

**DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for Correction of
Coast Guard Record of:

XXXXXXXXXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXXX

BCMR Docket
No. 2001-028

FINAL DECISION

ULMER, Deputy Chairman:

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was docketed on January 17, 2001, upon the Board's receipt of the applicant's complete application for correction of his military record.

This final decision, dated September 27, 2001, is signed by three duly appointed members who were designated to serve as the Board in this case.

The applicant, a former yeoman second class (YN2; pay grade E-5) in the Coast Guard Reserve, asked the Board to correct his record to show that he was retired from the Coast Guard by reason of physical disability in the highest grade that he has held during his military service. In the alternative, he stated that he should be reinstated in the Coast Guard Reserve so that he could earn enough years to qualify for retirement.

The applicant enlisted in the Coast Guard on April 26, 1975. His Coast Guard active duty service was terminated on xxxxxxxxxxxxxxxx, with a general discharge under honorable conditions because of misconduct due to fraudulent enlistment.¹ Prior to enlisting in the Coast Guard, the applicant had served for several years in the Air Force. The applicant stated that he had also served in the xxxxxxxxxxxx and xxxxxxxx National Guards.

EXCERPTS FROM RECORD AND SUBMISSIONS

¹ The applicant apparently "altered various and numerous documents concerning his prior military service. For example, the [Coast Guard Report of Investigation] contains evidence that [applicant] altered his record to show that he served as a captain in the Air Force at one time when he had not served as a captain . . . [O]ther documents had been altered to show different lengths of service than those [applicant] actually served. One of the alterations changed the reason for [applicant's] discharge from the xxxxxxxxxxxx National Guard from 'Fraudulent Enlistment' to 'Expiration of Term of Enlistment'." See BCMR No. 328-85, p.1.

The applicant claimed that he suffers from the following medical problems: heart attack/stroke, high blood pressure, high cholesterol, diabetes, and arthritis. He stated that he believed his record to be in error or unjust for the following reasons:

I have received no retirement or disability from the military services. [Seventeen years of] service should give me a disability at the highest rank held in the military services.

The applicant also claimed that he has suffered an injustice because he applied for a commission as an officer while in the Coast Guard, but he never received the test results. He stated that he was discharged from the Coast Guard shortly after he took the test for a commission as an officer.

The applicant stated that the three-year statute of limitations for filing a corrective action should be waived due to his disability, age, low-income, and length of military service.

The applicant submitted copies of documents from his Air Force record, copies of his Coast Guard enlistment and discharge documents, and copies of his discharge documents from the xxxxxxxxxxxx National Guard, which state that he was discharged due to fraudulent enlistment. He also submitted copies of certificates that show he has earned two doctors of divinity degrees and that he is an ordained pastor.

Applicant's Coast Guard Record

On February 27, 1976, the Commandant approved the applicant's discharge because of misconduct due to fraudulent enlistment. The Commandant stated that since the applicant's enlistment was fraudulent, he was not entitled to any credit for that enlistment. Apparently, prior to his actual discharge in 1976, the applicant had asked to remain in the Coast Guard either as an officer or enlisted person, or in the alternative to be retired. In reply to the applicant's request, the Commandant wrote the following:

[The applicant] does not meet the qualifications for direct commission or enlistment in the regular Coast Guard Reserve. He does not have 20 satisfactory years of Federal service for retirement under the provisions of 10 [U.S.C. §§] 1331-1337. Finally, the evidence and arguments presented by [the applicant] are insufficient to warrant convening a medical evaluation/disposition board to consider him for medical retirement or discharge.

