

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2007-165

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FINAL DECISION

This is a proceeding under 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 July 27, 2007, upon receipt of the applicant's completed application, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated April 10, 2008, is approved and 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 enlisted in the Coast Guard on July 24, 2001, and was honorably discharged on March 15, 2002, due to "alcohol rehabilitation failure," asked the Board to upgrade his reenlistment code from RE-4 (ineligible to reenlist) so that he can enlist in the Armed Forces again. The applicant stated that although he knew his RE-4 code would prevent him from reenlisting when he was discharged, it is in the interest of justice for the Board to consider his application because he wants to live up to the commitment he made when he enlisted in the Coast Guard.

The applicant alleged that he was discharged only because, when asked at mast what punishment he thought he should receive, he stated that he should be separated. After he said this during the mast, his commanding officer (CO) said, "If he doesn't want to stay, then we're not going to keep him." However, the applicant now regrets his decision. In support of his allegations, the applicant submitted a copy of a decision by the Discharge Review Board (DRB), which shows that although the DRB recommended that his RE code be upgraded to RE-3G, the Vice Commandant disapproved that recommendation on March 20, 2007.

SUMMARY OF THE APPLICANT'S RECORD

On July 24, 2001, the applicant enlisted in the Coast Guard at the age of 21 years. He completed boot camp and was assigned to a high endurance cutter.

On November 5, 2001, the applicant missed his ship's movement from Tijuana, Mexico, as a result of being intoxicated. He was absent without leave (AWOL) for three days.

On November 29, 2001, the applicant arrived at his duty station late with slurred speech and a strong smell of alcohol. He was found not fit for duty for the day due to his intoxication.

On December 3, 2001, the executive officer of the cutter prepared two forms CG-3307 ("Page 7s") to document the events of November 5, 2001, and November 29, 2001, as the applicant's first and second alcohol incidents. The first Page 7 states that the applicant was "counseled on the policies concerning alcohol use/abuse and the serious nature of this incident" and that he would be referred for alcohol screening. It also advises the applicant that any further alcohol incident may result in his separation pursuant to Article 20 of the Personnel Manual. The second Page 7 states that, because of his second alcohol incident, he might be separated for continued alcohol abuse pursuant to Article 20 of the Personnel Manual. The applicant acknowledged these Page 7s by signature on December 13, 2001.

On January 10, 2002, the XO entered a third Page 7 in the applicant's record to document his third alcohol incident. It states that on December 20, 2001, the applicant was apprehended by Naval Station San Diego security for driving under the influence (DUI) of alcohol. The applicant was given two breathalyzer tests. The first showed a BAC of 0.11% and the second showed a BAC of 0.09%. In addition, the applicant failed all field sobriety tests administered. The Page 7 further notes that the applicant had been allowed to leave work early that day because he said he needed to retrieve his vehicle from Tijuana, where it had been found after being stolen a few weeks earlier. The Page 7 states that because of the third alcohol incident, "you will be processed for separation." The applicant acknowledged the Page 7 by signature the same day.

On January 15, 2002, the applicant was taken to captain's mast and awarded non-judicial punishment (NJP) for the DUI. He also received a performance evaluation with very low marks, an unsatisfactory conduct mark, and a mark of "not recommended" for advancement. A Page 7 in his record states that he lacked leadership skills and had been counseled formally and informally about his poor military bearing, tardiness, lack of sobriety, and poor work ethic.

On January 24, 2002, the CO of the cutter informed the applicant that he had initiated action to discharge the applicant because of his three documented alcohol incidents. The CO advised the applicant that he had a right to submit a statement in rebuttal to the CO's recommendation. The applicant acknowledged the CO's notification, waived his right to submit a statement, and indicated that he did not object to being discharged.

On January 25, 2002, the CO submitted his recommendation that the applicant be honorably discharged for unsuitability because of his three alcohol incidents. The CO wrote the following in his recommendation:

3. I recognize that these three incidents occurred very close together and that [the applicant's] behavior is certainly indicative of what could be considered as "youthful indiscretions." I assure you that I have considered the Commandant's "Second Chance" program in this case and have

determined that it would not be in the best interest of the Coast Guard or the member in this instance.

a. [The applicant] was briefed several times upon check-in on the dangers and possible results of alcohol abuse. He ignored my warnings and visited Tijuana on two separate occasions, both resulting in alcohol incidents. He demonstrated little remorse after the first two incidents and basically “gave up” on giving the Coast Guard a chance after his third incident.

b. [The applicant] has stated that he does not wish to remain in the Coast Guard and every single member in his chain of command recommended his immediate administrative discharge. He stated at his Captain’s Mast that he believes he cannot succeed in a structured military environment and that he would be better off going home and working for his father’s construction company.

