

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2007-035

**XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX**

FINAL DECISION

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 November 24, 2006, upon receipt of the applicant's completed application for correction of his military record.

This final decision, dated July 31, 2007, is approved and 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 record by upgrading his 1984 discharge under other than honorable conditions (OTH) to at least a general discharge under honorable conditions. He also requested that the Board "clear handwritten dates" on his DD Form 214 (DD-214) documenting his service from December 31, 1981, to December 7, 1984. He further requested that the Board "increase the accuracy in block 28" that contains the narrative reason for his separation. The original DD-214 stated the reason for the applicant's discharge as "conviction by civil authorities," which was lined out, and the word "misconduct" was handwritten in the block. The original DD-214 also had some minor inaccuracies regarding the applicant's net active service. In block 12.c., his net active service was first shown as 2 years, 5 months, and 1 day but was corrected manually to show 2 years, 4 months, and 28 days. Block 29 was corrected by hand to show that the applicant had 3 days of lost time resulting from his arrests rather than 4 days, as originally shown, and to show that the period from June 1, 1984, to December 7, 1984, was also lost time because the applicant was incarcerated in the state penitentiary during this period.

The applicant alleged that the numerous cross-outs and added handwritten dates are confusing and that he needs to have his discharge upgraded in order to receive medical benefits. He stated that if his discharge is upgraded he can apply to the Department of Veterans' Affairs for benefits that would assist him in adjusting to society. He stated that he is currently in a state hospital and that after nine years of treatment he has been given permission to be released back into the community under supervision.

The applicant stated that he did not discover the alleged error until November 1, 2006, because he was unable to obtain his records while incarcerated. He further stated that he was not aware of the requirements for obtaining benefits until recently informed of them by his mental health clinicians

SUMMARY OF RECORD

The applicant served honorably in the active duty Coast Guard from January 3, 1978, until December 30, 1981.

On December 31, 1981, the applicant reenlisted in the Coast Guard for six years.

On October 26, 1983, the applicant was arrested by civilian authorities for child molestation and he was released from arrest on October 27, 2003.

On November 2, 1983, the applicant was arrested again by civilian authorities.

On December 1, 1983, the applicant was awarded non-judicial punishment for conduct that brought discredit upon the Coast Guard by obtaining loans on various occasions through false pretenses, a violation of Article 134 of the Uniform Code of Military Justice (UCMJ).

On June 1, 1984, the applicant was sentenced to 3 years in a California State Penitentiary for oral copulation with children under 11 years of age in violation of section 288(a)(c) of the California Penal Code. The applicant was remanded to the custody of the sheriff that day for delivery to the penitentiary.

On July 10, 1984, the applicant was advised by registered letter that his commanding officer (CO) was considering discharging the applicant from the Coast Guard by reason of misconduct due to civil conviction of a felony and due to violation of Article 134 of the UCMJ. The applicant was further advised that he could receive a discharge under other than honorable conditions. The CO advised the applicant that LT A, a lawyer, would contact the applicant to assist him in making decisions with respect to the following rights:

- a. to have your case considered by an administrative discharge board of not less than three officers.
- b. to request appointment of a lawyer within the meaning of UCMJ Article 27(b)(1) to represent you and, in your absence, to present your case before an administrative discharge board.
- c. to submit statements in your behalf, and;
- d. to conditionally or unconditionally waive any or all of the foregoing rights (only after consulting with an attorney) either in writing or by failing to reply to this letter of notification within 30 days of receipt.

On August 28, 1984, the applicant acknowledged notification of the proposed discharge and unconditionally waived his right to an administrative discharge board hearing. He did not submit a statement in his own behalf. He also acknowledged that he could receive an other than honorable discharge that could deprive him of many or all of his rights as a veteran under both federal and state legislation.

On November 9, 1984, the Commandant approved the applicant's discharge under other than honorable conditions by reason of misconduct.

On December 7, 1984, the applicant was discharged from the Coast Guard under other than honorable conditions.

VIEWS OF THE COAST GUARD

On April 4, 2007, the Board received an advisory opinion from the Judge Advocate General (JAG), stating that the Coast Guard had issued the applicant a new DD Form 214 to replace the one containing pen and ink corrections. The JAG argued that the applicant was not entitled to any further relief

In recommending denial of relief, the JAG argued that the application was untimely because it was filed more than twenty years after the applicant's discharge from the Coast Guard. 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 may waive the statute of limitations and consider the case if an applicant presents sufficient evidence that it is in the interest of justice to do so. The JAG stated that 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 was aware or should have been aware of his discharge when he received it in 1984. He noted that the applicant had been provided with an attorney prior to waiving his right to an administrative discharge board.

The JAG stated that the only explanation offered by the applicant for not filing his application sooner was his alleged inability to obtain his records because he was incarcerated and that he was unaware until recently that an upgraded discharge would afford him benefits. The JAG stated that the applicant provided no other evidence that his delay should be excused.

The JAG 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, he stated that the applicant bears the burden of proving error under 33 C.F.R. § 52.24, and that he has failed to meet his burden in this case.

