

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2003-084

XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX

FINAL DECISION

GARMON, Attorney-Advisor:

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 May 20, 2003 upon the BCMR's receipt of the applicant's request for correction.

This final decision, dated February 18, 2004, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant, a former seaman telecommunications specialist (SNTC; pay grade E-3), asked that his discharge be upgraded from general Under Honorable Conditions to Honorable, thereby allowing him to use educational benefits under the Montgomery GI Bill (MGIB) program.

APPLICANT'S ALLEGATIONS

The applicant alleged that he is unjustly being denied the use of his MGIB benefits. According to MGIB regulations, a member must have received an Honorable discharge during a period of eligible service in order to use educational benefits under the program. He alleged that in advising him to extend his original enlistment upon its expiration, rather than reenlist, his unit never told him that he could lose eligibility for MGIB benefits should the character of his separation be other than Honorable. He alleged that because he was not fully counseled of his "legal rights," he missed the opportunity to satisfy the period of honorable service required in order to use any MGIB educational benefits.

In support of his application, the applicant submitted a statement in which he wrote that he now regrets the manner in which he was discharged from the Coast Guard. He wrote that after he lost the xxxxxxxxx business he began while still in the service, he realized the importance of an education. He stated that in November 2002, he enrolled in an online degree program to obtain a Bachelor of Science in Business Marketing but that he has been unable to continue his studies due to a lack of funding.

The applicant also wrote that since his separation from the Coast Guard, he has counseled others who were seeking a career to join the Armed Forces. He stated that close members of his family have had rewarding careers in different branches of the military but that he desires to be the first in his family to obtain a Bachelor's degree. In closing, he asked that, in making a final decision in his case, the Board focus on his positive accomplishments and the decorations and awards he received during his period of Coast Guard service.

SUMMARY OF THE APPLICANT'S RECORD

On August 3, 1987, the applicant enlisted in the Coast Guard for four years. Prior to entering in the Coast Guard, he had served for twenty-three days in the United States Air Force.

On February 6, 1991, the applicant was given special recognition for his "exceptional performance of duty" through "poor weather, long hours, and numerous other obstacles to safely finish the job." He was commended for his "willingness to serve, attention to duty and dedication to mission."

On May 20, 1991, the applicant voluntarily extended his enlistment for thirty-three months to have sufficient obligated service to enroll in "A" School. As a result of this extension, his new expiration of enlistment (EOE) became May 3, 1994. Upon completing "A" School in October 1991, he was advanced to E-4 and voluntarily extended his enlistment for an additional seven months, through December 3, 1994, in order to accept overseas transfer orders.

On February 7, 1992, a negative page 7 entry was entered into the applicant's record, noting that the period of eligibility for his first Coast Guard Good Conduct Award was terminated due to his being assigned a mark of 3 in the conduct characteristic. Thereafter, several positive page 7s were entered in his record in 1992, 1993, and 1994.

On October 18, 1994, the applicant extended his enlistment for two years and eight months, through August 2, 1997, for purposes of the High Year Tenure (HYT) program. Because the applicant had not yet attained pay grade E-5, he was restricted

by the provisions of HYT and ineligible to reenlist beyond his tenth anniversary in the Coast Guard.

On January 29, 1996, the applicant formally requested to be honorably discharged from the Coast Guard. He explained to the Coast Guard Personnel Command (CGPC) that at the time he extended his enlistment through August 2, 1997, he believed that his domestic circumstances would remain the same. However, he stated that shortly after extending his enlistment, he became divorced from his wife, who moved with their child over 1000 miles away. He also stated that he had developed a xxxxxxxx business that he wished to devote himself to on a full-time basis. He stated that his discharge would allow him to see his daughter more frequently and to better serve his xxxxxxxx customers.

