

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-191

XXXXXXXXXXXXXXXXXX

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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 after receiving the applicant's completed application on July 1, 2009, 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 9, 2010, 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, a former first class avionics electrical technician with more than 17 years of active duty, asked the Board to upgrade his reenlistment code from RE-4 (ineligible to reenlist) to RE-1 (eligible to reenlist) and to return him to active duty in the Coast Guard.

The applicant alleged that he was wrongfully discharged from the Coast Guard on September 26, 2007, for a drug-related offense. He received a general discharge for misconduct and quickly applied to the Discharge Review Board (DRB). On February 7, 2008, the DRB convened and the members unanimously found that the applicant's discharge had been both improper and inequitable. The DRB recommended *inter alia* that his discharge be upgraded to honorable and that his RE code be upgraded to RE-1. On March 4, 2009, the Vice Commandant approved his honorable discharge but denied the recommended change to his RE code. The applicant alleged that the Vice Commandant's action in denying his request for an upgraded RE code was arbitrary and capricious.

The applicant alleged that his discharge resulted from negligent medical treatment he received while on active duty. Military physicians prescribed him powerful and highly addictive narcotic painkillers and failed to properly monitor his withdrawal from them. Because of their failure to monitor, he took more painkillers to alleviate his withdrawal symptoms from the prescribed painkillers. When he realized what he was doing, he asked for help. Almost three years later and after more than 17 years of his service, the Coast Guard discharged him with a general

discharge. Therefore, he argued, the Board should upgrade his RE code and return him to active duty in the Coast Guard because his discharge was “an example of extreme injustice.”

The applicant argued that his case does not qualify as a “drug incident” under Article 20.A.1.c. of the Personnel Manual. He was medically prescribed the painkillers he used, “albeit not by a military physician. [He] took the medication in order to alleviate the withdrawal symptoms associated with narcotic ‘tapering.’ He used the painkillers for their intended purpose: to alleviate pain.” The applicant alleged that proper monitoring “would have prevented [his] need for painkiller medication.”

Moreover, the applicant alleged that his due process rights were violated in several ways. First, he alleged that the Administrative Separation Board (ASB) served no purpose and did not provide due process because Coast Guard regulations require general discharges once a command has determined that a member was involved in a “drug incident.” The applicant argued that the Coast Guard’s zero-tolerance policy denied him due process since the “recommendations from the command and the ASB are procedural shams of the notice and hearing requirements.”

Second, the applicant alleged that his discharge was unjust because it took too long. His command took 18 months to initiate his discharge, and the Personnel Command then took 14 months to process him for discharge. The applicant alleged that this delay was prejudicial to him because he had secured employment with Gulfstream, Inc., but had to decline the offer because the Coast Guard had not yet acted on his case.

Third, the applicant alleged that the Coast Guard committed substantive due process errors because its “regulations unlawfully discriminate between ‘drug’ abusers and ‘alcohol’ abusers since both are chemically addictive and both may be used for legal purposes.” He argued that both types of chemical dependency should be treated the same under the regulations “when dealing with ‘legal substance’ dependency,” such as addiction to prescribed painkillers, and that the regulations should be revised to encourage members to seek help for addiction instead of deterring them from doing so by threatening them with an automatic general discharge. The applicant alleged that the zero-tolerance policy for drugs is contrary to the public interest “because it logically deters soldiers from seeking help.” He also argued that the zero-tolerance policy is contrary to the Coast Guard’s own stated objective, per Article 20.A.1.c. of the Personnel Manual, to identify, treat, and rehabilitate members with chemical dependencies.

Fourth, the applicant alleged that he was subject to selective prosecution because two other members of the air station had “committed multiple alcohol-related offenses” and yet had not been separated as required by the Personnel Manual.

The applicant stated that the ASB found that he had rehabilitative potential, and he alleged that he has been rehabilitated. He argued that the Personnel Command should have granted him a suspended discharge pursuant to Article 12.B.34. while he underwent rehabilitation. He further argued that the applicant’s command should have exercised discretion and that it was an abuse of discretion not to make an exception to the zero-tolerance policy in this case.

The applicant asked the Board to consider his outstanding military career, spotless disciplinary record, and excellent performance evaluations, as well as the injustice committed against him, and to return him to active duty with an RE-1 reenlistment code.

In support of his allegations, the applicant submitted letters from his parents and his sister to the Commandant. His parents stated that in 2004 the applicant became addicted to prescription medication which he began taking for pain. In December 2004, he closed himself in his bathroom alone and “underwent the terrible effects of withdrawal during a period of 48 to 72 hours.” He then advised his supervisor of his addiction. The applicant’s parents alleged that contrary to regulations, the ASB was convened more than 140 days later instead of just 30 days, and the ASB report was sent to the Personnel Command 112 days after the hearing instead of 30 days. Then the Personnel Command took four months to take final action on the applicant’s case instead of just 45 days. During all this time, the applicant suffered from not knowing whether his military career was ending even though he was no longer abusing the prescription drugs.

The applicant’s sister stated that her brother “has the biggest heart and the most genuine desire to ‘do the right thing’” and that it was that desire that caused him to report his addiction to the Coast Guard. The applicant told her that he was scared to report his addiction but “coming clean was the only honorable thing to do.” She alleged that he has remained clean since his detoxification.

The applicant also submitted four questionnaires solicited by the ASB on behalf of the applicant and completed by a lieutenant and three other petty officers whom the applicant had named as character references. In completing the questionnaires for the ASB, the four highly praised the applicant’s leadership and performance and rated him as outstanding, excellent, or above average in military appearance, knowledge, attitude, obedience, competence, patriotism, honesty, reliability, and initiative.

SUMMARY OF THE RECORD

On October 31, 1989, the applicant enlisted in the Coast Guard. Upon his enlistment, the applicant was counseled about the Coast Guard’s drug policy. Following recruit training, he served on a cutter before being trained in avionics. He subsequently served at Air Stations xxxxx, xxxxx, and xxxxx. On his semiannual performance evaluations, the applicant received increasingly higher marks as he advanced until receiving his best evaluation on November 30, 2001, when on his first evaluation as a first class petty officer, he received five above-average marks of 5, fifteen excellent marks of 6, and two best possible marks of 7 in the various performance categories. Three times the officers of his air station awarded him a trophy for “exemplify[ing] the high standards of character, professionalism, ability and leadership.”

After 2001, however, the applicant’s performance gradually declined. By November 30, 2003, he received more marks of 5 than 6 on his performance evaluations, and in 2004 and May 2005 he received average marks of 4 in some of performance categories. On November 30, 2005, the applicant received one below average mark of 3, six average marks of 4, eleven marks of 5, and two marks of 6 in the various performance categories, and he was not recommended for advancement. On his May 31, 2006, evaluation, the applicant received fourteen marks of 4, ten

marks of 5, and one mark of 6, and he was not recommended for advancement. The written comments stated that the applicant “lacks day to day consistency” and “has shown average leadership.”

