

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2011-160

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 application upon receipt of the applicant's completed application on April 26, 2011, and subsequently prepared the final decision as required by 33 CFR § 52.61(c).

This final decision, dated January 26, 2012, 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 ALLEGATION

The applicant asked the Board to correct his record by removing misconduct as the reason for his discharge from the Coast Guard Reserve in 1992 and by changing his RE-4 (not eligible to reenlist) reenlistment code to RE-1 (eligible to reenlist). Earlier, on February 18, 1990, the applicant was released from active duty and transferred to the Reserve to serve the remainder of his eight-year military obligation. At the time of his release from active duty, he received a DD 214 that shows he was honorably released from active duty with an RE-1 reenlistment code.

The applicant stated that he is attempting to enlist in the Army Reserve and was shocked to learn that he had an RE-4 reenlistment code. He stated that he learned of the alleged error on May 1, 2010. He stated that over the past 18 years, he has used his DD 214 releasing him from active duty, but he never knew about documents in his record that showed his general discharge from the Coast Guard Reserve by reason of misconduct (shirking).

The applicant stated that upon leaving active duty on February 18, 1990, he began a career as a professional fire fighter, and that his civilian work schedule conflicted with his Reserve drill obligations. He stated that he received bad advice on how to handle the situation, and he was under the assumption that he had fulfilled his obligation to the U.S. Coast Guard during his active duty period. He stated the following:

At the time all of this was happening I was only 21 years of old, working two jobs, going through a divorce and a bankruptcy.

I never knew about the disciplinary actions or the general discharge. If I had I would have never let that happen. My signature does not appear on any of the documents; nor the certified mail receipts . . .

I worked in public safety for 10 years and have been a small business owner for the last 10 years. I have never been in trouble with the law and have no record not even a parking ticket. I meet all requirements for the U.S. Army and have already passed my physical at M.E.P.S. The only thing stopping me from being able to serve my country is this scar on my record from 20 years ago.

BACKGROUND

The applicant enlisted in the Coast Guard on March 21, 1988, and committed to an eight-year military obligation. Two of the eight years were to be served on active duty and the remainder was to be served in the Reserve. On March 21, 1988, the applicant signed a statement of understanding with respect to the “2-year Enlistment Program with a Selected Reserve Commitment.” The applicant acknowledged on that document that after his release from active duty, he would be required to serve a minimum of 2 years in the Selected Reserve (SELRES) before transferring to another component of the Reserve. He also acknowledged that satisfactory participation in the SELRES required that he complete at least 48 drills per year and at least 12 days of active duty training each anniversary year and that he was obligated to keep his commanding officer informed of his address at all times.

The applicant was assigned to a SELRES unit. On June 23, 1991, the pay officer for Coast Guard Reserve Unit Panama City notified the applicant that he was absent from his June 15-16, 1991 drills without the absences having been excused. The pay officer told the applicant the dates for the next scheduled drills and that “excused drills needed to be made up for a good year. Failure to make these up will result in your being put in active pool.” A Retirement Points Statement shows that the applicant participated in 4 of 48 scheduled drills from February 19, 1991 to February 18, 1992.

On September 29, 1991, the commanding officer (CO) of the applicant’s unit sent the applicant a letter informing him that his participation in the Reserve was unsatisfactory due to failure to attend drills. The CO told the applicant that he could be separated from the Coast Guard because of his unsatisfactory participation and that failure to contact the pay officer within 10 days from the date of the letter would result in a recommendation for separation from the Coast Guard. The letter had the words “CERTIFIED MAIL—RETURN RECEIPT REQUESTED.” Similar letters were sent to the applicant about his lack of drill participation on October 27, 1991, November 17, 1991, and December 15, 1991, and March 29, 1992.

On January 26, 1992, the CO informed the applicant that he was recommending his discharge from the Coast Guard Reserve by reason of shirking due to failure to attend drills and

for failure to report to the pay officer as directed in earlier correspondence. The CO gave the applicant 30 days to submit a statement in his own behalf and told him of his right to consult with legal counsel. A copy of a certified mail return receipt with a February 5, 1992 date shows that someone at the applicant's address with the applicant's last name signed for a letter from the CO of his unit.

On May 31, 1992, the CO recommended to the Commandant, through the Eighth Coast District, that the applicant be discharged from the Coast Guard because of misconduct (shirking) with a general discharge. The CO stated that notification had been sent by certified mail and that the certified mail receipt showed "receipt of the letter by the member."

