DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2010-002

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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 after receiving the applicant's completed application on October 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 July 15, 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" as an E-1 on August 8, 1980, asked the Board to correct his record to show that he received an honorable discharge as an E-2. The applicant alleged that prior to his discharge, he had a heart-to-heart talk with a chief warrant officer (CWO) and told him that he wanted to leave the Service. The applicant alleged that he had a significant reason for wanting to leave the Service but declined to reveal that reason to the Board in his initial application.

The applicant alleged that the CWO told him that he would receive an honorable discharge as an E-2 and that he would be able to reenlist later. However, he was lied to in this regard and did not receive the discharge he was promised. The applicant alleged that he did not actually have to leave the military and was not "kicked out" but voluntarily agreed to be discharged based upon the CWO's false promises. Moreover, the applicant alleged, he was told that there was nothing wrong with his discharge and that he would not have accepted the discharge had he known that it would prevent him from being hired by government agencies.

The applicant alleged that he discovered the error and injustice in his record on August 1, 2009, when he realized that he was being denied government jobs that he was well qualified for because of 30-year-old information on his DD 214. He alleged that when he applied for a job at a medical facility of the Department of Veterans Affairs (DVA), his general discharge was held against him.

Regarding the circumstances of his enlistment and discharge, the applicant noted that he was just 17 years old when he enlisted and was "going through growing pains of my own experimenting with alcohol and drugs." He joined the Coast Guard to escape a very troubled family life but his recruiter should not have enlisted him because he was not ready for the responsibility. After enlisting, he enjoyed going on search and rescue missions but "could tell at that time something was lacking in my character. I did not fit in."

The applicant apologized for having given his superiors "a hard time" and making them dislike him and for being a "smart aleck kid, who needed to grow up. I just felt picked on, and did not know how to deal with it. I regret now I did not stay on, as I was not being fired or kicked out." The applicant stated that he was not discharged for misconduct and that there were no grounds for awarding him a general discharge.

The applicant stated that after his discharge it took him almost ten years to distance himself from his wayward lifestyle, to quit drugs and alcohol, and to stabilize his life. He argued, however, that his discharge should be upgraded because he is no longer a troubled 17 year old. He has become a mature citizen who has owned his own construction company for eleven years. He employs others and thus benefits his country.

In support of his allegations, the applicant submitted a certificate showing that he has received a high school equivalency diploma and several letters of reference, including letters from five clients for whom he has built or renovated homes and who highly praised his honesty, integrity, and the quality of his construction; one letter from a carpenter who is a subcontractor for the applicant's company and who stated that the applicant has strict policies against cutting corners and "maintains a very high sense of quality"; and one from a regional sales manager, who stated that he had observed the applicant's construction of a home in his neighborhood and that the applicant was very conscientious and built a high-quality house. The applicant also submitted a copy of his credit report, which is excellent, and an Oklahoma State criminal background check showing that he paid for a search of their records in October 2009 and that no criminal record was found for him.

The applicant also asked, if the Board upgrades his discharge, to have it upgraded in his legal name. He submitted evidence showing that he enlisted and served under a name that he had used since age 8, when his mother had him adopt a new first name and his new stepfather's last name, although he was not legally adopted by his stepfather. He stated that he reverted to using the name on his birth certificate after he was discharged from the Coast Guard.

SUMMARY OF THE APPLICANT'S MILITARY RECORD

On June 26, 1979, at age 17, the applicant enlisted in the Coast Guard. The recruiter noted that the name on the applicant's birth certificate was different from the name on all of his other official documents but that the different names were for "one and the same person."

On September 19, 1979, the applicant graduated from boot camp and advanced from E-1 to E-2. He received a conduct mark of 4.0 (out of 4.0) at the end of boot camp. He was assigned

to Group Xxxxx, xxxxxxxx. On a regular, semiannual evaluation dated December 31, 1979, the applicant received a mark of 2.7 for proficiency and performance and a mark of 4.0 for conduct.

On January 28, 1980, a chief petty officer at Group Xxxxx prepared a Page 7, which the applicant signed, stating that he had observed the applicant's performance for four months and that it was still unsatisfactory even though he had "interviewed" the applicant five times about his performance. He noted that there had been "some improvement" but that the applicant tended to wander off the job and showed little initiative or pride in his work. He also noted that the applicant had to be told things two or three times before he would do something.

On February 20, 1980, the applicant was punished at mast and received non-judicial punishment (NJP) for having been absent without leave (AWOL) for nine hours and for disobeying a lawful order. He was restricted to base with extra duties for seven days and forfeited $50 per month for one month. Pursuant to the mast, the applicant received an evaluation with a conduct mark of 3.0.