According to the report of an investigation dated June 11, 2006, in April 2002, the applicant was prescribed a narcotic painkiller, Oxycodone with acetaminophen, by a military doctor when he complained of pain in his back and neck. X-rays revealed two bulging discs and some disc decalcification in his neck, but the applicant did not want surgery and so military doctors continued to prescribe painkillers and physical therapy. The investigator found that the applicant had received prescriptions from military doctors for narcotic drugs such as Oxycodone, Diazepam, Fioricet, Lortab, Codeine, and Tramadol six times in 2002, six times in 2003, and four times in 2004. Gradually, the applicant began using the painkillers “to help him get through the day,” rather than for back pain. According to HS2 X, the applicant later told him that he had “a long history of using [Norco] and other opioid medications (to include Percocet, Tramadol, Fioricet, T3 [Tylenol 3], diazepam).”

In September 2004, the applicant stopped going to military doctors and started obtaining painkillers—specifically the narcotic drug Norco (Hydrocodone with Acetaminophen)—through civilian doctors over the internet on two websites, including www.norcoworldwide.com.¹ He used not only his own credit cards but his Government credit card to purchase Norco on-line. The applicant told the investigator that the doctor on this website advised him to take eight Norco pills per day for his back pain and that he followed this medical advice because he was naïve about addiction. The applicant also told the investigator that by November 2004, he was taking ten pills per day, so he consulted a civilian psychiatrist, who told him he should stop taking Norco because it was addictive. The applicant tried to stop taking Norco on his own but was unsuccessful.

The Applicant’s Self-Referral

On December 7, 2004, the applicant and his wife together advised his command that he was addicted and needed help. He told them that after his military prescription expired, he had continued to acquire painkillers from civilian sources. He also advised them that he had drained all of his family’s savings and charged his credit cards to the limit to buy narcotic drugs. The command had the applicant screened at an Army clinic the next day. An Army counselor advised the command that he should be held at the clinic for detoxification and for processing for separation from the Service. However, the command disagreed with the recommendation. The executive officer (XO) told the investigator that because the Personnel Manual does not address self-referrals for drug addiction, the command chose to treat the applicant’s self-referral as it would a request for treatment from an alcoholic, instead of proceeding with a drug incident investigation. The commanding officer (CO) stated that the command cadre “considered the situation ‘gray’ enough that [the applicant’s] situation ought to be handled similar to the self-referral of an alcohol dependency,” but they told him that he might be separated because of the Coast Guard’s drug policy. The CO elected to handle the matter quietly and discretely. He ordered an informal investigation of which there was to be no written record, removed the appli-

¹ This company is out of business. The applicant told the investigator that he could not remember the name of the other website from which he had ordered painkillers.

cant from flight status and aircraft maintenance, and sent him to a Navy inpatient substance abuse rehabilitation program.

Upon admission to the rehabilitation clinic on December 14, 2004, the applicant had between 50 and 60 pills, which he flushed. On December 30, 2004, the applicant was discharged from the clinic for outpatient treatment. He was diagnosed with an opioid addiction. The clinic report notes that the applicant reported that he had started taking painkillers at age 33,² when he took just two pills a day three or four times a year when he had back pain, but by age 37 he was taking ten to twelve pills every day “from the time he wakes up until he goes to sleep.” His aftercare program included abstention, two support group meetings per week, one formal continuing care group meeting at the clinic per week, stress management counseling, and frequent random urinalyses.³

On March 1, 2005, the applicant was counseled on a Page 7 about having misused a Government credit card 40 times during the prior ten months, which resulted in an unpaid balance of \$1,490.72.

According to the investigation, sometime in the spring of 2005, the applicant went to the clinic complaining of back pain and asked HS2 X for Ultram, which is a “non-narcotic pain medication that acts much like the other opioid medications.” HS2 X refused and offered to get him a doctor’s appointment at the local Army hospital, but the applicant refused and never came back to the clinic with a complaint of back pain. HS2 Y also witnessed this request.

The CO, who transferred from the air station in July 2005, stated that when he left the station he believed that the applicant had succeeded in defeating his addiction, and “the issue of his eventual discharge or retention was still in question.” Because the applicant had been removed from his prior duties, he had been assigned “as the coordinator for the air station’s Airman program,” assessing enlisted members’ skills and competency, and was doing a good job. The XO confirmed that after his reassignment, the applicant had “performed well and has regularly sought increased responsibilities. He was and continues to be a very solid performer with excellent career potential.”

On August 10, 2005, at the applicant’s own request, he began undergoing more frequent urinalysis. The investigator noted that the applicant had undergone four random urinalyses on August 26, September 9, September 22, and October 19, 2005, with no positive results.

On November 1, 2005, the applicant reported to HS2 X that he might have accidentally ingested codeine the night before when he took some cough medicine, which made him feel sleepy. The applicant stated that he did not know what was in the cough medicine because it was in an unlabeled bottle in his refrigerator.

² The applicant was born on December 11, 1967, so he turned 33 on December 11, 2000.

³ Opioids are detectable in urine variably from 2 to 7 days following ingestion.

Also in November 2005, the applicant sought help from a civilian doctor for the emotional stress of his separation from his wife. He was prescribed the non-narcotic antidepressant Celexa, which he did not report to his command.

On November 24, 2005, which was Thanksgiving Day, the applicant visited a civilian hospital emergency room (ER) complaining of inflammation of his lymph nodes. He did not disclose his opioid addiction to the ER doctor and received prescriptions for Oxycodone, 800 milligram tablets of Ibuprofen, and an antibiotic, which he filled at a Xxxx pharmacy.

On February 14, 2006, the XO ordered a lieutenant commander to investigate the applicant's drug use because the command suspected that he had relapsed.

On Thursday, May 11, 2006, the applicant visited an ER complaining of pain upon urination. He was diagnosed with kidney stones. The doctor prescribed 800-milligram tablets of Ibuprofen and 20 7.5/500-milligram pills of Oxycodone and recommended that the applicant stay home for two days and follow-up with his military physician on Monday if the stones did not pass. The applicant told the investigator that he informed the ER doctor about his opioid addiction but was told to take the Oxycodone anyway because of his severe pain.

On Monday, May 15, 2006, the applicant consulted an Army physician, who prescribed 30 pills of Oxycodone and told the applicant to wait a few more days to see if the stones would pass. The applicant did not reveal his opioid addiction to this doctor. Two days later, the applicant saw this doctor again and was prescribed 12 more pills of Oxycodone to use while the stones passed. He did not disclose his addiction. Two days later, the applicant again saw this doctor and was prescribed 12 pills of Oxycodone to use until he could be evaluated by a urologist. He did not disclose his addiction.

