

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2006-040

XXXXXXXXXXXXX
xxxxxxx, SR (former)

FINAL DECISION

AUTHOR: Hale, D.

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 January 20, 2006, upon receipt of the applicant's completed application and military records.

This final decision, dated September 28, 2006, 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, a former seaman recruit (SR; pay grade E-1) who served a little more than four months in the Coast Guard, asked the Board to correct his record by upgrading his reenlistment code from RE-4 (ineligible for reenlistment) to RE-3 (eligible for reenlistment except for a disqualifying factor).¹ The applicant stated that he wants his reenlistment code upgraded so he can enlist in the Army Reserve. He stated that he now realizes that he made poor choices when he was in the Coast Guard but that his problems "were linked to immaturity and alcohol abuse." He also stated that since his discharge in 1988, he has strived to be a responsible person and that he has held the same supervisory position for the past five years. He did not explain why he waited more than 16 years before filing his application.

¹ The Board presumes that the applicant would prefer that his RE-4 reenlistment code be upgraded to RE-1, which would make him eligible for reenlistment in any of the Armed Forces.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on September 9, 1987, at the age of twenty-one. After completing recruit training he was assigned to the USCG Air Station Sitka in Sitka, AK.

On December 20, 1987, the applicant was admitted to the hospital after becoming intoxicated and cutting his wrists in an apparent suicide attempt. The treating physician noted that the wounds to the applicant's wrists were superficial, that he suffered from alcohol abuse, and that he reported a history of poor performance in being compliant with authorities. He was released from the hospital on December 22, 1987, with a diagnosis of being a "problem drinker." The attending physician did not consider the applicant to have a psychological problem, that would disqualify him from further military service.

On December 23, 1987, the applicant's acting commanding officer (CO) placed a Page 7² in the applicant's record to document counseling about the December 20, 1987, alcohol incident. The acting CO noted that the applicant had been diagnosed as a problem drinker and that he would be referred to an appropriate medical facility for further screening and treatment. The acting CO also counseled the applicant that he was "prohibited from drinking alcohol" and advised him that "any evidence of alcohol consumption in the future will be considered to be a second alcohol incident and discharge proceedings per Article 12.B.16. of the [Coast Guard Personnel Manual] (unsuitability) would be taken."

On December 31, 1987, the applicant was discovered drinking alcohol in his room in violation of his CO's written order to refrain from drinking alcohol. He was charged with violating Article 92 of the Uniform Code of Military Justice (UCMJ) for failing to obey a lawful written order issued by a commissioned officer. He was awarded non-judicial punishment³ (NJP) of reduction to E-1 and forfeiture of \$306.00 for two months (suspended for six months).

On January 13, 1988, a Page 7 was placed in the applicant's record counseling him that he was being recommended for discharge from the Coast Guard for his second alcohol incident of December 31, 1987.

On January 17, 1988, the applicant was charged with violating Article 134 and Article 19 of the UCMJ for drunk and disorderly conduct and for violating two written

² A Page 7 entry documents any counseling that is provided to a service member as well as any other noteworthy events that occur during that member's military career.

³ Article 15 of the UCMJ provides NJP as a disciplinary measure that is more serious than administrative corrective measures but less serious than trial by court martial.

orders prohibiting consumption of alcohol and possession of alcohol in his room. He was awarded NJP of 45 days' restriction and 21 days of extra duty. The suspended punishment from the December 31, 1987, NJP was vacated and the punishment was executed.

On January 20, 1988, another entry was made on the January 13, 1998, Page 7 documenting that the applicant was being recommended for discharge for his third alcohol incident which occurred on January 17, 1988.

On January 21, 1988, the applicant's CO issued a memorandum to the applicant notifying him that he was being recommended for discharge. In signing the memo, the applicant acknowledged discharge notification, waived his right to make a statement, and waived his right to consult with a lawyer. On this same date, the CO attached this memo to a memorandum to the Commandant wherein he recommended that the applicant be discharged from the Coast Guard by reason of unsuitability because of his third alcohol incident.

On February 9, 1988, the applicant was discharged from the Coast Guard. He received a discharge "under honorable conditions," a separation code of JMG (unsuitability - alcohol abuse), and "unsuitability" as the narrative reason for separation. The record indicates that the applicant received an RE-4 reenlistment code (ineligible to reenlist). He had served in the Coast Guard for four months and twelve days.

Prior to filing his application with the Board, the applicant petitioned the Discharge Review Board (DRB) to upgrade his discharge from "general" to "honorable." On August 3, 1993, the DRB disapproved the applicant's request. On September 29, 1993, the Commandant reviewed the DRB's decision and approved its findings.