On January 30, 1996, the applicant's CO wrote a first endorsement to his request for discharge. With respect to the "Voluntary Early Release Program for Active Duty Enlisted Personnel," the CO stated that there was no program for "soliciting candidates for a voluntary early release from [the] service." He stated that the applicant had some personal issues which had been difficult to resolve as a result of his duties and that "the prospect of a personal business opportunity ... would allow him to better resolve these matters" He stated that, in light of the fact that he had more personnel in the applicant's rate than for which was billeted, he had no objections to the request if it was in the best interest of the service.

On February 14, 1996, a negative page 7 entry was entered into the applicant's record regarding his failure to report for duty on February 9, 1996. It was noted that the applicant failed to notify his supervisor or training petty officer until February 12, 1996 that he was experiencing difficulties in completing the assigned task for an All-Hands training scheduled on February 13, 1996. The applicant's actions and behavior was stated to have been "unsatisfactory in completing assigned collateral duties and performance that is expected from a Third Class Petty Officer." He was further counseled about his responsibilities and advised that "any future incidents may lead to disciplinary action."

On February 26, 1996, the applicant had a negative page 7 entered into his record to document his counseling on "the serious nature" of his being charged with driving under the influence (DUI), reckless driving, and wanton endangerment on January 27, 1996. He was further notified that the situation would be considered his first alcohol incident and that he was being referred to a community hospital for evaluation on March 20, 1996.

By memorandum dated February 28, 1996, the Commander of CGPC informed the applicant that his request for early release from active duty had been denied. The Commander stated that there was no policy or regulation in effect to "allow [his] early

release this far in advance of [his] normal expiration of enlistment." He was encouraged to complete his enlistment as agreed.

On March 7, 1996, an adverse page 7 was entered into the applicant's record to document his March 6, 1996 civil conviction stemming from charges of DUI, reckless driving, and wanton endangerment. It was noted that the applicant was fined \$500.00, had his driving privileges restricted for 30 days, and was required to complete a state-sponsored educational program for first-time offenders. The page 7 further noted that he was counseled on Coast Guard policies concerning alcohol use and/or abuse and was directed to have a mandatory screening at a community hospital on March 20, 1996.

On March 9, 1996, the applicant was counseled regarding the February 28, 1996 denial of his request for early release from active duty. The page 7 entry notes that he was advised of the following:

[T]here is no policy or regulation in effect authorizing early separation other than those defined in Section 12-B of [the Personnel Manual] – for which he does not qualify. He was instructed to contact the District CEA [command enlisted advisor] if he wanted to pursue this matter any further and seek advice from [his District legal office] concerning repercussions resulting from general discharges.

Additionally, [the applicant] was counselled, by all members of his chain of command, concerning his requirement to attend screening scheduled on [March 20, 1996] at [a community hospital.] Failure to attend this evaluation would be failure to obey an order or regulation (Article 92 UCMJ) and may result in disciplinary action.

On March 11, 1996, the applicant had a negative page 7 entered into his service record, assigning him marks of 2 in the "well-being," "loyalty," and "adaptability" dimensions of his March 6, 1996 enlisted performance evaluation form (EPEF). It stated that the applicant "frequently failed to maintain [his] assigned collateral duties creating an increased workload," was "convicted of driving under the influence, reckless driving, and wanton endangerment," and "consistently displayed discontent with the organization's decisions concerning [his] early release." As a result of his being assigned an "unsatisfactory" in the conduct performance dimension, the applicant's period of eligibility for a Good Conduct Award was terminated.

On March 14, 1996, the applicant's qualifications as a communications watch officer were revoked. A negative page 7 states that the actions taken were a result of "deteriorating/inconsistent watchstander performance and statements made on March 13, 1996 during an evaluation counselling session." It was noted that during that session, the applicant stated that he was unsure whether he "could be counted-on to stand [his] watch" and that "[m]aybe [he could be relied on] for [the coming] weekend." Consequently, the applicant was reassigned as a day worker within the operations department.

