DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2010-222

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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 upon receipt of the applicant's completed application on August 2, 2010, 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 28, 2011, 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 military record by upgrading his general discharge from the Coast Guard Reserve on December 19, 1994, to an honorable discharge; by upgrading his reenlistment code (ineligible to reenlist) to RE-1 (eligible to reenlist); and by changing his separation code from HKD, which denotes an involuntary discharge when a member has been absent without leave, and his narrative reason for discharge from "Misconduct (shirking)."

The applicant stated that after enlisting in the Reserve under the RK program for students on March 27, 1990, he began college, performed two satisfactory years of service, received several awards, and successfully completed the seaman and MRN-E3 courses for advancement to seaman (SN/E-3). However, in January 1991, he transferred from a regular college to Maine Maritime Academy. Therefore, in the spring of 1992, he was an academic sophomore but a technical freshman. As such, in addition to taking a full course load, he had to attend many required training activities, such as fire fighting and damage control training and ship-familiarization exercises, to prepare for a 60-day practical training cruise from early May through early July, which was required by the Coast Guard for licensing in the merchant marine.

The applicant alleged that the numerous training requirements hindered his ability to leave campus and travel three hours to drill with his Reserve unit in the spring and summer of 1992. Therefore, he used his unit's "apparently unofficial system of being excused from drill exercises," in which reservists who could not attend drill would contact one of the station's

senior enlisted members to inform them of the problem and then make up the missed time later, often by adding time to the two-week active duty training period. However, his academic and technical training workload did not allow him to complete the two-week active duty training period or to make up missed drills in 1992 because he had to participate in the freshman training cruise from early May 1992 to early July 1992 and was then "required to participate in a cooperative education experience from mid-July 1992 through late August 1992, during which [he] was employed as an entry-level mariner aboard a commercial towing vessel operating on the U.S. West Coast, in the Pacific Ocean and within the Hawaiian Islands." Therefore, the applicant was unable to complete his Reserve obligations during his anniversary year (AY) from March 27, 1992, to March 26, 1993.

The applicant alleged that although he had explained and sought pre-approval for his inevitable absences, he later learned that his command had simply marked him as absent instead of explaining to the Personnel Command why he had been unable to drill or perform annual training. The applicant noted that in light of his condensed training and academic schedule, he now believes that someone should have suggested he transfer to the inactive status list.

When the applicant returned to the maritime academy in the fall of 1992, he resumed drilling and drilled regularly from October 1992 through February 1993. Although he remained in the Reserve through December 2004, he "cannot accurately document my attendance, or potential lack thereof, at drill exercises" after March 1993 because he did not receive a Retirement Points Statement for AY 2004 or 2005. However, he noted that he was aboard a ship for a senior training cruise from late April through mid July 1993. However, thereafter he would have been available to make up for missed drills.

The applicant alleged that in 1994, during a Service-wide reduction in force, he accepted an offer of an early discharge without penalty. He alleged that in the documentation he received from the Coast Guard, "a general discharge with automatic upgrade to honorable discharge after a 6 month(s) incident-free probationary period was offered." However, he had to forfeit any remaining educational benefits and return all equipment and gear, if any, to the unit. There was a great deal of legal language, which he cannot remember, but given the opportunity of an apparently "amicable dissolution" of his Reserve enlistment, he signed and returned the papers because as a senior at the maritime academy, he had even less available time to leave campus than before. The applicant thereafter believed that his general discharge would be automatically upgraded to honorable six months later, and that with an honorable discharge, a merchant mariner license, and a college diploma, he could enter the next phase of his life unencumbered.

The applicant stated that quite unexpectedly, he eventually received a letter—his discharge paperwork—dated dated December 19, 1994, "which detailed determinations contrary to those I'd been led to believe would materialize." The letter included a vague allegation of misconduct "with no explanation other than the word 'shirking'." This letter also noted that he had received an RE-4 reenlistment code and an HKD separation code. The applicant alleged that he repeatedly requested an explanation or documentation regarding "the near-complete reversal executed by the United States Coast Guard (Reserve)" but learned nothing new. The applicant argued that this reversal from what he had agreed to was unjust. Therefore, he asked the Board to upgrade his discharge and reenlistment code. He noted that since his discharge, he has com-

pleted his bachelor's degree, is working on a master's degree, and has been a good citizen, neighbor, and family member.

The applicant stated that he discovered the alleged errors in his record on April 15, 2009, when he tried to reenlist and learned that his general discharge had never been upgraded; that it had been issued for misconduct (shirking); and that he was unable to reenlist.

