

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

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Application for the Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2011-019**

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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 upon receipt of the applicant's completed application and military records on November 11, 2010, and subsequently prepared the final decision for the Board as required by 33 CFR § 52.61(c).

This final decision, dated July 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**

The applicant asked the Board to correct his military record by paying him for 22 days of unused leave that allegedly was owed to him at the time of his discharge. He also requested a change in his unsuitability separation code (separation code 264).<sup>1</sup>

On May 5, 1967, the Commandant directed the applicant's discharge from the Coast Guard with a general discharge due to unsuitability under Article 12-B-10 of the Personnel Manual. The applicant was discharged on May 19, 1967. His DD 214 showed that he received a general discharge and separation code 264. The remarks section of the DD 214 contained the statement: "No. days' leave paid-." On May 26, 1967, the Coast Guard issued a DD 215 correcting the DD 214 to show that the applicant was paid for 22 days of leave. The DD 215 stated, "No. days leave paid – 22." (Emphasis added.)

The applicant alleged that although the DD 215 shows that he was paid for 22 days of leave, he never received any money for the leave. With respect to the separation code, he complained that he was not given a hearing.

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<sup>1</sup> In earlier application, BCMR No. 2006-188, the Board denied the applicant's request for a correction of his military record by upgrading of his general discharge to an honorable discharge and by removing a special court-martial conviction for assault. The issue of the character and type of the applicant's discharge will not be reconsidered in this decision.

### ***Basis for Unsuitability Separation Code***

The applicant enlisted in the Coast Guard on June 7, 1965. On April 25, 1967, the commanding officer informed the applicant that the command intended to recommend to the Commandant that the applicant be administratively discharged from the Coast Guard under Article 12-B-10 of the Personnel Manual due to inaptitude, apathy, defective attitude, inability to expend effort constructively, and financial irresponsibility.

On April 25, 1967, the applicant signed a statement in which he acknowledged that he had been informed of the proposed discharge, that he had been counseled regarding the matter, that he did not wish to submit a statement on his behalf, and that he was in complete accord with the proposed action.

On April 25, 1967, the CO recommended that the Commandant discharge the applicant for unsuitability, due to inaptitude, apathy, defective attitude, inability to expend effort constructively, and financial irresponsibility. The CO provided the following narrative with respect to the applicant:

[The applicant] was assigned to this station after boot camp, reporting 24 August 1965. He performed well, though slow, until August 1966. His slowness was attributed to a slight degree of immaturity, his superiors believing this would pass with time. Since then he has been a continual liability to the command due to his inaptitude, in combination with apathy. He can be trusted to perform only the most menial and simple tasks and then must be afforded constant supervision. Minor incidents involving infractions of regulations were overlooked in an effort to straighten him out and no official records were kept.

He has been a constant problem because of his relationships with other people, both civilian and military. He is always involved with women, married and single, to the extent that his life has been threatened on occasion. He is presently serving a sentence of confinement arising from an altercation over an enlisted man's wife. He has large financial obligations which he is unable to discharge and it is apparent that these obligations will continue to increase. His chances for advancement are nil . . . Counseling has proved to be of no value as [the applicant] seems to be incapable of managing his life in an orderly manner and seems little interested in his assigned duties or his relationship with the service.

On May 5, 1967, the Commandant directed the applicant to be discharged from the Coast Guard with a general discharge due to unsuitability under Article 12-B-10 of the Personnel Manual. The applicant was discharged from the Coast Guard on May 19, 1967.

### **VIEWS OF THE COAST GUARD**

On January 5, 2011, the Board received an advisory opinion from the Office of the Judge Advocate General (JAG). He recommended that the applicant's request for relief be denied for untimeliness and for lack proof of error or injustice. Based on the information of record, there is

no error or injustice in this case. Therefore, due to the length of the delay, the lack of compelling reason for not filing his application sooner, and the probable lack of success on the merits of his claim, it is not in the interest of justice to excuse the untimeliness and it should be denied because it is untimely.

The JAG attached a memorandum from the Commander, Personnel Service Center (PSC), and asked that the Board consider PSC's comments as a part of the advisory opinion. PSC stated that the DD 214 was incomplete when issued on May 19, 1967 because it did not state the number of leave days for which the applicant was paid. A DD 215 issued on May 26, 1967 correcting this oversight by showing that the applicant was paid for 22 days of leave.

PSC submitted a copy of the applicant's leave record with a stamped notation signed by the authorized certifying officer showing that the applicant was paid for 22 days of leave. At the bottom of the leave record under the heading "Record Closing Data", it shows "cash settlement requested 22 days."

PSC also submitted a copy of the Record of Discharge, Release from Active Duty, or Death CG-3309, which shows the applicant's unsuitability separation code and the following in the Disbursing Data section of the document: "Total allowance credited \$16.80 Cash settlement for unused accrued leave (22 days) \$86.46 due at discharge \$103.26." The document is signed by a CWO-1.

#### **APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD**

On January 11, 2011, the Board received the applicant's response to the advisory opinion, he disagreed with it. He denied that he received payment for 22 days of leave.

#### **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 the alleged error or injustice. See 33 CFR 52.22. The applicant stated that he discovered the alleged error on September 29, 2010. However, the applicant should have discovered the error when he received his DD 214 and DD 215. The DD 215 stated that the applicant was paid for 22 days of leave. If this was incorrect the applicant should have raised the issue within three years of the issuance of the DD 215. The applicant's statement that it is in the interest of justice to excuse his untimeliness if more than three years have passed since discovery of the error because "[it has been] mandated by congress" is not persuasive. Although 10 U.S.C. 1552 permits the Board to excuse untimeliness in the interest of justice, it does not require an automatic waiver of untimeliness in every case.

3. Although the applicant's explanation for not filing his applicant sooner is not persuasive, the Board must still perform at least a cursory review of the merits to determine whether it is the interest of justice to waive the statute of limitations. 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. Based on a review of the merits, the applicant is not likely to prevail on his claim, and therefore, the Board is not obligated to waive the statute of limitations in this case. The discharge documents related to the applicant's discharge (DD 215, his leave record, and the Record of Discharge, Release from Active Duty, or Death) show that the applicant was paid for 22 days of accrued unused leave upon his discharge from the Coast Guard. The applicant's argument that he did not receive such payment is insufficient to rebut the official records on this issue. Additionally, the applicant received all due process to which he was entitled under the Coast Guard Personnel Manual regarding his unsuitability discharge. He was notified of the discharge and given an opportunity to submit a statement in his own behalf, which he declined. He has produced no evidence that he was entitled to a hearing for his unsuitability separation code and the Board is aware of none.

5. Accordingly, it is not in the interest of justice to waive the untimeliness in this case and it should be denied because it is untimely.

**[ORDER AND SIGNATURES ON FOLLOWING PAGE]**

**ORDER**

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

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Katia Cervoni

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Lillian Cheng

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Ashley A. Darbo