On March 15, 1996, the applicant was reduced in rank to SNTC, pay grade E-3, as a result of non-judicial punishment for dereliction of duty. He submitted a handwritten note to his commanding officer stating the following:

I am writing you this letter to let you know that I'm not very proud of what I'm going to do. I'm informing the Coast [Guard] at this time, that I will not be going to the screening and counseling that I was assigned. I'm very sorry for this.

On March 19, 1996, the applicant was placed on six months' probation pursuant to Articles 12-B-16 and 12-B-18 of the Personnel Manual because of an "established pattern of shirking." The negative page 7 entry stated that during the previous two months, the applicant's performance had deteriorated and been inconsistent in that he had failed to complete assigned collateral duties, submitted inaccurate radio logs, failed to perform scheduled broadcasts, and been observed watching television during a scheduled watch. The applicant was counseled on guidelines that he had to adhere to during his probation and on the consequences of his failure comply with those guidelines.

On March 20, 1996, a negative page 7 was entered into the applicant's record, stating that his period of eligibility for a Good Conduct Award was terminated due to his being assigned a mark of "unsatisfactory" in the conduct performance dimension during the evaluation period ending March 15, 1996. He was also assigned a mark of 1 in the "loyalty" dimension and marks of 2 in the "quality of work," "working with others," and "setting an example" dimensions. The entry stated that the applicant repeatedly demonstrated his discontent with the Coast Guard's decisions concerning his early release requests.

On March 25, 1996, the applicant had a negative page 7 entered into his record about the requirement that he attend a March 27, 1996 screening at a community hospital that had been rescheduled from March 20, 1996. He was advised that his failure to attend the screening would be a failure to obey an order or regulation and could result in disciplinary action.

On March 27, 1996, the applicant signed a statement acknowledging that he unconditionally waived his right to a hearing before an Administrative Discharge Board. In that statement, he acknowledged that he was advised of (1) his commanding officer's recommendation that he be discharged under other than honorable conditions by reason of misconduct and (2) his rights to appear in a hearing with counsel before an Administrative Discharge Board, as a result of such recommendation. He also acknowledged that he had voluntarily signed the statement after being assisted and counseled by legally qualified counsel.

By memorandum, dated March 28, 1996, the Group Commander forwarded to CGPC his recommendation that the applicant be discharged for misconduct. The Group Commander outlined a "chronological history of the applicant's performance," which demonstrated an "established pattern of shirking." He stated that the applicant's attitude and performance have "steadily deteriorated since receiving the final denial letter [to his request for early release from the Coast Guard]." The Group Commander stated that the applicant acknowledged his intention to recommend him for discharge. He further stated that upon meeting with counsel, the applicant had indicated that he did not wish to make an additional statement and waived his right to an Administrative Discharge Board. With respect to the applicant's current performance, the Group Commander stated the following:

[The applicant] has made it clear that he will do whatever is necessary to obtain a discharge short of a court martial. After pursuing a discharge through the chain of command and contacting both the Group and District Command Enlisted Advisors, as well as the MCPOCG, he then requested assistance through his Congressman. A congressional inquiry has been initiated and is being processed at Coast Guard Headquarters.

I have removed [the applicant] from any duties in the Communications Center because I have lost faith and confidence in his abilities. Therefore, [the applicant] can no longer fulfill the duties to which [he is] assigned. I most strongly recommend that he expeditiously be [*sic*] discharged.

On March 29, 1996, the District Commander forwarded his endorsement of the Group Commander's request to the Commander of CGPC. He strongly recommended approval of the applicant's discharge because he was "unreliable" and had "become a serious burden to his command."

On April 5, 1996, CGPC ordered the Group Commander to discharge the applicant by reason of misconduct under Article 12-B-18 of the Personnel Manual, with a separation code of JKN (misconduct).

On April 12, 1996, the applicant signed a page 7 acknowledging that he had been counseled on and understood his rights on separation from the Coast Guard. He confirmed that all of his questions had been answered and that he had received his separation documents.

