

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2007-177

**XXXXXXXXXXXXXXXXXXXXX
XXX-XXXXXXXXXXXXXXXXX**

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 application on August 15, 2007, upon receipt of the applicant's completed application, and subsequently prepared the final decision for the Board, as required by 33 CFR § 52.61(c).

This final decision, dated April 30, 2008, 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 1988 under honorable conditions discharge to an honorable discharge. The applicant was discharged from the Coast Guard with a general discharge under honorable conditions (known as a general discharge) by reason of misconduct. He was assigned an RE-4 (not eligible to enlist) reenlistment code and an HKA (involuntary discharge due to a pattern of misconduct of a discreditable nature with military authorities) separation code.

The applicant alleged that his general discharge was not equitable because it was based on one isolated incident during his 17 months of service. In support of his BCMR application, the applicant submitted a copy of his application to the Discharge Review Board (DRB) that was returned to him because it exceeded the DRB's 15-year statute of limitations. In his DRB application, he stated that the misconduct for which he was discharged resulted from his dissatisfaction with an unexpected change in his duty assignment that kept him in Kodiak, Alaska. The applicant did not make a specific request for a change in his separation or reenlistment codes.

The applicant enlisted in the Coast Guard on November 17, 1986, and was discharged on April 18, 1988.

VIEWS OF THE COAST GUARD

On January 2, 2008, the Board received an advisory opinion from the Judge Advocate General (JAG), adopting the facts and analysis provided by the Commander, Coast Guard Personnel Command (CGPC).

CGPC noted that the application was not filed with the BCMR within its 3-year statute of limitations. The JAG provided a discussion of the merits and a recommendation for upgrading the applicant's discharge if the Board decided that it would be in the interest of justice to waive the statute of limitations.

CGPC noted the following pertinent events in the applicant's service record.

- On September 12, 1987, the applicant was punished at captain's mast (non-judicial punishment (NJP)) for reporting to duty 35 minutes late. The applicant's punishment included 21 days of restriction and a reduction to pay grade E-1, which was suspended for 4 months. CGPC further noted that the applicant had been late for duty three other times.
- On December 6, 1987, the applicant was punished at captain's mast for dishonorable failure to pay a debt in violation of Article 134 of the Uniform Code of Military Justice (UCMJ) and for making a false official statement, a violation of Article 107 of the UCMJ. His punishment was 30 days of extra duties, 30 days of restriction, and the vacation of the suspended reduction in rate from the earlier mast.
- On January 7, 1988, the applicant's commanding officer (CO) advised him that the CO was recommending that the applicant be discharged with a general discharge by reason of misconduct as a result of the two NJPs. The applicant acknowledged the proposed discharge, did not object to it, did not desire to submit a statement in his own behalf, and did not desire to seek legal counsel.
- On January 27, 1988, the applicant's CO recommended that the Commandant discharge the applicant from the Coast Guard due to misconduct. The CO stated that the applicant "has been a continual administrative burden since reporting aboard [the cutter], due to both his indebtedness problems . . . and his misconduct." In addition the CO stated that the applicant had repeatedly lied to his supervisors about his indebtedness problems and that "his value to this unit and potential for successful completion of his enlistment is extremely poor."
- On February 22, 1988, the applicant waived his right to a probationary period that would have allowed him an opportunity to correct his deficiencies.
- On April 18, 1988, the applicant was discharged pursuant to Article 12.B.18 of the Personnel Manual with a general discharge, a KHA separation code, and an RE-4 reenlistment code. At the time of his discharge the applicant had completed 1 year, 5 months, and 2 days of active service.

CGPC stated that at the time the applicant did not object to the discharge; nor did he allege that he was improperly discharged in his BCMR application. Instead, according to CGPC, the applicant alleged that the general discharge was inconsistent with his performance. CGPC further stated the following:

A review of the applicant's entire service record indicates that his performance evaluations for his enlistment meet the minimum factor average for awarding an honorable discharge pursuant to [the Personnel Manual]. Additionally, given the nature of the incidents relating to his discharge, they do not represent incidents that would normally be characterized [by] a general discharge. Therefore, in the interest of justice, if the BCMR concurs, the Coast Guard recommends that the applicant's record be corrected to reflect that he was awarded an honorable discharge vice [a discharge] under honorable conditions. He should be issued a new DD-214 reflecting this change along with an honorable discharge certificate.

The reenlistment code, narrative reason for separation and SPD code are consistent with the applicant's record and therefore should not be changed.

APPLICANT'S REPOSENSE TO THE VIEWS OF THE COAST GUARD

On January 8, 2008, a copy of the Coast Guard views was sent to the applicant for any response that he desired to make. The BCMR did not receive a reply 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. 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 this 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 or should have been discovered. See 33 CFR 52.22.
3. The applicant did not provide the date on which he discovered the alleged error. However, he should have discovered it on the date of his discharge in 1988 as the character of service is clearly written on his DD Form 214. He did not explain why he could not have filed his application with the Board within three years after his discharge from the Coast Guard.
4. 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."

5. A review the merits indicates that it is in the interest of justice to waive the statute of limitations, particularly since the Coast Guard admitted that an injustice exists in the applicant's record with respect to the character of his discharge. In this regard, CGPC noted that the applicant meets the requirements for an honorable discharge by having at least a 2.5 average mark in each performance factor over the course of his enlistment. Pursuant to Article 12.B.2.f.d. of the Personnel Manual, after June 30, 1983, a member must have a minimum characteristic average of 2.5 in each factor over the period of his enlistment to be eligible for an honorable discharge. In addition, according to Article 12.B.2.f.1.(7) of the Personnel Manual, misconduct does not disqualify the applicant from receipt of an honorable discharge. Therefore, CGPC recommended upgrading the applicant's general discharge to an honorable discharge. The Board agrees with the recommendation of the Coast Guard and finds that the applicant's average marks in each performance factor made him eligible for an honorable discharge. The Board further finds that it would be an injustice not to waive the statute of limitations and correct his record in this regard.

7. In light of the fact that the applicant had two captain's masts within approximately a four-month period, that his CO stated that he was an administrative burden to the unit, and that the applicant waived his right to a probationary period that would have allowed him an opportunity to correct his deficiencies, the Board is satisfied that his discharge by reason of misconduct was proper and appropriate. See Article 12.B.18.c. of the Personnel Manual.

8. The applicant's separation and RE-4 reenlistment codes are supported by the record and authorized by regulation. Pursuant to the Separation Designator Code (SPD) Handbook, only an RE-4 reenlistment code is authorized for the KHA separation code. The applicant has not provided the board with any evidence to prove that his separation and reenlistment codes are in error.

9. Accordingly, the applicant should have his general discharge upgraded to an honorable discharge. Further, in accordance with the advisory opinion, he should be issued an honorable discharge certificate.

[ORDER AND SIGNATURES ON NEXT PAGE]

ORDER

The application of former XXXXXXXXXXXXXXXX USCG, for correction of his military record is granted. His record shall be corrected to show that he received an honorable discharge. The Coast Guard shall issue the applicant a new DD 214 reflecting his honorable discharge, as well as an honorable discharge certificate. The following notation shall be made in Block 18 of the DD 214: "Action taken pursuant to order of BCMR."

No other relief is granted.

Bruce D. Burkley

Randall J. Kaplan

James E. McLeod