

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-146

XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX

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 after receiving the applicant's completed application on May 8, 2009, 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 February 25, 2010, 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 received a general discharge under honorable conditions from the Coast Guard on August 30, 2003, for misconduct, asked the Board to correct his record by upgrading his discharge to honorable. The applicant stated that his discharge was inequitable because his commanding officer (CO) had told him that he would receive an honorable discharge. Because his CO misinformed him and bullied him into signing his separation papers, he had no opportunity to appeal his general discharge. The applicant alleged that the general discharge was also unjust because the State never charged him with a crime and he was never involved with civil authorities. He stated that the general discharge has greatly affected his future because when he applies for jobs with police and fire departments, he is told that his general discharge prevents his employment. In support of his allegations, the applicant submitted two statements:

- Mr. M, who has been the applicant's friend since they were 13 years old, stated that the applicant "has always been the hardest working guy I have known" and "live[s] by a lot of the core values he learned in the military." Mr. M stated that the applicant made mistakes in the Coast Guard because of immaturity but is much more mature now. He stated that the applicant volunteered for the First Aid Squad at their high school and "has always been interested in helping his fellow man." He stated that the applicant now organizes volunteer projects for Habitat for Humanity and still wants to serve his country in the National Guard but cannot do so without an honorable discharge.

- Mr. S, the president of Legacy Landscapes, Inc., stated that the applicant has been a valued employee since May 2005 and has risen to the position of Project Manager for some of their biggest projects. Mr. S described the applicant as very dependable and trustworthy. He stated that the applicant communicates well with clients and shows good judgment and leadership.

SUMMARY OF THE APPLICANT'S MILITARY RECORD

On June 4, 2002, at age 20, the applicant enlisted in the Coast Guard for four years. On August 31, 2002, after completing boot camp, the applicant received a performance evaluation with good marks. He advanced to fireman apprentice (E-2).

On January 21, 2003, at age 21, the applicant was charged with assault and fleeing apprehension in violation of Articles 92 and 134 of the Uniform Code of Military Justice (UCMJ). The Report of Offense states that, while wearing a concealed handgun without a permit, the applicant was caught trying to steal a video by a local store manager. Instead of waiting for the police to arrive, the applicant fled the store. Later, when the CO ordered him to return to the unit, the applicant failed to obey the order. At home, the applicant pushed a crewmate who had refused to give the applicant his car keys. When the police arrived, the applicant was putting a sleeping bag and other personal effects in his truck.

On March 19, 2003, the applicant admitted to the charges against him at mast and was awarded non-judicial punishment (NJP) including 7 days of correctional custody, 14 days of extra duties, and reduction in pay grade from E-2 to E-1. On a performance evaluation, he received poor marks, an unsatisfactory conduct mark, a recommendation against advancement.

At 2:00 a.m. on April 15, 2003, the applicant was arrested by police for destroying several stop signs. The applicant had been seen dumping the signs in the front yard of a petty officer's house earlier that night. Tire tracks matching those of the applicant's truck showed that he had removed the stop signs by driving over them. When arrested, his blood alcohol content measured 0.106.¹ The misconduct and arrest were documented as the applicant's first "alcohol incident" on an Administrative Remarks ("Page 7") entry in his record.

Later that same day, the applicant's CO notified him by memorandum that he was initiating his discharge under Article 12.B.18. of the Personnel Manual because the applicant had been arrested by local police twice in three months and thus brought discredit upon the Coast Guard. The CO advised the applicant that he was recommending that he receive a general discharge but that Commander, Coast Guard Personnel Command (CGPC) would decide what type of discharge the applicant would receive. He also advised the applicant of his right to consult an attorney and to submit a statement to object to the recommendation for discharge.

The applicant signed an acknowledgement of the CO's notification of discharge memorandum. He acknowledged having been notified of his right to consult an attorney and to submit

¹ In Washington State, persons may be found guilty of driving under the influence (DUI) if their blood alcohol concentration (BAC) within two hours after driving is 0.08 or higher. WASH. REV. CODE ANN. § 46.61.502. (2009).

a statement on his own behalf. He acknowledged understanding that Commander, CGPC would decide whether he would be discharged and, if so, what type of discharge he would receive. The applicant also acknowledged understanding that a general discharge would deprive him of many rights as a veteran and that he could “expect to encounter substantial prejudice in civilian life in situations where the type of service rendered in any branch of the Armed Forces or the type of discharge received therefrom may have a bearing.” The applicant waived his right to consult a lawyer and stated that he would submit a statement on his own behalf. The acknowledgment indicates that the applicant signed it voluntarily and “of [his] own free will.”

