DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-212

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FINAL DECISION

This proceeding was conducted according to 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 completed application July 28, 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 April 22, 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 asked the Board to correct her record to show that she received an honorable discharge, instead of a general discharge under honorable conditions, when she was separated on June 11, 1945, because she was pregnant. In support of her allegations, the applicant noted that she was married on January 14, 1945, and she submitted a copy of her under honorable conditions discharge certificate. She did not explain why she waited more than sixty years to complain about her discharge.

SUMMARY OF THE APPLICANT'S MILITARY RECORD

On March 20, 1943, the applicant enlisted in the Coast Guard Reserve. She began active duty on May 18, 1943. On January 14, 1945, while serving as a yeoman, second class (Y2c) at the 7th Naval District in Miami, the applicant married a technical sergeant in the U.S. Army Air Force. On May 23, 1945, a doctor of the Public Health Service reported that a Friedman Rabbit Test performed on May 20, 1945, had shown that the applicant was six weeks pregnant.

On June 4, 1945, the applicant was discharged from the Reserve "under honorable conditions for the convenience of the Government," having served two years, two months, and fifteen days in the service. Her final average marks, on a 4.0 scale, were 4.0 in conduct, 3.52 in performance in rating (PIR), and 3.24 in "ability as leader of men."

VIEWS OF THE COAST GUARD

On December 18, 2009, the Judge Advocate General of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant relief in this case. In so doing, he adopted the findings and analysis in a memorandum prepared by the Personnel Service Center (PSC). The PSC noted that there is no document in the applicant's record expressly stating that she was discharged because of her pregnancy. The PSC also noted, however, that the applicant's final average conduct and PIR marks met the standard for an honorable discharge published in Personnel Bulletin No. 4-46, which was made retroactive to April 6, 1944. The PSC stated that under current standards, pregnant women are retained in the service instead of being awarded general discharges. Therefore, the PSC concluded that in the interest of fairness and equity, the Coast Guard would not object to upgrading the applicant's general discharge to honorable.

APPLICANT'S RESPONSE TO THE COAST GUARD'S VIEWS

On January 29, 2010, the Board received the applicant's response to the advisory opinion. She stated that she accepted the recommendation of the Coast Guard.

APPLICABLE REGULATIONS

Article 583 of the 1940 Regulations for the United States Coast Guard states that "[t]he Commandant, without recourse to a board, may direct the discharge of an enlisted man under honorable conditions for the convenience of the government." Article 584(4) provides that honorable discharges were awarded for any of five reasons: expiration of enlistment; convenience of the government; hardship; minority (age); and disability not the result of own misconduct. A general discharge under honorable conditions could be awarded "for the same reasons as an honorable discharge and issued to individuals whose conduct and performance of duty have been satisfactory but not sufficiently deserving or meritorious to warrant an honorable discharge." However, women who were discharged because of pregnancy commonly received general discharges under honorable conditions during World War II. In 1955, the Coast Guard issued a new Personnel Manual, CG-207, under which women who became pregnant received honorable discharges.

ALCOAST (P) 101, issued on June 12, 1946, stated the following:

> Effective immediately [PIR] mark for honorable discharge will be [2.75] instead of [3.0]. Make changes in PB No. 4-46 … . This change retroactive to 6 April 1944. Any individual discharged on or subsequent to 6 April 1944 with discharge under honorable conditions … solely because [PIR] mark was below [3.0] but mark [2.75] or above may forward his certificate of discharge to [Headquarters] with request that he be issued an honorable discharge form … . The matter will be given the widest publicity.

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 received her discharge under honorable conditions in 1945, and pregnancy has not been an authorized basis for a general discharge since 1955. Therefore, the Board finds that the application is untimely.

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."[1]

4. The applicant long delayed her application to upgrade her discharge to honorable and has not explained or justified the delay. However, a cursory review of the merits indicates that the applicant's discharge under honorable conditions is unjust. Therefore, the Board will excuse the untimeliness of the application and waive the statute of limitations.

5. The applicant's Coast Guard record indicates that she was discharged for the convenience of the Government, and her perfect conduct marks and good PIR marks met the standards for an honorable discharge under ALCOAST (P) 101. Therefore, it appears that, but for her pregnancy, the applicant would have received an honorable discharge. As there is nothing about pregnancy that would make a woman's military service "not sufficiently deserving or meritorious to warrant an honorable discharge," in accordance with the standard applied to members under Article 584(4) of the 1940 regulations, the Board finds that the applicant's general discharge under honorable conditions constitutes a clear, significant injustice[2] in her record, which should be corrected.

6. Accordingly, relief should be granted by correcting the applicant's military record to show that she received an honorable discharge, and the Coast Guard should send her an honorable discharge certificate.

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[1] *Allen v. Card*, 799 F. Supp. 158, 164-65 (D.D.C. 1992); s*ee Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

[2] 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). "Indeed, 'when a correction board fails to correct an injustice clearly presented in the record before it, it is acting in violation of its mandate.'" *Roth v. United States*, 378 F.3d 1371, 1381 (Fed. Cir. 2004) (quoting *Yee v. United States*, 206 Ct. Cl. 388, 397 (1975)). And "[w]hen a board does not act to redress clear injustice, its decision is arbitrary and capricious." *Boyer v. United States*, 81 Fed. Cl. 188, 194 (2008).

ORDER

The application of xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCGR, for correction of her military record is granted. The Coast Guard shall correct her record to show that she received an honorable discharge and shall send her an honorable discharge certificate.

Evan R. Franke

James E. McLeod

Adrian Sevier