SUMMARY OF THE APPLICANT'S MILITARY RECORD

On March 27, 1990, while a student at Southern Maine Technical College, the applicant enlisted in the Coast Guard Reserve for eight years under the RK program as a seaman apprentice. The Statement of Understanding he signed that day states the following in pertinent part:

> 1. …I understand that I will be required to participate satisfactorily (see paragraph 5) in the Selected Reserve until six years from the anniversary of my enlistment. For the last two years of my obligation, I will not be required to participate in the Selected Reserve. …
>
> 2. I will be ordered to IADT (Phase 1 – recruit training) within 180 days from the date of enlistment. I will be released in time to meet the convening dates of my education program. I may be required to complete recruit training during the summer.
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> 3. Upon enlistment, I will be assigned to a Coast Guard Reserve Unit (CGRU) and required to participate satisfactorily (see paragraph 5) in this unit for at least the first six years of my eight-year obligation. If I fail to participate satisfactorily I may be discharged, possibly under other than honorable conditions, or ordered involuntarily to active duty for a period of 24 months… [Paragraph 4. omitted.]
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> 5. Satisfactory participation is defined as:
>   a. successful completion of two phases of IADT. Phase I will be recruit training (at least eight weeks). Phase II will be Class A school (at least 10 weeks). If I am unable or unqualified to attend Class A school, Phase II will be on-the-job training (at least 12 weeks). …
>   b. Attending at least two single drills each month at my reserve unit in the first period between IADT phases; at least four single drills between subsequent inter-phase periods, if any.
>   c. Upon completion of Phase II, attendance at, and satisfactory performance in at least 48 scheduled drills and at least 12 days ADT each anniversary year until six years from the anniversary of my enlistment. In lieu of this requirement, satisfactory service of not more than 30 days active duty each year …
>   d. Satisfactory performance, adaptability, military behavior, and appearance for the full term of my enlistment.

From May 22 through July 13, 1990, the applicant attended recruit training and graduated with a Basic Training Honor Graduate Ribbon and a Coast Guard Bicentennial Unit Commendation Ribbon. He performed 4 drills in August, 8 in September, 4 in November, and 4 in December 1990, as well as 4 drills each in January and March 1991.

The applicant performed 4 drills in April 1991 and then performed active duty for training from May 12 through August 22, 1991. He advanced to seaman on September 1, 1991. He also completed 4 drills each in November and December 1991 and 4 drills in January 1992.

In AY 1993, running from March 27, 1992, to March 26, 1993, the applicant performed no active duty for training and 1 drill in October, 4 drills each in November and December 1992, and 4 drills each in January and February 1993. He did not perform any drills or active duty for training after February 1993.[1]

On September 20, 1994, the First District Commander sent the applicant a letter notifying him that he had been transferred from the Selected Reserve to the Individual Ready Reserve.

On December 19, 1994, the Commandant responded to a letter from the First District Commander, dated October 17, 1994, and authorized the applicant's general discharge "by reason of misconduct (shirking)" with an HKD separation code and an RE-4 reenlistment code.

On December 19, 1994, the applicant received a general discharge for misconduct (shirking) with an HKD separation code and an RE-4 reenlistment code.

VIEWS OF THE COAST GUARD

On November 15, 2010, the Judge Advocate General (JAG) submitted an advisory opinion in which he recommended that the Board deny the requested relief. In so doing, he adopted the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC).

The PSC stated that the application is untimely since the applicant could have applied for an honorable discharge when the Coast Guard failed to upgrade it within six months of his discharge, as he alleged he expected. The PSC stated that the applicant never applied to the Discharge Review Board and recommended that the Board not "excuse the applicant's gross untimeliness in this case."

The PSC stated that the Statement of Understanding shows that the applicant was informed of the participation requirements when he enlisted in 1990. The PSC noted that the applicant's participation was satisfactory during his first two years, AY 1991 and 1992 but unsatisfactory thereafter. The PSC stated that under Article 4.B.2.a.3. of the current Reserve Personnel Manual, it is compulsory to separate a seaman after two consecutive unsatisfactory years. The PSC noted that the record contains the Commandant's discharge orders in response to the request of the First District Commander.

Thus, the PSC concluded that the record supports the applicant's general discharge for shirking and noted that his military records are presumptively correct. In addition, the PSC argued that there is nothing in the record that substantiates the applicant's claim that he was discharged pursuant to a reduction in force or that his general discharge should have been upgraded six months after his separation. Therefore, the PSC recommended that the Board deny relief because the applicant "has failed to substantiate any error or injustice with regards to his record."

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[1] The applicant's Leave and Earnings Statement for September 1993 states that he had completed only 17 drills in fiscal year 1993, which began on October 1, 1992. His Retirement Point Statements show that the 17 drills were all performed before February 1993. His Leave and Earnings Statements from September 1993 through August 1994 show that he performed no more drills.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On December 22, 2010, the applicant responded to the views of the Coast Guard. The applicant alleged that his application is timely because the Coast Guard failed to notify him in 1994 that his discharge had been classified as general in perpetuity.

