

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2005-009

FINAL DECISION

Author: Ulmer, D.

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 application was docketed on October 20, 2004, upon receipt of the applicant's completed application and military records.

This final decision, dated June 30, 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 RE-4 (not eligible for reenlistment) reenlistment code to RE-1 (eligible for reenlistment). He further requested that his DD Form 214 be corrected to show that he was promoted to pay grade E-4.

The applicant stated that although he discovered the alleged error on September 30, 1977, it "should be corrected because it was never right." He alleged that the documents in his military record bearing his signature acknowledging the proposed discharge and electing not to make a statement in his own behalf were forgeries. He stated, "I was never given proper or legal counsel or court-martialed, or taken to [captain's] mast during this process."

In his statement to the Board, the applicant described a racial incident to which he was allegedly subjected prior to his discharge while serving with the Coast Guard in Greenville, Mississippi. He stated that one day a newspaper reporter was on board

observing their operations. According to the applicant, at the end of the day the cutter pulled into a private port and he and the reporter went into a store to get a beer. He stated when he placed the beer on the counter, the owner of the store replied, "We don't serve n----- here." The applicant indicated that this upset him and he went back to the ship, got his sea bag, and called for a car to take him to the gate so that he could leave the cutter. He stated that when the commanding officer (CO) learned about the car, he ordered the applicant back to the cutter. The applicant stated that later the CO read about the incident in the local newspaper and was furious. According to the applicant, the CO cursed him and gave him every bad work assignment. The applicant stated that he phoned his mother about the incident and she contacted the group commander. He stated that the group commander came to the cutter and told him that "[the group commander] would give [the applicant] an honorable discharge and full benefits if [he] would just leave." The applicant stated he has had a hard time dealing with the racial incident ever since his untimely dismissal from the Coast Guard.

The applicant submitted a statement from his mother corroborating the occurrence of the alleged racial incident. She claimed that the Coast Guard made a verbal deal with the applicant that if he did not press charges, he would receive an honorable discharge with full benefits. She stated that the racial incident was key to the applicant's diagnosis of Post Traumatic Stress Syndrome (PTSS).

The applicant submitted a mental status examination dated April 30, 2004. In that report, a Department of Veterans Affairs (DVA) psychiatrist stated that the applicant suffers with "alcohol and cocaine dependence in early remission, dysthymia, and anger dyscontrol problems." The medical note also stated that the applicant is being treated with the drug Depakote. The medical note further revealed that although the applicant initially sought treatment from the DVA for PTSD, a psychiatrist had determined that his symptoms were not consistent with that disease.

SUMMARY OF THE RECORD AND SUBMISSIONS

The applicant enlisted in the Coast Guard on June 23, 1975, and he was honorably discharged on September 30, 1977, under Article 12-B-18 (misconduct) of the Personnel Manual, with an HKA separation code and an RE-4 reenlistment code. During his time on active duty, the applicant was assigned to three different commands, the last being in Greenville, Mississippi. As discussed below, he was punished under Article 15 of the Uniform Code of Military Justice (known as non-judicial punishment (NJP) or captain's mast) and he was counseled often.

On December 18, 1975, while assigned to a unit in Japan, the applicant was punished at captain's mast for several violations of absence from his place of duty. His punishment included two hours of extra duty for fourteen days, forfeiture of \$50 pay for one month, and reduction to the next inferior pay grade, suspended for 6 months.

On January 27, 1976, he was punished at captain's mast for a violation of Article 128 (striking a dependent). His punishment included extra duty, forfeitures, and a reduction to pay grade E-1.¹

On March 12, 1976, the applicant was counseled on an administrative remarks page (page 7) about his inaptitude, specifically about his "lack of general adaptability, unhandiness and inability to learn." He was warned that he could be discharged if his behavior and performance did not improve. The applicant acknowledged this entry with his signature.

On August 18, 1976, the applicant was warned about malingering during assigned work detail.

On October 18, 1976, the applicant was punished at captain's mast for violating Article 91 of the UCMJ, by showing disrespect to a senior petty officer. He was punished by being restricted to the limits of the station and a suspension of his privileges.

On February 9, 1977, while assigned to a Mississippi unit, the applicant was punished at captain's mast for an unauthorized absence of less than twenty-four hours. His punishment included seven days of extra duty.

On February 9, 1977, the applicant was counseled on a page 7 about the overall deficiencies in his past performance and conduct. The entry further stated that the applicant was advised that under Coast Guard policy he could be "Expediently Discharged for Marginal Performance and Absenteeism" because of his low semi-annual marks and frequent violations of the UCMJ. The applicant was informed that he would be closely supervised and evaluated as a candidate for separation. The page 7 stated that the applicant expressed a desire to improve and that he wanted to be transferred to a new unit for a fresh start. The applicant acknowledged the counseling entry.

