

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-235

XXXXXXXXXXXXXXXXXXXX
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 case after receiving the completed application on August 15, 2009, and subsequently drafted the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated May 13, 2010, 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 correct his military record by changing his name and gender. He alleged that he is the veteran whose name and Social Security number (SSN) appear below his name in the case caption above. The veteran enlisted in the Coast Guard on April 10, 1989, and was honorably discharged from the Coast Guard on October 25, 1991 due to a physical disability rated at 10% disabling. The veteran's military records show that he was female when he served in the Coast Guard. The applicant alleged that he is the veteran and that a California State court has legally changed his name to the male name shown in the case caption and his gender to male. The applicant stated that it is in the interest of justice for the Board to consider his application even though more than three years have passed since he discovered the alleged error because for him to be recognized as a veteran his military documents need to match his legal name and gender.

In support of his allegations regarding his identity and name, the applicant submitted a photocopy of a California Superior Court order dated July 10, 2003, ordering that the veteran's original first and middle names be changed from female names to male names, with no change to the last name.

In support of his allegations regarding his gender change, the applicant submitted a photocopy of a California Superior Court order dated November 3, 2005, ordering that the

veteran's gender be changed from female to male and that he be issued a new birth certificate. The applicant submitted a copy of his birth certificate showing that he is a male.

VIEWS OF THE COAST GUARD

On December 10, 2009, the Judge Advocate General of the Coast Guard submitted an advisory opinion in which he adopted the findings and analysis provided in a memorandum on the case submitted by Commander, Personnel Service Center (PSC), who recommended that the Board deny relief.

PSC stated that in COMDTINST M1900.4D, the Manual for preparing DD 214s, Chapter 1.D.2.a. states that "[a]ll entries [on the DD 214], unless specified otherwise (i.e., block 7a, 7b), are for the current period of active duty only from the date of entry as shown in block 12a through the date of separation as shown in block 12b." Pursuant to this regulation, CGPC stated, the DD 214 was properly prepared with the applicant's legal name at the time.

PSC stated that the applicant's "legal name change and gender reassignment became effective after the period of service indicated on the DD 214. Therefore, there is no error or injustice with regard to the applicant's name as it appears on the DD 214 or in [other] official military records." PSC noted that records of former servicemembers are filed based upon Social Security Number and the name of the veteran at the time of discharge."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On December 11, 2009, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within thirty days. The Board received no response 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 submissions, and applicable law:

1. The Board has jurisdiction over this matter pursuant to section 1552 of title 10 of the United States Code.
2. Under 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22, an application to the Board must be filed within three years after the applicant discovers, or reasonably should have discovered, the alleged error or injustice. The application should have been filed within three years after the applicant obtained the legal order changing his gender on November 3, 2005. Therefore, the application is untimely by approximately eight months.
3. However, the Board may still consider the application on the merits, if it finds 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 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. See also *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

4. The applicant argued that it is in the interest of justice to consider his application because in order for him to be recognized as a veteran, he needs his military documents to match his legal name and gender. However, the applicant's reason is not specific enough for the Board to make a determination with regard to waiving the statute in the interest of justice. He offered no evidence of any prejudice or discrimination that he has suffered as a result of not having his military documents reflect his current legal name and gender.

5. Nor is the Board persuaded to waive the statute of limitations based on a cursory review of the merits. Although the applicant has proved that he is the same person as the veteran whose original, female name and SSN appear in the case caption above and that a California Superior Court ordered that his gender be changed to male, he has not proved by a preponderance of the evidence that his military records contain any factual error. The records show that the applicant entered, served in, and was discharged from the Coast Guard as a woman with the female name shown in the case caption. Therefore, the Board concludes that the applicant's military records are not erroneous even though they do not reflect his new name and gender.

6. A DD 214 (document discharging member from active duty) is a record of a single period of enlistment, like a snapshot, and it is supposed to reflect the facts of that enlistment and to be accurate as of the date of discharge.¹ COMDTINST M1900.4D, the manual for completing DD 214s, contains no provisions for updating DD 214s when veterans' personal data change after their separation from the Service. For example, the Coast Guard does not correct or issue new DD 214s when members or veterans later change their names due to marriage; change their home address; or earn new awards or time in service. Therefore, the Coast Guard's refusal to update the applicant's active duty military records is not an error.

7. Nor has the applicant proven an injustice. For the purposes of the BCMRs, "injustice" is "treatment by the military authorities that shocks the sense of justice but is not technically illegal."² The Board notes that the applicant could theoretically face some prejudice as a result of his situation, but he has not submitted any evidence of actual prejudice or denial of veterans' benefits. This case is distinguishable from Docket No.2008-181 in which that applicant had earned reserve retired pay as a man, changed his social security number under threat of domestic violence and subsequently changed his gender to female after surgery. The Coast Guard refused to pay her retired pay under her new social security number and name. The Board finding an injustice, granted limited relief by directing the Coast Guard to correct its electronic database of the Personnel Services Center to show that applicant as a female retired reservist, rather than male, and to correct the pay database to ensure that that applicant's retired pay and benefits are

¹ UNITED STATES COAST GUARD, COMDTINST M1900.4D, Chap. 1.D.2.a.

² *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976); see Decision of the Deputy General Counsel, BCMR Docket No. 346-89.

paid to her under her female name and her new Social Security Number. In the instant case, the applicant has not demonstrated that he is suffering any injustice as a result of any Coast Guard action. His DD 214 bears his SSN, and he has the court documents to prove that his name was once the name shown on the DD 214, which should be sufficient to establish his identity.

9. Accordingly, the Board finds that the applicant's request for correction of his military record should be denied because it is untimely and because it lacks merit.

ORDER

The application for correction of the military record of former XXXXXXXXXXXX, XXXXXXXXXXXX, USCG, now known as XXXXXXXXXXXX, is denied.

Donna M. Bivona

Nancy L. Friedman

Dorothy J. Ulmer