The applicant repeated his allegations about how his academic obligations interfered with his prior commitment to serve in the Reserve and about his unit's informal system of explaining absences from drill and making them up at a later date. He stated that since he enlisted under the RK program, which was designed expressly for students, the Coast Guard should have expected that some students might be unable to fulfill their Reserve obligations. In addition, he alleged that the Coast Guard did not fulfill its obligations to him because, while he was led to believe that he would be exposed to all of the various opportunities the Coast Guard had to offer, during his first year, he was assigned to perform menial tasks and participate in classroom discussions at a large shore unit, and he was not assigned to a small boat station until he requested it. The applicant also noted that only 50 points are required for satisfactory participation and he earned well more than 50 points during his first two years in the Reserve.

The applicant also repeated his allegations about having been offered an early general discharge, pursuant to a reduction in force, that would automatically be upgraded to honorable. He stated that he did not receive information about his discharge until "many months after-the-fact," when he had already graduated from the academy and that his general discharge came "as a complete surprise, especially given the previous discussions and agreement(s)." The applicant stated that he did not fully understand that the determination that he would receive a general discharge was final.

APPLICABLE REGULATIONS

Articles 4-A-1 and 4-B-1 of the Reserve Administration and Training Manual (RAT-MAN) in effect in 1994 provided that members in the RK program with less than two years of active duty were required to attend a minimum of 90% of their 48 scheduled drills each anniversary year and at least 12 days of ADT. Article 4-C-2 stated that failure to meet the participation requirements in Article 4-A-1 or Article 4-B-1 constituted "unsatisfactory participation."

Article 4-C-3 stated that COs should monitor reservists' participation and counsel them to correct deficiencies. Article 4-E-1 stated that, when a member in the RK program with less than two years of total active duty failed to attend drills in response to counseling about unsatisfactory participation, the CO should initiate the member's discharge for misconduct.

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. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.[2]

3. 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 alleged that he discovered the errors in his record in 2009 when he tried to reenlist. However, the Board finds that the preponderance of the evidence shows that the applicant knew in 1994 that he had received a general discharge. Therefore, his application is untimely.

4. 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."[3]

5. Regarding the delay of his application, the applicant alleged that he thought that his discharge had been automatically upgraded to honorable six months after his discharge and that he did not realize that it had not been upgraded until he tried to reenlist in 2009. The Board finds that the applicant's explanation for his delay is unconvincing. According to him, the Coast Guard announced a policy of awarding members general discharges and then doing all of the paperwork to upgrade those discharges six months later if the applicant's conduct was "incident-free," which would have required the Coast Guard to conduct post-discharge background checks on all of the members discharged under the policy. The Board does not believe that the Coast Guard ever announced or adopted such a policy. Moreover, even if for imponderable reasons the Coast Guard actually did announce such a policy, the applicant would have expected to receive an honorable discharge certificate in the mail sometime in 1995 and could have filed his complaint when he did not. The applicant has failed to show that anything prevented him from seeking correction of the alleged errors and injustices in his record more promptly.

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[2] *See Steen v. United States*, No. 436-74, 1977 U.S. Ct. Cl. LEXIS 585, at *21 (Dec. 7, 1977) (holding that "whether to grant such a hearing is a decision entirely within the discretion of the Board"); *Flute v. United States*, 210 Ct. Cl. 34, 40 (1976) ("The denial of a hearing before the BCMR does not *per se* deprive plaintiff of due process."); *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

[3] *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).

6. A cursory review of the merits of this case indicates that the applicant has submitted insufficient evidence to overcome the presumption of regularity.[4] The record contains no evidence that substantiates the applicant's allegations of error or injustice in his official military record, which is presumptively correct.[5] For example, there is no evidence supporting his allegations of excused absences, of an offer of an early discharge under a reduction in force, or of a promise that his general discharge would be automatically upgraded six months after his discharge. The applicant's Retirement Point Statements and Leave and Earnings Statements show that he failed to perform satisfactorily after March 1992 and that he performed no drills or active duty for training at all after February 1993. Therefore, his discharge for misconduct (shirking) under Article 4-E-3 of the RATMAN in December 1994 is supported in the record. In this regard, the Board notes that although the applicant was apparently kept busy with his studies and training to become a merchant mariner, he clearly did not fulfill his commitment to the Coast Guard Reserve. The Board also notes that under the Separation Designator Code Handbook, an RE-4 code is the only reenlistment code authorized for members discharged for misconduct. Therefore, the Board finds that the applicant's claim cannot prevail on the merits.

7. Accordingly, the Board will not excuse the application's untimeliness or waive the statute of limitations. The applicant's request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

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[4] Under the Board's rules, the Board begins its analysis in every case by presuming that the disputed information in the applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust. 33 C.F.R. § 52.24(b).

[5] *Id*.; *see Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992) (citing *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979), for the required presumption, absent evidence to the contrary, that Government officials have carried out their duties "correctly, lawfully, and in good faith.").

ORDER

The application of former xxxxxxxxxxxxxxxxxxxxxxxxx, USCGR, for correction of his military record is denied.

Anthony C. DeFelice

Peter G. Hartman

Vicki J. Ray