On Saturday, May 27, 2006, the applicant visited the ER complaining of pain upon urination. He was diagnosed with kidney stones and a urinary tract infection and prescribed 20 pills of Endocet, which contains Oxycodone and Acetaminophen and was noted to be "2 - 4 days worth." However, the applicant returned to the ER the next day, Sunday, complaining of more pain and was prescribed 20 pills of Hydromorphone and told to follow up with his Army physician on Tuesday, after the holiday. On May 30, 2006, the applicant saw the Army physician and received a referral to a urologist and a prescription for 40 pills of Oxycodone. He did not disclose his addiction. On June 5, 2006, the applicant saw the urologist, who found that he needed lithotripsy to break up a 5-millimeter stone and prescribed him 60 tablets of Oxycodone to take while awaiting the procedure scheduled for June 12, 2006.

Report of the Investigation

On June 11, 2006, the investigator submitted his report to the applicant's command. The following are excerpts of the report:

2. Difficulties encountered:

- a. Knowledge of the internet doctor site NorcoWorldwide is limited to information obtained from their web site and information provided by [the applicant]. No information is available on the second internet site used because [the applicant] does not remember the name.
- b. I was unable to obtain a list of medications purchased over the internet. [The applicant's] medication profile only lists medication obtained from local pharmacies and does not include medications obtained from internet purchases. ...

Findings of Fact

1. [The applicant] abused opiate-based pain medications, specifically the narcotic analgesic hydrocodone. He obtained hydrocodone by purchasing Norco online. Norco is the brand name for the combination of acetaminophen (Tylenol) and hydrocodone. Norco was obtained without prior approval of MLC(k) or other Coast Guard medical personnel ...
2. [The applicant] purchased Norco from two online sites. One web site was Norco Worldwide (www.norcoworldwide.com). NorcoWorldwide uses licensed doctors who prescribe medications filled through a U.S. licensed pharmacy. Their primary pharmacy is xxxxxxxxxxxxxxxx in xxxxxx, XX. ...
3. [The applicant] began taking pain medication for back pain in 2002. [The applicant] stopped going to the military doctor for pain medication and began purchasing medication on-line in September 2004. ...
4. [The applicant] used his government credit card to make some of his on-line drug purchases. He had 37 inappropriate charges on his government credit card during October, November, and December of 2004. ...

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13. [The applicant] was prescribed a narcotic analgesic (Tylox) on 24 Nov 05 [Thanksgiving Day] by an emergency room (ER) doctor. [He] visited the ER for lymph node inflammation. [He] did not notify the doctor of his opioid dependency. The prescriptions were filled on 24 Nov 05 at a xxxxxxxx Drug Store. Tylox is a trade name hydrocodone product. ...
14. [The applicant] was prescribed Celexa by a civilian doctor. Celexa is the brand name for citalopram which is an antidepressant medication. The prescriptions were filled on 18 Oct 05 and 16 Dec 05. These prescriptions were obtained without prior approval of MLC(k) or other Coast Guard medical personnel.
15. [The Medical Manual] prohibits active duty personnel from obtaining health care in civilian medical facilities for non-emergent conditions without prior approval of MLC(k). ...
16. [The Medical Manual] lists opioid dependence as disqualifying for enlistment, and requires processing in accordance with Chapter 20 of [the Personnel Manual].
17. [The applicant] presented to the ER for abdominal pain on 11 May 2006. He was diagnosed with renal calculi (kidney stone) and prescribed pain medication. He was prescribed a total of 214 tablets of narcotic pain medications during various doctor visits between 11 May and 5 Jun 06. ...

Opinions

1. [The applicant] intentionally used prescription medications for effect. Per [the Personnel Manual], using prescription medication for effect is contrary to their intended use and qualifies as a drug incident. ...
2. The preponderance of the evidence indicates that [the applicant] is opioid dependent.

3. [The applicant] became addicted to drugs original prescribed through the Coast Guard medical system. [He] crossed the line into drug incident when [he] took the medication for effect and sought the medication outside the Coast Guard medical system. ...
4. There is no indication that [the applicant] purchased the pain medication from any source other than the on-line doctors. ...
5. [The applicant] may have relapsed in November 2005. He drank the unlabeled cough medicine that may or may not have contained codeine on 1 Nov 05. He also obtained a prescription for Tylox on 24 Nov 05 after failing to inform an emergency room doctor that he was treated for an opioid dependency. ...
6. [The applicant] continues to abuse pain medication. ...
7. [The applicant] continues to violate [the Medical Manual] by seeking civilian medical care without going through the Coast Guard medical system. He filled two Celexa (citalopram) prescriptions obtained from a civilian doctor. He kept this a secret until specifically asked about it during a second interview. He then admitted to obtaining the medication only once. Records show he filled two prescriptions for the antidepressant medication (18 Oct 05 and 16 Dec 05). ...
8. [The Personnel Manual] provides guidance for members who self-refer for alcohol abuse but is silent about self-referrals for prescription drug abuse. Although [the applicant] should have come forward sooner, he did self-refer and some consideration should be given to that fact. ...

The investigator included with his report a statement signed by the applicant on March 1, 2006. The applicant was first advised of his rights. He stated that when he was prescribed narcotic pain medications, he was naïve about their addictive nature. He alleged that the doctors never told him that the drugs could be addictive. In September 2004, the applicant alleged, a friend introduced him to a doctor over the internet, who recommended that the applicant take eight Norco pills containing the opioid Hydrocodone every day. He followed this recommended regimen for two months because he was naïve. In November 2004, the applicant alleged, he consulted a civilian psychiatrist because he did not like the way the drugs made him feel. The psychiatrist informed him that Norco was very addictive and told him to stop taking it. Therefore, he tried to stop taking Norco and was unsuccessful because of withdrawal symptoms. In early December 2004, he discussed his problem with his family and decided to inform the Coast Guard about his problem. The applicant acknowledged that he had made many mistakes, including not reporting his problem immediately and getting help through the Coast Guard. The applicant noted that during the period of his drug abuse, his father died of a longstanding illness, his wife was diagnosed with diabetes, and a friend died in a car accident.

Discharge Proceedings

As a result of the investigator's report, the CO found that the applicant had been involved in a drug incident. On June 22, 2006, the CO notified the applicant that he had initiated the applicant's discharge for misconduct under Article 12.B.18. of the Personnel Manual due to his illegal use of prescription painkillers. The CO advised him that he had a right to submit a statement in his own behalf to rebut the recommendation for discharge; a right to present his case to an ASB with the assistance of a military lawyer at Government expense or a civilian lawyer at his own expense; and a right to consult a lawyer when deciding whether to request an ASB. The

applicant acknowledged this notification on June 29, 2006, and asked to consult an lawyer regarding his decision with respect to an ASB.

On August 8, 2006, after consulting with an attorney, the applicant asked for a hearing before an ASB. On August 23, 2006, a Navy attorney was detailed to serve as the applicant's counsel before the ASB. The record also contains an undated letter from the ASB to the applicant regarding the regulations that would apply to the ASB proceedings and how he should assert his rights timely and submit any objections to the process in writing.

