

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2005-007

FINAL DECISION

AUTHOR: Andrews, J.

This proceeding was conducted under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was docketed on October 18, 2005, upon receipt of the application and the applicant's military records.

This final decision, dated June XX, 2005, is 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 asked the Board to correct his military record by upgrading his 1973 general discharge under honorable conditions to an honorable discharge and by upgrading his rate upon discharge from seaman recruit (SR; pay grade E-1) to seaman (SN; pay grade E-3). He argued that his general discharge as an SR was unjust because he was a Vietnam Era veteran who served overseas. He alleged that he discovered this error in his record on September 10, 2004.

The applicant also alleged his discharge form, DD 214, erroneously shows that he had "time lost." He alleged that the days noted as lost were actually "justified as accountable service time."

SUMMARY OF THE RECORD

On October 22, 1971, at the age of 18, the applicant enlisted in the Coast Guard for four years, through October 21, 1975. Upon enlistment, he was advised in accor-

dance with Article 137 of the Uniform Code of Military Justice (UCMJ).¹ On February 11, 1972, while still assigned to a training center, the applicant received non-judicial punishment (NJP) for leaving his place of duty for about fourteen hours without authority. He was sentenced to fourteen days of correctional custody. On March 3, 1972, the applicant completed training and was advanced from SR to SA (seaman apprentice; pay grade E-2). His end of enlistment and pay base date were not adjusted.

On March 23, 1972, the applicant surrendered after having been away without leave (AWOL) since March 7, 1972. On March 28, 1972, he was returned to the training center and confined to the brig. His enlistment was extended by sixteen days because of the unauthorized absence and his pay base date was reset as November 8, 1971.² On March 31, 1972, he was tried by summary court-martial, convicted, and sentenced to ten days' restriction to base and forfeiture of \$80 per month for one month. In addition, his enlistment was extended by the three days of his confinement from March 28 to March 31, 1972, and his pay base date became November 11, 1971.

The applicant was assigned to a cutter based in Boston, Massachusetts, but went AWOL again on May 4, 1972. He surrendered on May 13, 1972, in California, and was returned to the cutter on May 19, 1972. His enlistment was extended by nine days because of the unauthorized absence, and his pay base date became November 20, 1971. On May 23, 1972, he was convicted at summary court-martial, sentenced to reduction to pay grade E-1 (SR) and to one month's confinement at hard labor. On June 16, 1972, he was released from the brig. His enlistment was extended by the twenty-four days of his confinement, and his pay base date became December 13, 1971.³

On July 25, 1972, the applicant surrendered in Ohio after having been AWOL from his cutter since July 18, 1972. He was returned to Boston on July 27, 1972, and confined to the brig pending another court-martial. He was advised that unless his conduct improved, he would be recommended for discharge by reason of unfitness. His enlistment was extended by seven days because of the unauthorized absence and four days for his confinement. His pay base date was adjusted to December 24, 1971.

On July 31, 1972, the applicant was tried by summary court-martial on two counts of going AWOL: the first, for one day of unauthorized absence on July 11, 1972, and the second for unauthorized absence from July 18 to July 25, 1972. He was also charged with willfully disobeying a lawful order of a petty officer on his cutter on July

¹ Article 137 of the UCMJ (10 U.S.C. § 937) requires the military services to explain parts of the UCMJ, including the punitive articles regarding drug abuse, at the time of enlistment.

² However, sixteen days after October 22, 1971, is November 7, 1971, not November 8.

³ However, twenty-four days after November 20, 1971, is December 14, 1971, not November 13. This adjustment therefore corrected the error noted in footnote 2.

17, 1972. He was convicted of all charges and sentenced to confinement at hard labor for one month and forfeiture of \$175 of pay for one month.

On August 9, 1972, while confined to the brig and having been counseled about the Coast Guard's Drug Abuse Exemption Program, the applicant admitted that he had smoked marijuana and "popped pills" on numerous occasions since enlisting. On August 18, 1972, he was released because the remainder of his confinement was remitted by the convening authority. His enlistment was extended for eighteen days for the duration of his confinement, and his pay based date became January 11, 1972.

On October 12, 1972, having been AWOL since October 9, 1972, and having missed his cutter's movement on October 11, 1972, the applicant surrendered himself and was assigned to the training center. His enlistment was extended by three days because of the unauthorized absence, and his pay base date became January 14, 1972.

On October 17, 1972, the applicant returned to the training center after having been AWOL since the day before. His enlistment was extended by one day because of the unauthorized absence, and his pay base date became January 15, 1972.

On November 7, 1972, the applicant returned to the training center after having been AWOL since November 3, 1972. His enlistment was extended by four days because of the unauthorized absence, and his pay base date became January 19, 1972.

