

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

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Application for Correction  
of the Coast Guard Record of:

**BCMR Docket No. 2009-248**

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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 upon receipt of the applicant's completed application on September 3, 2009, and subsequently prepared the final decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated May 27, 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**

The applicant asked the Board to correct his military record by upgrading his RE-4 (not eligible for reenlistment) reenlistment code to RE-3 (eligible for reenlistment except for disqualifying factor).

The applicant enlisted in the Coast Guard on July 14, 1998,<sup>1</sup> and was honorably discharged on August 30, 2001, by reason of unsuitability due to personality disorder, with a JFX (personality disorder) separation code, and with an RE-4 reenlistment code.

**APPLICANT'S ALLEGATIONS**

On July 12, 2001, the applicant was diagnosed with attention deficit hyperactivity disorder (ADHD) which formed the basis for his discharge from the Coast Guard. The applicant states that he had ADHD but has outgrown the condition. He stated that he was referred for a psychological evaluation while on active duty because ship's personnel thought he made a threatening gesture against another sailor. The applicant explained that when his supervisor took his study materials from him and refused to give them back he became upset. He stated that he went into another part of the ship, took out his knife and laid it on the tool box and stated to another person, "take this from me before I kill that guy." The next day he was taken off the ship

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<sup>1</sup> Prior to enlisting in the Coast Guard, the applicant served in the Army. His DD 214 from the Army states that he was discharged after 2 years, five months, and 16 days with a general discharge under honorable conditions, because of misconduct (no further information with regard to the misconduct).

and told he would undergo a psychological evaluation to determine if he were suicidal or homicidal.

On July 13, 2001, a mental health flight commander in the Medical Corps wrote a letter to the applicant's command stating that he had diagnosed the applicant with ADHD combined type. The mental health commander also wrote the following in part:

There is no evidence of a severe mental disorder that would warrant a medical board. [The applicant] is not now nor has he ever been suicidal, by his report. [The applicant] has a history of attention deficit disorder preceding his entry into the Coast Guard. Individuals with this disorder may have difficulty with mood instability or anger control as well as with learning and retaining information. However, it can respond to a combination of medication management and therapy. [The applicant] has only recently been restarted on medication for his condition after an absence of treatment since high school. I believe with a combination of treatment . . . and continued training and duty he could be an effective member of the Coast Guard, and would recommend a trial of such for about six months. If he is unable to perform up to acceptable standards after a trial of duty, disposition through administrative channels would be appropriate.

The applicant does not deny that he had ADHD at the time of his separation from the Coast Guard, but denies that he still has it today. In this regard, he stated that since his discharge he has been a manager for three business and operated machines and forklifts, which he would not have been able to do if he suffered with ADHD. The applicant stated that he regretted making the comment and gesture that led to his referral for a psychological evaluation and that he would never hurt anyone.

The applicant stated that although he discovered the alleged error on September 1, 2001, it is in the interest of justice to consider his application because "I want to proudly serve my country."

#### **PERTINENT EXCERPTS FROM THE APPLICANT'S MILITARY RECORD**

On July 25, 2001, the applicant was advised by his commanding officer (CO) that the CO had initiated action to discharge him from the Coast Guard under Article 12.B.9. of the Personnel Manual<sup>2</sup> due to his diagnosis of attention deficit disorder (ADD), a type of learning disorder. The CO told the applicant that although his overall performance marks warranted an honorable discharge, his immediate past performance marks indicated a number of deficiencies in his performance, "including an inability to understand and demonstrate knowledge of fundamental engineering concepts. The CO noted that the applicant had been on performance probation and undergone counseling for anger management. Still, the ADD continued to be a source of distraction for the applicant and his shipmates. The CO stated that the applicant's ADD was an obstacle to performing at an acceptable level.

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<sup>2</sup> Article 12,B.9. of the Personnel Manual contains the procedures for processing an unsatisfactory performer.

The applicant by his signature acknowledged the proposed discharge, objected to it, and attached a statement in his behalf. In his statement, the applicant asserted that the anger management sessions were beneficial. The applicant stated that the drug Zyban also helped with the ADD. The applicant stated that he had been diagnosed with ADD at the age of 12 and that he took the drug Ritalin until age 20 when he decided to stop taking it. The applicant asked to remain in the Coast Guard and reminded the CO of the investment that the Coast Guard had made in his training.