Administrative Separation Board Report

On October 3, 2006, the applicant's CO ordered the ASB to convene and conduct a hearing. He instructed the ASB to "render findings based on the facts obtained, identify any reasons for separation supported by the evidence, recommend either retention in or separation from the Coast Guard, and recommend the appropriate characterization of service." On November 14, 2006, the ASB convened and held a hearing. On December 15, 2007, the ASB forwarded its report to the applicant's CO. The ASB summarized the applicant's testimony as follows:

The respondent elected to make an oral un-sworn statement to the Board. The statement opened with a summary of the respondent's service. He stated he enjoyed serving in the Coast Guard and has been and will continue to be an asset to the service. Highlights of his career included selection as an alternate to Officer Candidate School and application to the Coast Guard Investigative Service. He acknowledged that the last two years of service had not been his best and that he "had a hard time leaving his problems at the gate." He is seeking help through the Employee Assistance Program (EAP). The respondent offered that there was no excuse for markings of "3" on his enlisted evaluations other than he was just not performing well. He did state that he has been a flight mechanic for 13 years and has served on a Flight Examination Board for seven years. He stated that he is capable and will perform better after this incident. The respondent stated that he was naïve to what drug addiction was and did not take advantage of the services that exist to help members (i.e., EAP). He stated that his motivation for not returning to using prescription medications was his daughter. The daughter's mother (respondent's ex-wife) is not in good health and not expected to live for longer than 10 years. He does not want his daughter to have a father who is addicted to medications in addition to being motherless. The respondent restated his enjoyment of serving in the Coast Guard. He stated that he never flew (as part of an aircrew) while taking prescription medications. He is now doing the same jobs as he was before the incident with the exception of quality assurance or flight duties. He is currently on anti-depressants. Respondent closed by reiterating his love for his job and asked for mercy from the Board.

Testimony of the Unit Corpsman

The ASB summarized the testimony of various witnesses in its report including the following testimony from the unit corpsman, HS1 Z, a first class health specialist. HS1 Z testified that in the spring of 2005, the applicant complained to him of back pain and asked him for Ultram to relieve the pain. Ultram "is a Schedule III non-narcotic prescription drug that has an 'opioid-like effect.' Opioid medications are a Schedule II narcotic, meaning they are known to be addictive." HS1 Z did not give the applicant the Ultram and advised him to seek care through his doctor. Then in November 2005, the applicant approached HS1 Z and told him that he "had taken cough medicine from an unlabeled container stored in the refrigerator the night before ... that the medication gave him a 'narcotic feel' and [he] was worried that it may have contained Codeine." HS1 Z documented the incident and told the applicant "that all future administration

of medications is to be conducted through the unit's corpsman." Also in November 2005, the clinic received information from a hospital emergency room that the applicant had visited for sinusitis and been prescribed the opioid medication Tylox. HS1 Z noted that the applicant was "going through 'rough times' to include a divorce and custody battle" in 2005 but that he had "passed all urinalysis tests that were administered."

HS1 Z stated that on May 15, 2006, the applicant went to a hospital emergency room for a kidney stone that was 5 millimeters in diameter and was prescribed Percocet, an opioid medication, for the pain. The applicant told the emergency room doctor that he was opioid dependent (HS1 Z did not state his basis for knowing that the applicant had told the doctor about his addiction), but the doctor prescribed Percocet anyway. The applicant "followed up with his military primary care manager but did not disclose his opioid dependency. Over the course of approximately one month, [the applicant] was prescribed various opioid medications in short-term doses (small quantities). In once instance, [the applicant] took Hydromorphone but experienced nausea and vomiting and was told to switch to Percocet. After the kidney stone was passed, the prescription of small quantities of Percocet ceased. Later, HS1 Z learned that the applicant had twice taken prescription medications while at work.

HS1 Z testified regarding Coast Guard regulations and stated that although the applicant was fit for duty, he was not authorized to fly; that a member cannot fly for one full year after taking an anti-depressant medication; and that there is no regulation regarding a member returning to flight status following opioid dependency. HS1 Z further testified that regulations state that members are supposed to seek routine and chronic care through military facilities; that seeking routine and chronic care at civilian medical facilities in neither authorized nor expressly prohibited; that emergency care may be sought at a civilian hospital; and that "members in a flight status can never self-medicate."

HS1 Z further stated that the applicant's use of prescribed medications following his medical visits did not constitute abuse and that because there are no non-narcotic alternatives for severe pain, people who are opioid dependent should not be prohibited from taking opioids. "Ultimately," he said, "it is the responsibility of the doctor to prescribe the necessary medications" if the patient discloses his dependency. "If a dependency condition is not made known to the doctor, then that responsibility lies with the patient." HS1 Z alleged that HS2 Y knew of the applicant's dependency at the time of his sinus infection.

Because the applicant reported his own drug dependency and the drugs had been prescribed, the unit treated him as it would treat someone who reported his own alcohol dependency and sent him for two weeks of inpatient treatment at a Navy Substance Abuse and Rehabilitation Program.

Testimony of Colleagues

AMT1 X, who worked with the applicant, praised his character and "stated that he would have no problems with any of the aircraft that [the applicant] may work on." AMT3 X, who also worked with the applicant, stated that there had "been no indications of problems with [the applicant] while on duty" and that he had been coping with his problems very well.

Testimony of the Applicant's Parents

The applicant's mother stated that in December 2004, he went through withdrawal by himself. In June 2005, his daughter fell and broke some teeth, which cost a lot to repair, and in July 2005, the applicant's wife left him. Because of the divorce, the applicant had to sell his house and pay child support. In January 2006, he learned he was being investigated for drug use and could be discharged. He had to take a second job at Home Depot. The applicant's stepfather stated that the applicant was a very honest and caring person.

Findings of the Administrative Separation Board

The ASB found that the applicant had "used drugs for other than their intended purpose when he began to use them 'for effect' and to avoid withdrawal symptoms instead of their intended use as pain relief." The ASB also found that the applicant had received high performance marks for most of his career, numerous personal citations, and positive endorsements for OCS and CGIS and that the board had received a great deal of testimony reflecting the applicant's "caring, dedicated, and selfless character."

The ASB concluded that the applicant's conduct had met the criteria for a "drug incident" under Article 20.A.2.k.1.d. of the Personnel Manual and that otherwise, "he has had an exemplary career." Because of the drug incident, the ASB recommended that the applicant be discharged, but because of his exemplary service, the ASB recommended that he receive an honorable discharge. The ASB noted that there were mitigating and extenuating circumstances but that the applicant's conduct constituted a drug incident and that he was culpable. The ASB also found that "the military medical system in some ways failed [the applicant]. If he had been properly monitored, it is unlikely that he would have developed his dependency. The Board believes that [he] has been a solid Coast Guardsman and with proper guidance and support, could continue to be." The ASB noted that if the applicant had abused alcohol instead of drugs, he would have been retained because Coast Guard regulations do not require separation after a single alcohol incident. The ASB stated that if Coast Guard policy had any flexibility to allow retention of a member following a drug incident, the board would have recommended his retention on active duty.

