

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2010-138

XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX

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 upon receipt of the applicant's completed application on March 19, 2010, and subsequently prepared the final decision for the Board as required by 33 CFR § 52.61(c).

This final decision, dated December 30, 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 his record by changing his RE-4 (not eligible to reenlist) reenlistment code to RE-1 (eligible for reenlistment) and/or to change his separation code to reflect "the changeable condition of citizenship" so that he can enlist in the Army Reserve.

On August 19, 1988, the applicant was honorably discharged by reason of expiration of enlistment with a KBK (voluntary discharge upon the expiration of enlistment) separation code and the RE-4 reenlistment code. At the time of his discharge, he had served for four years in the Coast Guard.

The applicant alleged that the RE-4 reenlistment code was assigned solely because he was not a citizen of the United States at the time of his discharge. He argued that the RE-4 reenlistment code does not reflect the quality of his performance while on active duty. He asserted that the RE-4 code is unjust and prejudicial because the DD 214 is used by local, state, and the federal government. He stated that citizenship is not a requirement to join the Army reserve and that the RE-4 reenlistment code is the only issue blocking his enlistment in the Army Reserve. The applicant submitted documents from an Army recruiter stating that he was not eligible to apply for enlistment in the Army because of the RE-4 reenlistment code.

The applicant stated that he discovered the alleged error on February 19, 2010, and that it is in the interest of justice for the Board to consider the application even if it has been more than three years since he discovered the error because he was an honorable and contributing member of the Coast Guard, and he will be a contributing member of the Army Reserve. He stated that he deserved the chance to continue to serve the United States. Because of his age, he stated that he had to enlist by his birthday in May 2010.

VIEWS OF THE COAST GUARD

On July 7, 2010, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board grant partial relief. The JAG attached comments from the Commander, Personnel Service Center (PSC) as a part of the advisory opinion. PSC stated that the application should be denied because it was untimely. However, if the Board waives the untimeliness, PSC stated the following:

[According to an administrative remarks page (page7)], "Follow-up reenlistment interview conducted this date . . . Member advised he is not recommended for reenlistment as initially counseled on February 23, 1988. Member is not a U.S. citizen, and therefore cannot reenlist. He is assigned reenlistment code RE-4 for this reason. Member states his intentions are not to seek reenlistment.

According to [the Separation Program Designator (SPD) Handbook], the most appropriate separation for the applicant should have been JCP . . . for "Involuntary discharge directed by established directives . . . when a member is not a citizen of the United States or fails to complete naturalization procedures. For this separation code, a reentry code of either RE-3A or RE-4 is authorized.

According to ALCOAST 125/10, updated guidance . . . stipulates for separation code JCP, a reentry code of RE-3 is default.

In accordance with today's policy, the applicant would have been discharged with a separation code of JCP and a reentry code of RE-3.

PSC recommended that a DD 215 be issued correcting block 26 of the DD 214 to read JCP and block 27 to read RE-3.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 14, 2010, the Board received the applicant's response to the views of the Coast Guard. The applicant restated the position taken in his basic application. He stated that he disputes the Coast Guard's opinion and sees no discussion or reason why the RE-4 cannot be changed to RE-1. He stated that ALCOAST 125/10 states that "RE codes provide a mechanism for categorizing reenlistment eligibility based upon the individual's reason for discharge and their service record." The applicant offered following: "Even though it is not standard, the opinion could have come up with the conclusion of KBK/RE-3A if they were inclined to consider my service record."

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 section 1552 of title 10 of the United States Code.

2. The application was not timely. To be timely, an application for correction of a military record must be submitted within three years after the applicant discovered or should have discovered the alleged error or injustice. See 33 CFR 52.22. The applicant claimed that he did not discover the alleged error until February 19, 2010. However, he should have discovered it at the time of discharge because the RE-4 reenlistment code is written on his DD 214. His signature is also on the DD 214. Therefore his application was submitted approximately nineteen years beyond the statute of limitations. The applicant argued that it is in the interest of justice to waive any untimeliness because he was an honorable and contributing member of the Coast Guard. However, his reason does not explain why he could not have filed his application sooner.

3. 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.

4. Notwithstanding the Board's finding 2 above, a cursory review of the merits reveals that there is an error on the applicant's DD 214 that is potentially prejudicial and should be corrected. Therefore, the Board will waive the untimeliness in the interest of justice so that the applicant's DD 214 can be corrected to accurately depict his reenlistment code. In this regard, the JAG argued that the KBK separation code currently on the DD 214 is incorrect and stated that JCP is the correct separation code according to the SPD handbook. JCP means that the applicant's discharge was involuntary and directed by established directives because he was not a citizen the United States and failed to complete the naturalization process. However, the applicant disagrees with changing his separation code and argues that expiration of enlistment was the reason for his discharge. According to the DD 214, he completed his four years of active duty. The Board will not change the separation code to JCP because he was not discharged because of his alien status, although he was prohibited from reenlisting because of it.

5. The Board agrees with the applicant that the only reason he was given the RE-4 was because he was not a citizen of the United States at the time of his discharge. Therefore, the Board will correct the applicant's reenlistment code to RE-3A (alien).

6. The applicant is not entitled to an RE-1, which means eligible for reenlistment, because Articles 1.G.5.1.5. and 12.B.4.a. of the Personnel Manual state that an alien who fails to become a naturalized citizen is not eligible to reenlist in the Coast Guard. The applicant has offered no evidence that he was a naturalized citizen at the time of discharge. Nor has he offered any evidence that he is currently a naturalized citizen.

7. With regard to the Army Reserve, an RE-3A is not an absolute bar to reenlistment. It means that the applicant is eligible for reenlistment in the armed service, except for the disqualifying factor of being an alien. The Army Reserve has the option of waiving the RE-3A reenlistment code and enlisting the applicant.

8. Accordingly, the applicant is entitled to the partial relief discussed above.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of former XXXXXXXXXXXXXXXX, USCG, for correction of his military record is granted in part as follows:

Block 27 of his DD 214 shall be corrected to show reenlistment code RE-3A.

No other relief is granted.

Julia Andrews

Darren S. Wall

Kenneth Walton