On February 27, 1976, the Commanding Officer (CO) of Enlisted Personnel at Coast Guard Headquarters informed the applicant that he had been issued a general discharge "for misconduct by reason of procurement of fraudulent enlistment effective 27 February 1976." The applicant was further informed that he would receive an RE-4 (not eligible for reenlistment) reenlistment code. The CO further stated as follows:

Article 15-A-2 of [the Personnel Manual, CG-207] defines the types of service that are not creditable for pay, longevity or retirement purposes. A person who is discharged by reason of a fraudulent enlistment is not entitled to credit for any service during such enlistment. You are advised that your official records and separation documents reflect a general discharge from the Coast Guard Reserve

for fraudulent enlistment. Although this does not invalidate your previous service in the United States Air Force, it does cancel any benefits or entitlements based on or derived from your enlistment in the Coast Guard Reserve. Determination of eligibility for veterans benefits based on your Air Force Service will be made by the appropriate agency or administration involved at the time of your application for benefits.

In a previous application to the Board, BCMR No. 328-85, the applicant requested that his misconduct discharge from the Coast Guard Reserve be declared illegal and all evidence of it be removed from his official records. He claimed that since there was no lawful enlistment there could be no discharge. The applicant also requested an upgrade of his RE-4 reenlistment code so that he could reenlist and complete twenty years of service to earn a retirement. He also asked that his "time in the Coast Guard . . . count towards his retirement." Last, the applicant requested in Docket No. 328-85 that the Board consider advancing him to the rank of E-9. In 1987, the Board issued a final decision denying the applicant's request in that case because it was untimely. However, the Board stated that

[e]ven if we were to consider petitioner's application on the merits we would deny relief. Contrary to petitioner's statement, an enlistment contract, signed by him on April 26, 1975, does exist. Petitioner has not provided any evidence that an error or injustice occurred with respect to the Coast Guard's action in his case. It appears that the Coast Guard had ample grounds to discharge petitioner with a general discharge by reason of misconduct due to fraudulent enlistment and to prosecute him in Federal Court.² We would not find any change to petitioner's record to be warranted.

The applicant's military medical record contained an enlistment medical examination dated February 22, 1975 stating that the applicant was in good health. On a later medical examination, dated October 24, 1975 the applicant was determined to be qualified for active duty training. The medical examination contained the following note: "There is no active pulmonary disease, minimal fibrosis is present at the left base, the heart is normal in size."

Views of the Coast Guard

On May 7, 2001, the Board received an advisory opinion from the Chief Counsel of the Coast Guard recommending that the Board deny relief to the applicant. He stated as follows:

[T]he Chairman should dismiss this case with prejudice for lack of jurisdiction. Applicant was given a general discharge from the Coast Guard Reserve on 27 February 1976 under honorable conditions for misconduct by reason of fraudulent enlistment. Further . . . Applicant's Coast Guard service was voided by the determination of fraud, which made any service in the Coast Guard *void ab initio*.

² With respect to the federal court prosecution, the Board in BCMR No. 328-85, recited the following; "petitioner stated that after he was discharged, representatives of the Coast Guard Reserve followed him to xxxxxxxx and charged him in Federal court. Petitioner submitted documents showing that on September 21, 1977, he was found guilty as charged, in the U.S. District Court for the xxxxxxxx xxxxxxxx xx xxxxxxxx, of the offenses of [defrauding the United States]."

Hence, Applicant has no cognizable Coast Guard record to correct . . . Moreover, even if the Chairman determined this matter was subject to the BCMR's jurisdiction, the determination the Board made in [BCMR No. 1985-328] would bar any relief sought by Applicant.

Applicant's Response to the Views of the Coast Guard

On May 17, 2001, the Board received the applicant's reply to the views of the Coast Guard. He stated his disagreement with the Coast Guard's position.

The applicant denied that he had fraudulently enlisted in the Coast Guard. He stated that all records that he sent to the Board are true and correct. He further stated that his enlistment was approved by the Reserve Division at Coast Guard Headquarters. The applicant further claimed that he took a test for a commission as an officer and a few days later action was taken against him for fraudulent enlistment. He stated that in 1977 he was given a three-year suspended sentence by a federal court judge for defrauding the government. He claims that some of the evidence that was used against him in that conviction was created by someone other than himself.

FINDINGS AND CONCLUSIONS

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

1. The BCMR has jurisdiction of the case pursuant to section 1552 of title 10, United States Code. This provision states that the Board may correct any military record. Therefore contrary to the Coast Guard's opinion, the Board has the authority to correct the applicant's record if it determines such record to be in error or unjust.

