant's appeal to the Commander of the Atlantic Area. The CO stated that before going on annual leave on July 15, 1999, the applicant had not informed his supervisors of any family problems and told them that he would be present for his discharge physical on July 20, 1999, as ordered. Because the Commander of the Atlantic Area failed to take action on the applicant's appeal within five days of the day the applicant submitted it, the punishment was deferred.¹¹ Also on August 10, 1999, CGPC authorized the applicant's command to delay his discharge until completion of the disciplinary action.

On August 16, 1999, the CO sought authority to issue the applicant a general discharge in accordance with Article 12.B.2.f.2.b.(2)¹² and CGPC's message dated July 16, 1999. The CO stated that the applicant met the requirements for a general discharge and that his military record documented contempt for the Coast Guard's core values. The command stated that giving the applicant "the privilege of an honorable discharge ... would demean those who have in fact honorably served."

On August 24, 1999, CGPC replied that upon completion of the disciplinary action and after the applicant had been counseled by an attorney in accordance with Article 12.B.16.d.3. of the Personnel Manual,¹³ the command should issue the applicant a general discharge.

On August 31, 1999, the applicant signed a statement acknowledging that he had been "afforded an opportunity and did, in fact, consult with [name of attorney] of the Naval Legal Services Office with regard to my receiving a general discharge from the United States Coast guard."

¹¹ Article 1.F.5. provides that a "member who appeals his or her NJP punishment is required to serve any punishment while the appeal is pending. If action by the appeal authority is not taken on the appeal within 5 calendar days after submission, however, the member may request any unserved punishment involving restraint or extra duties be deferred until the action on appeal is taken. Such requests shall be granted." Article 1.F.6.e.(1) provides that a "punishment that has been deferred pending the decision of an appeal shall take effect on the date the member's commanding officer is advised of the appeal decision."

¹² Article 12.B.2.f.2.b.(2) provides that a member may receive a general discharge "[w]hen based on the individual's overall military record or the severity of the incident(s) which results in discharge, Commander, (CGPC-epm-1) directs issuing a general discharge."

¹³ Article 12.B.16.d.3. states that before initiating a discharge for unsuitability, a CO must "[a]fford the member an opportunity to consult with a lawyer as defined in Article 27 (b) (1), UCMJ, if the member's character of service warrants a general discharge."

On September 3, 1999, the applicant received a general discharge with a narrative reason for separation of "Unacceptable Conduct," a JNC separation code, and an RE-4 reenlistment code (ineligible), pursuant to Articles 12.B.16. and 12.B.2.f.2. of the Personnel Manual.

On October 20, 2003, the Coast Guard's Discharge Review Board denied the applicant's request for an honorable discharge.

VIEWS OF THE COAST GUARD

On May 23, 2005, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request for lack of merit.

The JAG alleged that the applicant's arguments about why his discharge should be upgraded are "flawed in a variety of respects." The JAG stated that there is no evidence that the applicant was ever promised an honorable discharge as he alleged. The JAG pointed out that on July 16, 1999, CGPC authorized the command to award the applicant the type of discharge warranted by his performance marks. The JAG stated that while this discharge was pending, the applicant committed further misconduct by skipping his discharge physical examination, which caused his command to request permission to discharge him for misconduct.

The JAG pointed out that the applicant admitted his offense at mast on August 4, 1999, and appealed only the severity of his sentence. The JAG stated that the failure of the Commander of the Atlantic Area to take action of the applicant's appeal did not "reverse" the NJP but merely suspended it. The JAG stated that the Coast Guard cannot produce a copy of the response of the Commander of the Atlantic Area to the applicant's appeal because in accordance with Article 1.G.4. of the Military Justice Manual, such records are only retained for four years. The JAG pointed out that because the mast sentence was suspended and never enforced, the applicant received less punishment than even he himself requested in his appeal. The JAG stated that there is no evidence that the applicant's final NJP was ever invalidated. He stated that the general discharge "was based on a continuing pattern of misconduct of which the events leading to his NJP of 04 August were only a part" and "the latest example" of his misconduct. The general discharge was not part of the sentence of the August 4 mast. The JAG stated that even if the Commander of the Atlantic Area had reduced the sentence in response to the applicant's appeal, "that decision would not have affected the characterization of Applicant's discharge at all."

The JAG further pointed out that, contrary to the applicant's allegation, his record contains documentation of his having been afforded "the due process rights to which he was entitled," including an opportunity to consult with an attorney about his

general discharge on August 31, 1999. The JAG stated that “[a]lthough reprehensible, Applicant’s lack of candor [about this consultation] is not surprising considering the numerous examples of Applicant’s lack of integrity documented throughout his service record.”

The JAG concluded that the applicant failed to overcome the presumption of regularity and to prove that his general discharge is erroneous or unjust.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 31, 2004, the applicant responded to the JAG’s advisory opinion. The applicant stated that even though the NJP of August 4, 1999, was not “reversed,” it was still deferred and went away. Therefore, he argued, his general discharge should have been deferred and gone away too.

The applicant alleged that when he sought and received a copy of his military record from the National Archives, it did not contain any documentation of a consultation with an attorney dated August 31, 1999. The applicant also alleged that he did not receive a copy of the letter dated July 8, 1999, wherein his XO informed him that the type of discharge he received would be determined by CGPC.

The applicant argued that the Coast Guard should not receive a presumption of regularity since, on his cutter, a married engineering officer “was kicked out for having sex with a hooker”; two firemen “were kicked out for smoking marijuana on the fan-tail”; and a second class petty officer was “kicked out for drilling a peephole through the wall of the crew lounge into the women’s shower.” He stated that “the Coast Guard has about as much honor as a bag of Doritos.”