On June 11, 1992, the Commander, Eight Coast Guard District, sent the applicant a notice that the commander was also recommending his discharge from the Coast Guard Reserve due to unsatisfactory participation and that the applicant had 30 days to submit a statement in his behalf. The applicant was also told that he could consult with legal counsel and that he could receive a general discharge. A domestic return receipt shows that someone at the applicant's address signed for a certified letter from Commander Eight Coast Guard District on July 8, 1992.

On September 3, 1992, the Commander, Eight Coast Guard District forwarded the CO's request for the applicant's discharge to the Commandant. The Commander stated that he agreed with the recommendation for discharge.

On September 18, 1992, the Commandant, authorized the applicant's discharge from the Coast Guard Reserve by reason of misconduct (Shirking). He also directed that the applicant receive a general discharge and an RE-4 reenlistment code.

On September 22, 1992, the Commander, Eight Coast Guard District told the applicant by letter that he was discharged from the Coast Guard Reserve effective September 18, 1992 by reason of misconduct (shirking) and that his general discharge certificate was enclosed.

VIEWS OF THE COAST GUARD

On July 18, 2011, the Judge Advocate General (JAG) of the Coast Guard issued an advisory opinion recommending that the Board deny relief based on the comments from the Commander, Personnel Service Center (PSC) that were attached to the advisory opinion.

PSC noted that the application was untimely and should be denied for that reason. With respect to the merits of the application, PSC stated that the following:

There is nothing in the applicant's record to substantiate his claim that he could have remained oblivious of his responsibility to be an active SELRES member or his obligation to serve in the Reserve component until March 20, 1996. Rather, the applicant's record . . . supports that he was given ample opportunity and warnings to remedy his situation before discharge would be authorized. As this did not occur, it is therefore compulsory to separate a non-participatory junior

member in accordance with policy set forth in [Article 4.B.2.a.3.] of the Reserve Policy Manual.

The Coast Guard stated that the applicant's application is similar to that in Docket No. 2010-247 wherein the Board denied upgrading that applicant's general discharge due to misconduct (shirking). The Board also refused to excuse the untimeliness of the application in Docket No. 2010-247 noting that it lacked potential merit. The Board stated that although that applicant's civilian employment as a police officer interfered with his attendance at regular weekend drills, the Coast Guard attempted to accommodate him, to no avail, by offering alternative drill schedules. The Board also stated in Docket No. 2010-247 that that applicant's Retirement Points Statements supported the Coast Guard's decision to discharge him because of an established pattern of shirking.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 26, 2011, the Board sent a copy of the views of the Coast Guard to the applicant for a response. The Board did not receive a reply from the applicant.

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 submission 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 did not discover the error regarding his general discharge from the Coast Guard Reserve until May 1, 2010, apparently when he attempted to enlist in the Army Reserve. He argued that his signature does not appear on any of the documentation or the certified mail return receipts. However, the applicant does not deny that the address listed on the notification letters about his missed drills or the proposed discharge was correct; nor does he deny that he received the letters from the individuals who signed for them. Moreover, there is no evidence in the military record that any of the letters sent to the applicant were returned to the Coast Guard. Accordingly, the Board is persuaded that sufficient information was provided to the applicant to inform him that he was being processed for separation from the Coast Guard Reserve with a general discharge due to misconduct (shirking). Accordingly, the applicant should have filed his application with the Board within three years of his discharge from the Coast Guard Reserve on September 18, 1992. The application is untimely.

3. Although the application is untimely, 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. A cursory examination of the merits indicates that the applicant is not likely to prevail. Article 12.B.18.b.8. of the Personnel Manual permits the Coast Guard to discharge a member for a pattern of shirking. The Coast Guard warned the applicant several times about his failure to satisfactorily participate in drills, but he did not heed the warnings. In addition, Article 12.B.18.a. authorized the Commander, Coast Guard Personnel Command to direct the type of discharge warranted by the particular circumstances of a given case. Here the applicant was given a general discharge from the Reserve because he failed to satisfactorily participate in scheduled drills or to make up missed drills. A Retirement Points Statement shows that for the year from February 19, 1991 to February 18, 1992, the applicant participated in only 4 of 48 scheduled drills. It would be inappropriate to grant the applicant an honorable discharge when he failed to honor his obligation to the Coast Guard Reserve. In addition, the RE-4 reenlistment code was appropriate because he did very little, if anything, to earn a recommendation for reenlistment in the Reserve.

5. Discharge from the Reserve is not documented on a DD 214, but rather with a discharge certificate and notation in the service record. The applicant's general discharge from the Reserve and the RE-4 reenlistment are documented in his military record.

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

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

Katia Cervoni

Lillian Cheng

Ashley A. Darbo