

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2006-139

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FINAL DECISION

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This is a proceeding under the provisions of section 1552 of title 10 and section 425 of Title 14 of the United States Code. The Chair docketed the case on June 30, 2006, upon receipt of the applicant's completed application and military records.¹

This final decision, dated February 15, 2007, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST FOR RELIEF

The applicant asked the Board to upgrade his undesirable discharge to an honorable discharge. The applicant enlisted in the Coast Guard Reserve on December 26, 1941, and was discharged on April 18, 1945, with an undesirable discharge due to unfitness.

The applicant stated that he enlisted at age seventeen and was involved in the invasion of Normandy, with continued action in France. He stated that during his service he began having serious trouble with his feet and was treated at a Marine hospital. He alleged that hospital personnel indicated that he would be getting a medical discharge, but instead he was returned to duty. The applicant stated that he

¹ The applicant sought relief from the Board in an earlier application BCMR No. 326-89. The Chairman denied the applicant's request under 33 CFR § 52.15-5(a) of the Board rules at that time. This provision permitted the Chairman to deny an application if he determined that the applicant failed to contain sufficient evidence to demonstrate probable error or injustice or if it was untimely and the interest of justice did not require a waiver of the statute of limitations. The denial was without prejudice to the applicant, if he resubmitted the request with new relevant evidence. The current rules do not permit the Chair to deny an application on the merits.

became upset with the lack of care and went AWOL to recuperate. He stated that after approximately thirty days of AWOL, he turned himself in to authorities. When discharged, he was given an undesirable discharge rather than an honorable discharge.

The applicant stated that after his discharge from the Coast Guard, he volunteered for hazardous duty as a merchant seaman serving on ships that supported troops in the Korean conflict as well serving on an ammunition ship during the Vietnam conflict.

With respect to the untimeliness of his application, the applicant stated the following:

[I] was aware of the events at the time (in 1945) but failed to understand the significance of an undesirable discharge. [I] respectfully request that the Board find it in the interest of justice to correct [my] discharge to one of at least a general discharge under honorable conditions both for [my] reputation to ensure that [I am] eligible for benefits that [I] would have otherwise have earned by virtue of [my] several years of wartime service . . . [I] should not be stigmatized by an undesirable discharge given [my] extensive service prior to [my] foot problem, [my] relatively brief AWOL, and [my] subsequent merchant marine service for which [I was] awarded an Honorable Discharge by the Coast Guard . . .

SUMMARY OF RECORD AND SUBMISSIONS

The applicant enlisted in the Coast Guard on December 26, 1941. On January 25, 1945, a Board of Medical Survey (Medical Survey) determined that the applicant had a constitutional psychopathic inferiority without psychosis, and should be discharged on the ground that he was "emotionally unsuited for service." The Medical Survey also determined that the applicant was responsible for his actions at the time he committed the absence offenses, and that the applicant was competent to stand trial.

The applicant's record indicates that prior to the Medical Survey, he had several periods of unauthorized absence that resulted in non-judicial punishment or summary court-martial. On September 5, 1944, the applicant was convicted at summary court-martial of being AWOL for three hours. On June 29, 1944, he was punished at deck court for leaving his assigned post without authority. On December 8, 1944, he was convicted at summary court-martial of a 29-day AWOL and of disobeying a lawful order. His sentence included two months of confinement and a loss of \$30 per month for six months. The convening authority approved the sentence except that the confinement was suspended for a period of six months. Due to a subsequent unauthorized absence from December 13-26, 1944, the suspension was vacated, and according to the record the applicant was required to serve the two months of

confinement.

On April 12, 1945, the Commandant disapproved the recommendation to discharge the applicant by reason of physical disability. The Commandant stated that since the Medical Survey found that the applicant was mentally responsible for the alleged offenses committed, an undesirable discharge was appropriate. The Commandant directed that the applicant be given an opportunity to submit a statement in his own behalf with respect to the undesirable discharge.

On April 18, 1945, the applicant submitted a statement objecting to the discharge. In this regard, he stated the following: "During the invasion of Normandy, we were attacked by enemy aircraft. They started dropping bombs and we got a near miss. And the concussion from the bombs affected me. And from then on, I started getting into trouble for which wasn't my fault. I've been in the Service, three and a half years, and have had a good record up until that day. I feel that I don't deserve an undesirable discharge." The applicant was discharged on April 18, 1945, with an undesirable discharge.