Regarding the character of his discharge, the applicant stated that in July his department head told him to “be cool and don’t get in trouble and you’ll get an honorable discharge.”

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 10 U.S.C. § 1552. An application to the Board must be filed within three years after the applicant discovered or reasonably should have discovered the alleged error in his record.¹⁴

¹⁴ 10 U.S.C. § 1552; 33 C.F.R. § 52.22.

Although the applicant filed his application more than three years after he knew or should have known that he received a general discharge, he filed it within three years of having timely filed an application with the DRB, which has a fifteen-year statute of limitations. Therefore, the applicant has exhausted his administrative remedies and his application is considered timely.¹⁵

2. The applicant alleged that he received a general discharge on September 3, 1999, as a result of the mast on August 4, 1999, and that because the rest of his sentence was “reversed,” he should have received an honorable discharge. However, the applicant’s general discharge was not part of his sentence at mast. In accordance with Article 15 of the UCMJ, the maximum punishment a CO may impose at mast is confinement on bread and water for not more than 3 days; correctional custody for not more than 30 days; reduction in pay grade; forfeiture of not more than one-half the member’s pay for 2 months; extra duties for up to 45 days; and restriction to specified limits for not more than 60 days. A CO may not impose any discharge at mast. Moreover, the applicant’s military records show that his discharge was effected administratively under Article 12.B.16. of the Personnel Manual, rather than punitively under the UCMJ.

3. The applicant alleged that when CGPC approved his general discharge, CGPC was unaware that his NJP had been “reversed” and that had CGPC known of the reversal, he would have received an honorable discharge. As evidence, the applicant cited CGPC’s message dated August 24, 1999, in which CGPC indicated that upon completion of the disciplinary action (NJP) and after the applicant had been counseled by an attorney, the command should issue the applicant a general discharge.

4. There is no evidence in the record that the applicant’s NJP was “reversed.” Under Article 1.F.5. of the Military Justice Manual, if an appeal authority fails to take action on a mast appeal within five days, the punishment is deferred (delayed) until the appeal authority does take action. Therefore, CGPC’s message dated August 24, 1999, was correct in indicating that the disciplinary action was not yet complete because on that day the applicant’s appeal was still pending since the appeal authority had not yet acted. The applicant has not proved that CGPC was under any misconception as to the status of his NJP when it approved the proposed general discharge on August 24, 1999.

5. CGPC’s message dated August 24, 1999, authorized the command to issue the applicant a general discharge upon completion of the disciplinary action (NJP) and after affording the applicant an opportunity to consult an attorney. The applicant alleged that the Coast Guard denied him his right to counsel. However, his military records show that he was offered counsel on two occasions: First on July 8, 1999, when he acknowledged by signature the XO’s notification of the proposed discharge and

¹⁵ 33 C.F.R. § 52.13(b); *Ortiz v. Sec’y of Defense*, 41 F.3d 738, 743 (D.C.C. 1994).

affirmatively declined his right to consult counsel; and second on August 31, 1999, when he signed a statement acknowledging that he had been “afforded an opportunity and did, in fact, consult with [name of attorney] of the Naval Legal Services Office with regard to my receiving a general discharge from the United States Coast guard.” The applicant’s military records also show that he was advised of the reason he was being discharged and afforded an opportunity to submit a statement in his own behalf. The applicant has not proved that he was denied any due process with respect to his general discharge pursuant to Article 12.B.16.d. of the Personnel Manual.

6. The record is unclear as to how the disciplinary action was completed prior to the applicant’s discharge on September 3, 1999. The applicant alleged that the sentence was overturned because he later received money that had been withheld as a result of the NJP and did not serve the 60 days of restriction. The JAG has stated that the Coast Guard cannot produce a copy of the appeal authority’s response to the applicant’s appeal because in accordance with Article 1.G.4. of the Military Justice Manual, such records are retained for only four years. Since the applicant was discharged on September 3, 1999, it may be that to expedite the applicant’s discharge, the appeal authority set aside the sentence even though the applicant pled guilty.

7. The applicant argued in effect that if CGPC had known that his most recent sentence would not be enforced, CGPC would not have authorized the general discharge. However, CGPC’s message of August 24, 1999, shows that CGPC was aware that the applicant’s appeal was still pending and the outcome still unknown. Therefore, CGPC clearly approved the general discharge, pursuant to Article 12.B.2.f.1.d.(d) of the Personnel Manual, on the basis of the CO’s recommendation and the applicant’s prior record of frequent misconduct and poor effort and attitude. The applicant has not proved that the Coast Guard committed any error in issuing him a general discharge.

8. The applicant alleged that when he was advised of the proposed discharge on July 8, 1999, he was told that he would get an honorable discharge if he did not get into further trouble. However, at mast on August 4, 1999, the applicant admitted that he intentionally disobeyed an order by skipping his discharge physical examination, which had been scheduled for July 20, 1999. In light of this incident and the applicant’s overall very poor performance, the Board finds that he has not proved that his general discharge was unjust in any way.¹⁶

9. Accordingly, the applicant’s request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

¹⁶ “Injustice” is “treatment by the military authorities that shocks the sense of justice, but is not technically illegal.” *Reale v. United States*, 208 Ct. Cl. 1010,1011 (1976); Decision of the Deputy General Counsel, BCMR Docket No. 2001-043.

ORDER

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

Frank H. Esposito

Randall J. Kaplan

Dorothy J. Ulmer