

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2012-137

**XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX**

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 30, 2012, and subsequently prepared the final decision as required by 33 CFR § 52.61(c).

This final decision, dated February 1, 2013, 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 upgrading his general discharge under honorable conditions to an honorable discharge. The applicant did not list the date on which he discovered the alleged error, but stated that it is in the interest of justice to consider his application if it is untimely because "Prior service with allotted benefits should be allowed as I have served my commitment." The applicant submitted no other evidence in support of his application.

The applicant's military record shows that he enlisted in the Coast Guard Reserve (inactive duty) for 6 years on June 24, 1974. He agreed to become a member of the Ready Reserve immediately upon enlistment and to satisfactorily participate in each unit assignment. Before beginning inactive duty, the applicant was required to complete recruit training and a period of post-recruit training. After completing his required active duty, the applicant was assigned to a Reserve unit to begin his inactive duty.

The military record indicates that the applicant was transferred from his then-assigned unit to an Administrative Reserve Unit, effective 6 July 1976, because his whereabouts were unknown.

On December 15, 1976, the applicant's commanding officer (CO) sent the applicant a letter at his last known address about his unsatisfactory participation in the Reserve. He was

directed to report to his division officer within 30 days of that letter to explain why he failed to report for his unit's annual inspection and for required counseling.

On January 20, 1977, the applicant's CO informed the applicant by letter that he had a total of 18 absences and that he had not communicated with his unit about his failure to satisfactorily participate in unit drills. The CO told the applicant that malingering would not be tolerated and that his failure to communicate was inexcusable. The CO ordered the applicant to report to his unit's administrative office on February 28, 1977 to explain his reason for not complying with orders.

On February 27, 1977, the CO advised the applicant that 30 days from the date of the letter, the command would recommend that the applicant be discharged with a general discharge because of his chronic absenteeism and failure to obey orders. The applicant was advised that he had 30 days from the date of the letter to submit a statement on his behalf. The letter was sent to the applicant's last known address, with copies to his known relatives.

On February 27, 1977, an administrative remarks entry (Page 7) states that the applicant's mark for conduct was reduced due to chronic excessive absenteeism and failure to communicate or to obey orders.

On March 27, 1977, the applicant's CO recommended to the Commander of the Eleventh Coast Guard District that the applicant be discharged from the Coast Guard due to chronic absenteeism.

In an October 4, 1977 certified letter return receipt requested, the Commander of the Eleventh Coast Guard District advised the applicant that he was being considered for discharge from the Coast Guard Reserve by reason of misconduct. The letter informed the applicant that he could submit a statement on his behalf within 30 days from the date of the letter and that a general discharge could be issued if a reply was not received within the time allowed. The applicant was also told that he could consult with legal counsel about the proposed discharge by contacting the Eleventh Coast Guard District legal officer.

On November 8, 1977, the Commander, Eleventh Coast Guard District recommended to the Commandant that the applicant be discharged due to his chronic absenteeism. He also informed the Commandant that all of their attempts to locate the applicant were unsuccessful.

On November 18, 1977, the Commandant directed the Commander of the Eleventh Coast Guard District to discharge the applicant by reason of misconduct (shirking) under Article 12-B-18(b)(7) of the Personnel Manual. The Commandant directed that the applicant receive a general discharge.

On December 1, 1977, the applicant was discharged from the Coast Guard Reserve.

VIEWS OF THE COAST GUARD

On October 16, 2012, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which the JAG noted that the application was not timely and should be denied for that reason. The JAG also stated that the applicant failed to provide any evidence supporting his request to change his general discharge to an honorable discharge. The JAG attached a memorandum from the Commander, Personnel Service Center (PSC) as a part of the advisory opinion.

PSC argued that the application should be denied because it is untimely and because the applicant provided no explanation for why he failed to file a timely application. PSC stated that the applicant did not provide any evidence (other than his own statement) that the Coast Guard committed an error or injustice in awarding him a general discharge from the Coast Guard Reserve.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 23, 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. Although the applicant did not list the date on which he discovered the alleged error, the Board finds that he should have discovered the alleged error at the time of his discharge from the Coast Guard Reserve December 1, 1977. The applicant was warned in letters sent to his last known address through certified mail that he would be discharged for misconduct and could receive a general discharge, particularly if he did not submit a statement within 30 days of the letter notifying him of the proposed discharge. The Board presumes that he received the letters because he did not state that he was unaware that he was being discharged from the Reserve in 1977. Therefore, the application is untimely.

3. The applicant argued that the three-year statute of limitations should be waived so that he can obtain the benefits he earned as a result of serving his time. The applicant enlisted in the Reserve on June 24, 1974 for six years and agreed to serve satisfactorily for a period of 6 years. From the record, his chronic absenteeism began on or about July 1976, approximately 2 years into a six-year enlistment. He was discharged due to misconduct on December 1, 1977, well short of completing his six-year enlistment. The reason for not filing his application sooner is not persuasive to the Board.

4. 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.

5. A cursory examination of the merits indicates that the applicant is not likely to prevail because he has offered no evidence that the Coast Guard committed an error or injustice by discharging him from the Reserve with a general discharge. He has not rebutted the evidence of record that he was chronically absent from his unit from about July 1976 until his discharge on December 1, 1977.

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

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

Troy D. Byers

Lillian Cheng

Frank E. Howard