

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2011-116

XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX

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 March 3, 2011, 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 December 22, 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 upgrade his January 15, 1971, general discharge under honorable conditions to an honorable discharge. He alleged that one day when he was restricted to base, he left for three hours and when he returned the chief "beat[] the crap out of me" even though he never struck back. He was later told that if he refused to sign certain papers, he would be court-martialed and given a dishonorable discharge. The applicant stated that he believed what he was told because he was 18 years old and was given no legal advice.

The applicant alleged that it is in the interest of justice for the Board to excuse the untimeliness of his application because he is disabled by hepatitis C, cirrhosis, and degenerative arthritis and it is almost impossible for him to get a job.

SUMMARY OF THE RECORD

On August 25, 1969, the applicant enlisted in the Coast Guard at age 17. Upon completing recruit training, he advanced to seaman apprentice, pay grade E-2, and was assigned to a cutter stationed in xxxxxxxxxxxxxxxxxxxxxxxxx.

In May 1970, the applicant requested a hardship discharge. He reported that his mother, living in xxxxxxxxxx, had four younger children, including a 16 year old with medical problems, two brothers who were 11 and 7 years old, and a 4-year-old sister. He stated that his mother

worked the third shift in a factory but was frequently laid off and that she received no alimony from her former husbands. Her third husband had a poor paying job, had to pay alimony, and had recently been hospitalized. The applicant stated that he needed to leave the Coast Guard so that he could get a better paying job to support his family and his mother could stay home to take care of his siblings.

On August 3, 1970, the applicant underwent a psychiatric evaluation because of a “recent history of irritability, confusion, episodes of loss of emotional control, and some anxiety symptoms.” The applicant reported that his stepfather was unable to work because of a back injury and his mother was having difficulty supporting four other children. He reported that he thought about his family’s problems constantly, felt frustrated and irritable, and was getting into fights with his crewmates. The doctor noted that the applicant had applied for a hardship discharge but that his request had “been slowed apparently because of some trouble with the local police.” Another medical note stated that the applicant had bought stolen property but that the matter “had been cleared up.” The psychiatrist found the applicant fit for duty but referred him for counseling because of his preoccupation with his family’s problems.

On September 26, 1970, the applicant’s friends left him in the emergency room of a hospital with an empty bottle of Roboxin. The doctor reported that he was uncooperative and hostile and refused to give any additional information. The doctor wrote, “probable drug overdose, i.e., LSD bad trip, amphetamines.” The doctor wrote that the Coast Guard had identified him and reported that he had been “suspected of using amphetamines in the past.” After resting for several days, the applicant told the doctor that he was frustrated because the Coast Guard would not give him a hardship discharge, that his mother needed his help, and that he had attempted suicide by taking pills that had been prescribed for a back injury. The doctor discharged him as fit for duty but diagnosed him with a passive-aggressive personality.

On October 19, 1970, the applicant was tried by special court-martial for an unauthorized absence and breaking restriction on October 4, 1970. He pled guilty and was sentenced to 21 days of hard labor and restriction to base. The sentence was approved on December 4, 1970, and the restriction was to extend from that date through December 24, 1970.

On November 6, 1970, the applicant went to the local Public Health Service hospital. The only documentation of this visit in his military record is an order from the doctor, who wrote, “NFFD [not fit for duty] from present until Tues. AM when [he] will be [transferred] to USPHS Staten Island for psych. eval. Escort recommended.”

On November 18, 1970, the applicant was admitted to a psychiatric hospital on Staten Island for evaluation. The applicant reported that his request for a hardship discharge had been denied even though his mother needed to work to support her four younger children but could not work because two of the children were pre-school aged. The applicant admitted that he had gone to the hospital feeling “panicky and as he puts it, paranoid,” but he denied having disciplinary problems or using illegal drugs. The psychiatrist found the applicant to be psychiatrically unsuitable for military service, fit only for light duty, and recommended that he be administratively discharged for unsuitability because of a “primary inherent personality defect”—passive-

aggressive personality. Following this hospitalization, on November 21, 1970, the applicant was transferred from the cutter to the Base.

