

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-147

**XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX**

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 upon receipt of the applicant's completed application on May 8, 2009, and subsequently prepared the final decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated January 28, 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 APPLICANT'S ALLEGATIONS

The applicant asked the Board to correct his record by upgrading his reenlistment code so that he is eligible to enlist in the National Guard.

The applicant enlisted in the Coast Guard on July 5, 2000, and was honorably discharged on April 1, 2003, by reason of unacceptable conduct. He was assigned an RE-4 (not eligible to reenlist) reenlistment code and a JNC (unacceptable conduct) separation code.

The applicant stated that he made some mistakes while in the Coast Guard due to outside influences and that his attempts to rectify them were not successful. He stated that he did not have evidence to support an injustice, but it has been his life-long dream to serve and retire from the Coast Guard as did his father, grandfather, and numerous uncles. He also stated the following:

When I joined the military I was a child who thought he was a man. I was single and didn't need to care for anyone but myself, or so I thought. I am now married. I have one child and care for my wife's two children as if they were my own. I have been employed the entire time since my discharge trying to relieve debt and pay bills . . . I provide a roof over my families head and food in their stomachs. Again, I only request that you review my military records good points instead of

only the bad and give me one more chance to do the right thing and retire from the United States Armed Forces as a true "Coastie" should.

The applicant stated that he discovered the alleged error or injustice on June 1, 2005. He stated that it is in the interest of justice to waive any untimeliness so that he can follow in the footsteps of his parents and other relatives who served in the military.

APPLICANT'S MILITARY SERVICE

The applicant was punished at captain's mast (also known as non-judicial punishment) on January 4, 2001, July 18, 2001, and September 5, 2002 for unauthorized absences offenses. As a result of the September 5, 2002 captain's mast, the CO gave the applicant a letter documenting his punishment of 8 days extra duty and reduction to pay grade E-1 (suspended for six months). The CO also directed the applicant to devise a written plan to repay \$85.00 that he owed to a crewmember by the close of the date of the letter.

On September 5, 2002, a page 7 was entered into the applicant's record advising him that a six-month probationary period had begun and that it was scheduled to end on March 5, 2003. He was advised that an administrative discharge would be initiated if his performance did not improve, if he engaged in further conduct that that would form the basis of an unsuitability discharge, or if he engaged in misconduct.

A page 7 dated October 11, 2002, counseled the applicant about his unsatisfactory performance since September 5, 2002. The page 7 noted that since the probationary period began on September 5, 2002, the applicant had been late for morning muster once, failed to complete a duty assignment, was caught out of uniform by wearing a tongue ring, failed to notify his supervisor that he lost his identification card, and allowed the repossession of his automobile for failure to make required payments. The CO notified that the applicant that he would initiate proceedings to discharge the applicant from the Coast Guard due to unsuitability, financial irresponsibility, and misconduct. The applicant acknowledged this entry on October 23, 2002.

The applicant's record also contains numerous other negative administrative remarks (page 7) entries documenting his misbehavior. For instance, page 7s noted that the applicant was asleep on watch, left the fire watch without permission, made false statements, and refused to follow orders. There are approximately 27 such page 7s in the applicant's military record.

On November 4, 2002, the applicant's CO informed him that the CO had initiated action to discharge the applicant from the Coast Guard due to the applicant's continued trend of unsatisfactory performance and his failure to accept responsibility of his actions. The CO noted the applicant's violation of his September 5, 2002 probation.

On November 4, 2002, the applicant acknowledged the proposed discharge, waived his right to make a written statement, but objected to the discharge.

On December 2, 2002, the CO recommended to the Commander, Coast Guard Personnel Command (CGPC) that the applicant be discharged by reason of unsuitability due to an established pattern of shirking and financial responsibility.

On February 14, 2003, the CO's superior in the chain of command recommended that CGPC approve the CO's request to discharge the applicant. On February 24, 2003, the Commander, Coast Guard District One also recommended that CGPC approve the CO's request to discharge the applicant from the Coast Guard.

On March 4, 2003, CGPC directed that the applicant be discharged from the Coast Guard with an honorable discharge by reason of unsuitability due to apathy, defective attitudes, and inability to expend effort constructively under Article 12.B.16 of the Personnel Manual. CGPC directed that the applicant receive a JNC separation code. The applicant was discharged on April 1, 2003.