In his statement responding to the CO’s recommendation for discharge, the applicant asked to be retained on active duty because he enjoyed and took pride in his work. He wrote, “I know what I did was wrong and am very sorry for my actions.” He did not deny having committed the offenses for which he was arrested but attributed his actions to his alcohol consumption. The applicant stated that if he stopped drinking he could “have a long and prosperous career in the Coast Guard” and that he had an appointment with the command’s addiction representative. The applicant also stated that his “work performance pretty much speaks for itself. I have met all my qualification requirements on time and am well on the way to being a 47 motor lifeboat engineer as well as a boarding team member.” He asked for another chance to continue his career in the Coast Guard.

On April 16, 2003, the applicant was advised on a Page 7 that he was “being placed on a six-month probation” and had to “show significant improvement in overcoming your tendencies to act immaturely.” The Page 7 states that any further infractions would cause the CO to initiate his discharge for misconduct.

The CO forwarded the discharge package² to the CGPC through the Group Commander and the District Commander. The CO wrote that the applicant’s job performance had been good but that he recommended that the applicant receive a general discharge because the applicant had been counseled about his conduct but “[t]hrough his actions he has tarnished the positive image that has taken so many honest and hard working Coast Guardsmen and women years to build.” The CO stated that he would have recommended that the applicant receive an honorable discharge except that the applicant’s misconduct on April 15, 2003, occurred less than a month after he received NJP for his prior misconduct.

On April 30, 2003, the Group Commander forwarded the discharge recommendation to the District Commander and agreed with the CO’s recommendation for a general discharge. The Group Commander noted that the applicant had been charged by civil authorities with two misdemeanors as a result of his actions on January 21, 2003, and with two second class felonies (malicious mischief and theft) as a result of his actions on April 14, 2003 and that charges were pending for these offenses.

² The date that the CO sent the discharge recommendation package to his chain of command is unclear. Although his memorandum bears the date April 15, 2003, one of the enclosures listed on that memorandum is dated April 24, 2003. Therefore, it appears that the memorandum was drafted on April 15, 2003, but not completed and submitted until after April 24, 2003.

On June 16, 2003, the District Commander forwarded the discharge package to CPGC and agreed with the CO's recommendation for a general discharge for misconduct.

On July 1, 2003, CGPC ordered that the applicant be discharged on July 30, 2003, with a general discharge for misconduct because of his frequent involvement of a discreditable nature with military and/or civilian authorities pursuant to Article 12.B.18. of the Personnel Manual.

On July 15, 2003, the applicant's command entered a Page 7 in his record noting that he had been diagnosed as alcohol dependent and recommended for out-patient rehabilitative treatment. The Page 7 indicates that the applicant had declined treatment and acknowledged that "[b]y doing so, you have waived all right to any future benefits under the Department of Veterans Affairs program for treatment of chemical dependency."

On July 30, 2003, the applicant received a general discharge for misconduct with an RE-4 reenlistment code (ineligible for reenlistment). Block 24 of his DD 214 states that his character of service was "general."³

On April 23, 2004, the applicant asked the Discharge Review Board (DRB) to upgrade his discharge to honorable. He denied having been charged with a crime and alleged that his CO had told him he would receive an honorable discharge. On September 13, 2004, the DRB found that the applicant's discharge was proper and equitable and recommended that his request be denied. The Acting Commandant approved the DRB's recommendation the same day. On September 14, 2004, the applicant was notified of the decision and of his right to apply to the Board for Correction of Military Records for further consideration.

VIEWS OF THE COAST GUARD

On September 30, 2009, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request for untimeliness and lack of merit. In so doing, the JAG adopted the findings and analysis provided in a memorandum on the case prepared by the Coast Guard Personnel Service Center (CGPSC).

CGPSC stated that the application was untimely because the applicant submitted it more than three years after his application to the DRB was denied and failed to justify his delay. CGPSC further stated that contrary to the applicant's claim, his discreditable involvement within civilian and military authorities is substantiated in the record. CGPSC also noted that the CO advised the applicant in the notification of discharge dated April 15, 2003, that he was recommending that the applicant receive a general discharge.

CGPSC concluded that the applicant's request for an honorable discharge "is not supported by policy, precedence, or the interest of justice" and that he has failed to prove that his general discharge is erroneous or unjust.