VIEWS OF THE COAST GUARD

On May 18, 2006, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the applicant's request.

The JAG relied on a memorandum from the Coast Guard Personnel Command (CGPC) concerning the applicant's request. CGPC stated that the applicant's request should be denied because it is untimely and because he has failed to "substantiate any justification for the delay in presenting this case." Notwithstanding the timeliness issue, CGPC alleged that the applicant's discharge was in accordance with Coast Guard

policy and that the applicant acknowledged his rights and waived his right to consult with a lawyer. CGPC indicated that "during the course of his four month and twelve day enlistment, he was involved in three alcohol incidents, awarded NJP twice, and his conduct was contrary to good order and discipline." Finally, the CGPC argued that the applicant's RE-4 reenlistment code is prescribed for his discharge and character of service, and that it would be inconsistent to assign a reenlistment code other than RE-4 in conjunction with a general discharge.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 2, 2006, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 days. No response was received.

APPLICABLE REGULATIONS

Article 20 of the Coast Guard Personnel Manual contains the regulations regarding alcohol abuse by Coast Guard members. Article 20.A.2.d. states that an alcohol incident is "any behavior, in which alcohol is determined, by the commanding officer, to be a significant or causative factor, that results in the member's loss of ability to perform assigned duties, brings discredit upon the Uniformed Services, or is a violation of the UCMJ, 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 for the behavior to be considered an alcohol incident."

Article 20.B.2.g. of the Personnel Manual states that the first time a member is involved in an alcohol incident, except those described in Article 20.B.2.f., the commanding officer shall ensure counseling is conducted and recorded on a Page 7 entry in the member's personal data record (PDR), acknowledged by the member, and a copy sent to CGPC.

Article 12.B.2.h. of the Personnel Manual states that "[e]nlisted members involved in a second alcohol incident will normally be processed for separation in accordance with Article 12.B.16."

Article 12.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."

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 submission, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was untimely.

2. An application to the Board must be filed within three years after the applicant discovered or should have discovered the alleged error in his record. 10 U.S.C. § 1552. An applicant has 15 years from the date of discharge to apply to the DRB for an upgrade of his discharge. The applicant applied to the DRB approximately eight years after his discharge, and the DRB issued its final decision on August 3, 1993. According to *Ortiz v. Secretary of Defense*, 41 F.3d 738 (D.C. Cir. 1994), the BCMR's three-year statute of limitations begins to run at the conclusion of DRB proceedings for an applicant who is required to exhaust administrative remedies by applying to the DRB before seeking redress from the BCMR. The Chair received the applicant's BCMR application on December 27, 2005, and therefore, it was untimely.

3. 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 consider the reason for the delay and conduct a cursory review of the merits of the case. *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992). The applicant has not offered any explanation of why he waited so long to file his application, nor has he provided any basis on which to excuse his untimely application.

4. The applicant requested an upgrade of the reenlistment code on his DD 214 so he can enlist in the Army Reserve. Notably, the applicant did not allege that the Coast Guard committed any error or injustice when it discharged him following three alcohol incidents. The applicant merely states that his problems "were linked to immaturity and alcohol abuse."

5. The record indicates that after the applicant's first alcohol incident on December 20, 1987, in which he became intoxicated and cut his wrists, he was properly counseled pursuant to Article 20.B.2.g. of the Personnel Manual. The Page 7 that documented this alcohol incident indicates that he was referred for alcohol screening, as required under Article 20.A.2.e. The applicant was involved in a second alcohol incident on December 31, 1987, in violation of his CO's explicit order to refrain from drinking. The Page 7 that documented the second alcohol incident indicates that he was counseled that he was being recommended for discharge by reason of unsuitability. On January 17, 1988, the applicant experienced his third alcohol incident when he created a disturbance with his drunk and disorderly conduct. The Page 7 that documented the third alcohol incident indicates that the previous discharge recommendation was being cancelled and that he was being recommended for discharge by reason of his third alcohol incident. The record indicates that the applicant received all due process with respect to his discharge. An RE-4 code is the only reenlistment code authorized for members discharged due to alcohol abuse.

6. Accordingly, due to the length of the delay, the lack of a persuasive reason for not filing his application sooner, and the lack of probable success on the merits of his claim, the Board finds that it is not in the interest of justice to excuse the untimeliness in this case. The application should be denied because it is untimely.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of former SR XXXXXXXXXXXXX, xxxxxxxxxxx, USCG, for correction of his military record is denied.

Julia Andrews

H. Lee Einsel, Jr.

Kathryn Sinniger