On February 4, 2002, the Commander of the Pacific Area Maintenance and Logistics Command forwarded the CO’s recommendation to the Coast Guard Personnel Command (CGPC) stating that the “discharge package for [the applicant] has been routed for consideration of a ‘Second Chance Waiver.’ [He] has not been granted a waiver and the package is forwarded for processing.”

On February 8, 2002, CGPC ordered that the applicant be discharged by reason of unsuitability pursuant to Article 12.B.16. of the Personnel Manual, with separation code JPD and the corresponding narrative reason for separation “found in the Separation Program Designator Handbook.”

On March 15, 2002, the applicant was honorably discharged from the Coast Guard with a JPD separation code, an RE-4 reenlistment code, and “Alcohol Rehabilitation Failure” as his narrative reason for separation. The original DD 214 also cites Article 12.B.16. of the Personnel Manual as the separation authority.

On February 28, 2007, the DRB issued a decision recommending several corrections to the applicant’s DD 214 because, although it found that the discharge was equitable, it also

felt that the discharge was not carried out in accordance with Coast Guard policy in that the applicant’s record did not have any documentation showing the applicant failed or refused alcohol rehabilitation treatment or medical screening results. The applicant received three documented alcohol incidents within a two-month period. The Board recommends changing the applicant’s separation code to JFV vice JPD, narrative reason to Condition, Not a Disability vice Alcohol Rehabilitation Failure, reenlistment code to RE-3G vice RE-4, and separation authorization to Persman Art. 12-B-12 vice 12-B-16. The applicant will need to show a recruiter how the circumstances that led to his separation have been resolved.

The table below shows the DRB’s recommendations, dated February 28, 2007, and the action taken by the Vice Commandant on March 20, 2007.

DD 214 Block	Original Entry in Block	DRB Recommendation	Commandant Decision
Separation Authority	Article 12.B.16.	Article 12.B.12.	Approved
Separation Code	JPD	JFV	JNC
Reenlistment Code	RE-4	RE-3G	Disapproved—no change
Narrative Reason	Alcohol Rehabilitation Failure	Condition, Not a Disability	Unsuitability

On March 30, 2007, the Coast Guard issued the applicant a DD 215, which is the correction form for a DD 214, showing that his separation code is JNC and his narrative reason for separation is “Unsuitability.”

VIEWS OF THE COAST GUARD

On December 18, 2007, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant limited partial relief by ordering the Coast Guard to issue the applicant a new DD 214 with the corrections currently shown on the DD 215 incorporated therein, so that the derogatory information corrected by the Commandant will not appear on his DD 214.

The JAG noted that “[p]ursuant to 33 C.F.R. § 52.64, this case presents issues of significant Coast Guard policy regarding good order and discipline as it relates to character of service, narrative reasons for discharge, and reenlistment eligibility codes.” However, the JAG did not describe how or why the request for an upgraded RE code in this case challenges a significant issue of Coast Guard policy any more than any other request for an upgraded RE code.¹

Regarding the merits of the applicant’s request for a better RE code, the JAG adopted the findings and analysis provided in a memorandum on the case prepared by CGPC. CGPC stated that after his three alcohol incidents, the applicant was considered for a “second chance waiver,” but the Commander of the Pacific Area Maintenance and Logistics Command disapproved such a waiver on February 4, 2002. CGPC stated that given the applicant’s poor performance with multiple alcohol incidents during his 7 months and 19 days on active duty, he “is not suitable for military service and the assignment of RE-4 (not eligible for reenlistment) is equitable and in accordance with Service policy.” CGPC noted that the assignment of the RE-4 code is required by regulation for anyone discharged with either a JPD or a JNC separation code. CGPC further noted that the applicant has submitted no new evidence nor “addressed any resolution regarding the conditions that led to his discharge or post discharge alcohol rehabilitation. The clear pattern of alcohol abuse and the significant nature of the incidents that led to his discharge represent a significant risk and neither the SPD code nor the reentry code should be changed.”