³ Chapter 1.E. of the manual for preparing DD 214s, COMDTINST M1900.4D, provides that the "character of service" in block 24 of a DD 214 shall state "under honorable conditions" when a member receives a general discharge.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 27, 2009, the applicant responded to the views of the Coast Guard. He stated that after the DRB denied his request he did not promptly apply to this Board because he was shocked and disappointed by the DRB's decision and consulted an attorney about his options.

The applicant stated that the "incidents [he] was involved with [as] a young man in the Coast Guard have affected [his] ability to obtain a job with any civil service organization." He stated that he will be a registered emergency medical technician within a few months and needs just a few more credits to receive a degree in criminal justice but cannot get a job in any police or fire department because of the general discharge. He alleged that it is unfair that he has been hamstrung by the Coast Guard. In support of these allegations, the applicant submitted a letter from an officer of the Gwinnett County Police Department in Lawrenceville, Georgia, acknowledging him as a "police candidate" but stating that the applicant's "military history places you outside of our hiring guidelines and you are no longer being considered for the position. The information discovered during your background investigation would prevent any future employment with our agency."

The applicant repeated his allegation that his CO had assured him he would get an honorable discharge and "had nothing to worry about." The applicant also alleged that he "was promised an RE code that would allow for reenlistment."

APPLICABLE REGULATIONS

Article 12.B.18.b. of the Coast Guard Personnel Manual in effect in 2003 states that Commander, CGPC could direct the discharge of an enlisted member for misconduct because of the member's "discreditable involvement with civil or military authorities," established pattern of shirking, drug abuse, etc. Article 12.B.18.a. states that the type of such a discharge may be honorable, general, or under other than honorable (OTH) conditions. Article 12.B.18.c. states the following:

Commanding officers must afford a member a reasonable probationary period to overcome deficiencies before initiating administrative discharge action in cases of frequent discreditable involvement with civil or military authorities; ... If a command contemplates discharging a member for reasons contained in this paragraph, it shall counsel the member a formal probation or treatment period of at least six months has begun and make an appropriate Administrative Remarks, CG-3307, entry in the member's PDR stating the command will initiate administrative discharge processing unless the member shows significant improvement in overcoming the deficiency during the probationary period. The member must acknowledge the entry in writing. ... However, commanding officers are authorized to recommend discharge at any time during the probation if the member is not making an effort to overcome the deficiency. ... Submit copies of all CG-3307 entries as an enclosure to the discharge recommendation submitted to Commander, (CGPC-epm-1).

Article 12.B.18.e. states that when initiating the honorable or general discharge for misconduct of a member with less than eight years of military service, the commanding officer shall

1. Inform the member in writing of the reason(s) for being considered for discharge (specifically state one or more of the reasons listed in [see] Article 12.B.18.b. supported by known facts).

2. Afford the member an opportunity to make a written statement. If the member does not desire to do so, the commanding officer sets forth that fact in writing over the member's signature. If the member refuses to sign a statement his or her commanding officer will so state in writing.

3. Afford the member an opportunity to consult with a lawyer as defined by Article 27(b)(1), UCMJ, if contemplating a general discharge. If the member requests counsel and one is not available, the commanding officer must delay discharge proceedings until such time as counsel is available.

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 after the applicant discovers, or reasonably should have discovered, the alleged error or injustice. The applicant in this case filed his application more than three years after he knew or should have known of the alleged errors and more than three years after the decision of the DRB.⁴ Therefore, his application was not timely.

3. Pursuant to 10 U.S.C. § 1552(b), 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."⁵

4. The applicant alleged that he did not submit a timely application because he was in shock after receiving the decision of the Discharge Review Board. This Board finds that the applicant's explanation for his delay is not compelling.

5. The applicant alleged that his general discharge was inequitable because his CO promised him an honorable discharge and bullied him into signing "separation papers" so that he could not "appeal" his CO's recommendation. A cursory review of the merits of the applicant's allegations shows that they lack merit. The CO clearly notified the applicant by memorandum on April 15, 2003, that he intended to recommend that the applicant receive a general discharge because of his misconduct. The applicant acknowledged receipt of this notification with his signature. There is no evidence supporting the applicant's claim that his CO bullied him into signing any "separation papers." Moreover, the Coast Guard does not need the signed permission of a member to discharge him for misconduct. In fact, the record shows that the applicant

⁴ Under *Ortiz v. Secretary of Defense*, 41 F.3d 738, 743 (D.C. Cir. 1994), a BCMR application is considered timely if it is filed within 3 years of the decision of the DRB, which has a 15-year statute of limitations. 10 U.S.C. § 1551.

