DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2011-001

XXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXX

FINAL DECISION

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the application upon receipt of the applicant's completed application on October 5, 2010, and subsequently prepared the final decision as required by 33 CFR § 52.61(c).

This final decision, dated June 23, 2011, 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 removing a negative administrative remarks page (page 7) dated January 16, 2003. The subject page 7 states the following:

> 16Jan03: You have been disenrolled from Food Service Specialist (FS) A School with a "Fault" disenrollment, as a result of your own actions. Specifically, you were disenrolled because you were arrested by the California Highway Patrol (CHP) for driving under the influence (DUI) of alcohol with a Blood Alcohol Content (BAC) of .09. As a result of your "fault" disenrollment, you are not eligible to reapply for any Class "A" school for one (1) year from date on your disenrollment . . . [The applicant acknowledged the entry with his signature on April 28, 2003].

The applicant admitted that he was involved in one alcohol incident on April 27, 2003, and one alcohol-related situation on April 3, 2004. However, he argued that the incident discussed above on the January 16, 2003 page 7 could not have taken place because he did not report to FS "A" school in California until March 16, 2003. He stated that on January 16, 2003, he was still at Coast Guard Station Venice, Louisiana.

The applicant had an earlier application before the Board, Docket No. 2006-063, in which he requested that his RE-4 (not eligible) reenlistment code be upgraded so that he could reenlist in the Coast Guard. The disputed page 7 was mentioned in the final decision in Docket No. 2006-063. The Board made the following findings and conclusions in that case:

> 2. The applicant requested that the reenlistment code on his DD 214 be upgraded so he can reenlist in the Coast Guard. The applicant stated that the RE-4 reenlistment code is unjust and it prohibits him from having a career in the military.
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> 3. The record indicates that the applicant experienced numerous problems related to his alcohol consumption during his service in the Coast Guard. *In January 2003, he was disenrolled from A School because he had been arrested by the local authorities for driving under the influence.* On April 27, 2003, the applicant was once again stopped by local law enforcement and was found to be driving while intoxicated. On April 28, 2003, he was referred to the Command Drug and Alcohol Representative (CDAR) at TRACEN Petaluma for evaluation, who subsequently noted that the applicant met the diagnostic criteria for substance abuse. The Coast Guard informed the applicant that the April 27, 2003, incident was "being considered his first alcohol incident for documentation purposes" and that "any further incidents may result in your separation from the U.S. Coast Guard." [Emphasis added.]
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> 4. The record indicates that the applicant was arrested on April 4, 2004, for public drunkenness, and the Page 7 documenting the incident noted that the incident would be recorded as an "alcohol situation," in lieu of an "alcohol incident." The applicant was referred to a TRACEN Petaluma medical officer, in accordance with Article 20.A.2.e. of the Personnel Manual, who provided a diagnosis of alcohol abuse and recommended that the applicant complete a 14-day outpatient treatment program. The record indicates that the applicant declined treatment for his alcohol abuse, and that he was counseled that his refusal to attend and complete the treatment would result in his being recommended for discharge from the Coast Guard. The Board notes that on May 5, 2004, when the applicant was told that he was being discharged from the Coast Guard, he once again indicated that he "did not desire to receive treatment for substance abuse." The applicant also did not object to being discharged.
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> 5. The Board finds that the applicant was properly discharged subsequent to his failure to participate in an alcohol treatment program. In accordance with Article 20.B.2.k. of the Personnel Manual, the applicant's CO had the authority to recommend discharge of any member who had refused to undergo the treatment deemed necessary by the CO and a competent medical authority.
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> 6. The applicant has failed to prove by a preponderance of the evidence that his discharge for alcohol rehabilitation failure following his refusal to attend treatment for his alcohol problem was in any way erroneous or unjust or that he

> was denied any due process pursuant to his discharge under Article 12.B.16. of the Personnel Manual. In accordance with the SPD Handbook, an RE-4 code is the appropriate reenlistment code for a member discharged for refusing to participate in a treatment program for alcohol rehabilitation. Although the applicant provided a letter from his stepfather and letters from two Coast Guard members who knew him prior to his discharge, he has not submitted sufficient evidence of successful rehabilitation treatment for alcohol abuse or evidence of his sustained sobriety following such treatment. In light of the current record, the applicant has not proved that his receipt of the RE-4 code is erroneous or unjust.
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> 7. Accordingly, the applicant's request should be denied.

Although not discussed in the Findings and Conclusion of Docket No. 2006-063, the Board notes that on April 28, 2003, the commanding officer of USCG Training Center Petaluma suspended the applicant's base driving privileges for one year due to his April 27, 2003 stop by local law enforcement for driving while intoxicated.