On March 1, 2007, the applicant's CO forwarded the report of the ASB to CGPC through the District Commander and stated that he fully concurred with the recommendation for an honorable discharge in light of the applicant's "exemplary service prior to this incident, the highly favorable statements provided by co-workers, and the recommendation of the [ASB]."

On April 11, 2007, the District Commander forwarded the report of the ASB to CGPC and concurred with the findings and the recommendation for an honorable discharge based on the applicant's "actions with respect to his self-reporting, and his exemplary service as documented in the Board's report prior to the incident leading to this separation recommendation."

On August 24, 2007, Commander, CGPC approved the ASB's recommendation that the applicant be discharged but disapproved the recommendation that his discharge be honorable because "Coast Guard policy does not provide special consideration that would allow the

upgrade of a discharge for members involved with a drug incident as recommended by the Board.” Commander, CGPC stated that the applicant would receive a general discharge under honorable conditions by reason of misconduct due to a drug incident.

On September 26, 2007, the applicant received a general discharge for misconduct under Article 12.B.18. of the Personnel Manual, with a GKK separation code, denoting drug abuse, and an RE-4 reenlistment code. He had completed 17 years, 10 months, and 27 days of military service and had received the following awards and decorations: five consecutive Coast Guard Good Conduct Awards; Commandant’s Letter of Commendation with two gold stars; Presidential Unit Citation; DOT Outstanding Unit Award; Coast Guard Unit Commendation with one gold star; Coast Guard Meritorious Unit Commendation with two gold stars; Joint Meritorious Unit Award; Bicentennial Unit Commendation; Coast Guard “E” Ribbon; Global War on Terrorism Service Medal; Humanitarian Service Medal with one bronze star; National Defense Service Medal with one bronze star; Special OPS Service Ribbon with two bronze stars; Sea Service Ribbon; Pistol Marksman Ribbon; and Rifle Marksman Ribbon.

Although the applicant was discharged and reenlisted several times during his career and reenlisted indefinitely on November 9, 2003, his record contains one DD 214 covering his almost 18 years of service from October 31, 1989, to September 26, 2007. The DD 214 notes his character of service as “general.”

On September 18, 2008, the President of the DRB informed the Commandant that following a hearing on February 7, 2008, the DRB had voted unanimously to recommend correction of the applicant’s record to reflect an honorable discharge under Article 12.B.12. of the Personnel Manual with a JND separation code, meaning that he was discharged for “miscellaneous/general reasons.” The DRB reported the following:

The applicant was being treated for injuries sustained in the line of duty in 2004. His course of treatment included prescribed, addictive narcotic pain killers. Based on information included in the member’s medical record and information contained in the [ASB] documents, the [DRB] found insufficient evidence to support a finding of a drug incident.

The [DRB] determined that in this particular case, there was insufficient basis to justify separating the applicant for a drug incident. The applicant became addicted to opiate based pain medications, which had been prescribed for his use through the military medical care system. After his “official” supply was used up, he sought and received additional medications through a legitimate online medication provider. Once the applicant realized he had an addiction, he self referred for military treatment. The [ASB] convened for this applicant recommended he be discharged based on current policy for a drug incident. Additionally, they recommended he be given an honorable discharge. The additional [ASB] comments are quoted herein verbatim:

“The decision of the [ASB] turned on the wording in the Personnel Manual (12.B.4.a.) that states, ‘Any member involved in a drug incident ... as defined in Article 20.A.2.k., will be processed for separation from the Coast Guard ...’ Despite mitigating and extenuating factors, the [ASB] was bound by this explicit policy. While [the applicant] was culpable, the military medical system in some ways failed [him]. If he had been properly monitored, it is unlikely that he would have developed his dependency. The [ASB] believes that [the applicant] has been a solid Coast Guardsman and with proper guidance and support could continue to be.

“The Command had no latitude in this case due to the narrow focus of current drug regulations. If the abuse had been alcohol, vice prescription medications, the member’s self-referral would not have constituted an alcohol incident, and the member would be retained. If there were a change in the Coast Guard policy, the [ASB] could have come to a different decision as to the disposition of this case.”

[DRB] members requested the [ASB] package on [the applicant] and all members reviewed it. [DRB] members agree with the [ASB] members that the military medical system failed this applicant. If he had been properly monitored while he was prescribed this high power narcotic, his dependency would have likely been discovered and treated. The applicant self referred to his chain of command on 7 December 2004 to seek treatment for his drug dependency and was subsequently boarded and discharged.

The [DRB] believes that when the applicant self referred, he should have been treated for his addiction and give the opportunity to rehabilitate. Had this been the case, this would not have constituted a drug incident and the applicant would not have been discharged. The [DRB] resolved that the discharge was not carried out in accordance with Coast Guard policy. The [DRB] recommends an Honorable discharge, a separation code of JND by narrative reason of Miscellaneous/General, and a re-entry code of RE-1.

Propriety: Discharge was improper.

Equity: Discharge was not equitable.

Board Conclusion: The [DRB] voted 5-0 to grant relief.

On March 4, 2009, the Vice Commandant ordered that the applicant’s DD 214 be changed as the DRB had recommended except that she ordered “No Change” to his RE-4 reenlistment code.

As a result of the Vice Commandant’s decision, the Coast Guard issued the applicant a form DD 215, which is a form for making corrections to a veteran’s DD 214. The DD 215 shows that the applicant’s discharge has been corrected to honorable; the authority for the discharge to Article 12.B.12. of the Personnel Manual; the separation code to JND; and the narrative reason for separation to “Separation for Miscellaneous/General Reasons.”

VIEWS OF THE COAST GUARD

On October 15, 2009, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the applicant’s requests. In so doing, he adopted the findings and analysis of the case provided in a memorandum prepared by the Personnel Service Center (PSC).

The PSC noted that the applicant alleged that the Vice Commandant acted arbitrarily and capriciously in not upgrading his reenlistment code. The PSC stated that the Vice Commandant exercised her delegated authority and discretion in taking final action on the DRB’s recommendation. The PSC submitted an email from the legal advisor to the Vice Commandant, who stated that the Vice Commandant

carefully considered the recommendation of the Discharge Review Board (which struggled with the ADSEP Board’s finding of a drug incident where the individual self-reported his addiction)

and the Vice concurred in upgrading the discharge to Honorable. That the Vice examined the record and concurred in part and disagreed in part reflects careful consideration and deliberation in the exercise of her discretion ... the exact opposite of an arbitrary action. The concurrence with upgrading to Honorable does not mean that the Vice Commandant agreed with the DRB that there was no drug incident; it simply means she concurred that in this case, the standard General Under Honorable Conditions discharge was not the appropriate result.