Attached to the advisory opinion as Enclosure (1) were comments from Commander, Coast Guard Personnel Command (CGPC), who offered the following:

The DD-214 contained in the applicant's record . . . includes unauthorized pen and ink changes.[¹] CGPC administratively reissued the applicant a DD-214.

The applicant contends that his time lost is excessive however he does not provide any justification for his statement. The applicant had three periods of absence that constitute lost time. Deductible time was recorded for his civil arrests and confinement for the following periods: October 26-27, 1983 (inclusive); November 2, 1983; and the period from his civilian conviction and confinement, June 1, 1984 through December 6, 1984 (day prior to his discharge from the Coast Guard). The applicant's net service in item 12.c. of his reissued DD-214 . . . properly reflects this time lost. The time lost is supported by his record . . .

The applicant requests consideration for an upgrade to his discharge from other than honorable to general [under honorable conditions], however he does not provide any justification regarding an error or injustice to support such a claim. The applicant was processed according to applicable regulations . . . and waived his right to an administrative separation board . . . A complete review of the applicant's record supports the character of service rendered to the applicant upon discharge. The applicant was convicted of a felony by the State of California. Specifically, "Oral Copulation with children under the age of 11 years, Count 3, a felony" and sentenced to 3 years of confinement . . . Under the UCMJ, Article 134 (indecent acts or liberties with a child) the maximum punishment for such offense is dishonorable discharge, forfeiture of all pay and allowances, and confinement for 7 years." In addition, the applicant received 30 days of correctional custody and reduction to pay grade E-3 at NJP for obtaining loans under false pretenses and representing himself as an E5/E-6 on 7 separate occasions during his enlistment . . . Clearly the nature of the applicant's civil offense and conviction warrants a character of service no better than that currently assigned . . . Any upgrade to the applicant's discharge is not warranted.

APPLICANT'S REPOSENSE TO THE VIEWS OF THE COAST GUARD

On April 17, 2007, a copy of the Coast Guard's views was sent to the applicant for any response that he desired to make. The BCMR did not receive a reply from the applicant to the views of the Coast Guard.

FINDINGS AND CONCLUSIONS

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

¹ Paragraph 8.k. of COMDTINST M1900.4D states that corrections to the DD-214 after issuance will be made on a DD-215. It does not authorize handwritten changes to be made on the DD-214. This instruction further states that any alterations on the DD-214 will render it void.

1. The Board has jurisdiction of this case pursuant to section 1552 of title 10 United States Code.

2. The application was not timely. The applicant had been discharged for approximately twenty years before he filed his application with the Board. To be timely, an application for correction of a military record must be submitted within three years after the alleged error or injustice was discovered or should have been discovered. See 33 CFR 52.22.

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." See also Dickson v. Secretary of Defense, 68 F.3d 1396 (D.C. Cir. 1995).

4. Although the applicant's signature is on the original DD Form 214, he claims that he did not discover the alleged error until November 2006. Moreover, the applicant acknowledged in a letter waiving his right to an administrative discharge board that he could receive an other than honorable discharge and that, if awarded, such a discharge, it would most likely result in the loss of any veterans benefits. Therefore, the Board finds that the applicant was aware or should have been aware of his other than honorable discharge and the negative effect that it would have on any potential veterans' benefits at the time of his discharge.

5. A cursory examination of the merits of the case indicates that the applicant is not likely to prevail on his request for an upgrade of his discharge. The applicant did not allege any specific error or injustice on the part of the Coast Guard, nor did he present any proof that the Coast Guard had committed an error or injustice by discharging him with an other than honorable discharge. Article 12.B.2. of the Personnel Manual permits the Coast Guard to assign an other than honorable discharge where misconduct forms the basis for the separation. Article 12.B.18.b. of the Personnel Manual states that the Commandant may discharge a member for misconduct who has been convicted by civil authorities of an offense for which the maximum penalty under the UCMJ is death or confinement in excess of one year or that involves moral turpitude. As the advisory opinion stated, seven years was the maximum confinement under the UCMJ for the offense in which the applicant was convicted in civilian court. Therefore, the applicant's civilian conviction and sentence met the requirement for an other than honorable discharge by reason of misconduct. Moreover, the applicant received due process. He was notified of the discharge, was assigned a lawyer for consultation, and waived his right to an administrative discharge board hearing, as well as his right to submit a statement. In light of the foregoing, it is not likely that the applicant will prevail on his request for an upgrade of his discharge.

6. The Coast Guard has issued a new DD-214 to replace the original one that contained pen and ink corrections. Block 12.c. of the new DD-214 shows the applicant's net active service to be 2 years, 4 months, and 28 days. In block 28., the narrative reason for separation is misconduct as directed by the Commandant's November 9, 1984, message approving the applicant's other than honorable discharge. Block 29 shows the three days that the applicant was

under civilian arrests as lost time, as well as the period from June 1, 1984, until December 6, 1984, during which he was incarcerated prior to his discharge. The applicant has not shown that any of these entries are incorrect.

7. Accordingly, due to the length of the delay, the lack of compelling reasons 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. The application should be denied because it is untimely and because it lacks merit.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of former SN XXXXXXXXXXXXXXXX, USCG, for correction of his military record is denied.

Bruce D. Burkley

J. Carter Robertson

Dorothy J. Ulmer