CGPC noted, however, that there is no evidence in the record that the applicant ever underwent alcohol rehabilitative counseling or treatment. Therefore, although the separation code, narrative reason for separation, and separation authority shown on the DD 214 have technically been corrected by the Commandant with a DD 215, CGPC recommended that the Board order the Coast Guard to re-issue the applicant a DD 214 with the corrected information so that the original, derogatory information need not be seen by future potential employers.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 21, 2008, the Board received the applicant’s response to the views of the Coast Guard. He wrote that he disagreed with the recommendation not to upgrade his RE code

¹ Under 33 C.F.R. § 52.64, the Board may take final action on any application to change a reenlistment code “[u]nless the Coast Guard, in submitting its views pursuant to § 52.42(b), identifies and describes a significant issue of Coast Guard policy challenged in the application.”

but does not “have any other information or reason apart from what I have already submitted to your office. I just would like a second chance to make things right. I will say that everything I did looks bad on paper and I understand the [Coast Guard’s] reservations. That being said, the XO of the [cutter] said at my captain’s mast ‘we were going to keep you’ after I requested that my punishment should be separation from the Coast Guard. After the XO said that, the CO said ‘if he doesn’t want to stay, we’re not going to keep him.’”

APPLICABLE REGULATIONS AND PRIOR CASES

Coast Guard Personnel Manual (COMDTINST M1000.6A)

Article 20 of the Personnel Manual in effect in 2002 contains the regulations regarding alcohol abuse by Coast Guard members. Article 20.B.2.d. defines an “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. The member need not be found guilty at court martial, in a civilian court, or be awarded non-judicial punishment (NJP) for the behavior to be considered an alcohol incident.”

Article 20.B.2.g.1. states that following a first alcohol incident, the member is counseled about the Coast Guard’s alcohol policies and the counseling is documented on a Page 7 in the member’s record. In addition, under Article 20.B.2.e., “[a]ny member who has been involved in alcohol incidents or otherwise shown signs of alcohol abuse shall be screened in accordance with the Alcohol Abuse Treatment and Prevention Program The results of this alcohol screening shall be recorded and acknowledged on a [Page 7].” This second Page 7 must also include a “statement of recommended treatment, if any.”

Article 20.A.2.e. states that “alcohol screening” is an “evaluation by a physician, clinical psychologist, or a DoD or civilian equivalent CAAC counselor to determine the nature and extent of alcohol abuse.” According to Article 20.B.3.b., following screening, “[c]ommanding officers shall seek appropriate treatment for members who have abused alcohol or been diagnosed as alcohol dependent. . . . Members shall be treated for alcohol abuse or dependency as prescribed by competent medical authority. However, . . . their scheduled separation or release to inactive duty for any reason shall not be delayed for the sole purpose of completing alcohol treatment.”

According to Article 20.B.2.h.2., “[e]nlisted members involved in a second alcohol incident will normally be processed for separation in accordance with Article 12.B.16.” However, in “cases involving enlisted members whose commanding officer feels that an exceptional situation warrants consideration for retention, a letter request for retention and treatment, including the medical screening results, treatment plan, and commanding officer’s recommendation concerning treatment shall be forwarded via the chain of command to Commander (CGPC-epm) who shall consult with Commandant (G-WKH) and direct the appropriate action regarding retention. The command recommendation for retention will be submitted as a cover letter to the required discharge package.”

Article 20.B.2.i. states that “[e]nlisted members involved in a third alcohol incident shall be processed for separation from the Service.”

Article 12.B.16. authorizes the administrative discharge of members for alcohol abuse pursuant to Article 20.B.2.

SPD Handbook

The Separation Program Designator Handbook permits the use of the following codes, narrative reasons, and reenlistment codes, which might apply to the applicant’s case:

SPD Code	Narrative Reason	RE Code	Authority	Explanation
JPD	Alcohol Rehabilitation Failure	RE-4	12-B-16	Involuntary discharge ... when a member failed through inability or refusal to participate in, cooperate in, or successfully complete a treatment program for alcohol rehabilitation.
JFV	Condition, Not a Disability	RE-3G RE-3X RE-4	12-B-12	Involuntary discharge ... when a condition, not a physical disability, interferes with the performance of duty (enuresis, motion sickness, allergy, obesity, fear of flying, et al.).
JNC	Unacceptable Conduct	RE-4	12-B-16	Involuntary discharge ... when member performs acts of unacceptable conduct (i.e., moral and/or professional dereliction) not otherwise listed.