Moreover, in exercising her discretion pursuant to 33 CFR Part 51 and considering all relevant information in the record, the Vice was well aware of [the applicant's] continued misuse of his Government credit card to purchase pills --- one factor of many that were available to the Vice for consideration as she reasonably determin[ed] that [the applicant] should not be afforded the opportunity to reenlist.

An RE-4 is an available reentry code in the SPD handbook for a JND/Miscellaneous SPD Code and is well within the Vice Commandant's discretion to award. The result is not capricious just because the Board recommended something different or because the applicant does not like it.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 4, 2009, the Board received the applicant's response to the views of the Coast Guard. The applicant stated that the Coast Guard addressed only his claim that the Vice Commandant's decision was arbitrary and capricious and not his claim that the Coast Guard had violated his due process and equal protection rights.

The applicant noted that recently, Captain xxxxxxxxxxxxxx was allowed to retire from the Coast Guard after being tried by court-martial for using cocaine. His sentence was just a written reprimand and a \$5,000 fine. The applicant alleged that whereas he himself confessed his addiction to lawfully prescribed painkillers and sought help, the captain "lied about his unlawful use and tried to blame it on others." The applicant submitted a copy of a newspaper article about Captain xxxxxxxxxxx's conviction with several comments from Coast Guard members accusing the Coast Guard of having a double standard for officers and enlisted members.

Therefore, the applicant argued, justice requires either that he receive constructive credit for service up to 20 years with retirement pay or reinstatement on active duty. The applicant argued that the Coast Guard's zero-tolerance policy is flawed and inequitable and that it "dismisses military commanders' inherent right to exercise discretion in all UCMJ matters."

APPLICABLE REGULATIONS

Medical Manual

Chapter 2.A.1.b. of the Medical Manual (COMDTINST M6000.1C) states the following regarding members' medical care:

Under ordinary circumstances, members shall be enrolled in Active Duty TRICARE Prime, assigned a Primary Care Manager (PCM) and receive health care at that organization to which the member is assigned. However, Commanding Officers may request assignment to another USMTF [U.S. medical treatment facility] through the cognizant MLC. Members away from their duty sta-

tion or on duty where there is no USMTF of their own service may receive care at the nearest USMTF.

Chapter 2.A.1.e. states the following regarding members' use of other Services' medical facilities and civilian facilities:

The closest USMTF having the appropriate capabilities shall be used for nonemergency health care. Health care in civilian medical facilities for nonemergent conditions is not authorized without prior approval of MLC (k). All health care received at other than a CG Clinic shall be recorded in the Coast Guard health record.

Chapter 2.A.8. lists the procedures a member must follow before seeking nonemergency medical care at a nonfederal facility.

Under the regulations for prescribing practices, Chapter 10.B.6.c.1. states that "[c]ontrolled substances shall be prescribed in minimal quantities consistent with proper treatment of the patient's condition." In addition, such prescriptions are limited to 30-day quantities.

Chapter 5.B.5.b. states that opioid dependence is disqualifying for retention on active duty and that opioid dependent members shall be processed in accordance with Article 20 of the Personnel Manual.

Personnel Manual

Article 20 of the Personnel Manual (COMDTINST M1000.6A (Change 41)) contains regulations regarding suspected illegal drug use by members. Article 20.A.1.b. states that "[t]he goal of the substance and alcohol abuse program is to enable the Coast Guard to accomplish its missions unhampered by the effects of substance and alcohol abuse." Article 20.A.1.c. states that the Coast Guard attempts to "[d]etect and separate from the Coast Guard those members who abuse, traffic in, or unlawfully possess drugs" and to "[f]acilitate the identification, treatment, and rehabilitation of members who are found to be chemically dependent on drugs or alcohol prior to discharge from the Coast Guard."

Article 20.C.1.d. states that a unit CO should "investigate all incidents or circumstances in which the use or possession of drugs appears to be a factor, and take appropriate administrative and disciplinary action." Article 20.C.3.a. states that "Commanding officers shall initiate an investigation into a possible drug incident, as defined in Article 20.A.2, following receipt of a positive confirmed urinalysis result or any other evidence of drug abuse."

Article 20.A.2.h. defines "drug abuse" as "[t]he use of a drug or substance for other than its intended legal use."

Article 20.A.2.k.1. defines a "drug incident" as

- a. Intentional use of drugs;
- b. Wrongful possession of drugs;
- c. Trafficking (distribution, importing, exporting, or introduction into a military facility) of drugs;

- d. The intentional use of other substances, such as inhalants, glue, and cleaning agents, or over-the-counter (OTC), or prescription medications to obtain a “high,” contrary to their intended use; or,
 - e. A civil or military conviction for wrongful use, possession, or trafficking of drugs, unless rebutted by other evidence.
2. The member need not be found guilty at court-martial, in a civilian court, or be awarded NJP for the conduct to be considered a drug incident.
 3. If the conduct occurs without the member’s knowledge, awareness, or reasonable suspicion or is medically authorized, it does not constitute a drug incident.

Article 20.C.3.a. states that “[c]ommanding officers shall initiate an investigation into a possible drug incident, as defined in Article 20.A.2, following receipt of a positive confirmed urinalysis result or any other evidence of drug abuse. The absence of a positive confirmed urinalysis result does not preclude taking action based on other evidence.”

Article 20.C.3.e. states that in determining whether a drug incident has occurred, the CO shall use “the preponderance of the evidence standard.”

Article 20.C.4. states that if a CO determines that a drug incident did occur, the CO will do the following:

1. Administrative Action. Commands will process the member for separation by reason of misconduct under Articles 12.A.11., 12.A.15., 12.A.21., or 12.B.18., as appropriate. Cases requiring Administrative Discharge Boards because of the character of discharge contemplated or because the member has served a total of eight or more years, will also be processed under Articles 12.B.31. and 12.B.32., as appropriate.
2. Disciplinary Action. Members who commit drug offenses are subject to disciplinary action under the UCMJ in addition to any required administrative discharge action.
3. Eligibility for Medical Treatment. Members who have been identified as drug dependent will be offered treatment prior to discharge. If accepted, immediately on completing this treatment, the member will be discharged from the Service. Treatment will be coordinated through the applicable Maintenance and Logistics Command and may be either in-patient or out-patient treatment. ...

Article 20.C.5.1. states the following:

In cases in which the commanding officer determines the urinalysis result attributed to a particular member resulted from administrative error; faulty chain of custody, evidence of tampering, or that drug use was not wrongful; e.g., prescribed medication or unknowing ingestion, the commanding officer will make a finding of no drug incident and close the investigation.

Article 12.B.18.b.4. states that “[a]ny member involved in a drug incident ... will be processed for separation from the Coast Guard with no higher than a general discharge.”