On August 8, 2001, the CO asked the Commander, Coast Guard Personnel Command to discharge the applicant under Article 12.B.16. (unsuitability) of the Personnel Manual due to the ADD diagnosis and the performance and behavior problems associated with it. The CO stated that since reporting aboard the command, the applicant had been a source of constant negative attention to the crew and the command. The CO noted that the applicant had been placed on performance probation because of his poor performance, attitude and behavior, his failure to qualify as engineer of the watch, and his failure to become qualified in damage control. The CO also noted that the applicant began anger management counseling in the spring of 2001 to assist with curbing his explosive outburst at home and work, but the anger management counseling had little effect. For example, in June 2001 the applicant became angry at his supervisor, walked around with his fists clenched, and turned his knife over to a supervisor, resulting in the applicant's removal from the cutter. The applicant was subsequently diagnosed with ADD.

The CO stated that although the ADD may be managed with proper medication and therapy, the applicant had not responded to his current therapy including medication and counseling. The CO stated that in his opinion, the applicant had been afforded more than sufficient opportunity to prove his worth to the military with lackluster results.

On August 15, 2001, CGPC directed the applicant's discharge from the Coast Guard by reason of unsuitability with a JFX (personality disorder) separation code and an RE-4 reenlistment code.

On February 19, 2004, the Coast Guard Discharge Review Board (DRB) reviewed the applicant's request for an upgrade of his reenlistment code. The DRB members voted unanimously to deny the applicant's request. The DRB's final decision stated that the applicant's discharge was properly carried out in accordance with Coast Guard policy. The DRB noted the applicant's record of poor performance and his preexisting personality disorder (ADD), as well as the fact that up until his enlistment in the Coast Guard the applicant had taken Ritalin.<sup>3</sup>

## **VIEWS OF THE COAST GUARD**

On October 7, 2003, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief. The JAG also adopted the facts and analysis provided by Commander, Personnel Service Command (PSC) as the Coast Guard's

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<sup>3</sup> The DRB also noted that prior to enlisting the applicant had served in the Army from September 1, 1992 until February 16, 1995. He was discharged from the Army by reason of misconduct, with a JKA (pattern of misconduct) and an RE-3 (eligible to reenlist except for disqualifying factor).

advisory opinion. PSC asserted that the application was untimely and that the applicant had not provided an explanation for his failure to file timely, except that he wanted to serve his country.

PSC also stated that the discharge was in accordance with Coast Guard policy and noted that the applicant did not contest the findings of the DRB or allege that he had experienced any unjust prejudice. PSC concurred with the findings of the DRB in their entirety and argued that the Coast Guard's actions are presumptively correct in the absence of evidence to the contrary.

### **APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD**

On January 13, 2010, the BCMR sent the applicant a copy of the views of the Coast Guard and invited him to respond. The BCMR did not receive a response.

### **APPLICABLE LAW**

#### ***Personnel Manual (COMDTINST M1000.6)***

Article 12.B.16. of the Coast Guard Personnel Manual authorizes enlisted personnel to be discharged by reason of unsuitability at the direction of the Commandant for inaptitude, personality disorders, apathy, defective attitudes, inability to expend effort constructively, unsanitary habits, alcohol abuse, financial irresponsibility, or sexual harassment.

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

#### ***Medical Manual (COMDTINST M6000.1B)***

Chapter 3.D.33 of the Medical Manual states "Use of medication to improve or maintain academic skill (e.g., Ritalin . . .) after age 12 is disqualifying."

Chapter 5.B.2 of the Medical Manual lists the personality disorders that qualify a member for administrative discharge pursuant to Article 12.B.16. of the Personnel Manual. They are Paranoid, Schizoid, Schizotypal, Obsessive Compulsive, Histrionic, Dependent, Antisocial, Narcissistic, Avoidant, Borderline, Passive-aggressive, and Personality disorder NOS. Neither ADD nor disorders usually first evident in infancy, childhood or adolescence are included in the list of personality disorders.

