

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2005-035

XXXXXXXXXXXXX.
XXXXXXXXXX, AM3 (former)

FINAL DECISION

AUTHOR: Hale, 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 December 7, 2004, upon receipt of the applicant's completed application and military records.

This final decision, dated August 31, 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, a former aviation mechanic (AM) in the Coast Guard, asked the Board to correct his military record by upgrading his reenlistment code and his separation code so he can enlist in the Air Force Reserve.

The applicant stated that he enlisted in the Army National Guard in September 2003 but would like to enlist in the Air Force Reserve and complete his military career.¹ However, he alleged that the Air Force would not allow him to enlist because he was discharged from the Coast Guard with an RE-3P² reentry code.

¹ The applicant alleged that the Army National Guard enlisted him notwithstanding the RE-3P reenlistment code.

² A reenlistment code of RE-3P means the member is eligible for reenlistment except for a disqualifying factor (physical disability), and must have a waiver to reenlist.

In support of his allegations, the applicant submitted a spirometry³ report and a chest x-ray dated April 16, 2002. The radiologist who performed the test and evaluated the x-ray noted that the “testing indicates normal spirometry” and that the chest x-ray was “normal.”

SUMMARY OF THE RECORD

On June 1, 1987, the applicant enlisted in the Coast Guard for a term of four years. After completing recruit training, he was assigned to a cutter.

During his enlistment, the applicant sought treatment on several occasions for complaints consistent with asthma. His condition apparently worsened and his records indicate that he was temporarily retired from the Coast Guard on July 20, 1995, due to physical disability. The applicant’s DD Form 214 dated June 20, 1995, indicates that he was temporarily retired from the Coast Guard effective June 21, 1995, placed on the temporary disability retired list (TDRL), and given a separation code of SFK⁴ and a reenlistment code of RE-2.⁵

On August 9, 1999, the Coast Guard’s Central Physical Evaluation Board⁶ determined that the applicant was not fit for continued duty in the Coast Guard. The applicant was issued a DD Form 215 (Correction to DD Form 214) indicating that he was being discharged from the Coast Guard and was being removed from the TDRL. His DD Form 215 indicates that he was given a separation code of JFL⁷ and a reenlistment code of RE-3P. He received \$23,764.80 in severance pay.

VIEWS OF THE COAST GUARD

On April 19, 2005, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief. The

³ A spirometry is the measurement of the breathing capacity of the lungs, such as in pulmonary function tests. DORLAND’S ILLUSTRATED MEDICAL DICTIONARY, 29TH ED. (2000), p. 1680.

⁴ SFK: Temporary physical disability, retirement required by law. SPD Code Handbook, page 1-6 and 3-2.

⁵ RE-2: Ineligible for reenlistment because of placement on TDRL. SPD Code Handbook, page 3-1.

⁶ The Central Physical Evaluation Board is a permanently established administrative body convened to evaluate, on a records basis, the fitness for duty of active and reserve members and the fitness for duty of members on TDRL. See Chapter 4.A.1. of the Physical Disability Evaluation System Manual (COMDTINST M1850.2C).

⁷ JFL is used to denote an involuntary discharge for members discharged for a disability, with severance pay. SPD Code Handbook, page 2-5

JAG relied on a memorandum from the Coast Guard Personnel Command (CGPC) concerning the applicant's request.

The JAG argued that the applicant's request should be denied because the Applicant did not "offer any evidence that the Coast Guard committed any error or injustice." In addition, the JAG argued that the applicant is not entitled to an upgrade of his reenlistment code because he was administratively separated after a lengthy period of evaluation in the Physical Disability Evaluation System (PDES) and received separation pay and the accordant RE-3P reenlistment code pursuant to the Separation Program Designator (SPD) Handbook. The JAG argued that the RE-3P code is appropriate because it places military recruiters on notice that the applicant has a medical problem that may affect his performance. The JAG further argued that "To remove [the] flag would not only be contrary to the effective Coast Guard regulation, but would allow [the] applicant to enlist without having his medical condition appropriately evaluated. This could potentially be dangerous, or even fatal, to applicant and others."

