

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2006-158

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XXXXXXXXXXXXXXXXXXXXXXXXX

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. The Chair docketed the case on August 4, 2006, upon receipt of the application and the applicant's military records.

This final decision, dated March 30, 2007, 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 general discharge from the Coast Guard Reserve for misconduct (shirking) on July 9, 1991, to an honorable discharge. The applicant also complained about not being able to reenter the military. His reenlistment code is RE-4 (not eligible to reenlist). He stated that until May 7, 2006, he was unaware that his discharge would prohibit him from reentering the military, and he now wants to enlist in the New Jersey National Guard.

The applicant alleged that his commanding officer (CO) "failed to utilize fair and impartial judgment when considering my discharge." He stated that he joined the Reserve after graduating from high school in 1984 in order to save money for college. However, in 1986, he decided to become a trooper for the New Jersey State Police. Within a year, he was accepted, attended the academy, and was assigned to a highway station as a "general road trooper." Unfortunately, State Police had a rotating work schedule and, as a new trooper, he was off work only one weekend per month. Therefore, his work schedule strongly conflicted with his drill schedule. The applicant alleged that he found himself constantly asking senior troopers to switch shifts with him so that he could attend weekend drills, but they rarely agreed. His sergeant was not willing to set his schedule so that he could attend his Reserve drills and told him that he had to choose between being a trooper and being a reservist.

The applicant stated that he ultimately took a day off so that he could attend drill and explain his circumstances to his CO, but when he arrived, he was told that the CO was unavailable. Therefore, he later called his CO, explained his circumstances, and asked to be released into the Individual Ready Reserve (IRR; inactive status). However, his CO “was adamant that I remain in the active reserves and that I needed to convince my civilian supervisors that I had an obligation to the USCGR.” Then, “[f]eeling that [the CO] did not fully understand my position and that he had shown prejudice towards my civilian occupation, I decided to memorialize my situation in a letter dated March 25, 1991,” to the District Commander. In the letter, he again asked to be released into the IRR. However, in July 1991, he was told that he would be given a general discharge. He alleged that he did not object simply because he was naïve and needed to “move on with my life.” He alleged that because he was discharged “under honorable conditions” he did not think that the discharge would adversely affect his ability to reenlist at a later date.

The applicant believes that his inability to reenlist is unfair because, before he joined the State Police, he had an excellent record as a reservist, and because both his sergeant in the State Police and his CO “were unwilling to work with me to resolve my situation.”

The applicant alleged that he has had an excellent record as a trooper and is now a sergeant first class in charge of communications. He stated that as a supervisor of other young troopers, he has ensured that they do not encounter the same problems he had so that they can attend their drill weekends. In addition, he alleged that he has earned a Master’s Degree from Seton Hall University.

In support of his allegations, the applicant submitted a letter of reference from a sergeant in a municipal police department who is also an officer in the Air National Guard. He stated that he has known the applicant for ten years and that the applicant’s “level of integrity and character are well known to all of those who know him. He is respected greatly by his peers.” He described the applicant as dependable, dedicated, and loyal.

SUMMARY OF THE APPLICANT’S MILITARY RECORD

On January 17, 1985, while a student at Union County College, the applicant enlisted in the Coast Guard Reserve for eight years under the RK program. The Statement of Understanding he signed that day states the following in pertinent part:

1. ...I understand that I will be required to participate satisfactorily (see paragraph 5) in the Selected Reserve until six years from the anniversary of my enlistment. For the last two years of my obligation, I will not be required to participate in the Selected Reserve. ...
2. I will be ordered to IADT (Phase 1 – recruit training) within 180 days from the date of enlistment. I will be released in time to meet the convening dates of my education program. I may be required to complete recruit training during the summer.
3. Upon enlistment, I will be assigned to a Coast Guard Reserve Unit (CGRU) and required to participate satisfactorily (see paragraph 5) in this unit for at least the first six years of my eight-year obligation. If I fail to participate satisfactorily I may be discharged, possibly under other than honorable conditions, or ordered involuntarily to active duty for a period of 24 months... [Paragraph 4. omitted.]

5. Satisfactory participation is defined as:
 - a. successful completion of two phases of IADT. Phase I will be recruit training (at least eight weeks). Phase II will be Class A school (at least 10 weeks). If I am unable or unqualified to attend Class A school, Phase II will be on-the-job training (at least 12 weeks). ...
 - b. Attending at least two single drills each month at my reserve unit in the first period between IADT phases; at least four single drills between subsequent inter-phase periods, if any.
 - c. Upon completion of Phase II, attendance at, and satisfactory performance in at least 48 scheduled drills and at least 12 days ADT each anniversary year until six years from the anniversary of my enlistment. In lieu of this requirement, satisfactory service of not more than 30 days active duty each year ...
 - d. Satisfactory performance, adaptability, military behavior, and appearance for the full term of my enlistment.