Discharge Review Board (DRB) Decision

Prior to filing his application with the BCMR, the applicant submitted an application to the DRB for a change in his reenlistment code. On August 15, 2005, the Commandant approved the DRB's decision not to change the applicant's reenlistment code. The DRB members felt that the discharge and reenlistment code were in accordance with Coast Guard policy and that the applicant failed to show any change in performance since separation from the Coast Guard that would merit an upgrade of his reenlistment code.

VIEWS OF THE COAST GUARD

On September 30, 2009, the Board received an advisory opinion from the Judge Advocate General (JAG), of the Coast Guard recommending that the applicant's request be denied.

The JAG also adopted the facts and analysis provided by Commander, Personnel Service Center (PSC) as a part of its advisory opinion. PSC noted that the application was not timely. With respect to the merits, PSC stated that the DRB found the discharge to be in accordance with Coast Guard policy. PSC noted that the applicant did not contest the findings of the DRB, nor allege that he had been treated unjustly. PSC concurred with the findings of the DRB and noted that the Coast Guard's actions are presumptively correct, in the absence of evidence to the contrary.

APPLICANT'S REPOSENSE TO THE VIEWS OF THE COAST GUARD

On October 1, 2009, a copy of the Coast Guard's views was sent to the applicant for any response that he wanted to make. The BCMR did not receive a response from the applicant.

APPLICABLE REGULATIONS

Article 12.B.16.b. of the Personnel Manual authorizes a discharge by reason of unsuitability due to apathy, defective attitudes, and inability to expend effort constructively. The provision defines this basis for discharge as “A significant observable defect, apparently beyond the member’s control, not readily describable elsewhere.”

Article 12.B.16.c. of the Personnel Manual states that a discharge for apathy or defective attitudes will not be initiated until the member has been afforded a reasonable probationary period to overcome these deficiencies. The provision further states:

When commands contemplate discharging a member for these reasons they shall counsel the member that a formal probationary period of at least six months has begun and make an appropriate administrative remarks [page 7], entry in the member’s PDR that administrative discharge processing will be initiated unless the member shows significant improvement in overcoming the deficiency during the probationary period. The member must acknowledge this entry in writing. Commanding officers are authorized to recommend discharge at any time during probation if the member is not attempting to overcome the deficiency. Submit copies of all [page 7] entries as an enclosure to the discharge recommendation submitted to Commander (CGPC-emp-1).

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction of this case pursuant to section 1552 of title 10 United States Code.
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. Under *Ortiz v. Secretary of Defense*, 41 F.3d 738, 743 (D.C. Cir. 1994), the Board’s three-year statute of limitation did not begin until the DRB issued its decision on August 16, 2005, the date of the letter notifying the applicant of that decision. The BCMR received the applicant’s application on March 19, 2009, more than three years after issuance of the DRB decision. Therefore, the application was not timely. The applicant’s desire to serve in the military as his father and other relatives have done is not a persuasive reason for waiving the statute of limitations.
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." The court further stated 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." *Id.* at 164, 165. See also *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

4. The Board is not persuaded to waive the statute of limitations based on a cursory review of the merits. The applicant offered no evidence or argument of an error committed by the Coast Guard and the Board finds none in its review.

5. Nor has the applicant made a persuasive case that he has suffered an injustice. The applicant's request to upgrade his reenlistment code so that he can serve in the military like his father did does not persuade the Board that he suffered or suffers from an injustice. Injustice is defined as "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 applicant was counseled numerous times about his conduct and behavior, but failed to conform his behavior to the requirements of the Personnel Manual and to the expectations of his supervisors. As the CO indicated, he was a burden to the command and his crewmates.

6. The applicant stated that he made mistakes while in the Coast Guard and wants another opportunity to serve in and retire from the Coast Guard. He stated that he is now a married father who has been steadily employed since his discharge, but he did not provide any corroboration of his post-service life changes. Such post-service conduct and behavior even if true, is insufficient to prove that he should have his reenlistment code upgraded or that the Coast Guard treated him unjustly by assigning the RE-4 reenlistment code at the time of discharge. The applicant's record of negative page 7 entries and non-judicial punishments more than support the assignment of the RE-4 reenlistment code.

7. Accordingly, the applicant has failed to prove an error or injustice and his request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

Robert S. Johnson, Jr.

Randall J. Kaplan

Thomas H. Van Horn