DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-003

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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 October 3, 2008, upon receipt of the applicant's completed application, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated May 21, 2009, 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, who was honorably discharged on October 2, 1985, upon the expiration of his first enlistment, asked the Board to upgrade his reenlistment code from RE-4 (not eligible to reenlist) to RE-1 (eligible to reenlist) and to "correct the 1 day of engineering certifications." He asked that his "fire fighting for engineering be changed to the correct time of service."

The applicant alleged that he discovered the errors on his DD 214 on September 1, 2008. He stated that the Board should correct the injustice in his military record because it has affected his life "in a negative way. It made [him] feel that they did not want African Americans in the service until they can place them up front in combat. [He] just want[s] to serve and can't carry it around with [him] anymore." He stated that he wants to reenlist but cannot because of the RE-4.

The applicant stated that he enlisted in the Coast Guard in 1981 after three years in the Army ROTC. However, he was assigned to a cutter, and his chief

> did not like the fact that he had a seaman on his boat that was Army that he felt did not belong there. That's when it all started. You can call it prejudice, I called it inhumane treatment. I was ordered to go out to paint in the rain by myself along with other cruelties that a young man should not endure. The other crew members were following me around and looking at me in the showers because they were told that black people had tails like monkeys. It was not a very good time for me and when my mom got sick I transferred (hardship) back to California. There it was better in the Fire Department where I received my training as an Engineer. It was more than a year of training and when they asked me to reenlist and I said no, they placed 1 day of training on my records and the RE-code 4 "not eligible" to reenlist after they asked me to do so.

The applicant further stated that he is now a college graduate and wants to serve his country as he believes the leadership and diversity of the Armed Forces have improved. In support of his application, he submitted his DD 214; a California State certificate dated May 1, 1985, acknowledging his satisfactory completion of Fire Fighter 1 class; a California State certificate dated November 14, 1985 (following his discharge from the Coast Guard), acknowledging his satisfactory completion of Fire Apparatus Driver/Operator I class; and a letter from the registrar of the University of Phoenix verifying that the applicant graduated on April 30, 2008, with an Associate of Arts in Business degree.

SUMMARY OF THE APPLICANT'S MILITARY RECORD

On September 28, 1981, at 18 years of age, the applicant enlisted as a seaman (SN/E-3) in the Coast Guard for four years. He was enlisted as an E-3, rather than an E-1, based upon his participation in the Junior ROTC for three years and his high school diploma.

On November 20, 1981, upon completing boot camp, the applicant was assigned to a large cutter homeported in Portsmouth, Virginia. On January 28, 1982, the applicant submitted a request to attend "A" School to become a subsistence specialist (SS).

On May 3, 1982, the applicant was counseled about "his poor performance of duty during the 9 day OLP completed today. [He] was further advised that he is to be held fully accountable for his actions or lack thereof."

On July 30, 1982, the applicant was advised that his orders to attend SS "A" School had been canceled and that he had been suspended from the waiting list until December 31, 1982, because he needed to improve his "attitude, appearance, and performance of duty to qualify for assignment to Class 'A' School."

On February 10, 1983, the applicant was taken to captain's mast for having been derelict in the performance of his duty by failing to make rounds while assigned to the watch on January 24, 1983. He was awarded non-judicial punishment (NJP) consisting of a reduction in rate and pay grade to seaman apprentice (SA/E-2), which was suspended for two months on condition of good behavior, and he was assigned 14 days of extra duties. The suspension was not vacated, so his rate was not actually reduced as a result of this mast.

On April 5, 1983, the applicant requested a humanitarian transfer to the San Francisco Bay area so that he could care for his mother, who had been disabled in a motor vehicle accident and had no other family who could care for her. His commanding officer (CO) endorsed his request the same day. The CO noted that although the applicant's "performance has been marginal at times, he is intelligent and capable. With close supervision he can do acceptable work. I believe him sincere in his desire to help his mother; perhaps this responsibility will hasten his maturation."

On June 17, 1983, the applicant was taken to mast and awarded NJP by his CO for "wrongfully appropriat[ing] a foul [weather] jacket and coveralls, the property of U.S. Govern-

ment, and personal clothing of a crewmember." He was reduced in rate to SA/E-2 and fined one-half pay per month for two months.