BCMR Docket No. 1998-047

In BCMR Docket No. 1998-047, the applicant was discharged by reason of alcohol rehabilitation failure following two alcohol incidents. After the first, an arrest for driving under the influence in July 1996, his screening was delayed due to his cutter’s underway schedule until November 1996. In November, he was finally screened and in December, his command formally documented his first alcohol incident and ordered him to undergo Level I rehabilitative treatment. However, before he began treatment, on January 1, 1997, he was arrested for assault committed while under the influence of alcohol. Therefore, his command recommended his discharge and referred him to Level II treatment. He was discharged on April 16, 1997, before completing the treatment program, with a JPD separation code and “alcohol rehabilitation failure” as his narrative reason for separation.

In his advisory opinion for Docket No. 1998-047, the Chief Counsel of the Coast Guard recommended that the Board change the applicant’s separation code to JNC and his narrative reason for separation to “unacceptable conduct.” The Board found that the narrative reason for separation “alcohol rehabilitation failure” was inaccurate because the applicant’s screening and treatment were delayed by the Coast Guard and his treatment was not completed by the time he was discharged. Therefore, the Board granted the relief recommended by the Chief Counsel and did not change the applicant’s reenlistment code, which was RE-4.

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. Because the applicant submitted his application within three years of the decision of the DRB, his application is considered timely in accordance with the decision in *Ortiz v. Secretary of Defense*, 41 F.3d 738, 743 (D.C.C. 1994).

2. The applicant asked the Board to upgrade his RE code. He alleged that he was only discharged because he told his CO at mast on January 15, 2002, that he wanted to be discharged. However, under Article 20.B.2.i. of the Personnel Manual, “[e]nlisted members involved in a third alcohol incident shall be processed for separation from the Service.” Therefore, while the CO could have asked CGPC to retain the applicant following his first two alcohol incidents, in accordance with Article 20.B.2.h.2., the applicant’s third alcohol incident mandated his discharge under the regulations whether or not his CO would have agreed to retain him. Moreover, prior to the mast, on January 10, 2002, the XO documented the applicant’s third alcohol incident on a Page 7, which also notified the applicant that because of the third incident he would be processed for discharge.

3. The DRB recommended that several blocks on the applicant’s DD 214 be corrected because he was never afforded rehabilitative treatment since his three alcohol incidents occurred so close together in time. As a result of the Vice Commandant’s action on the DRB’s recommendation, the applicant now has a JNC separation code for unacceptable conduct, “Unsuitability” as his narrative reason for separation, and an RE-4 reenlistment code. The applicant argued that the Vice Commandant’s decision not to upgrade his reenlistment code to RE-3G in accordance with the DRB’s recommendation is unjust. However, the RE-3G code and narrative reason “Condition, Not a Disability” that the DRB favored are for members discharged not for alcohol abuse but for conditions such as enuresis (incontinence), obesity, and seasickness.

4. Under the Separation Program Designator Handbook, an RE-4 is the only reenlistment code authorized for anyone discharged for alcohol or drug abuse. The record indicates that the applicant was properly discharged because of alcohol abuse in accordance with the regulations in the Personnel Manual, and he has submitted nothing to prove to this Board that he no longer abuses alcohol. The Board finds no basis in the record for upgrading the applicant’s reenlistment code. The applicant has not proved by a preponderance of the evidence that his RE-4 code is erroneous or unjust.²

5. As the applicant never failed alcohol rehabilitation treatment while on active duty, his original DD 214 is unduly derogatory and the corrections made on the DD 215 do not hide the error since the applicant must show his DD 214 and DD 215 to all potential employers.

² See *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976) (holding that for purposes of the BCMRs under 10 U.S.C. § 1552, “injustice” is “treatment by military authorities that shocks the sense of justice”).

Therefore, the Board agrees that the Coast Guard should issue him a new DD 214 incorporating all of the changes ordered by the Vice Commandant on March 20, 2007.

6. Accordingly, the applicant's request should be denied, but the Coast Guard should issue the applicant a new DD 214 to replace his old DD 214 and the DD 215.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of former SR xxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is denied, except that the Coast Guard shall issue him a new DD 214 incorporating the corrections made on his DD 215 dated March 30, 2007, so that the new DD 214 will show separation code JNC in block 26 (instead of JPD) and the word "Unsuitability" in block 28 (instead of "Alcohol Rehabilitation Failure"). In addition, the following notation shall be made in block 18 of the new DD 214: "Action taken pursuant to order of BCMR."

Dorothy J. Ulmer

Thomas H. Van Horn

Darren S. Wall