CGPC recommended that relief be denied and stated that because the applicant was separated due to a physical disability, the only reenlistment code authorized with a separation code of JFL is RE-3P or RE-4 (not eligible for reenlistment). The CGPC also pointed out that the RE-3P code does not preclude the applicant from ever being considered for reenlistment. On the contrary, CGPC noted that the applicant merely needs to demonstrate to a recruiter that he is otherwise fully qualified for enlistment and has overcome the problem that led to his original separation from the Coast Guard.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 3, 2005, the BCMR sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 days. A response was not received.

APPLICABLE LAW

Article 12.B.15.b. of the Personnel Manual provides that the Commander, (CGPC-epm-1) may direct or authorize a discharge for physical disability when a medical board has determined that the member does not meet the minimum standards for retention on active duty.

Article 1.E. of the Coast Guard Instruction for completing discharge forms states that a member's DD Form 214 should show a separation code and reenlistment code "as shown in the SPD Handbook or as stated by [CGPC] in the

message granting discharge authority.” The narrative reason for separation on the DD 214 must be whatever is specified by CGPC.

The SPD Handbook mandates the assignment of an RE-3P reenlistment code with the JFL separation code. It states that the JFL code is to be used when there is an involuntary separation as directed by established directive, resulting from physical disability, with entitlement to severance pay. The authorized narrative reason for separation under this code is “Physical Disability.”

SPD Code	Narrative Reason for Separation	RE Code	Separation Authority	Explanation
JFL	Disability, severance pay	RE-3P	12.B.15	Involuntarily discharge [by direction] resulting from physical disability with entitlement to severance pay. Retirement not authorized

Article 2.E.1.b.5. of the Coast Guard Recruiting Manual states that an RE-3 (alpha character) reenlistment code is not a bar to enlistment or reenlistment and shall not be, by itself, the reason to reject a prospect or applicant.

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 in this case pursuant to section 1552 of title 10 of the United States Code.

2. An application to the Board must be filed within three years of the day the applicant discovers the alleged error in his record. 10 U.S.C. § 1552(b). The applicant was issued a DD Form 215 on June 2, 2000, with an RE-3P reenlistment code, and he knew or should have known that he had received an RE-3P reenlistment code. Therefore, the Board finds that the application was filed more than 2 years after the statute of limitations expired and is untimely.

3. Under 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. 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 instructed 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 provided no explanation for his failure to request an upgrade of his reenlistment code at an earlier date. Moreover, a cursory review of the record indicates that the applicant has not proved that the Coast Guard committed an error or injustice when it gave him an RE-3P reenlistment code. Therefore, the Board finds that it is not in the interest of justice to waive the three-year statute of limitations.

5. The Board notes that the applicant is not contesting his discharge from the Coast Guard; he is only seeking a change in his reenlistment code so he may enlist in the Air Force Reserve, which apparently refused to grant him a waiver. Notably, the applicant did not allege that the Coast Guard committed any error or injustice when it discharged him for having a physical disability. The applicant's DD Form 214 indicates that he was temporarily retired from the Coast Guard due to a physical disability (asthma). After more than four years on TDRL, the Central Physical Evaluation Board determined that the applicant was still not fit for duty, and he was subsequently discharged with a reenlistment code of RE-3P, in accordance with Article 12.B.15.b. of the Personnel Manual.

6. The SPD handbook clearly states that members discharged for a physical disability shall receive an RE-3P reenlistment code. The RE-3P code is not a permanent bar to enlistment but requires the applicant to satisfy a recruiting command that he no longer suffers from the disability that led to his discharge before he is allowed to enlist. See Article 2.E.1.b.5. of the Coast Guard Recruiting Manual. The applicant submitted medical records indicating that at least some doctors might find him fit for military service. It is within the discretion of each service whether to grant him a waiver based on the medical evidence, and the Board sees no reason to circumvent their discretion by raising the applicant's reenlistment code to RE-1.

7. Accordingly, due to 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 APPEAR ON NEXT PAGE]

ORDER

The application of former AM3 xxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is denied.

Toby Bishop

Philip B. Busch

Nancy L. Friedman