On November 15, 1946, the Discharge Review Board (DRB) issued a decision denying the applicant's request for an upgrade of his undesirable discharge. The DRB noted that the applicant's final average marks were 2.68 in proficiency in rating and 3.52 in conduct. The DRB decision further noted that the applicant had served satisfactorily at various shore stations during his career, but also noted his disciplinary record after being transferred to a cutter. The Board of Medical Survey did not persuade the DRB to upgrade the applicant's discharge. In this regard, the DRB stated the following:

In reviewing all of the available evidence including the war history of the [cutter] during the period the petitioner served on that ship, the Board is of the opinion that [the applicant] exaggerated to the Medical Survey Board, as indicated in his health record, the amount of combat to which he was subjected and that he was a so-called "ineffectual" on board. On return to the United States the ship transferred him to shore duty, thus removing him from any further exposure to enemy action. Having been placed in a position where he would not be subject to further combat, and a Medical Survey Board finding him responsible for his actions, the [DRB] concludes that the action of Headquarters in issuing him an undesirable discharge was correct.

VIEWS OF THE COAST GUARD

On October 23, 2006, the Board received the views of the Coast Guard from the Judge Advocate General (JAG) who advised that the applicant's discharge should be upgraded from undesirable to a general discharge under honorable conditions, as

recommended by CGPC. The JAG adopted the analysis provided by the Commander, Coast Guard Personnel Command (CGPC), which was attached as Enclosure (1) to the advisory opinion. CGPC first noted that the application was untimely and that it should be denied for that reason. However, CGPC provided an opinion that included a grant for partial relief, should the Board consider the case on the merits.

CGPC stated that the applicant's discharge appears proper and without error. CGPC noted that while the applicant contended that he suffered from foot problems and was to receive a medical discharge due to that ailment, there is no corroboration in the medical record that the applicant suffered from foot problems. CGPC further stated the following:

The applicant was discharged from the Coast Guard on April 18, 1945 with an undesirable discharge. The Applicant then returned to his pre-Coast Guard service with the Merchant Marine from May 11, 1945 through July 3, 1945. Pursuant to Public Law 95-202, personnel who served in the U.S. Merchant Marine during armed conflict between December 7, 1941 and August 15, 1945 . . . shall [have the service] considered [as] active duty for provisions of the Veterans Administration. Based upon this authority in 1989, the applicant was issued a DD-214 and honorable discharge certificate for his service in the U.S. Merchant Marine . . .

The applicant petitioned the [DRB] in 1947 to upgrade his discharge, and his request was denied. The applicant's record of service during his tenure with the Coast Guard included numerous periods of absence without leave and [deck and summary courts]. The applicant's service does not meet the criteria for an honorable discharge. However, given the applicant's record and the lack of a punitive discharge by a court-martial it is unlikely that the applicant would have received a discharge of worse character than a general discharge if he were processed by today's standards. Therefore, the Coast Guard is not opposed to upgrading the applicant's type of discharge to general under honorable conditions.

CGPC recommended, in the interest of justice, that the applicant's type of discharge be upgraded to a general discharge under honorable conditions.

APPLICANT'S REPLY TO THE COAST GUARD VIEWS

On October 25, 2006, the Board sent a copy of the Coast Guard views to the applicant for a response. The Board did not receive a response from the applicant.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the submissions of the applicant and the Coast Guard, the military record of the applicant, and applicable law.

1. The BCMR has jurisdiction of the case pursuant to section 1552 of title 10, United States Code. The applicant sought relief from the Board in an earlier application BCMR No. 326-89. The Chairman denied the applicant's request under 33 CFR § 52.15-5(a) of the Board rules at that time. This provision permitted the Chairman to deny an application if he determined that the applicant failed to submit sufficient evidence to demonstrate probable error or injustice or if it was untimely and the interest of justice did not require a waiver of the statute of limitation. However according to the decision in BCMR No. 326-89, 33 CFR § 52.15-5(b) stated that a Chairman's denial was without prejudice if the applicant presented new relevant information. In 1990, the Board's rules were changed to allow for further consideration of a Chairman's denial if requested by the applicant upon the submission of further evidence (the reference to relevance being omitted). In 2003, the Chairman's denial was removed entirely from the Board's rules, leaving the issuance of all final decisions to the Board. The applicant's request never received the full review on the merits by the Board that he would be entitled to under the current rules. Therefore, as a matter of equity, his current application was docketed as BCMR No. 2006-139.