2. The application was not timely. The applicant had been discharged from the Coast Guard for approximately 24 years before he filed this application with the Board. To be timely, an application for correction of a military record must be submitted within three years after the alleged error or injustice was discovered or should have been discovered. See 10 USC § 1552(b).

3. Untimeliness can be waived if the Board finds that it is in the interest of justice to do so. The Board, in determining whether to waive the timeliness requirement, "should consider the reasons for the delay and the plaintiff's potential for success on the merits, based on a cursory review, as factors in the interest of justice analysis." See Allen v. Card, 799 F. Supp. 158, 166 (D.D.C. 1992). The applicant stated that he discovered this error on March 1, 2000. The Board finds that the applicant discovered or should have discovered the alleged error or injustice with respect to his discharge much earlier. He also should have been aware in 1976, or very soon thereafter, of any medical condition that could have led to a physical disability retirement, since any such condition must have been incurred while he was on active duty. Therefore, the applicant should have been aware at the time of his discharge of any diseases or injuries that caused him to be unfit to perform his military duties.

4. The applicant certainly should have discovered the alleged errors in 1985 when he filed his first application (BCMR No. 328-85) with the Board challenging the legality of his

discharge. Although the Board issued a final decision denying relief in that case in 1987, the applicant still waited approximately 13 years before filing his current application with the Board.

5. The applicant asked the Board to waive the statute of limitations because of his disability, age, low income, and length of service. However, he failed to explain why he could not have filed the application sooner. There is no evidence in the record that the applicant suffered with a medical condition that interfered with his to ability to file a timely application with the Board. The applicant's reasons for not filing his application sooner are not persuasive.

6. The Board finds that even if the untimeliness were excused, the applicant would not succeed on the merits of his claim. The Coast Guard has determined that the applicant's enlistment from xxxxxxxxxxxxxxxx to xxxxxxxxxxxxxxxxxxxxxx was fraudulent and that he would not receive any credit for time served during that enlistment. The fraudulent enlistment is the only Coast Guard service for the applicant. Since the applicant is not entitled to reap any benefit from the fraudulent enlistment, he is not eligible for a retirement because of physical disability, even if such a disability were incurred during his Coast Guard Service. Moreover, he has not submitted any evidence that proves he was ever unfit to perform his military duties during a period of active duty. The medical evidence in his record indicates that he was fit to perform the duties of his rate. Current medical conditions, not incurred on active duty, are not a basis for awarding a physical disability retirement.

7. The applicant has not presented any evidence establishing that the Coast Guard committed an error or injustice when it discharged him because of misconduct due to fraudulent enlistment. In addition, the Board in BCMR No. 328-85, noted that it found no error or injustice with respect to the applicant's 1976 discharge.

8. There is no evidence in the record that the applicant was ever commissioned as an officer in the Coast Guard. The fact that he took a test that could possibly have led to a commission does not mean that he was ever commissioned.

9. Based on the above, it is not in the interest of justice to waive the statute of limitations in this case.

10. The Board notes that the applicant may qualify for veteran's benefits based on his Air Force service. If he has not done so, he should contact the Department of Veterans Affairs for a determination of his eligibility for veteran's benefits based on his Air Force service.

11. The Board did not treat this application as a request for reconsideration of Docket No. 328-85 because the two applications contain different requests for relief. In Docket No. 328-85, the applicant requested to have all evidence of his Coast Guard enlistment and discharge removed from his military record, which was denied by that Board. In the current case, he is asking for a physical disability retirement based on his active duty service.

12. Accordingly, this case should be denied.

[ORDER AND SIGNATURES ON NEXT PAGE]

ORDER

The application of xxxxxxxxxxx xxx x. xxxxxx, xx., xxx xx xxxx, USCG, for the correction of his military record is denied.

Michael K. Nolan

Edmund T. Sommer, Jr.

David M. Wiegand