Article 12.B.31.a. states that an ASB is “a fact-finding body appointed to render findings based on the facts obtained and recommend either retention in the Service or discharge. If recommending a discharge, the board also recommends a reason for discharge and the type of discharge certificate to be issued.”

Article 12.B.31.d. states that Commander, CGPC, will review an ASB record and “approve or disapprove the board’s findings of fact, opinions, and recommendations in whole or in part. Commander (CGPC-c) may disapprove findings and opinions if they were made based on incomplete evidence, contrary to the evidence the board considered or to law or regulation, a misunderstanding or misapplication of written policy, or otherwise clearly in error.” Article 12.B.31.e.2. states that Commander, CGPC may “[a]pprove the [ASB’s] recommendation for discharge, but change its type either to one more favorable than recommended if the circumstances warrant it or to one less favorable than recommended based on a determination the type of discharge recommended does not fall within Article 12.B.2. guidelines.” Article 12.B.31.e.4. states that Commander CGPC may “[a]pprove a discharge, but suspend its execution for a specified probationary period. See Article 12.B.34.”

Article 12.B.34.a. states the following:

Before a member’s enlistment or period of obligated service expires, Commander (CGPC-c) may suspend executing an approved discharge for a specified period if the circumstances in a case indicate a reasonable prospect for rehabilitation. During this period of suspension, the member will be afforded an opportunity to demonstrate proper behavior and efficient performance of assigned duties for an extended period under varying conditions.

1. When the member satisfactorily completes the probationary period, the approved discharge will be canceled automatically.

2. The member’s further misbehavior, substandard performance of duty, or demonstrated inability to conform to the demands of a military environment during the probationary period may establish the basis for one of these actions:

a. Punitive or new administrative action may be initiated despite the suspension of executing the approved discharge.

b. Suspension of the approved discharge vacated, and the approved discharge executed, including discharging a member in absentia if he or she has been beyond military control for 15 or more days.

Under 33 C.F.R. § 51.4, the DRB is a “board consisting of five members of the U.S. Coast Guard, appointed by the Commandant of the Coast Guard and vested with the authority to review the discharge of a former member. The board is empowered to change a discharge or issue a new discharge to reflect its findings, subject to review by the Commandant or the Secretary.” Under 33 C.F.R. § 51.2(b)(4), the Commandant “[r]eview[s] and take[s] final action on all DRB decisions which are not reviewed by the Secretary.” The Commandant has delegated this authority to the Vice Commandant.

Under the SPD Handbook, a member involuntarily discharged for “miscellaneous/general reasons” with a JND separation code may be assigned a reenlistment code of RE-1 (eligible to reenlist), RE-3 (eligible to reenlist except for disqualifying factor; waiver required), or RE-4 (ineligible to reenlist). Pursuant to Note 2 of ALCOAST 125/10, issued on March 18, 2010, the RE-3 is now the default reenlistment code for members discharged with a JND separation code. Note 5 under the ALCOAST, which applies to members separated with a JND, states that members separated because of a second alcohol incident will normally receive an RE-3 code but that the RE-4 is prescribed for cases “involving DUI, associated alcohol-related misconduct, or members who fail to complete or refuse treatment.”

FINDINGS AND CONCLUSIONS

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

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

2. The applicant alleged that his discharge on September 26, 2007, was erroneous and unjust. He asked the Board to reinstate him on active duty, to award him constructive service credit and retire him with 20 years of service, or at least to upgrade his RE-4 reenlistment code to RE-1 so that he may reenter the military. The Board begins its analysis in every case by "presuming administratively regularity on the part of Coast Guard and other Government officials."⁴ The applicant bears the burden of proving the existence of an error or injustice by a preponderance of the evidence.⁵ Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."⁶ For the reasons stated below, the Board finds that the applicant has failed to prove by a preponderance of the evidence that his either his separation *per se* or his honorable discharge for "miscellaneous/general reasons" with an RE-4 reenlistment code are erroneous or unjust.

3. The record shows that the applicant became opioid dependent upon prescription drugs after they were prescribed by military physicians on six occasions in 2002, six occasions in 2003, and four occasions in 2004 when the applicant sought relief from back pain. Apparently, the applicant began taking the drugs not only when he was suffering from back pain, which was the legal purpose of the prescription, but also when he was not suffering from back pain but wanted the narcotic effect of the drug (the "high") and when he was suffering from withdrawal symptoms of the drugs themselves. Instead of seeking help from the military physicians who had prescribed the drugs for his back pain, the applicant repeatedly sought the drugs through unauthorized sources over the internet and used a Government credit card to do so. He began to take ten to twelve painkillers per day, and as an AET1 was apparently working on Coast Guard aircraft while "high."

4. The applicant alleged that his discharge was unjust because he became addicted when military physicians negligently failed to monitor his drug use. The ASB's report supports this allegation by stating that "[i]f he had been properly monitored, it is unlikely that he would have developed his dependency." However, most people who are prescribed opioid drugs do not become addicted, and the applicant has not submitted evidence showing that his military physicians knew or should have known that he was becoming addicted to the drugs prescribed for his back pain. Moreover, the applicant's misconduct was not limited to his use of opioid drugs for

⁴ 33 C.F.R. § 52.24(b).

⁵ *Id.*

⁶ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

other than their prescribed purpose of alleviating back pain. He also committed serious misconduct when he used a Government credit card to buy the drugs on-line.

5. The record shows that after exhausting his family's finances and incurring significant debt to buy drugs from these unauthorized sources, the applicant and his wife came to the command and confessed his problems on December 7, 2004. The applicant's command handled his confession and addiction with great discretion in 2004 and 2005 because they did not want his career to be ruined. In December 2004, to avoid creating documentation of illegal drug use that could result in his discharge, the command conducted an undocumented investigation and sent him to a Navy rehabilitation facility without documenting his addiction or treatment in his official records. Upon release from the rehabilitation facility, he was placed in an aftercare program requiring *inter alia* abstention and attendance at support group meetings. The command did not punish the applicant for obtaining opioid drugs from unauthorized sources or for using a Government credit card to do so. The Page 7 entered in his record on March 1, 2005, to document his misuse of the Government credit card does not mention purchases of drugs. The command went to great lengths to avoid creating any record that might have drawn the attention of the Personnel Command and resulted in the applicant's discharge. Instead, the command quietly reassigned him to administrative duties.

