

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

Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 2004-138

FINAL DECISION

Author: Ulmer, D.

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 application was docketed on June 4, 2004, upon the Board's receipt of the applicant's complete application for correction of his military record.

This final decision, dated February 24, 2005, is signed by the three duly appointed members who were designated to serve as the Board in this case.

The applicant asked the Board to upgrade his RE-4 (not eligible to reenlist) reenlistment code so that he would be able to reenlist in the military. He was discharged from the Coast Guard under honorable conditions (general discharge) by reason of misconduct. He was assigned an RE-4 reenlistment code and a JDT (fraudulent entry into military service, drug abuse) separation code.

APPLICANT'S ALLEGATION

The applicant alleged that he did not attempt to leave the Coast Guard or break his enlistment contract. He stated that he enlisted at age 17 and upon arriving at recruit training he became ill. He alleged that he was then given the option of leaving the Coast Guard and returning later if he desired to do so and was in good health. He stated that he did not return because of a civilian job opportunity. He further stated that he currently has the desire and opportunity to serve in the United States Army National Guard but is barred from enlisting due to his RE-4 reenlistment code.

The applicant stated that he did not discover the alleged error until October 11, 2003.

SUMMARY OF RECORD AND SUBMISSIONS

The applicant enlisted in the Coast Guard on October 29, 1996, and was discharged on November 8, 1996. He had served eleven days on active duty at the time

of his discharge. The applicant's signature is on the DD Form 214 (discharge document).

The record indicates that on October 30, 1996, the applicant's command referred the applicant to a doctor for evaluation because the applicant was experiencing abdominal pain and nausea, vomiting, and diarrhea. The medical note stated that the applicant was also suffering from bilateral knee and shoulder pain. The medical note further indicated that the applicant had experienced these types of physical manifestations from childhood, but did not mention them on his pre-enlistment Report of Medical History form. In this regard, the medical note reported the applicant said that the military entrance processing station personnel told him that "his problem was resolved and there was no need to put it down on the medical report."

Dr. A, the treating physician, diagnosed the applicant as suffering from Undifferentiated Somatoform Disorder, which was disqualifying for enlistment. He recommended that the applicant be discharged from the Coast Guard.

The applicant's pre-enlistment August 20, 1996, Report of Medical History did not indicate that the applicant suffered from any existing medical problems, but it indicated that the applicant had been arrested and that he had previously used marijuana. His October 30, 1996, pre-training Report of Medical History indicated that the applicant had experienced several pre-service problems, including swollen or painful joints, dizziness and fainting, frequent indigestion, and intestinal trouble, etc.

The applicant's military record does not indicate that he was involved in any criminal or disciplinary problems during his eleven days on active duty.

VIEWS OF THE COAST GUARD

On October 19, 2004, the Board received an advisory opinion from the Judge Advocate General (JAG) of the Coast Guard. He asked the Board to accept the comments from the Commander, Coast Guard Personnel Command (CGPC) as the advisory opinion in this case. CGPC noted the application was untimely.

On the merits, CGPC recommended alternative relief instead of that requested by the applicant. He stated that the applicant's record should be corrected by changing the reason for discharge to "erroneous entry", the separation code to JFC (erroneous entry) and the separation authority to Article 12.B.12. (convenience of the government) of the Personnel Manual. He did not recommend changing the applicant's reenlistment code. In addition, CGPC stated the following:

The record shows that the applicant's separation from the Coast Guard in 1996 was carried out in accordance with the policy in effect at that time. However, the separation code and character by which the applicant was discharged was not the most appropriate and does not reflect the nature of the applicant's discharge.

The record . . . shows that the applicant was not recommended for discharge due to drug abuse. The recommendation for immediate discharge of the applicant was the result of a diagnosis of Undifferentiated Somatoform Disorder. Undifferentiated Somatoform Disorder is disqualifying for appointment, enlistment, or induction. An assessment of the applicant's record establishes that this disorder existed prior to the applicant's enlistment and that the applicant's complete medical history was erroneously concealed . . . While it was not established, with specificity, that the applicant was either aware of or deliberately concealed a prior diagnosis of Undifferentiated Somatoform Disorder, it is apparent that the applicant did procure an erroneous entry by either deliberate material omission or due to erroneous counseling [to omit the information].