Chapter 5.B.17. of the Medical Manual lists ADD under the heading "Disorders, Usually First Evident in Infancy, Childhood, or Adolescence." It is disqualifying for appointment, enlistment, or induction or a member diagnosed with the condition after entry into the military shall be processed in accordance with Chapter 12 of the Personnel Manual.

#### ***Commandant Instruction (COMDTINST) M1900.4B (Instruction for the Preparation and Distribution of the Certificate of Release or Discharge from Active Duty, DD Form 214***

Article 4.a. states that the DD 214 provides a concise record of a period of service with the Armed Forces at the time of a member's discharge. Section 5. states that the DD 214 is important in obtaining veterans' benefits, reemployment rights, and unemployment insurance. Further, Article 1.D.2. states that the DD 214 must be accurate and complete in order for it to fulfill the purposes for which it was designed.

***Personnel Manual (COMDTINST M1000.6A)***

Article 12.B.9. of the Personnel Manual authorizes the discharge of members whose performance demonstrates they cannot or will not contribute to supporting the Coast Guard's mission.

***Separation Program Designator Handbook***

The Separation Program Designator Handbook authorizes the assignment of an RE-3G or an RE-4 reenlistment code with the JFV separation code. The SPD Handbook states that the JFV separation code for "condition, not a disability" is appropriate when there is an "[i]nvoluntary discharge directed by established directive when a physical disability, which interferes with the performance of duty (Enuresis, motion sickness, allergy, obesity, fear of flying, et al.)."

**FINDINGS AND CONCLUSIONS**

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

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code.

2. The application was not timely. Under 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22, an application to the Board must be filed within three years after the applicant discovers, or reasonably should have discovered, the alleged error or injustice or within three years of the issuance of a DRB decision. See *Ortiz v. Secretary of Defense*, 41 F.3d 738, 743 (D.C. Cir. 1994). This application was submitted approximately five years after the issuance of the DRB decision and therefore is approximately two years beyond the statute of limitations. The applicant discovered or should have discovered the alleged error at the time of the DRB decision denying his request for an upgrade of his reenlistment code.

3. The Board may still consider the application on the merits, if it finds it is in the interest of justice to do so. In *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992), the court stated that in assessing whether the interest of justice supports a waiver of the statute of limitations, the Board "should analyze both the reasons for the delay and the potential merits of the claim based on a cursory review." The court further stated that "the longer the delay has been and the weaker the reasons are for the delay, the more compelling the merits would need to be to justify a full review." *Id.* at 164, 165.

4. The applicant asserted that it is in the interest of justice for the Board to excuse his untimeliness and consider the merits of his application because he wants to serve his country.

The Board is not persuaded to waive the statute of limitations because of the applicant's desire to serve his country.

5. However, a cursory review of the merits reveals a probable error in the applicant's reason for separation and his separation code. The applicant's record should reflect the most accurate reason for his discharge under the Personnel Manual. His discharge by reason of unsuitability due to personality disorder is not accurate and the record should be corrected. Therefore it is in the interest of justice to waive the statute of limitations under the circumstances of this case.

6. The Coast Guard committed an error by listing the reason for the applicant's discharge as unsuitability (due to personality disorder) and his separation code as JFX (personality disorder). According to Article 5.B.17. of the Medical Manual, ADD is a "disorder usually first evident in infancy, childhood or adolescence," and a basis for an administrative discharge under Article 12 of the Personnel Manual. ADD is not a personality disorder. Article 5.B.2. of the Medical Manual lists the following as personality disorders: paranoid, schizoid, schizotypal, obsessive compulsive, histrionic, dependent, antisocial, narcissistic, avoidant, borderline, personality disorder NOS, and personality traits. Additionally, there is no evidence in the military record that the applicant was ever diagnosed with a personality disorder. Therefore, unsuitability due to a personality disorder as the narrative reason for separation and the JFX separation code are erroneous.<sup>4</sup>

7. Chapter 1.D.2. of the DD 214 instruction states that the DD 214 must be accurate and complete to fulfill the purposes for which it was designed. As stated above, the Medical Manual does not list ADD as a personality disorder. Nor does ADD fit within any of the other eight grounds for an unsuitability discharge under Article 12.B.16 of the Personnel Manual, which are inaptitude, apathy, defective attitudes, and inability to expend effort constructively, unsanitary habits, alcohol abuse, financial irresponsibility, sexual harassment, and not adhering to Core Values.