From June 10 through August 2, 1985, the applicant attended recruit training. Upon completing training, he advanced from seaman recruit (SR; E-1) to seaman apprentice (SA; E-2). He completed 2 drills in August, 4 drills in September, and 2 drills in October, 1985. His anniversary year ending January 16, 1986, was satisfactory since he earned more than 50 points toward retirement.

From November 24, 1985, through January 31, 1986, the applicant attended BM "A" School to become a boatswain's mate. Upon graduation, he advanced to seaman and received his rating designator (SNBM; E-3). On August 1, 1986, upon completing six months in grade as an E-3, the applicant advanced to BM3/E-4. A Retirement Points Statement (CG-4175) shows that he completed 4 drills each month in his anniversary year ending January 16, 1987, except for November 1986, during which he completed 12 days of ADT from November 17 through 28.

The applicant's CG-4175 for his anniversary year ending January 16, 1988, shows that he completed 36 of the 48 scheduled drills and no ADT.

On August 29, 1989, the applicant's CO sent him the following letter concerning "Mandatory Attendance at Unit Drills":

1. To date you have missed a total of 10 drills during this anniversary year and have had 2 unsatisfactory previous years.
2. As an "RK" you are obligated to perform not less than ninety percent (90%) of all scheduled drills. Your performance thus falls far below that which is required by Section 4-A-1 of COMDTINST M1001.27.
3. Section 12-B-8 of the Reserve Administration and Training Manual [RATMAN] COMDT-INST M1001.27 deals with processing procedures for unsatisfactory performers requiring that "Whenever a reservist is failing to participate satisfactorily through failure to attend prescribed drills, answer official correspondence, or participate satisfactorily in the training mission, he/she should be immediately counseled so as to induce satisfactory participation." Failing this, steps to commence a Discharge for Unsuitability shall be taken.
4. You are advised that this command will be drilling on Saturday and Sunday, 23/24 September 1989 at Station Sandy Hook. You are directed to report during the scheduled drill to the Captain

for counseling. You are directed to report at this command not later than 0745 on the 23rd and departing 1630 on the 24th of September.

5. Bring with you any and all documentation to substantiate all missed drills.

On December 3, 1989, the applicant's supervisor notified him that he had missed 16 drills since his last anniversary date, January 17, 1989, and 8 drills since September 30, 1989. He advised him to make up the drills. The applicant's CG-4175 for the anniversary year ending January 16, 1989, shows that he completed 36 drills and performed 13 days of ADT from August 7 through 19, 1988.

The applicant's CG-4175 for the anniversary year ending January 16, 1990, shows that he completed 18 drills and performed no ADT. On February 25, 1990, the applicant's CO sent the following letter to the District Commander:

1. In accordance with [Article 12-B-11 of the RATMAN], it is requested that proceedings for general discharge be initiated for [the applicant].
2. Member has failed to comply with repeated orders to appear for counseling and review of his status (Enclosure no. 1). He has displayed his unwillingness to satisfactorily participate in the Reserve Program by not attending designated drill weekends and not fulfilling required ADT.
3. This unit requests that the general discharge proceedings be started. ...

On April 29, 1990, the XO of the applicant's unit sent him the following letter:

1. I have reviewed your record and have found that for last year you were absent 30 of the 48 scheduled drills. So far, this year you have missed all 16 drills. Records show that your last participation in the Coast Guard Reserve was August 1988. Note that through your absence, you are in violation of your contract and are subject to general discharge.
2. You are directed to report to me personally on Saturday, May 19, 1990, for counseling regarding your past and future Reserve participation.

On his performance evaluation for the period ending June 30, 1990, the applicant received primarily marks of 2 (on a scale of 1 to 7, with 7 being best) in the various performance categories, such as conduct, communicating, teamwork, knowledge, workmanship, stamina, professionalism, judgment, responsibility, and loyalty.

On November 12, 1990, the applicant's CO wrote him the following letter:

1. I have reviewed your record and have found that this year you were absent for 24 drills. You missed 44 drills last year. Records show that your last participation in the Coast Guard Reserve was August 1988. Note that through your absences you are in violation of your contract and are subject to a general discharge.
2. You are directed to report to me personally on Saturday, December 15, 1990, for counseling regarding your past and future Reserve participation.