On December 4, the commanding officer (CO) of the cutter wrote a memorandum to the Base command about the applicant. He stated that the applicant had requested a hardship discharge in May 1970 and submitted letters from his mother, grandmother, and former employer. However, when asked for additional required information, the applicant had not provided it. After a problem with the local police had been cleared up, the applicant was advised that if he provided the necessary additional information, the command would initiate a hardship transfer or discharge. However, no further information was received, and in August 1970, the command noticed that the applicant required constant supervision. He complained of nervousness, but was found psychiatrically fit for duty. The CO noted the applicant's drug overdose in September and his special court-martial in October. The CO stated that the applicant was sent to the psychiatric hospital in November because on November 6, 1970, he had complained of having flashbacks from taking LSD. When the applicant returned to the cutter upon his release from the hospital and was awaiting transfer orders, he climbed the ship's mast while carrying a guitar at 3:00 a.m. on November 21, 1970, and had to be talked into climbing down.

On December 17, 1970, the Base CO advised the applicant that he was being recommended for an administrative discharge due to unsuitability under Article 12-B-10 of the Personnel Manual in accordance with the psychiatrist's findings. The Base CO advised him that he could submit a statement in his own behalf. The applicant acknowledged the notification and noted that he did not wish to submit a statement.

On December 18, 1970, the applicant was punished at mast for having "introduced an unauthorized female visitor into barracks" the day before. He was awarded a forfeiture of \$50 in pay per month for two months and 14 days of restriction to base with extra duties beginning as of December 25, 1970.

On December 23, 1970, a chief warrant officer (CWO) reported that the day before, he had been advised that the applicant had told someone that he had a date that night even though he was restricted to Base. The applicant had reported for muster at 8:00 p.m. on December 22nd, but at 10:00 p.m. he was not in the barracks. The CWO "piped him to lay to Base Operations with negative results." Two petty officers searched all of the barracks, cars, boats, docks, and grounds on the Base but could not find the applicant. Therefore, the CWO reported the applicant as being absent without leave (AWOL) at 11:30 p.m. At 2:30 a.m., a petty officer reported that the applicant was on the dock with a belt in his hand. The CWO found the applicant in front of the barracks, on his knees with his head on the ground, "saying over and over, 'that's alright I'll find my way home.'" When the CWO tried to get the applicant to stand up, the applicant began swinging at him. When the CWO tried to put handcuffs on him, the applicant "jumped up and ran out the gate yelling, 'God help me I'll find my way home.'" The applicant ran between some houses and two petty officers tried to find him to no avail, so the CWO contacted the shore patrol. A petty officer on rounds at the base found a suitcase full of the applicant's clothes beside a government vehicle. At about 3:50 a.m., the applicant returned to his room, and the CWO set a watch so the applicant could not leave again.

On December 23, 1970, the Base CO received a summary of the applicant's medical history from the local Public Health Service hospital. The Chief Medical Officer recounted the applicant's consultations and noted that on November 6, 1970, the applicant had gone to the hospital and admitted that he was using marijuana and LSD and that he suffered from flashbacks from the LSD, which frightened him. He asked when the flashbacks would stop and whether he would be permanently damaged. However, the Chief Medical Officer noted, when admitted to the psychiatric hospital on Staten Island, the applicant had denied using illegal drugs. The Chief Medical Officer concurred with the psychiatrist that separation from the Coast Guard would be in the best interest of both the applicant and the Service.

On December 23, 1970, the Base CO sent the Commandant a recommendation that the applicant be discharged for unsuitability. The CO noted that the applicant had been found psychiatrically unfit for anything but light duty and that, while serving restriction for a prior offense, he had become intoxicated and taken an intoxicated female into the barracks. The CO also described the incidents on December 22 and 23, 1970, which he stated had alarmed some civilian neighbors.

On January 14, 1971, the applicant was taken to mast for an unauthorized absence from December 22 to 23, 1970, and for attempting to strike the CWO and escaping from lawful custody on December 23, 1970. He was awarded correctional custody for 30 days and reduction in pay grade to E-1.