I find that the applicant's reenlistment code should remain RE-4. The applicant's current diagnosis of Undifferentiated Somatoform Disorder is disqualifying for future enlistment. The applicant should not have received a separation code of JDT in that the applicant was not separated due to drug abuse. A separation code of JFC would be more applicable to this case: (1) this separation code is assigned to a member who is involuntary discharged by an established directive (no board entitlement) when an individual erroneously enlists (not related to alcohol or drug abuse), (2) "fraudulent" doesn't adequately reflect that the applicant was not previously diagnosed with Undifferentiated Somatoform Disorder, (3) the possibility exists that the applicant might have been miscounseled concerning the omission of information in his medial history.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 19, 2004, a copy of the Coast Guard views was sent to the applicant for any response that he desired to make. He did not submit a response.

APPLICABLE REGULATIONS

Coast Guard Personnel Manual

Article 12.B.2.f.1. sets the standards for an honorable discharge. It provides that a member who is separated for convenience of the government, has exhibited proper military behavior and proficient performance of duty for their age, grade, length of service, and general aptitude, and has an average minimum mark of 2.5 in each performance factor over the period of the member's enlistment meets the eligibility requirements for an honorable discharge. Subsection f. of this provision states that the proficiency mark requirement shall be disregarded for a recruit discharged while undergoing recruit training.

Article 12.B.5.b. states that commanding officers must notify a member with fewer than eight years of total active duty of the reasons why he or she is ineligible to reenlist and that he or she may submit a written appeal through the chain of command with 15 days of notification. The member must acknowledge this notification.

Article 12.B.12 (Convenience of the Government) states that a convenience of the government may be granted for a erroneous entry to a member undergoing recruit training in an original enlistment who has fewer than 60 days' active service and has a physical disability not incurred in or aggravated by a period of military service (a defect that existed prior to the member entering the service).

Article 12.B.18.b.2. of the Personnel Manual authorizes the Commander, Coast Guard Personnel Command (CGPC) to discharge a member by reason of misconduct for "[p]rocur[ing] a fraudulent enlistment, induction, or period of active service through any deliberate material misrepresentation, omission, or concealment, which, if known at the time, might have resulted in rejection."

Separation Program Designator (SPD) Handbook

Separation Program Designator (SPD) Handbook, section two, authorizes only the assignment of an RE-4 reenlistment code for the JDT separation code. The SPD Handbook states that the JDT separation code is appropriate when there is an "[i]nvoluntary discharge directed by established directive (no board entitlement) when a member procured fraudulent enlistment, induction or period of military service through deliberate material misrepresentation, omission or concealment of drug use/abuse."

The SPD Handbook authorizes either an RE-3E (eligible for reenlistment, except for disqualifying factor) or RE-4 reenlistment code. The SPD Handbook states that the JFC separation code is appropriate when there is an "[i]nvoluntary discharge directed by established directive (no board entitlement) when a member erroneously enlisted . . . into a service component (not related to alcohol or of drug abuse)."

Coast Guard Medical Manual

Article 3.D.32 states that a Somatoform Disorder may be addressed as a neurotic disorder, and Article 5.B.12 states that such disorders are disqualifying for an appointment or enlistment.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's submissions and military record, submission of the Coast Guard, and applicable law:

1. The BCMR has jurisdiction over this matter pursuant to section 1552 of title 10, 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 alleged error or injustice was discovered or should have been discovered. See 33 CFR 52.22.

3. However, the Board may still consider an untimely application on the merits, if it is in the interest of justice to do so. In deciding whether it is in the interest of justice to waive the statute of limitations, the Board should take into consideration the length and reason for the delay and the likelihood of the applicant's success on the merits. See Allen v. Card, 799 F. Supp. 158, 164 (D.D.C. 1992).

4. The applicant's application was submitted approximately five years beyond the Board's three-year statute of limitations. Although the applicant stated that he did not discover the alleged error until October 11, 2003, he should have discovered it on the date of his discharge. The Board is persuaded in this finding by the fact that the applicant's signature appears on the DD Form 214 (discharge document) and he did not deny that he was aware of the reason for his discharge at the time of his separation. However a cursory review of the merits indicates that the applicant's record contains an error. Therefore, it is in the interest of justice to waive the statute of limitations in this case.