The applicant stated that he did not discover the alleged error in the current case until August 17, 2010. He also argued that it is in the interest of justice to consider his application if more than 3 years have passed since he discovered the error because the earlier Board may have relied on the page 7 in denying his request for an upgrade of his reenlistment code. The final decision in Docket No. 2006-063 was issued on October 16, 2006.

VIEWS OF THE COAST GUARD

On February 2, 2011, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief to the applicant. The JAG stated that the application is untimely and should be denied on that basis.

With respect to the merits, the JAG stated that date of entry (16Jan03) on the page 7 is an administrative error or oversight. The JAG noted that the applicant was scheduled to arrive at FS "A" school in Petaluma CA not later than March 16, 2003, based upon a copy of his orders that were attached to the advisory opinion; that he was arrested and charged with DUI on April 27, 2003; that his driving privileges on CG Training Center Petaluma were suspended on April 28, 2003; and that on April 28, 2003, the applicant acknowledged his disenrollment from "A" school. The JAG stated that although the entry date on the page 7 appears to be incorrect, it is the Coast Guard's position that this error should be deemed harmless at best because the applicant was well aware of the date of his arrest and of his withdrawal from "A" school. The JAG further stated the following:

> The page 7 clearly describes the performance deficiencies at issue; is member specific; and is a valid use of the command's authority to place members on notice of substandard performance. The applicant provided no evidence to refute the validity of the [page 7] documenting [his] misconduct. Therefore, the assumption can be made that the page 7 entry into the applicant's record is valid albeit [with an] incorrect entry date.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 3, 2011, the BCMR received the applicant's response to the views of the Coast Guard. The applicant stated that he has no further requests if the Coast Guard is saying that the January 16, 2003, date is a clerical error and that the prior Board was not influenced by the erroneous date in the final decision in Docket No. 2006-063.

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. To be timely, an application for correction of a military record must be submitted within three years after the applicant discovered or should have discovered the alleged error or injustice. See 33 CFR 52.22. The applicant asserted that he discovered the alleged error on August 17, 2010. However he should have discovered the alleged error as early as April 28, 2003 when he acknowledged the January 16, 2003 entry with his signature and no later than his discharge from the Coast Guard on June 3, 2004.

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. See also Dickson v. Secretary of Defense, 68 F.3d 1396 (D.C. Cir. 1995).

4. The applicant argued that the Board should excuse his untimeliness because the subject page 7 may have caused the earlier Board, in BCMR No. 2006-063, to believe that he had three alcohol incidents/situations, instead of two. Even if true, the application is still untimely. The Board issued that decision October 19, 2006, and the applicant did not file his current application with the Board until September 20, 2010. The applicant has not articulated a reason that persuades the Board that he could not have submitted his application within three years of October 19, 2006.

5. With respect to a cursory review of the merits, the Board finds that the applicant is not likely to prevail on his claim that the subject page 7 should be removed because it refers to an incident that did not occur. In this regard, he argued that he did not begin "A" school until March 2003. The Board agrees with the JAG that the January 16, 2003 date on the subject page 7 is an administrative error, but the content clearly reflects an incident that occurred while the applicant was attending "A" School. The page 7 indicates that the applicant was disenrolled from "A" school due to an arrest by the CHP for a DUI. Additionally, the applicant's

acknowledgement of his disenrollment from "A" school on April 28, 2003, persuades the Broad that although the January 16, 2003 entry date on the page 7 is an administrative error, the arrest actually happened on April 27, 2003, as stated by the JAG. The April 28, 2003 letter suspending the applicant's driving privileges on Training Center Petaluma due to an April 27, 2003 DWI is further evidence that the January 16, 2003 date is an administrative error but that the content on the page 7 accurately refers to the April 27, 2003 DUI.

6. More importantly, the Board finds that the earlier Board in Docket No. 2006-063 denied the applicant's request for an upgrade of his reenlistment code because he refused to attend a 14-day program for alcohol abuse as recommended by a medical officer and his command, and not because of the number of alcohol incidents/situations that were documented in his record. He was subsequently discharged because of alcohol rehabilitation failure. Article 20.B.2.k. of the Personnel Manual states that members refusing to undergo the treatment deemed necessary by the CO and a competent medical authority are normally processed for separation. That Board also found that according to the Separation Program Designator Handbook, the RE-4 code was the appropriate reenlistment code for a member discharged for refusing to participate in a treatment program for alcohol rehabilitation.

7. Accordingly, the Board finds that it is not in the interest of justice to waive the statute of limitations in this case and it should be denied because it is untimely.

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

ORDER

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

Philip B. Busch

Reagan N. Clyne

Rebecca D. Orban