Also on January 14, 1971, the Base CO notified the applicant that he was being recommended for a discharge for "unfitness," under Article 12-B-12 of the Personnel Manual. The CO advised him that he had a right to make a statement in his own behalf. The applicant acknowledged the notification and noted that he did not wish to submit a statement. The CO forwarded this notification to the Commandant and noted that the "provisions of Article 12-B-12(B)(3) [regarding discharges for unfitness due to illegal drug use] had been explained to the applicant. He wrote that the applicant wanted to be released from active duty as soon as possible and "willingly accepted the recommendation by this command for discharge by reason of unfitness for drug abuse causes."

On January 15, 1971, the Commandant ordered the Base to discharge the applicant with a general discharge by reason of unfitness under Article 12-B-12 of the Personnel Manual. The applicant was discharged the same day. He received a general discharge for unfitness in accordance with Article 12-B-12 of the Personnel Manual. He had completed 1 year, 4 months, and 21 days of active duty, and his final average marks (on a 4.0 scale) were 2.28 for proficiency in rating and 2.75 for conduct.

VIEWS OF THE COAST GUARD

On June 2, 2011, the Judge Advocate General (JAG) of the Coast Guard recommended that the Board deny relief in this case. He stated that the application should be denied because of its untimeliness and because the applicant "has not provided any relevant documentation or rationale to support his position."

The JAG also adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC). The PSC stated that there is no evidence supporting the applicant's claim that the CWO assaulted him and that the evidence "paints a very different picture." The PSC noted that there is also no evidence that the applicant was coerced into accepting the proposed discharge under duress. The PSC noted that the record shows that the applicant wanted to be discharged as soon as possible and accepted the CO's recommendation. The PSC stated that under current regulations, the applicant would likely have received the same sort of discharge, although "unfitness" is now called "unsuitability."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 9, 2011, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 days. No response was received.

APPLICABLE LAW

Article 12-B-12(b)(3) of the Personnel Manual authorized the administrative discharge of members for "unfitness" due to illegal drug use. If the member's CO was recommending an honorable or a general discharge, the member was entitled to notification of the proposed discharge and an opportunity to submit a statement.

Under Article 12-B-3(a) of the manual, a member discharged for "unfitness" could receive an honorable discharge if he had demonstrated "proper military behavior and proficient performance of duty" and had earned "a minimum final average of 2.7 in proficiency and 3.0 in conduct." Under Article 12-B-3(b), a member could receive a general discharge for unfitness if the member's final average marks were lower than 2.7 for proficiency or 3.0 for conduct.

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), an application should be filed within three years of the applicant's discovery of the alleged error or injustice. The Board finds that the application was untimely because it was submitted approximately 40 years after the applicant received his general discharge for unfitness.
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 excusing the untimeliness of an application, 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." *Id.* at 164-65; see *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

4. The applicant alleged that it is in the interest of justice for the Board to excuse the untimeliness of his application because he is disabled by hepatitis C, cirrhosis, and degenerative arthritis, and it is almost impossible for him to get a job. The Board finds the applicant's argument unpersuasive because it does not explain or justify his long delay in seeking correction of the alleged error or injustice.

5. The Board's cursory review of the merits of the case shows that the applicant was properly discharged for unfitness due to illegal drug use in accordance with Article 12-B-12 of the Personnel Manual. His military records support the reason for and character of his discharge, and he was afforded the due process then provided for members awarded a general discharge for unfitness. His final average marks—2.28 for proficiency and 2.75 for conduct—mandated a general discharge under Article 12-B-3 of the Personnel Manual. These military records are presumptively correct. 33 C.F.R. § 52.24(b). The Board finds insufficient grounds in the record for upgrading his discharge as if he had earned an honorable discharge. His claim cannot prevail on the merits.

6. Accordingly, the applicant's request should be denied because it is untimely and lacks merit.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

Bruce D. Burkley

Christopher M. Dunne

Barbara Walthers