On July 13, 1983, after Coast Guard Headquarters received information from the applicant's mother's doctors, the applicant was granted a temporary humanitarian transfer from the cutter to a shore command in the Bay area because of his mother's disability. He was to report to the new unit on July 30, 1983.

On July 21, 1983, the applicant was taken to captain's mast again for having been absent without leave from his unit from July 9 through 13, 1983. As a result of this unauthorized absence, his enlistment was extended by five days. The CO awarded him NJP consisting of seven days' restriction to base and two hours of extra duty each day for seven days.

On July 30, 1983, the applicant reported for duty at the Coast Guard Support Center in Alameda, California. His mother was documented as his dependent.

On January 24, 1984, the applicant's humanitarian transfer was made permanent. His new CO noted that the applicant's mother was still disabled and that the applicant had "performed in a satisfactory manner" and had "not been a disciplinary problem," since reporting aboard. On October 3, 1984, the applicant's mother was removed as a dependent upon the applicant's request, and his housing allowance was reduced to reflect the change.

The applicant's evaluation marks sheet indicates that he was taken to mast and awarded NJP on October 31, 1984, for an offense that was not described in his record.

On April 5, 1985, the applicant was counseled about the upcoming end of his enlistment. He was advised that he was recommended for reenlistment, but he told the command that he was undecided.

On June 25, 1985, the applicant was taken to mast for disobeying a lawful order by drinking alcohol while on duty. He was awarded NJP of 14 days of extra duty.

The applicant's evaluation marks sheet indicates that he was taken to mast and awarded NJP again on July 14, 1985, for an offense that was not described in his record.

On August 6, 1985, the applicant was counseled about his failure to report to perform the extra duties he had been awarded as NJP on July 14, 1985.

On October 2, 1985, the applicant was honorably discharged upon the expiration of his enlistment. He was still an E-2 without a skill rating. His DD 214 and a Personnel Action entry in his record indicate that he was not recommended for reenlistment and assigned an RE-4. Both forms were signed by the applicant.

Achievement Sheets in the applicant's record show that he attended a one-day class called Basic Structural Fire Fighting on July 13, 1984; and two one-day classes, called Fire Fighter 1 and Volunteer Fire Fighter, on May 1, 1985. These classes are noted in the "Military

Education" section of his DD 214 (block 14), which shows the following training: "Fire Fighter 1, 1 day, May 1985; Volunteer Fire Fighter, 1 day, May 1985; Basic Structural Fire Fighting, 1 day, July 1984."

VIEWS OF THE COAST GUARD

On February 10, 2009, the Judge Advocate General of the Coast Guard submitted an advisory opinion in which he adopted the findings and analysis provided in a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC).

CGPC noted that the application was submitted untimely and that the applicant "provided no justification for the delay in filing." CGPC stated that the applicant's request should be denied based on its untimeliness and lack of merit.

CGPC noted that there are four court memoranda documenting NJPs in the applicant's record and that he was still an E-2 when he was discharged after four years of service.

CGPC stated that while the applicant was apparently recommended for reenlistment on April 5, 1985, under Article 4.B.11.g. of the Personnel Manual, he was not actually authorized to reenlist without the approval of CGPC because of his humanitarian transfer.

CGPC noted that members discharged when their enlistments expire may be assigned only the RE-1 (eligible) or RE-4 (ineligible) reenlistment codes. CGPC alleged that there is no documentation in the applicant's record regarding his not being recommended for reenlistment, but argued that the RE-4 was not unjust given his substandard conduct, lack of a skill rating, and unresolved humanitarian assignment at the time of his discharge.

CGPC stated that the work that the applicant was assigned, which he attributed to prejudice, "is not inconsistent with work typically assigned to non-rated personnel or personnel of his pay grade." CGPC also noted the applicant's disciplinary problems while assigned to the cutter and to the Support Center in Alameda.