⁵ *Allen v. Card*, 799 F. Supp. 158, 164-65 (D.D.C. 1992); see also *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

was afforded the right to consult counsel about the proposed general discharge, which he waived, and to rebut his CO's recommendation for a general discharge, as required under Article 12.B.18.e. of the Personnel Manual. Article 12.B.18.e. affords the member the right to object to a discharge and to submit a statement in rebuttal, as the applicant in fact did, not to "appeal" a CO's discharge recommendation. The Board's review shows that the applicant received due process under Article 12.B.18.e.

6. The applicant alleged that his offenses did not warrant a general discharge for misconduct with an RE-4 reenlistment code. However, the preponderance of the evidence in the record indicates that during his year in the Coast Guard, the applicant committed the following offenses, which he did not deny at mast or in his rebuttal to the CO's notification of discharge: attempting to steal a video from a store while carrying a concealed weapon without a permit, assaulting a crewmate, and removing and stealing several stop signs while driving under the influence of alcohol. Although the applicant now denies any involvement with civil authorities, an electronic database search of Washington State criminal records reveals that he was charged with carrying a weapon without a permit and with third degree theft on January 20, 2003, and that he was charged with an unstated offense on April 15, 2003. Although the State charges were ultimately dropped, the Board finds that the applicant's misconduct as described by his command was egregious and very dangerous to many other people. He has not shown that his command's characterization of his actions was erroneous. The Board's review indicates that the applicant's general discharge with an RE-4 reenlistment code (ineligible to reenlist) was warranted.

7. The applicant alleged that his general discharge is unjust because some police and fire departments have refused to hire him after performing a background investigation and discovering his general discharge for misconduct. The fact that the employment guidelines of some other institutions require veterans seeking employment to have honorable discharges does not make the general discharges and other less than fully honorable discharges issued by the Coast Guard and other Armed Forces erroneous or unjust.⁶

8. Although the applicant did not raise the issue, the Board's cursory review of the merits of this case reveals one anomaly in the record: Instead of placing him on performance probation following his first offenses in January 2003 or at the mast on March 19, 2003, the CO waited until April 16, 2003—the day after the applicant allegedly removed and stole the stop signs—to place him on performance probation, as required for a misconduct discharge under Article 12.B.18.c. of the Personnel Manual. However, Article 12.B.18.c. also states that a member may be discharged for misconduct before the end of a probationary period "if the member is not making an effort to overcome the deficiency." The record shows that the applicant's CO submitted his discharge recommendation up the chain of command before the end of the probationary period without addressing this issue. Whether the CO did not believe the applicant was trying to overcome his deficiencies or whether he felt that the applicant's offenses justified his discharge without a long probationary period is not documented in the record. Nor was the issue addressed by the Group Commander or District Commander in their endorsements, and CGPC

⁶ For the purposes of the BCMRs, "[i]njustice', when not also 'error', is treatment by the military authorities, that shocks the sense of justice, but is not technically illegal." *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976). The Board has authority to determine whether an injustice exists on a "case-by-case basis." Docket No. 2002-040 (DOT BCMR, Decision of the Deputy General Counsel, Dec. 4, 2002).

authorized the applicant's discharge in the middle of the probationary period, as permitted under Article 12.B.18.c. The Board finds insufficient evidence in the record to conclude that the Coast Guard committed error or injustice by discharging the applicant before the end of his probationary period.

9. The Board finds that the applicant's request for an honorable discharge cannot prevail on the merits. Accordingly, the Board will not excuse the application's untimeliness or waive the statute of limitations with regard to his request for an upgraded discharge. His request for an honorable discharge should be denied.

10 The Board notes, however, that block 24 of the applicant's DD 214 erroneously states that his character of service was "general." Chapter 1.E. of the manual for preparing DD 214s, COMDTINST M1900.4D, states that when a member receives a general discharge, the character of service documented in block 24 of the DD 214 should be "under honorable conditions." Therefore, the applicant's DD 214 should be corrected to show the phrase "under honorable conditions" in block 24.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of former SR xxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is denied, except that his DD 214 shall be corrected to show the character of service as “under honorable conditions” in block 24.

Bruce D. Burkley

Francis H. Esposito

Erin McMunigal