On February 27, 1980, the applicant was punished at mast and received NJP for wrongfully appropriating a musical tape of another E-2, Mr. H. His punishment was reduction in rate from E-2 to E-1 and forfeiture of $50 per month for two months.

On March 5, 1980, a psychiatrist reported that he had examined the applicant, who admitted to a juvenile criminal history progressing from shoplifting to auto theft, to using LSD on five or six occasions ("most recently a week and a half ago"), and to using marijuana "on a more or less daily basis." The applicant told the psychiatrist that he had joined the Coast Guard "to keep [his] ass out of jail" because the sheriff had told him that if he enlisted, the charges of auto theft would be dropped. The psychiatrist reported that the applicant showed

> no evidence of psychotic thought disorder, no paranoia, no hallucinations or delusional thinking. He does not have schizophrenic thinking disorder, manic or depressive illnesses; no suicidal ideation is apparent. He does not have dangerous impulsivity nor are there any specific neurotic symptoms.
>
> [The applicant] relates that he has come to grief in the Coast Guard because of his behavior. He believes that he has been misunderstood in that his entering another coastguardman's room to borrow some items has been seen by the authorities as theft. He does admit the room was locked, but has ready rationalization for his behavior.
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> After considerable discussion with [the applicant], it appears that he does not have a psychotic or neurotic mental disorder, but does have antisocial personality characteristics.

The psychiatrist recommended that the applicant be administratively discharged or given more guidance and supervision to see if he could adjust to military life.

On March 12, 1980, the Group Commander notified the applicant that he was recommending that the applicant receive an honorable discharge for unsuitability because of his negative attitude, apathy, lack of discipline, emotional instability, and inability to adapt to military life. He noted that what type of discharge the applicant would receive would be determined by

the Commandant. He advised the applicant of his right to disagree with the discharge and to submit a rebuttal statement.

On March 13, 1980, the applicant acknowledged receiving notification of his proposed discharge for unsuitability. He waived his right to submit a statement and noted that he did not object to being discharged.

The applicant's acknowledgement and waiver were forwarded with the Group Commander's recommendation for discharge to the Commandant. In his recommendation, the Group Commander stated that the applicant had been a marginal, apathetic performer despite numerous counseling sessions and that he lacked discipline and was emotionally unstable. The Group Commander noted that the applicant had been awarded NJP twice and "appears to be non-responsive to traditional disciplinary methods." In addition, he stated that the applicant had been referred to a local psychiatrist for consultation, who "revealed no specific mental disorder" but confirmed suspicions of drug abuse.

On April 24, 1980, the Officer in Charge (OIC) of Station Xxxxx informed the Commandant that the applicant had been arrested by the St. Louis County Sheriff's Office in Xxxxx that morning for extradition to Madison, Wisconsin, on a charge of "delivery of a controlled substance, contents THC" (a component of marijuana).

On May 1, 1980, the Group Commander reported to the Commandant that the applicant was in jail, had been scheduled for an extradition hearing due to a felony arrest warrant, and had not been able to "make bail" set at $5,000.

On May 7, 1980, the applicant's command reported that the applicant's mother had agreed to post bond for him. The applicant waived extradition and was sent to Wisconsin. On May 11, 1980, the applicant was released on bail. However, he did not return to his unit and remained AWOL until July 23, 1980.

On May 23, 1980, the District Commander forwarded the recommendation for the applicant's discharge to the Commandant but recommended that the applicant be discharged by reason of personality disorder due to his "antisocial personality characteristics." He stated that his recommendation was substantiated by the applicant's behavioral patterns.

On June 5, 1980, the Commandant instructed the applicant's command to advise him of the proposed discharge for unsuitability, of his right to submit a statement objecting to the proposed discharge, and of his right to consult counsel if a general discharge was indicated by the applicant's marks.

On June 9, 1980, while the applicant was still AWOL, the Group Commander sent a letter addressed to him at his home address of record advising him that the Commandant had issued the order for his discharge. The letter states that because his average proficiency mark was below 2.7, he would receive a general discharge and was therefore entitled to consult an attorney. He was advised of how to telephone the District legal office. The Group Commander also

advised him that he could submit a letter on his own behalf and that if he did not want to do so, he should indicate that.

On June 30, 1980, on his regular, semiannual performance evaluation, the applicant received a proficiency mark of 1.9 and a conduct mark of 2.4.

On July 10, 1980, the Group command advised the Commandant that they were unable to discharge the applicant because he was still AWOL.

On July 23, 1980, the applicant returned to his unit from being AWOL. On July 24, 1980, he was punished at mast and awarded NJP of a $100 forfeiture. Pursuant to the mast, he received a performance evaluation with a conduct mark of 2.0

On July 25, 1980, the Group Commander notified the Commandant that the applicant had "entered a voluntary plea of guilty to the lesser charge of possession (vice delivery) of a controlled substance" in Madison, Wisconsin, on July 23, 1980, and had surrendered himself to Coast Guard jurisdiction later that night.