On May 31, 1977, the applicant was again taken to captain's mast at the Mississippi unit for unauthorized absences and for disobeying an order by placing an FTS telephone call. He was punished with 14 days extra duty.

On June 3, 1977, the applicant's CO informed the applicant that he was initiating action to discharge him from the Coast Guard due to his disciplinary record and because of other numerous minor infractions, such as sleeping while on watch, sleeping

¹ The achievement sheet in the applicant's military record shows that he was advanced to SA (pay grade E-2) on May 6, 1976. The achievement sheet shows no further advancements.

during working hours, fighting, tardiness, and showing disrespect to senior petty officers. The CO informed the applicant that he had the right to submit a statement in his own behalf, in which he could object to the discharge.

On June 3, 1977, the CO, through his chain of command, requested that the applicant be discharged from the Coast Guard under honorable conditions (known as a general discharge) because of marginal performance.

On June 8, 1977, the applicant signed a statement acknowledging notification of the proposed discharge and objected to it but waived his right to submit a statement.

On July 11, 1977, the Commander, Second Coast Guard District, recommended that the applicant be discharged from the Coast Guard due to misconduct rather than marginal performance. Based on an average of the applicant's proficiency mark (2.95 on a scale of 1 to 4, with 4 being highest) and his average conduct mark (3.51), the Commander recommended that the applicant receive an honorable discharge.² The Commander further stated the following:

Contact with [the applicant] revealed that he objects to the proposed discharge action because he feels he can improve his performance and successfully complete his enlistment. However, he continues his disruptive behavior in spite of the attempts to motivate him through proper punishment and appropriate counseling. It is apparent that all efforts at salvaging the individual and producing an effective Coast Guardsman have failed. Further retention would only place an unnecessary burden on the command and an unnecessary drain on Coast Guard resources.

On July 21, 1977, the Commandant disapproved the CO's request for a convenience of the government discharge by reason of marginal performance and directed the applicant's CO to inform the applicant that the Commandant was contemplating a discharge by reason of misconduct. The CO was directed to obtain a new notification statement from the applicant and if a general discharge under honorable conditions was contemplated, the applicant should be offered the opportunity to consult with legal counsel

On August 11, 1977, the applicant acknowledged that the Commandant was contemplating discharging him from the Coast Guard under honorable conditions and that he could submit a statement in his own behalf, which he waived.

² According to Article 12.B.3. of the Personnel Manual then in effect, an "individual must have made a minimum final average of 2.7 in proficiency and 3.0 in conduct" to receive an honorable discharge.

On September 1, 1977, the Commandant approved the applicant's discharge by reason of misconduct. On September 30, 1977, the applicant was honorably discharged from the Coast Guard due to misconduct, with an HKA separation code and a RE-4 reenlistment code.

IEWS OF THE COAST GUARD

On March 9, 2005, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request.

In recommending denial of relief, the JAG argued that the application was untimely. He stated that applications for correction of military records must be filed within three years of the date the alleged error or injustice was, or should have been, discovered. 33 CFR § 52.22. He said that the Board could waive the statute of limitations and consider the case, if the applicant presents sufficient evidence that it is in the interest of justice to do so. As the JAG argued, the length of the delay, the reasons for the delay, and the likelihood of the applicant's success on the merits of his claim are factors to be considered in deciding whether to waive the statute of limitations.

The JAG stated that the applicant filed his application more than 20 years beyond the statute of limitations, despite becoming aware of the alleged error on the date of his discharge in December 1977. The JAG noted that the applicant offered no reason for the delay but asserted that his record should be corrected, "because it was never right." According to the JAG "Applicant's self-serving claim of injustice does not provide good cause for his failure to timely file."

The JAG stated that the applicant offered no evidence to support his claim that his DD Form 214 was improperly prepared. He further stated that absent strong evidence to the contrary, government officials are presumed to have carried out their duties correctly, lawfully, and in good faith. Arens v. United States, 969 F.2d 1034, 1037 (1992). Moreover, the applicant bears the burden of proving error. 33 C.F.R. § 52.24. He stated that the applicant has failed to meet his burden of proving error since he offered no evidence that his signature was forged on his discharge documents or that he should have been advanced to pay grade E-4, except for his own self-serving statement and that of his mother. The JAG stated that in contrast, the applicant's record is replete with evidence of his misconduct and mediocre performance at three separate Coast Guard units. The JAG stated that the Coast Guard acted properly and in accordance with established procedures in discharging the applicant as it did.