6. On February 14, 2006, however, the command convened a documented, informal investigation based upon suspicions that the applicant was again abusing prescription drugs. In addition to documenting the facts that had gone undocumented in December 2004, the investigator found that on several occasions in 2005 and 2006, the applicant had accepted and filled prescriptions for opioid drugs without informing the prescribing physician of his addiction and had accepted and filled a prescription from another unauthorized source. The report of the investigation led the CO to find that a drug incident had occurred. Under Article 20.C.4.1. of the Personnel Manual, a member involved in a drug incident must be processed for separation. The applicant argued that his command should have exercised additional discretion and not initiated his discharge. However, the command exercised great discretion in 2004, giving the applicant a second chance. The fact that the command later took action against the applicant after receiving evidence that he was accepting and filling prescriptions for opioid drugs without informing the prescribing physician of his addiction does not shock the Board's sense of justice.⁷

7. The applicant alleged that his discharge was erroneous because his conduct did not meet the definition of a drug incident. However, the definition of a drug incident under Article 20.A.2.k. of the Personnel Manual includes the "intentional use of ... prescription medications to obtain a 'high,' contrary to their intended use." The record clearly supports the finding of the CO and the ASB that the applicant had used prescription drugs to obtain a "high," rather than for their prescribed purpose. Members involved in a drug incident are processed for sepa-

⁷ Under 10 U.S.C. § 1552, the Board is authorized not only to correct errors but to remove injustices from any Coast Guard military record. For the purposes of the BCMRs, "[i]njustice", when not also "error", 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). The Board has authority to determine whether an injustice exists on a "case-by-case basis." Docket No. 2002-040 (DOT BCMR, Decision of the Deputy General Counsel, Dec. 4, 2002).

ration.⁸ Moreover, the applicant was diagnosed as opioid dependent, which is disqualifying for enlistment or retention on active duty.⁹

8. The applicant alleged that he was denied due process because the ASB only recommended his discharge because Coast Guard policy requires the separation of all members involved in a drug incident. He argued that the policy rendered the ASB proceedings a “procedural sham.” While the ASB members acted in accordance with the Coast Guard’s policy regarding drug incidents in recommending the applicant’s discharge and noted that they would not have done so if the policy had been more flexible, the convening authority expressly stated in his October 3, 2006, memorandum that the ASB could recommend the applicant’s retention on active duty. In addition, the record shows that the ASB carefully considered the evidence and reached a reasonable decision to determine that a drug incident had occurred and to recommend discharging the applicant. He has not shown that he was denied due process in the ASB proceedings.

9. The applicant argued that the Personnel Command should have suspended his discharge and given him a second chance under Article 12.B.34. of the Personnel Manual. However, the applicant’s command had already given him a second chance in December 2004 and throughout 2005 by keeping quiet about his addiction, getting him treatment, and refusing to issue a drug incident finding or initiate his discharge. The Board is not persuaded that the Coast Guard committed error or injustice by refusing to give the applicant a third chance under Article 12.B.34.

10. The applicant alleged that he was denied due process because the Coast Guard did not discharge him until almost three years after he admitted to his addiction. It is true that the applicant admitted to his addiction on December 7, 2004, and was not discharged until September 26, 2007. However, for most of that period, the applicant was being given a second chance to remain on active duty by his command. There is no evidence that he did not want that second chance or that he was unaware that evidence of renewed misconduct could result in discharge proceedings. The record shows that the command began an official investigation on February 14, 2006, based upon suspicions of renewed drug abuse; completed the investigation on June 11, 2006, after accumulating evidence of continuing misconduct; and advised the applicant of the discharge proceedings on June 22, 2006. The actual discharge proceedings took approximately fifteen months, from June 22, 2006, to September 26, 2007. Given the applicant’s request for an ASB and the issues involved, the Board is not persuaded that the Coast Guard unduly delayed the applicant’s discharge contrary to his best interest.

11. The applicant alleged that he was denied due process because the Coast Guard has no rational basis for having different regulations for alcohol abuse and prescription drug abuse since both substances can be used legally and can be addictive. However, alcohol and prescription drugs do not have the same physiological effects, and alcohol is not a controlled substance in the same sense that prescription drugs are controlled substances. Moreover, drug interdiction

⁸ Personnel Manual, Article 20.C.4.

⁹ Medical Manual, Chapters 5.B.5.b. and 3.D.31.o.

is one of the Coast Guard's major missions. The Board is not persuaded that the Coast Guard lacks a rational basis for treating alcohol abuse and prescription drug abuse differently.

12. The applicant alleged that he has been the subject of "selective prosecution" because he knows of two petty officers who committed multiple alcohol-related offenses at his unit who were not discharged. He also pointed out that Captain xxxxxxxxxxxxxxxx was allowed to retire after he tested positive for cocaine and argued that he should be granted constructive service credit so that he will have enough time in service to retire. The applicant has not shown that his own misconduct was comparable to that of the petty officers or Captain xxxxxxxxxxxx. Unlike Captain xxxxxxxxxxxx, the applicant unfortunately did not have sufficient years of service to retire when his misconduct was discovered. Twenty years of service are required for retirement, and while the applicant's addiction and discharge are very unfortunate, the Board is not persuaded that the applicant's separation from active duty was *per se* erroneous or unjust or that he should otherwise be entitled to reinstatement on active duty or constructive service and retirement for twenty years of duty.

13. The applicant alleged that the Vice Commandant's action in disapproving the DRB's recommendation that his reenlistment code be upgraded was arbitrary and capricious. The applicant's record now shows that he was discharged for "miscellaneous/general reasons" with separation code JND. Under ALCOAST 125/10, the RE-3 separation code is the default for members being discharged for "miscellaneous/general reasons," but both the RE-1 and RE-4 are also authorized. Note 5 in the ALCOAST indicates that the type of misconduct committed by the member should determine whether he receives an RE-3 or RE-4. In this case, the applicant repeatedly sought drugs from unauthorized sources and charged their purchase on a Government credit card contrary to policy. The JAG cited this misconduct in the explanation of the Vice Commandant's decision in the advisory opinion, and in light of the misconduct, the Board finds that the RE-4 reenlistment code is neither erroneous nor unjust.

14. The applicant has not proved by a preponderance of the evidence that he was erroneously or unjustly discharged or that his RE code should be upgraded. Therefore, his requests for relief should be denied. However, the Board notes that following the decision of the DRB, as approved by the Vice Commandant, the Coast Guard corrected the applicant's DD 214 by issuing a DD 215 correction form. The DD 215 leaves the prejudicial information on the DD 214 visible to all to whom the applicant must show his discharge papers. Therefore, the Board finds that the Coast Guard should issue the applicant a new DD 214 with the information on the DD 215 included therein.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of former xxxxxxxxxxxxxxxxxxxxxxxxx, 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 the DD 215 dated May 13, 2009, following the decision of the Discharge Review Board, so that

- block 24 of his DD 214 shall show an honorable discharge;
- block 25 shall show Article 12-B-12 of the Personnel Manual as the separation authority;
- block 26 shall show JND as the separation code; and
- block 28 shall show “Miscellaneous/General Reasons” as the narrative reason for separation.

The following notation may be made in Block 18 of the DD 214: “Action taken pursuant to order of BCMR.”

No other relief is granted.

Philip B. Busch

Dorothy J. Ulmer

Kenneth Walton