8. Because ADD does not fit within any of the other grounds for an unsuitability discharge under Article 12.B.16. of the Personnel Manual, the Board must determine the narrative reason for the applicant's discharge that most accurately describes his situation. Chapter 12 of the Personnel Manual lists all of the reasons for administrative discharges, and the one that appears to fit the applicant's situation most accurately is discharge by reason of convenience of the government due to a "condition that, though not a physical disability, interferes with performance of duty; e.g. enuresis or somnambulism," which is described in the Separation Program Designator (SPD) Handbook as "condition, not a disability."

9. Further, according to the SPD Handbook, the corresponding separation code for a discharge by reason of "condition, not a disability" is JFV, which means an "involuntary discharge directed by directive when a condition [that is] not a physical disability . . . interferes

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<sup>4</sup> In BCMR No. 2009-211, the applicant was diagnosed with separation anxiety disorder, which the Coast Guard coded as a personality disorder on his DD 214. The Board corrected that applicant's record to show that he was discharged for the convenience of the government due to a condition, not a disability, rather than for unsuitability due to personality because under the Medical Manual and the Coast Guard Personnel Manual separation anxiety disorder is not a personality disorder.

with the performance of duty.” The SPD Handbook offers the following examples of such conditions: Enuresis, motion sickness, allergy, obesity, and fear of flying.

10. By correcting the narrative reason for the applicant’s discharge to convenience of the government and the separation code to JFV (“condition, not a disability”), the Board must review the correctness of the applicant’s RE-4 reenlistment code. The SPD Handbook authorizes either an RE-3G or an RE-4 reenlistment code with the JFV separation code. The Board is not persuaded to upgrade the applicant’s RE-4 reenlistment code based upon the evidence of record. In this regard, the Board notes that the applicant was not qualified for enlistment because he had taken the drug Ritalin from age 12 until age 20, when he stopped taking it without medical authorization. Further his preexisting ADD was disqualifying for enlistment. It is not clear from the record whether the applicant withheld this information from his recruiter and was therefore able to enlist. However, it is clear from the Medical Manual that he was not and is not eligible for enlistment. Further, the applicant’s CO did not recommend the applicant for retention and stated that the applicant had been a problem for the crew and the command since he reported to that unit. According to the CO, the applicant failed to improve his performance, attitude, and behavior even after being placed on probation. In this regard, he failed to qualify as engineer of the watch and to qualify in damage control. The CO also noted that anger management counseling had little effect on the applicant’s behavior. The CO stated the applicant did not respond to his then-current medication and counseling therapy and that the Coast Guard would never see any return on its investment in him. The applicant has a long history of ADD and is not qualified for enlistment in the armed services. The RE-4 bars his reenlistment and prevents a repeat of the problems incurred by his command during his enlistment. The applicant has not demonstrated an error or injustice in the assignment of the RE-4 reenlistment code.

11. In light of the above findings, the Board finds that it is in the interest of justice to change the narrative reason for separation shown on the applicant’s DD 214 to “Condition, Not a Disability” and the separation authority to Article 12.B.12 of the Personnel Manual. In addition, the applicant's SPD code should be changed to JFV. The applicant has not persuaded the Board that his RE-4 reenlistment code is erroneous or unjust.

12. Accordingly, the applicant’s request should be granted in part as discussed above.

**[ORDER AND SIGNATURES ON FOLLOWING PAGE]**

## ORDER

The application of XXXXXXXXXXXXXXXXXXXX, USCG, for correction of his military record is granted in part. Specifically, his DD Form 214 shall be corrected to show the following:

- Block 25 shall be corrected to show Article 12-B-12 of the Personnel Manual as separation authority.
- Block 26 shall be corrected to JFV (condition not a physical disability) as the separation code.
- Block 28 shall be corrected to show convenience of the government as the reason for separation.

The Coast Guard shall issue him a new DD Form 214 with these corrections. Block 18 shall be amended to state, "Action taken as result of BCMR."

No other relief is granted.

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Randall J. Kaplan

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Erin McMunigal

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Thomas H. Van Horn