On December 12, 1972, the applicant returned to the training center after having been AWOL since the day before. His enlistment was extended for one day because of the unauthorized absence, and his pay based date became January 20, 1972. He was placed in confinement in Boston pending a special court-martial. The charge sheet indicates that he was charged with unauthorized absences for the following periods: October 9 to 12, October 16 to 17, November 3 to 7, and December 11 to 12, 1972. He was also charged with missing his cutter's departure (ship's movement) on October 11, 1972. On December 18, 1972, he was tried by special court-martial, convicted, and sentenced to six months of confinement at hard labor and forfeiture of \$96 per month for six months. The sentence was later reduced to four months' confinement and forfeiture upon remittance by the supervisory authority.

On February 6, 1973, while in confinement, the applicant was evaluated by a psychiatrist. The applicant told the doctor that he did not like serving in the Coast Guard because he wanted to travel. The doctor reported that the applicant felt no guilt for his misconduct and diagnosed him with an immature personality. He noted that although the applicant was fit for duty, his personality "may preclude satisfactory adjustment to military life. If such is the case, the subject's command may wish to consider administrative separation."

On March 28, 1973, the applicant's commanding officer (CO) informed him that he was initiating his administrative discharge for unsuitability because of his immature personality. The applicant was advised that he could submit a statement on his own behalf. The applicant signed the CO's notification in acknowledgement and a form letter in which he certified that he had been fully counseled about his pending discharge and did not intend to submit a statement.

On March 30, 1973, the Commandant ordered that the applicant be administratively discharged for unsuitability in accordance with Article 12-B-10 of the Personnel Manual. The message indicates that the applicant should receive either an honorable or general discharge in accordance with current regulations.

On April 2, 1973, the applicant was released from the brig. His enlistment was extended by 111 days because of his confinement from December 12, 1972, to April 1, 1973, and his pay base date became May 10, 1972. On April 3, 1973, he underwent a physical examination pursuant to a pending administrative discharge.

On April 4, 1973, the applicant—still an SR/E-1—received a general discharge for unsuitability pursuant to Article 12-B-10 of the Personnel Manual with an RE-4 reenlistment code (ineligible) and 265 as a separation code (which meant unsatisfactory handling of personal affairs). His DD 214 and an Administrative Remarks page in his record indicate that because of time lost, he had served only 10 months and 25 days of creditable active duty. His time lost was noted on both documents as follows: 3/7/72 to 3/22/72; 3/28/72 to 3/30/72; 5/2/72 to 5/12/72; 5/23/72 to 6/15/72; 7/18/72 to 7/24/72; 7/27/72 to 7/30/72; 7/31/72 to 8/17/72; 10/9/72 to 10/12/72; 10/16/72 to 10/17/72; 11/3/72 to 11/7/72; 12/11/72 to 12/11/72; 12/12/72 to 12/17/72; 12/18/72 to 4/1/73. His final average evaluation marks were 2.85 for proficiency and 2.45 for conduct (on a scale of 4.0).

VIEWS OF THE COAST GUARD

On February 25, 2005, the Judge Advocate General (JAG) submitted an advisory opinion in which he recommended that the Board deny the requested relief because of the application's untimeliness and lack of merit. However, he stated that the Coast Guard's review of the applicant's military records revealed a small error in the calculation of lost time. He recommended that the Board correct this error.

The JAG argued that the applicant "failed to show why it is in the interest of justice to excuse the delay" in his application. He stated that the applicant's allegation that he did not discover the alleged error in his record until September 10, 2004, "is simply not credible." Moreover, he pointed out, 33 C.F.R. § 52.22 provides that an application "must be filed within three years after the applicant discovered or reasonably should have discovered the alleged error or injustice." The JAG argued that the

applicant reasonably should have discovered the alleged errors when he received his DD 214 in 1973. The JAG pointed out that the applicant has provided no reason for his delay and has submitted no evidence. Therefore, he argued, the Board should not find that it is in the interest of justice to excuse the application's untimeliness.

The JAG further argued that, should the Board waive the three-year statute of limitations, the requested relief should be denied because the applicant has offered no evidence of error by the Coast Guard in the characterization of his service and discharge. He argued that the applicant has not overcome the presumption of regularity with respect to his discharge. Moreover, the JAG argued, the applicant's military records contain many instances of misconduct, which show that he "was properly separated from the Coast Guard before the expiration of enlistment after a far less than satisfactory period of service."

The JAG included with his advisory opinion a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC), which he adopted. CGPC stated that the applicant was afforded due process and that it is improbable that he did not understand the characterization of his discharge when he received his DD 214 or know that his rate was SR, rather than SN. CGPC recommended that the requested relief be denied. However, CGPC stated that its review of the applicant's record indicates that the DD 214 erroneously shows that the applicant lost time from 5/2/72 to 5/12/72, when in fact it should state 5/4/72 to 5/12/72. CGPC further stated that the two days should be added to the net and total service time recorded on the DD 214, which should show 10 months and 27 days of service instead of 10 months and 25 days. The JAG stated that the Coast Guard "is willing to waive Applicant's failure to timely file for purposes of correcting the two day error."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 1, 2005, the Chair sent the applicant a copy of the advisory opinion and invited him to respond within thirty days. No response was received.

