

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2005-167

XXXXXXXXXXXXXXXXXX
Xxx xx xxxxx, SR/E-1 (former)

FINAL DECISION

AUTHOR: Hale, D.

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 September 16, 2005, upon the BCMR's receipt of the applicant's completed application for correction.

This final decision, dated June 1, 2006, 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 seaman recruit (SR; pay grade E-1) who served a little more than two years in the Coast Guard, asked the Board to correct his record by upgrading his 1981 discharge (under other than honorable conditions) to honorable. The applicant stated that he served his country and feels that he is entitled to an honorable discharge. He further stated that he regrets not having fulfilled his four years of active duty and that "I was a very young and foolish boy at that time in my life." He did not explain why he waited more than 24 years before filing his application.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on October 17, 1978. During his enlistment, the applicant was disciplined on several occasions for being absent without leave (AWOL) and for a variety of related offenses.

On August 17, 1979, the applicant was charged with violating Article 86 of the Uniform Code of Military Justice (UCMJ) for being AWOL. He was also charged with missing his ship's movement and for disobeying a lawful order. He was awarded non-judicial punishment (NJP)¹ of 21 days' restriction and 21 days of extra duty.

On October 2, 1980, the applicant was awarded NJP of three days' restriction and 14 days of extra duty for being AWOL.

On November 10, 1980, the applicant was awarded NJP of 30 days' restriction for being AWOL and for breaking his restriction.

On April 30, 1981, the applicant was charged with being AWOL for four months, breaking his restriction, and for missing his ship's movement. Following his apprehension he was held in pre-trial confinement to ensure his presence at the subsequent court martial.

On May 19, 1981, under the advice of counsel, the applicant requested discharge from the Coast Guard "under other than honorable conditions for the good of the service" in lieu of trial by court martial. In his letter to the Commandant requesting discharge, he stated that

I understand that if this request is approved I will receive a discharge under other than honorable conditions. I understand that such a discharge may deprive me of virtually all veteran's benefits based upon my current period of active service and that I may expect to encounter substantial prejudice in civilian life in situations where the type of service rendered in any branch of the Armed Forces or the character of discharge therefrom may have a bearing.

On June 10, 1981, the applicant's commanding officer (CO) certified that the charges against the applicant were accurate and stated that "further disciplinary action would not alter this situation and that his release from the Coast Guard would be best for both parties." The CO noted that the applicant had received three NJPs involving AWOL while assigned to the ship and that his marks had been consistently below average in both proficiency and conduct. He also stated that the applicant had "neither the ability to presently compete successfully in the Coast Guard nor the ambition to improve himself sufficiently to allow himself to compete in the future."

On June 19, 1981, the Commander, Thirteenth Coast Guard District (the officer exercising general court martial authority over the applicant) recommended approval of the applicant's discharge.

¹ Article 15 of the UCMJ provides NJP as a disciplinary measure that is more serious than administrative corrective measures but less serious than trial by court martial.

On October 28, 1981, the applicant was discharged from the Coast Guard pursuant to Article 12.B.21. of the Coast Guard Personnel Manual. He received a discharge “under other than honorable conditions,” a separation code of KFS,² and “under other than honorable conditions” as the narrative reason for separation.³ The record indicates that the applicant received an RE-4 reenlistment code (ineligible to reenlist). He had served in the Coast Guard for two years, six months, and 20 days.

² KFS denotes a discharge allowed by established directive when separated for conduct triable by court martial for which the member may voluntarily separate in lieu of going to trial.

³ On May 19, 1982, the Coast Guard placed a DD Form 215 (correction to the DD Form 214) in the applicant’s record changing the narrative reason for separation to “for the good of the service.”

VIEWS OF THE COAST GUARD

On January 30, 2005, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he adopted the findings of the Coast Guard Personnel Command (CGPC) and recommended that the Board deny the applicant's request. The JAG argued that the applicant failed to submit a timely application and failed to provide any evidence in support of his claim that his record should be changed or that he suffered an injustice.

The JAG also argued that notwithstanding the timeliness issue, relief should be denied because the applicant had accumulated 171 days of "bad time" over four separate periods of unauthorized absence. Finally, the JAG noted that the applicant, after consulting with legal counsel, requested a discharge under other than honorable conditions in lieu of being court martialed for desertion.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On February 2, 2006, the BCMR sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 days. The BCMR did not receive a response.

APPLICABLE REGULATIONS

Under Article 12.B.21.a. of the Coast Guard Personnel Manual in effect in 1981, a member could request a discharge under other than honorable conditions for the good of the service in lieu of UCMJ action if punishment for the alleged misconduct could result in a punitive 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 section 1552 of title 10 of the United States Code. The application was untimely.

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 214 on October 28, 1981, with a discharge under other than honorable conditions and an RE-4 reenlistment code. This information is clearly marked on the DD 214 and thus he knew or should have known that he had received a

discharge under other than honorable conditions. Therefore, the Board finds that the application was filed more than 22 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 discharge at an earlier date, and stated that he experienced problems in the Coast Guard because “he was young and foolish at that time in his life.” A cursory review of the record indicates that the applicant has not proved that the Coast Guard committed an error or injustice in awarding him a discharge under other than honorable conditions. The record indicates that the applicant, with the advice of counsel, voluntarily submitted a request to be discharged under other than honorable conditions to avoid being court martialed. In addition, the applicant’s CO supported his discharge, citing the applicant’s history of NJPs and the futility of pursuing further disciplinary action. The Board concludes that the applicant’s request lacks any discernible merit.

5. 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 SR XXXXXXXXXXXXXXXXXXXX, USCG, for correction of his military record is denied.

Elizabeth F. Buchanan

Randall J. Kaplan

Audrey Roh