On January 1, 1991, the CO sent the District Commander a letter asking that he initiate proceedings to award the applicant a general discharge. The CO wrote that the applicant

has not participated in an IDT for his annual year 1990 (40 drills missed). He also had an unsatisfactory year in 1989 (36 unexcused absences). He has displayed complete unwillingness to participate in the Reserve Program by not fulfilling the requirements of his contract. He has failed to comply with repeated orders to appear for counseling and review of his status as evidenced by enclosures (1) and (2).

On March 1, 1991, the District Commander sent the applicant a letter stating that he was initiating the applicant's general discharge due to misconduct for shirking. The District Commander informed the applicant that he had a right to consult legal counsel and to submit a written statement. In response, the applicant acknowledged receipt of the notification, acknowledged having been provided the opportunity to consult with a lawyer about the proposed discharge, objected to his discharge, and submitted the following statement, in pertinent part, dated March 25, 1991:

Sir, this is to inform you that I object to a general discharge from the U.S. Coast Guard and respectfully request to be placed in the Inactive Ready Reserve.

I have a lot of respect and admiration for the Coast Guard family and would very much like to be part of that family. But due to my present circumstances with my civilian occupation as a New Jersey State Trooper working a rotating schedule, along with attending college part time, I am unable to participate in my drills.

In the letters you have received from my unit, it indicates that I have failed to contact them reference my poor attendance. Commander, on April 30, 1990, at approximately 8:45 p.m., I contacted [the CO] at his residence and explained my situation, but my point is that I was in contact with the unit.

Commander, I understand that I could have handled my attendance differently, but I cannot undo the damage.

In closing I would like to state that I am very proud of being a member of the United States Coast Guard. Until my enlistment with the New Jersey State Police, I was very aggressive and productive in my unit. I was a certified crew member, boarding officer, and also completed several Coast Guard schools with high rankings.

I do not wish to be separated from the Coast Guard. I only wish to be placed in the Inactive Ready Reserve so that some day I may return to active reserve status.

If this request is unable to be granted, I ask only that I receive an honorable discharge from the United States Coast Guard so that I will not encounter prejudice in my civilian life.

On June 7, 1991, the District Commander forwarded the CO's letter initiating the applicant's discharge to the Commandant with a recommendation that it be approved. The District Commander wrote that the applicant had been counseled by an attorney and that it

is the opinion of this command that Reserve Unit Sandy Hook has done everything feasible to ensure that [the applicant] was aware of his responsibility to attend scheduled drills. Further retention of [him] is not warranted and he should be separated from the Coast Guard Reserve with a General Discharge by reason of Misconduct (Shirking).

On July 9, 1991, the Commandant ordered that the applicant receive a general discharge for misconduct (shirking) with reenlistment code RE-4. The applicant's command executed the order the same day. The applicant's final CG-4175 shows that he neither drilled nor performed ADT during his final, partial anniversary year.

VIEWS OF THE COAST GUARD

On January 3, 2007, the Judge Advocate General (JAG) submitted an advisory opinion in which he recommended that the Board deny the requested relief. The JAG stated that the Board should not waive the statute of limitations because the applicant failed to provide "good cause for his failure to timely file." The JAG further stated that the applicant repeatedly failed to perform his reserve duty requirements and received due process prior to his discharge. The JAG further argued that the applicant "failed to present any evidence that he was improperly discharged or that the Coast Guard improperly characterized the nature of his service."

The JAG also adopted the facts and analysis provided in a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC). CGPC stated that the applicant's record "demonstrates a clear pattern of poor Reserve participation" although he was "afforded numerous opportunities and counseling regarding his participation requirements." CGPC stated that although the applicant "contends that he was prohibited from participating in Reserve drills due to his civilian employment and college work ... [t]here is no record of the Applicant attempting to rectify his participation other than the Applicant's statement that he called his commanding officer at home on April 30, 1990." CGPC stated that although the applicant did request transfer to the IRR, such a transfer "was not authorized for 'RK' program personnel with less than 2 years [of] active duty" under Article 4-E-1 of the RATMAN. CGPC stated that the applicant's contention that his command did not treat him fairly is not corroborated by the correspondence in his record, which instead substantiates his command's efforts to help him meet his Reserve obligations. CGPC argued that the applicant's general discharge was issued "in accordance with Coast Guard policy and consistent with the Applicant's poor participation record and failure to uphold the terms of his contract."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 4, 2007, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within thirty days. No response was received.

APPLICABLE REGULATIONS

Articles 4-A-1 and 4-B-1 of the RATMAN provided that members in the RK program with less than two years of active duty were required to attend a minimum of 90% of their 48 scheduled drills each anniversary year and at least 12 days of ADT. Article 4-C-2 stated that failure to meet the participation requirements in Article 4-A-1 or Article 4-B-1 constituted "unsatisfactory participation."