The JAG attached comments from the Commander, Coast Guard Personnel Command (CGPC) as Enclosure (1) to the advisory opinion. In recommending that the Board deny the applicant's request, CGPC stated the following:

There is no evidence in the Applicant's record nor was any presented by the applicant to support his allegation that he should have been advanced to E-4. The record shows that the applicant was advanced to pay grade E-2, but was subsequently reduced back to pay grade E-1 on January 28, 1976 as a result of [NJP] . . . Subsequently, the applicant was able to advance to pay grade E-2 and complete the Seaman (E-3) course on October 22, 1976 . . . However, the Applicant's pattern of misconduct . . . deficiencies in his past performance . . . and processing for separation precludes me from assuming that the Applicant should have been advanced beyond the pay grade of E-2.

I find no evidence of error or injustice in the record to recommend approval of the Applicant's request. The underlying reason for the Applicant's discharge was unfitness due to a pattern of misconduct. While the Applicant alleges that the conditions that led to his discharge were racially motivated while stationed in Mississippi it fails to account for the pattern of misconduct progressing prior to his assignment in Mississippi. I believe the record refutes this allegation and I am satisfied that he was afforded full due process during the disciplinary and separation processes he underwent, and that he didn't suffer an injustice.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 10, 2005, 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 from the applicant.

APPLICABLE LAW

Personnel Manual (CG-207)

Article 12-B-3 (Standards for Discharge) of the Personnel Manual in effect at the time of the applicant's discharge stated that an honorable discharge by reason of misconduct could be awarded. Subsection (2) states that "a member will not necessarily be denied an honorable discharge solely by reason of a specific number of convictions by courts-martial or actions under Article 15 of the [UCMJ] during his current enlistment or period of obligated service. Subsection (2)a. states that an individual must

have made a minimum final average of 2.7 in proficiency and a 3.0 in conduct for an honorable discharge.

Article 12-B-18(a) stated that an enlisted member could be separated by reason of misconduct under other than honorable conditions, with general discharge, or with an honorable discharge as warranted by the particular circumstances of a given case. Subsection (b)(5) states that "[f]requent involvement of discreditable nature with civil or military authorities" is a basis for a discharge by reason of misconduct.

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 applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.31, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. 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. This application was submitted approximately 20 years beyond the statute of limitations.

4. The Board may still consider the application on the merits, however, if it finds it is in the interest of justice to do so. The interest of justice is determined by taking into consideration the reasons for and the length of the delay and the likelihood of success on the merits of the claim. See, Dickson v. Secretary of Defense, 68 F.3d 1396 (D.D.C. 1995); Allen v. Card, 799 F. Supp. 158, 164 (D.D.C. 1992). The applicant admitted on his application that he discovered the alleged error in 1977, but reasoned that the statute of limitations should be waived because his discharge was never right. The Board is not persuaded by the applicant's reason for not filing his application sooner.

5. With respect to the merits of the case, the Board finds that the applicant is not likely to prevail. He claimed that he was the victim of a racial incident while assigned to a unit in Mississippi, which prompted his CO's superior officer to offer him an honorable discharge with full benefits. Nothing in the military record indicates that any bargaining occurred between the applicant and members of his chain of command with respect to the reason for and type of discharge he would receive. The applicant received an honorable discharge because his average proficiency and conduct marks

met the minimum requirements for an honorable discharge, as permitted under the Personnel Manual. Further, he has offered no evidence, except for his and his mother's statements that his misconduct discharge and RE-4 reenlistment code were assigned in error. Their statements do not establish by a preponderance of the evidence that the reenlistment code and misconduct discharge are erroneous, particularly in light of the applicant's military record, which is replete with captain's mast and counseling entries.

6. The applicant's allegation that his signature was forged on the documents related to his discharge is a mere allegation with no corroboration. The applicant complained that he did not receive legal counsel with respect to his discharge. Article 12-B-18 of the Personnel Manual, stated that a member should be afforded the opportunity to consult with counsel *if a general discharge is being contemplated*. Since the applicant received an honorable discharge, as recommended by the Commander, Second Coast Guard District, any failure to provide him with the opportunity to consult with a lawyer was harmless, particularly in light of the fact that the applicant had less than eight years of service and was not entitled to an administrative hearing.

7. Moreover, there is no evidence in the record that the applicant was ever a petty officer third class (pay grade E-4) prior to or at the time of his discharge. Nor has the applicant presented evidence that he suffered from any physical disability while serving on active duty.

8. Accordingly, due to length of the delay, the unpersuasive reason for not filing his application sooner, and the probable lack of success on the merits of his claim, 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 _____, USCG, for correction of his military record is hereby denied.

Bruce D. Burkley

Raghav Kotval

Kevin M. Walker