On August 4, 1980, the applicant signed an acknowledgement of having received the Group Commander's letter dated June 9, 1980, regarding his pending general discharge. The applicant also acknowledged that he had a right to consult counsel but indicated that he did not wish to do so and did not wish to submit a statement objecting to the recommended discharge.

On August 8, 1980, the applicant received a general discharge under honorable conditions for "Unsuitability" with an RE-4 reenlistment code (ineligible to reenlist). His final average marks were 2.30 for proficiency and 3.08 for conduct.

VIEWS OF THE COAST GUARD

On March 12, 2010, the Judge Advocate General (JAG) submitted an advisory opinion in which he recommended that the Board deny relief. In so doing, he adopted the facts and analysis provided in an enclosed memorandum prepared by the Coast Guard Personnel Service Center (PSC).

The PSC stated that the application was not timely and should be denied for untimeliness. The PSC also argued that the applicant's case lacks merit because under the Personnel Manual, general discharges were normally awarded to members with final average marks of less than 2.7 for proficiency or less than 3.0 for conduct. The PSC stated that the applicant's low final average proficiency mark warranted a general discharge. The PSC further noted that after it was determined that the applicant's marks warranted a general discharge, he was offered the opportunity to consult an attorney, which he declined. The PSC argued that the applicant's discharge was carried out in accordance with applicable policies and procedures at the time and that the applicant has failed to substantiate any error or injustice.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On April 1, 2009, the Board received the applicant's response to the views of the Coast Guard. The applicant admitted that he had a poor attitude and performance in the Coast Guard but asked the Board to upgrade his discharge based on his post-service conduct if at all possible.

The applicant alleged that he was never told that he might receive something other than an honorable discharge. He alleged that there is no letter in his record expressly advising him that he might receive a lesser discharge.

The applicant alleged that he originally requested discharge because after he was assigned to Station Xxxxx in November 1979, an older member, Mr. H, befriended him. One night when they were going out for a drink in Mr. H's pickup truck, Mr. H began singing the lyrics to a song, "boys, boys, it's a beautiful thing, boys," and making suggestive comments to him. Mr. H then scooted over on the seat, put his hand on the applicant's thigh near his crotch, and tried to kiss him. The applicant pushed him away, told him to stop, and asked him if he was gay. When Mr. H admitted it, the applicant said, "I'm not." Mr. H tried to touch him again, and the applicant removed his hand and told him to drive him back to the base. Mr. H asked him not to tell. When the applicant asked him, "Why shouldn't I," Mr. H said, "Don't tell. I have friends here." Later that week, he was invited to a boat to play cards and drink. There, he was confronted by four older and larger Coast Guard members, who cornered him. One of them started to punch him. He began to cry. They told him that he better not say anything about being "hazed" and that he should leave Mr. H alone. The applicant stated that he never reported these events because he thought it would do no good and that he would be labeled a snitch. The next day, Mr. H took an empty baggie with traces of marijuana in it to the OIC and told him that he had found it under the applicant's pillow. The applicant denied the baggie was his but was reprimanded and received a suspended punishment. Therefore, he asked, "Can you blame me for my 'attitude' and not speaking up?" He stated that the baggie in fact belonged to Mr. H, and it was a matter of "the pot calling the kettle black."

The applicant alleged that when he told the CWO that he wanted to leave the Service, he was advised that he could get away from Xxxxx by going to radioman's school instead, but he refused. He alleged that he would not have been invited to go to radioman's school if his performance marks were not good enough for an honorable discharge. Moreover, he stated, if his marks were not good enough for an honorable discharge, then he should not have been told that he would get an honorable discharge. In addition, he argued that his marks were "close enough" for an honorable discharge.

The applicant stated, with regard to his arrest, that it was not related to his service in the Coast Guard, that the offense had occurred prior to his enlistment when he was still a juvenile, and that it was a misdemeanor, not a felony. He stated, "I myself never did anything wrong to the Coast Guard, or to anybody." He also alleged that he never received any counseling and that the Coast Guard took advantage of his youth and innocence, demoralized him, and then let him "fall through the cracks." He alleged that the Coast Guard acted cowardly, showing "less concern than they would in rescuing a civilian from troubled waters. I was abandoned, and hung out to dry." The applicant denied having a personality disorder, which he alleged would have pre-

cluded his ability to succeed in business. He also argued that he received a general discharge because he had asked to be discharged and the Coast Guard did not want to look bad.