On April 26, 1996, the applicant signed a page 7 acknowledging that he had received a copy of Enclosures (1) through (3) of the MGIB Manual. He also received pre-separation counseling on the MGIB program, which included coverage on "the procedures for applying for such benefits," "[t]he consequences of requesting early separation from the Coast Guard prior to meeting the minimum service requirements to be eligible for the MGIB benefits," and "the opportunity to enroll into the MGIB program from VEAP, if [he was] being involuntarily separated."

Also on April 26, 1996, the applicant was discharged "Under Honorable Conditions" with a JKN separation code, an RE-4 reenlistment code (not eligible for reenlistment), and "Misconduct" as the narrative reason for separation on his DD 214. At the time of his separation from the Coast Guard, the applicant was serving in pay grade E-3 and was credited with 8 years, 8 months, and 24 days of active duty service.

VIEWS OF THE COAST GUARD

On October 7, 2003, the Judge Advocate General of the Coast Guard provided comments to the Board. He attached to his advisory opinion a memorandum on the case prepared by CGPC. In adopting the analysis of CGPC, the Chief Counsel recommended that the Board grant no relief.

The Judge Advocate General argued that the applicant submitted an untimely application and has failed to provide the Board with any reason why it is in the interest of justice to excuse the delay. He alleged that the applicant's request, dated April 16, 2003, was submitted nearly four years after the expiration of the time limit for filing his application for correction. He argued that the record clearly shows that the applicant was, or should have been, aware of the alleged error within three years of April 26, 1996, the date when his DD 214 was issued to him. He asserted that because the applicant has offered no explanation in support of his claim that he did not discover the error until January 5, 2003, the three-year filing requirement under 33 C.F.R. § 52.22 should not be waived.

The Judge Advocate General stated that in order to satisfy the eligibility requirements of the MGIB program, a member must be awarded an honorable discharge for an eligible period of service during his or her military career, even if a subsequent discharge is only "Under Honorable Conditions." He asserted that because the applicant voluntarily extended his original enlistment, he did not have an eligible period of service for the MGIB. He asserted that prior to the applicant's receiving a general discharge, he was counseled on the ramifications of that discharge on his MGIB entitlement. He contended that because the record contains no evidence of either an error or injustice, the applicant has failed to carry his burden of production and persuasion.

The Judge Advocate General argued that after the applicant's request for early separation was disapproved, his record shows that "he embarked on a purposeful course of conduct designed to get him kicked out of the Coast Guard as quickly as possible." He argued that in accordance with established policy, it was appropriate for the Coast Guard to administratively discharge the applicant when he "refus[ed] to perform his duties, refus[ed] to obey orders, and engag[ed] in illegal conduct." In fact, he asserted, the applicant fails to allege that the Coast Guard committed any error with respect to his separation process but, instead, requests an upgrade of his discharge "[only to] avail himself of the educational benefits of the [MGIB program]." He argued that

because the applicant chose to obtain an early discharge by inappropriate methods, his claim is without merit.

The Judge Advocate General argued that the applicant was afforded all his due process rights at separation. He asserted that prior to being placed on probation, the applicant was counseled on the consequences of continuing his poor performance. He asserted that the applicant was properly notified of his CO's intention to recommend his separation under honorable conditions and that he (the applicant) unconditionally waived his rights to have an administrative discharge board and to make a statement on his own behalf. He asserted that the Board should deny relief in this case.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 14, 2003, the Chair sent a copy of the views of the Coast Guard to the applicant and invited him to respond within 30 days. The Board received no response.

APPLICABLE LAW

Article 7.g. of the Commandant Instruction 1760.9A (Montgomery G.I. Bill (MGIB) – Active Duty Education Assistance Program) provides that commanding officers are required to counsel all active duty MGIB participants on the MGIB program upon separation, request for early separation, and involuntary separation.