2. 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 sixteen years after the Chairman issued a decision denying the applicant's request for an upgrade of his discharge. The applicant knew the facts of his discharge since his separation from the Service in 1945 and certainly knew the facts of his discharge when the Chairman denied his request for an upgrade in 1990.

3. However, the Board may still consider the application on the merits, if it finds 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 stated 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.

4. The applicant's explanation in support of a waiver of the statute in the interest of justice is not persuasive. In this regard, the Board notes that the record does not support the applicant's argument that he failed to understand the significance of an

undesirable discharge at the time or shortly after his discharge. The fact that the applicant filed earlier applications with the DRB and the BCMR supports a finding that as early as 1946 he was aware of the type of discharge he received and that it was not an honorable one. However, Allen v. Card requires the Board to perform a cursory review of the merits in determining whether it is in the interest of justice to waive the statute. Based upon a cursory review of the merits that included the recommendation of the Coast Guard to upgrade the applicant's discharge to a general discharge under honorable conditions, the Board finds that it is in the interest of justice to waive the statute of limitations and proceed to a full review of the merits.

5. The applicant does not allege any specific error on the part of the Coast Guard, and the Board finds that the Coast Guard did not commit an error by discharging the applicant with an undesirable discharge in 1945. However under the standard set forth in the Department of Transportation General Counsel's memorandum of July 2, 1976, the Board may upgrade a discharge if it is "adjudged to be unduly severe in light of contemporary standards," but, "the Board should not upgrade a discharge unless it is convinced, after having considered all the evidence [including changes in community mores, civilian as well as military, since the time of discharge, as well as post-service conduct, in addition to the applicant's record], that in light of today's standards, the discharge was disproportionately severe vis-à-vis the conduct in response to which it was imposed."

6. After having reviewed all the evidence, the Board is convinced that under today's standards it is very unlikely that a member with circumstances similar to the applicant's would receive an other than honorable discharge, today's equivalent of an undesirable discharge, for committing and being punished for absence offenses. In fact Article 12.B. 2.f.1.b of the Personnel Manual states that the Service will not necessarily deny a member an honorable discharge solely for a specific number of courts-martial convictions or actions under Article 15 of the UCMJ during a current enlistment. More importantly, the Deputy General Counsel in BCMR No. 322-91 stated, "upgrades from bad conduct discharges have been customarily granted by the Board where absences were involved. See BCMR 89-78; BCMR 154-85; BCMR 8-80; BCMR 24-81, and BCMR 240-85." She noted that Chapter 12 (Separations from the Service) of the Personnel Manual did not prohibit awarding a general discharge under the circumstances described in BCMR No. 322-91.²

7. In addition to committing only short absence offenses, other factors favorable to the applicant and support an upgrade of his discharge are (1) the fact that his final

² Also see BCMR No. 34-93 where the Board upgraded a 1944 undesirable discharge to a general discharge under honorable conditions. In that case, the applicant had three captain's masts for unauthorized absences and insubordination and a deck court for conduct prejudicial to discipline. In granting relief as recommended by the Coast Guard, the Board stated "The applicant is entitled to clemency after more than 40 years in the status of one who has an undesirable discharge."

average marks satisfied those for granting a general discharge, (2) the fact that he served for more than three years during WWII, some of which was satisfactory, (3) the fact that he had a diagnosed preexisting medical condition that contributed to his inability to adapt to war, and (4) the fact that he served during wartime in the Merchant Marine earning an honorable discharge certificate.

8. In light of today's standards for determining the type of discharge to which a member is entitled and the Deputy General Counsel's decision in BCMR 322-91, the Board agrees with the Coast Guard that it is in the interest of justice to upgrade the applicant's undesirable discharge to a general discharge under honorable conditions. There is nothing in the record to suggest that the applicant's post service conduct would cause the Board concern in upgrading this discharge.

9. Accordingly, the Board finds that the applicant is entitled to relief recommended by the Coast Guard.