APPLICABLE REGULATIONS

Article 12-B-10 of the Personnel Manual in effect in 1973 authorized the Commandant to direct the discharge of an enlisted member by reason of unsuitability. It provided that prior to recommending a member for such a discharge, the CO was required to notify the member of the contemplated action and permit him to submit a statement on his own behalf. According to Article 12.b.2.f.1.c. of the current Personnel Manual, prior to 1983, a member must have received final average marks of at least 2.7 in proficiency and 3.0 in conduct to receive an honorable discharge.

COMDTINST 1900.4A provided that a member's net active service should be calculated on his DD 214 by entering "the years, months, and days of service creditable for basic pay purposes." In addition, it provides that the rate listed shall be the rate held at the time of discharge.

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 10 U.S.C. § 1552.

2. An application to the Board must be filed within three years after the applicant discovers the alleged error in his record. 10 U.S.C. § 1552(b). The applicant received his discharge in 1973. Although he stated that he discovered the alleged errors in his record in 2004, the Board agrees with the JAG that the applicant reasonably should have discovered the alleged errors when he received his DD 214 in 1973. Therefore, under 33 C.F.R. § 52.22, his application was untimely.

3. Pursuant to 10 U.S.C. § 1552(b), the Board may waive the three-year statute of limitations if it is in the interest of justice to do so. Before denying an application based on the statute of limitations, the Board must consider the reasons for the delay and conduct a cursory review of the merits of the case. *Dickson v. Sec'y of Defense*, 68 F.3d 1396 (D.D.C. 1995); *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

4. The applicant did not explain why he waited more than thirty years to apply to the Board for the requested correction.

5. The Board's review of the case reveals a complete lack of merit. Although the applicant was technically a member of the Coast Guard for the 531 days between October 22, 1971, and April 4, 1973, he was either AWOL or confined to the brig for at least 201 of those 531 days and therefore served less than a year of creditable time. During his short time in the service, he had nine unauthorized absences, and he was court-martialed four times. His repeated misconduct earned him a reduction in rate to SR/E-1 and final average marks of 2.85 for proficiency and 2.45 for conduct. Therefore, in accordance with applicable regulations, at the time of his discharge, he was an SR/E-1 and he did not merit an honorable discharge. His DD 214 is correct in showing that he received a general discharge "under honorable conditions" as an SR/E-1.

6. The applicant alleged that he had no "time lost" during his enlistment. However, his record is replete with evidence of at least 201 days of time lost due to

periods of unauthorized absence and confinement.⁴ After reviewing the applicant's record, CGPC noted that one of the dates in the list of periods of time lost—May 2, 1972—should actually be May 4, 1972, since that is the date he went AWOL. CGPC advised that this typographical error should be corrected and that the two days should be added to the applicant's net service, so that his DD 214 would be corrected to show 10 months and 27 days of active service rather than 10 months and 25 days. The JAG stated that he would not object to waiving the three-year statute of limitations solely for the purpose of making this small correction.

7. The Board agrees that the record indicates that the applicant went AWOL on May 4 rather than May 2, 1972. The Board's review of the record, however, indicates that upon the applicant's discharge on April 4, 1973, his pay base date had been adjusted to May 10, 1972. Accordingly, he might have been deemed to have completed 10 months of service as of March 9, 1973, and 26 additional days of service by April 4, 1973, for a total of 10 months and 26 days of net service.⁵ However, under 33 C.F.R. § 52.24(b), the applicant's military records are presumptively correct, and the Board is not persuaded that either CGPC's or its own calculations made thirty years after the applicant's discharge are necessarily more accurate than those made by the applicant's command. Although the JAG might not object to a waiver of the statute of limitations for the correction of these small alleged errors, the Board is not persuaded that it is in the interest of justice to excuse the applicant's delay. Under 10 U.S.C. § 1552(a), the Board is not required to correct every small error found in a military record, much less any possible small error believed to be found more than thirty years after an applicant's discharge. Therefore, the Board finds that it is not in the interest of justice to excuse the applicant's delay or to make any corrections to his record.

8. Accordingly, relief should be denied.

⁴ The 201 days do not include the applicant's unauthorized absence and correctional custody during training in February 1972 since his pay base date and end of enlistment were not adjusted for those periods of "lost time."

⁵ The fact that 1972 was a leap year could explain why the subtraction of two days of "lost time" from the applicant's DD 214 would increase his net total of service by only one day.

ORDER

The application of _____, for correction of his military record is denied.

James E. McLeod

J. Carter Robertson

Darren S. Wall