Article 7.g.(2) of the instruction states that "MGIB participants who request early separation from the Coast Guard, prior to meeting the minimum service requirements to be eligible for MGIB benefits are [to be counseled] on the consequences of their actions." Article 7.g.(3) provides that members who are involuntarily separated from the Coast Guard receive pre-separation counseling on the benefits of enrolling in the MGIB, if he or she previously declined the opportunity to enroll. It is further provided that an administrative entry to memorialize the counseling is signed by both the member and the advisor and, thereafter, filed in the member's record.

Article 1 of Enclosure (1) to Commandant Instruction 1760.9A sets forth the eligibility criteria for active duty personnel. Article 1.D. provides that "[s]ervice members must receive an HONORABLE discharge for the term of service detailed in paragraph 1.A. or B to use benefits. This does not include a general discharge under honorable conditions." Article 1.B. states that "[s]ervice on active duty for at least 3 continuous years"

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 submission, and applicable law:

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

2. The applicant was discharged from the Coast Guard on April 26, 1996. The alleged error or injustice was or with reasonable diligence should have been discovered in April 1996, when he signed and received his discharge papers. The application for correction in this case is dated April 16, 2003. Title 10 U.S.C. § 1552(b) provides that application for correction of military records must be filed within three years after the discovery of the alleged error or injustice. Therefore, the application was untimely.

3. Failure to file within three years may be excused by the Board, however, if it finds that it would be in the interest of justice to do so. The Board's regulations state that "[i]f an application is untimely, the applicant shall set forth reasons in the application why its acceptance is in the interest of justice. An untimely application shall be denied unless the Board finds that sufficient evidence has been presented to warrant a finding that it would be in the interest of justice to excuse the failure to file timely." 33 C.F.R. § 52.22. The application contains no stated reason why the Board should waive the statute of limitations but instead, notes—also without explanation—that he discovered the alleged error or injustice on January 5, 2003. Even if this is the date he realized his ineligibility for MGIB benefits, it is not the date he discovered the character of his discharge, which is the error he alleges.

4. In addition to examining the length of delay and the reasons for it, the Board must also perform a cursory review of the merits to determine the likelihood of success on the merits of the claim. *See Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.D.C. 1995). To that end, the Board finds that the applicant has presented insufficient evidence to show that the Coast Guard committed an error or injustice by allowing him to extend his original enlistment without informing him that he could lose his eligibility for the MGIB if he committed misconduct in the future and did not receive an honorable discharge.

5. According to the MGIB Manual, members are to receive counseling about the ramifications of separation on his or her eligibility for MGIB benefits when being processed for separation, early separation, or involuntary separation. *See* Article 7.g. of the MGIB Manual. The record indicates that while the applicant was being processed for separation, he was counseled on his MGIB eligibility and that he acknowledged receiving pre-separation counseling on the MGIB and copies of Enclosures (1) through (3) of the MGIB Manual. As a result, the preponderance of the evidence indicates that the Coast Guard complied with its regulations by fully counseling the applicant in a

timely manner about the effect that the character of his service would have on his MGIB eligibility. Moreover, the applicant has failed to prove that he was entitled to receive, or that the Coast Guard had a duty to provide, MGIB pre-separation counseling when he signed his extension contracts.

6. Furthermore, there is no evidence in the record to indicate that the lack of such counseling works an injustice against the applicant. The applicant's records reflect that he extended his original enlistment contract on three dates: May 20, 1991; October 2, 1991; and October 18, 1994. His records also indicate that he asked for an early discharge from the Coast Guard on January 1, 1996 and was subsequently recommended for separation due to misconduct under Article 12-B-18 on March 28, 1996. Because the applicant's extensions took place prior to his request for early discharge and his CO's recommendation for separation, the record fails to show that his unit had reason to know at the time he executed his extension contracts that he would be discharged "Under Honorable Conditions" or that his service would somehow not be considered fully honorable. Under these circumstances, the Board is not persuaded that the applicant was treated unjustly.

7. Accordingly, the Board finds that it is not in the interest of justice to waive the statute of limitations in this case. The applicant's request should be denied for untimeliness because it lacks merit.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