Article 4-C-3 stated that COs should monitor reservists' participation and counsel them to correct deficiencies. Article 4-E-1 stated that, when a member in the RK program with less than

two years of total active duty failed to attend drills in response to counseling about unsatisfactory participation, the CO should initiate the member's discharge for misconduct. If the member had at least two years of active duty, the CO could initiate the member's discharge for misconduct or initiate his transfer to the IRR.

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. Under 10 U.S.C. § 1552(b), an application to the Board must be filed within three years after the applicant discovers the alleged error in his record. The applicant received his general discharge and RE-4 code in 1991. Although he stated that he discovered the alleged error (his inability to reenlist) in 2006, the Board notes that the applicant was afforded legal counsel concerning the effect of his general discharge and finds that he knew or should have known that he would not be allowed to reenlist prior to or upon his discharge in 1991.¹ Therefore, his application was untimely.
3. Pursuant to 10 U.S.C. § 1552(b), however, the Board may excuse the untimeliness of an application 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 to determine 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."²
4. Other than alleging that he did not previously know that he could not reenlist, the applicant did not explain why he waited more than fifteen years to ask for his discharge to be upgraded. He has not provided a compelling reason for his long delay.
5. Under 33 C.F.R. § 52.24(b), the applicant's military records are presumptively correct, and he bears the burden of proving error or injustice in his records by a preponderance of the evidence. The applicant alleged that he was unjustly given a general discharge for shirking after his civilian employment as a trooper, beginning in 1987,³ interfered with his drill attendance. A letter in his record dated March 25, 1991, shows that he attributed his failure to attend drills to his rotating work schedule as a trooper and to his part-time college coursework. A summary of his total participation, taken from his CG-4175s and other documents, appears as follows:

¹ "An application for correction of a record must be filed within three years after the applicant discovered or reasonably should have discovered the alleged error or injustice." 33 C.F.R. § 52.22.

² *Allen v. Card*, 799 F. Supp. 158, 164-65 (D.D.C. 1992).

³ The applicant alleged that he graduated from the police academy and was assigned to a highway station as a trooper within a year of a 1986 recruiting announcement about becoming a trooper.

Anniversary Year	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1/17/85 – 1/16/86						boot camp		2	4		BM A School	
1/17/86 – 1/16/87	Sch.	4	4	4	4	4	4	4	4	4	ADT	4
1/17/87 – 1/16/88	4	4	4	4	2	5		4	4	5	4	
1/17/88 – 1/16/89	4	4	4	4		4	4	ADT	4	4	4	
1/17/89 – 1/16/90	4	2	2	4	4		2					
1/17/90 – 1/16/91*												

* Although there is no CG-4175 for this anniversary year, on January 1, 1991, the applicant's CO notified the District Commander that the applicant had not attended a single drill that year.

6. The applicant's explanation for his failure to participate satisfactorily is similar to that he offered to the District Commander in 1991, but at that time he added the fact that he had allowed his part-time college coursework—a voluntary if laudable endeavor—to interfere with his drilling. As the applicant's CO forwarded his March 25, 1991, letter to the District Commander, the applicant's explanations for not fulfilling his contractual obligation were presumably duly assessed but rejected. The Board further notes that, although the applicant indicated that he began his job as a trooper in 1987, his participation did not markedly wane until 1989.

7. Upon enlistment, the applicant was notified of the participation requirements and warned that failure to meet them could result in an other than honorable (OTH) discharge. He signed a contract to serve for eight years, accepted the Coast Guard's training, and thereafter participated fairly regularly for only three years before his attendance record became abysmal. He was repeatedly offered counseling about his participation and received due process, including legal counsel, prior to his discharge. Although he asked to be transferred to the IRR, that was not an option available under Article 4-E-1 of the RATMAN.

8. The Board's cursory review of the merits of the case indicates that the applicant has submitted insufficient evidence to prove that his 1991 general discharge for misconduct (shirking) and consequent RE-4 reenlistment code are erroneous or unjust.⁴

9. Accordingly, the Board finds that it is not in the interest of justice to waive the statute of limitations in this case because the applicant failed to justify his long delay in seeking relief and cannot prevail upon the merits. Therefore, his request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

⁴ According to *Sawyer v. United States*, 18 Cl. Ct. 860, 868 (1989), *rev'd on other grounds*, 930 F.2d 1577, and *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976), for purposes of the BCMRs under 10 U.S.C. § 1552, "injustice" is "treatment by military authorities that shocks the sense of justice."