The applicant alleged that the Coast Guard is refusing to admit that it made any mistakes in his case and wants to cover up even the suggestion that it made a slight error. He stated that he has become a hard-working, sober taxpayer and an upright general contractor, and asked, "Why couldn't the Coast Guard see that about me then." With regard to the Coast Guard's allegation that his application was not timely, he asked, "is there a statute of limitation in doing the 'right thing to your fellow man'?" The applicant also alleged that a judge would not allow the documents in his record, many of which were not signed by him or addressed to him, to be admitted into evidence in a court of law.

APPLICABLE REGULATIONS

Article 12-B-2 of the Personnel Manual in effect in 1980 (CG-207) stated that a member could receive an honorable discharge for unsuitability if the member's final average marks were at least 2.7 in proficiency and 3.0 in conduct. Members being discharged for unsuitability whose marks did not meet those standards could receive general discharges.

Article 12-B-16(b) of the manual authorized the Commandant to direct the discharge of an enlisted member for "unsuitability," due to, *inter alia*, apathy, defective attitude, or personality disorders as "determined by medical authority." Article 12-B-16(h) stated that when a psychiatric condition was a consideration in the discharge for unsuitability, the member should be examined by a psychiatrist.

Under Article 12-B-16(d), prior to recommending a member for such a discharge, the CO was required to notify the member of the proposed discharge; afford him the opportunity to submit a statement on his own behalf; and, if a General discharge was contemplated, allow him to consult with an attorney.

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 over this matter under 10 U.S.C. § 1552(a).

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. Although the applicant alleged that he discovered the error in his record in 2009, the Board finds that he has known that he received a general discharge for unsuitability since 1980. Therefore, his 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 seeking correction of his general discharge and did not provide a compelling explanation for his delay.

5. The applicant alleged that he was tricked into accepting a general discharge because he had been told he would receive an honorable discharge. The Board's review of the record shows that he was originally recommended for an honorable discharge but was advised on March 12, 1980, that what type of discharge he received would be determined by the Commandant. Moreover, the applicant subsequently went AWOL. After he went AWOL, on June 9, 1980, the Group Commander sent him a letter notifying him that he would receive a general discharge and so was entitled to consult an attorney. On August 4, 1980, the applicant acknowledged receipt of the June 9, 1980, letter and waived his right to consult an attorney and to submit a statement objecting to his discharge. The applicant received poor marks each of the three times he was punished at mast and on his semiannual evaluations. His final average marks clearly warranted a general discharge under Article 12-B-2 of the Personnel Manual.

6. The applicant argued that his discharge should be upgraded because of his post-service conduct, and he submitted several letters of reference, a credit report, and a police investigation indicating that he has long been an upstanding citizen. In 1976, however, the Board received the following instruction regarding veterans' discharges from the delegate of the Secretary, which he stated was to be "binding on the Board until specifically reversed by one of my successors":[2]

> [T]he board should not upgrade discharges solely on the basis of post-service conduct. … This emphatically does not mean that the justness of a discharge must be judged by the criteria prevalent at the time it was rendered. The Board is entirely free to take into account changes in community mores, civilian as well as military, since the time of discharge was rendered, and upgrade a discharge if it is judged to be unduly severe in light of contemporary standards … [T]he Board should not upgrade a discharge unless it is convinced, after having considered all the evidence …, that in light of today's standards the discharge was disproportionately severe vis-à-vis the conduct in response to which it was imposed.

In light of the applicant's repeated misconduct while on active duty, the Board is not persuaded that his general discharge was disproportionately severe.

7. The applicant received all due process with regard to his general discharge for unsuitability. In accordance with Article 12-B-16 of the Personnel Manual, he was evaluated by a psychiatrist on March 5, 1980, notified of the reason for his pending discharge and the type of discharge he would receive (general) on August 4, 1980, and informed of his right to consult an attorney and to submit a statement objecting to his discharge, although he opted not to exercise

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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] Memorandum of the General Counsel, U.S. Department of Transportation, to J. Warner Mills, et al., Board for Correction of Military Records (July 8, 1976) (on file with the Board).

those rights. The applicant's allegations of abuse are not supported by evidence and are insufficient to overcome the presumption of regularity[3] and to prove that his general discharge for unsuitability is erroneous or unjust.[4]

8. Accordingly, the application should be denied for untimeliness. The Board will not waive the statute of limitations in this case because the applicant's claims cannot prevail on the merits.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

[3] 33 C.F.R. § 52.24(b).

[4] For purposes of the BCMRs under 10 U.S.C. § 1552, "injustice" is "treatment by military authorities that shocks the sense of justice." *Sawyer v. United States*, 18 Cl. Ct. 860, 868 (1989), *rev'd on other grounds*, 930 F.2d 1577 (citing *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976)).

ORDER

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

Francis H. Esposito

Jeff M. Neurauter

Adrian Sevier