5. With respect to the merits, the Coast Guard conceded, and the Board finds, that the applicant's record should be corrected by changing the reason for his discharge from misconduct to erroneous entry, by changing the separation code from JDT (misconduct) to JFC (erroneous entry) and by changing the separation authority from Article 12.B.18 (misconduct) to Article 12.B.12 (convenience of the government). In this regard, CGPC admitted that the JDT separation code the applicant received upon discharge was erroneous because there is no evidence in the record that the applicant was involved with drugs while on active duty, as that code suggests.

6. A misconduct discharge may still be appropriate if the applicant deliberately hid his preexisting medical condition from the Coast Guard at the time of his enlistment. However, the Coast Guard admitted, and the Board finds, that there is insufficient evidence in the record to establish that the applicant fraudulently enlisted by deliberately concealing his pre-existing medical problems. The Board is persuaded in this finding by the applicant's non-rebutted statement that military personnel at the military entrance processing station told him that his problems had resolved and that he did not need to put that information of his pre-enlistment Report of Medical History form. The Board also notes the applicant's honesty about his pre-service health problems on his pre-training Report of Medical History form and about an arrest and prior drug use on his pre-enlistment Report of Medical History form. In light of his honesty with respect to an arrest, prior drug use, and his prior health problems on his pre-training medical form, the Board finds no reasonable explanation for the applicant's decision not to be upfront about his pre-existing medical condition on his pre-

enlistment medical form unless he was told not to report the medical condition or he did not understand at the time that he needed to report it. Therefore, there is insufficient evidence in the record to support a discharge by reason of misconduct due to fraudulent enlistment.

7. The Coast Guard did not address whether the applicant's discharge under honorable conditions (known as a general discharge, the second best discharge) should be changed to an honorable discharge. The Board finds that the applicant's military record, once corrected, supports an honorable discharge. Under Article 12.B.2.f. (Standards for Discharge) of the Personnel Manual, the applicant meets the requirements for an honorable discharge. First, an honorable discharge may be awarded for convenience of the government discharges (Article 12.B.2.f.1, of the Personnel Manual). Second, the applicant has no unsatisfactory conduct marks or disciplinary problems in his record. See Article 12.B.2.f.b. of the Personnel Manual. Third, the 2.5 proficiency mark requirement in each factor for an honorable discharge is to be disregarded in the applicant's case. Article 12.B.2.f.1.f. (3), states that if a member is discharged while undergoing recruit training the proficiency mark requirement shall be disregarded. Fourth, the record does not establish that the applicant fraudulently enlisted in the Coast Guard by deliberately concealing his pre-service medical problems, which would be the only basis for lowering the character of his discharge to general.

8. For the reasons discussed in Finding 7. above, the applicant's reenlistment code should be upgraded to RE-3E. The SPD handbook authorizes either an RE-3E or an RE-4 for a JFC separation code. There is nothing in the record to support giving the applicant an RE-4 reenlistment code. In this regard, the evidence does not support a finding of fraudulent enlistment and he had no disciplinary infractions during his eleven days of military service. An RE-3E is the more appropriate reenlistment code. An RE-3E permits the applicant to reenlist, but only if he proves that he no longer suffers from Undifferentiated Somatoform Disorder.

9. The Board notes that the applicant did not request an upgrade in his discharge. However, the Board finds that it is difficult to make the corrective changes to the applicant's record as discussed in this decision and leave the general discharge in the applicant's record. According to Article 12.B.2.f.2. (General Discharge) of the Personnel Manual, a general discharge applies when a member is discharged for drugs, when the member's final average for other than recruits, is less than 2.5, or when CGPC directs upon reviewing the member's military record. The applicant's case meets none of the requirements for a general discharge, particularly in light of the fact that the record does not contain any evidence that the applicant was notified of his proposed discharge and given an opportunity to submit a statement in his own behalf.

10. Accordingly, the applicant is entitled to relief.

ORDER

The application of _____ USCG, for correction of his military record is granted. Specifically, his DD Form 214 shall be corrected to show the following:

Block 24 shall be corrected to show an honorable discharge.

Block 25 shall be corrected to show Article 12-B-12 of the Personnel Manual as the separation authority.

Block 26 shall be corrected to show JFC as the separation code.

Block 27 shall be corrected to show RE-3E as the reenlistment code.

Block 28 shall be corrected to show convenience of the government as the reason for separation.

The Coast Guard shall issue the applicant a new DD Form 214.

All other requests for relief are denied.

Harold C. Davis, MD

Audrey Roh

Marc J. Weinberger