

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2012-104

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 March 20, 2012, and subsequently prepared the final decision as required by 33 CFR § 52.61(c).

This final decision, dated December 7, 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 changing his RE-4 (not eligible to reenlist) reenlistment code and his JKB (involuntary discharge by reason of misconduct due to conviction by civilian authorities) to codes that would allow him to enlist in the Navy Reserve as a registered nurse (RN).

The applicant stated that his discharge was due to an event (criminal vehicular homicide) that occurred while he was in a liberty status. He stated that since that day he has earned a master's degree and a RN degree. He stated that he has proved that what happened was a fluke or an accident.

The applicant stated that he discovered the alleged error on February 28, 2012. He stated that if his application is untimely, it is in the interest of justice to excuse any untimeliness because he has led an exemplary life since he left the Coast Guard and he has proved to the nursing licensure board of his state that he has good moral character.

BACKGROUND

The applicant enlisted in the Coast Guard on October 9, 1990. On January 28, 1995, the applicant, while on liberty, was driving under the influence of alcohol when he collided head-on with another vehicle. The person in the other vehicle died from injuries sustained in the

accident. On June 9, 1995, the applicant pleaded guilty in civilian court to criminal vehicular homicide.¹ He was sentenced on July 7, 1995 to serve 48 months in the state correctional facility, of which the applicant was required to serve 32 months with the remainder being served on supervised release status. He was committed to the custody of the commissioner of corrections at that time.

On July 10, 1995, the applicant's commanding officer (CO) informed the applicant that he had initiated action to discharge the applicant from the Coast Guard by reason of misconduct due to his civilian conviction for criminal vehicular homicide.

On July 15, 1995, the applicant acknowledged the proposed discharge and his right to consult with a lawyer. He did not object to the discharge, but wrote in his statement that he did not want a discharge due to misconduct because it would adversely affect him when he sought employment upon his release from incarceration. He also noted his excellent performance record and stated that serving in the Coast Guard had been a very positive experience.

On July 22, 1995, the applicant's CO recommended to the Commander, Military Personnel Command that the applicant be discharged from the Coast Guard under Article 12.B.18(b)(1) of the Personnel Manual by reason of misconduct due to a civilian conviction. The CO recommended that the applicant received an honorable discharge based upon his quality of service over the period of his enlistment.

On July 27, 1995, the Commandant approved the applicant's honorable discharge from the Coast Guard by reason of misconduct due to a civil court conviction under Article 12.B.18 of the Personnel Manual. The Commandant directed that the applicant be assigned a JKB separation code.

On August 17, 1995, the applicant was discharged from the Coast Guard with an honorable discharge, by reason of misconduct due to a civilian conviction, with a JKB separation code and an RE-4 reenlistment code.

VIEWS OF THE COAST GUARD

On August 22, 2012, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief. The JAG noted that the application was untimely because the applicant should have discovered the alleged error at the time of his discharge on August 17, 1995. The JAG stated that the applicant's argument that his untimeliness should be excused because he has led an exemplary life since his discharge is not persuasive because it has no bearing on the reasons for the discharge. The JAG also argued that it is not in the interest of justice to excuse the untimeliness because a cursory review of the merits reveals that it is unlikely that the applicant will prevail on his claim for an upgrade of his reenlistment and separation codes.

¹ The charge to which the applicant pled guilty was as follows: "The Defendant [applicant's name], did cause the death of a human being, to-wit: [deceased person's name], while operating a motor vehicle while having an alcohol concentration of .10 or more as measured within two hours of the time of driving."

The JAG stated that Article 12.B.18.b.1 of the Personnel Manual authorized the Commander, Coast Guard Military Personnel Command to discharge a member by reason of misconduct for conviction by foreign or domestic civil authorities of an offense for which the maximum penalty under the UCMJ is death or confinement longer than one year. The JAG stated that at the time of the applicant's civil conviction, the maximum penalty under Article 119 (involuntary manslaughter) was confinement for three years, which satisfied the confinement requirement for a discharge by reason of misconduct due to a civil conviction. The JAG also stated the following:

As to the applicant's post-discharge good conduct argument, past Board decisions in BCMR Nos. 2007-095 and 2012-020, "dictate that in considering the character of a discharge, the Board should not upgrade a decision based on post-discharge conduct alone, but may take into account changes in the community mores, civilian as well as military, since the time the discharge was rendered, and upgrade a discharge if it is judged to be unduly severe in light of contemporary standards." Current Coast Guard policy, however, has not changed regarding criminal conduct as demonstrated by the applicant. In fact, the applicant could very well have received a lower discharge than the Honorable discharge that he currently has. [The JAG] and . . . PSC are in agreement that the applicant's separation and reenlistment codes are correct and should not be changed.

In order for there to be an injustice rising to the level that merits action by the BCMR, there must be treatment by the military authorities that "shocks the sense of justice." *Sawyer v. United States*, 18 Cl. Ct. 860, 868 (1989) (citing *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976), *cert. denied*, 429 U.S. 854 (1976)). The applicant's application fails this test since his conduct at the time of separation would entail the exact same treatment, or worse, if it were to happen today. It is not [Coast Guard] policy to change separation and reenlistment codes simply due to the passage of time and a lack of misconduct during the applicant's subsequent time as a civilian.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 24, 2012, 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 alleged that he discovered the error on February 28, 2012, but he should have discovered the alleged error at the time of his separation on August 17, 1995 or at least within three years of that date. He was advised on July 10, 1995, that his CO was recommending his discharge by reason of misconduct due to his civilian conviction. The Board is not persuaded to excuse the untimeliness because of the applicant's exemplary post-discharge conduct or because he has earned several college degrees since his discharge.

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 excuse the untimeliness. 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 because the Coast Guard properly discharged him in accordance with Article 12.B.18.b.1. of the Personnel Manual. This provision authorizes the Coast Guard to discharge a member by reason of misconduct due to a civil conviction if the maximum penalty under the UCMJ for the same or a similar offense would be confinement for longer than a year. The applicant was convicted of criminal vehicular homicide in civilian court and sentenced to 48 months in prison. According to the JAG, a civil conviction for criminal vehicular homicide is the equivalent of a conviction for involuntary manslaughter under Article 119 the UCMJ, which calls for a maximum sentence three years confinement. Therefore, the Coast Guard properly discharged the applicant by reason of misconduct due to a civil conviction. The applicant's JKB separation code and RE-4 reenlistment codes were properly assigned according to the Separation Program Designator (SPD) Handbook.

5. The applicant has not persuaded the Board that his separation and reenlistment codes are unjust. In this regard, the Board notes that the applicant operated an automobile while under the influence of alcohol that collided head-on with another car resulting in the death of the passenger in the other vehicle. The applicant pled guilty to criminal vehicular homicide and served at least 32 months of confinement. The misconduct exhibited by the applicant during this incident does not warrant a higher reenlistment code or a different separation code. In addition, as the Coast Guard argued, Coast Guard policy is the same today as it was at the time of the applicant's discharge. Therefore, the applicant has not proved that his treatment with regard to his discharge was unjust.

6. The application should be denied because it is untimely and it is not in the interest of justice to waive the untimeliness.

ORDER

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

Donna M. Bivona

Andrew D. Cannady

Francis H. Esposito