With regard to the applicant's training, CGPC stated that the applicant's complaint is unclear but that the classes he took on active duty are shown on the DD 214. CGPC noted that the applicant apparently took the one-day Fire Apparatus Driver/Operator I class after his discharge, so it would not be documented on his DD 214.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On February 19, 2009, 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

Article 12-B-4.a. of the Personnel Manual in effect in 1985 stated the following regarding the reenlistment of enlisted members:

> In general, a member who meets the standards for an honorable discharge set forth in Article 12-B-2.f. should be eligible for reenlistment, except where the reason for discharge precludes reenlistment, such as physical disqualification, disability, unsuitability, misconduct … . It is not the intent to encourage commanding officers to refuse reenlistment to those individuals who have demonstrated a potential for a successful and productive career in the Coast Guard. Generally, commanding officers will not be allowed to reenlist individuals in the E-2 paygrade. Personnel who are at the E-2 paygrade at the end of their enlistment shall be assigned the classification of Not Eligible for Reenlistment and provision of Article 12-B-5 shall be adhered to. … However, personnel … whose personal problems have resulted in hardship assignments beyond 4 months shall be considered poor risks and therefore shall be screened carefully prior to being considered for reenlistment.

Article 12-B-5 provided that if at the time of the pre-discharge interview "or at any time subsequent thereto, a commanding officer determines that an enlisted member [with less than eight years of service] is not eligible for reenlistment," the command had to inform the member of the reason he was not eligible for reenlistment and of his right to appeal the decision within fifteen days.

Chapter 1.E. of the manual for completing DD 214s, COMDTINST M1900.4D, states the following about what information should be entered in block 14, "Military Education":

> To assist the former service member in employment placement and job counseling, those formal service schools and in-service training courses captured in PMIS/JUMPS and successfully completed during the period of service covered by the form will be in this block, e.g., medical and dental, electronics, supply administration, personnel, or heavy equipment operations.

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) and 33 C.F.R. § 52.22, an application to the Board must be filed within three years of the date the applicant discovered or reasonably should have discovered the alleged error in his record. Although the applicant claimed that he discovered the alleged errors on his DD 214 in September 2008, the Board finds that he knew or should have known about the allegedly erroneous information on his DD 214 when he received and signed it and the Personnel Action page on October 2, 1985. 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."[1]

4. Other than stating that he is tired of having the RE-4 and wants to reenlist, the applicant did not explain why he waited more than twenty years to seek correction of the alleged errors. He has not provided a compelling reason for his long delay.

5. A cursory review of the record reveals that the applicant's allegations of error and injustice are not corroborated. Although he claimed that his DD 214 should show a year of training, there is no evidence that he attended more than a few one-day fireman's classes while on active duty, and those he attended during his enlistment are already shown on his DD 214. It is possible that the applicant underwent some on-the-job training, but under the rules for completing DD 214s in COMDTINST M1900.4D, only formal service schools and training courses successfully completed may be recorded in block 14 on a DD 214. In addition, there is no evidence corroborating the applicant's allegations of maltreatment. His military records show that the applicant was enlisted as an E-3 because of his three years in the JROTC, but that because of repeated disciplinary and performance problems, he was punished at mast several times, never earned a petty officer's skill rating, and was reduced from E-3 to E-2. Article 12-B-4.a. of the Personnel Manual in effect in 1985 clearly stated that members who were still E-2s after four years in the service should not be eligible for reenlistment. While the applicant was apparently told on April 5, 1985, that he was eligible to reenlist, that information was incorrect. Moreover, the applicant was punished twice more at mast for misconduct he committed after that counseling session on April 5, 1985, and before his discharge on October 2, 1985. His command's decision to assign him an RE-4 code is presumptively correct[2] and amply supported by the documentation of his poor performance and discipline. The fact that the applicant has recently completed an Associate of Arts in Business degree and wants to reenlist does not persuade the Board that his RE-4 code is erroneous or unjust. The Board finds that his claims cannot prevail on the merits.

6. Accordingly, the Board finds that it is not in the interest of justice to waive the statute of limitations or to excuse the untimeliness of the application in this case because the applicant has failed to justify his long delay in seeking relief and because his claims cannot prevail upon the merits. Therefore, his requests should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

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

[2] 33 C.F.R. § 52.24(b); *see Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992) (citing *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979), for the required presumption, absent evidence to the contrary, that Government officials have carried out their duties "correctly, lawfully, and in good faith.").

ORDER

The application of former SA xxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is denied.

Patrick B. Kernan

Erin McMunigal

Jeff M. Neurauter