DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2004-116

XXXXXXXXXXXXXX
xxxxxxxxxxxxxx

FINAL DECISION

Author: Hale, 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. It was docketed on May 13, 2004, upon the BCMR's receipt of the applicant's request for correction.

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.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant asked the Board to correct his record by upgrading his separation code (JML), narrative reason for separation (homosexuality), and reenlistment code (RE-4).[1] The applicant did not specify which separation code, narrative reason, or reenlistment code he wanted placed in his Coast Guard record. The applicant argued that the codes should be upgraded because he is not a homosexual, nor was he a homosexual at the time of his discharge, and that he did not discover the meaning of the separation and reenlistment codes until he recently attempted to reenlist in the Armed Forces.

SUMMARY OF THE APPLICANT'S RECORD

On February 5, 1980, the applicant enlisted in the Coast Guard. On May 6, 1987, the applicant sent a memorandum to the Commanding Officer (CO) of his unit, requesting an administrative discharge from the Coast Guard while citing provisions of

---

[1] A reenlistment code of RE-4 means the applicant is "ineligible for reenlistment" into the Armed Forces.

the Coast Guard Personnel Manual pertaining to discharges for homosexual conduct. In his memorandum to the CO, the applicant stated the following:

> I am not a homosexual, but I do 'habitually associate myself with persons known to be homosexuals.' In accordance with [Article 12.B.33.a.(6)(c)1 of the Personnel Manual], this means that I am classified as a class III homosexual, to be discharged for unsuitability.
>
> I have never, and will never attempt, or engage in a homosexual act. I also will not prejudice myself against homosexuals, or any other group of individuals, for any reason.

The applicant's CO responded in a letter dated May 7, 1987, stating that

> I am holding action on your request for an administrative discharge pending the results of the official investigation now in progress. As you are aware, the investigation may raise other, non-sexual related, issues that could require further action. [[2]]

On July 29, 1987, the applicant's Acting CO issued a letter informing the applicant that he was being discharged from the Coast Guard for unsuitability pursuant to Article 12.B.16.b.6. In his letter, the CO noted that he decided to discharge the applicant because of the applicant's admission in his May 6, 1987, letter that he was a Class III homosexual. The CO noted that the final decision on his discharge and the type of discharge would rest with the Commandant. The letter also informed the applicant that he had the right to submit a rebuttal and to consult with legal counsel.

On July 29, 1987, the applicant submitted a response to the CO's July 29, 1987, letter. In his letter, the applicant acknowledged that his discharge had been proposed and acknowledged that he had been provided the opportunity to consult legal counsel. Finally, he noted that he did not object to being discharged from the Coast Guard. The applicant attached a statement to the July 29 letter, and noted, in pertinent part, that

> … I am not homosexual or bisexual.
>
> I have friends that are openly homosexual. … I associate with these people primarily because I am on the Resurrection and Prayer (RAP) ministry team at my church. As a RAP team member, I visit AIDS patients in hospitals and in their homes. I have, on occasion, escorted a

---

[2] The applicant was determined to have unlawfully collected rent-plus allowances over his actual costs over a 5-month period in 1983 and 1984. He made restitution of $960.00 to the government, and no command action was taken.

> partially debilitated patient out to various bars and dance clubs. … I am therefore guilty of 'habitually associating with persons known to be homosexual.' …
>
> The Coast Guard personnel manual dictates that my behavior means that I am a Class III homosexual. … It appears that the Coast Guard would have their personnel prejudice themselves against homosexuals. … [I] can not and will not knowingly prejudice myself against homosexuals for any reason whatsoever. …
>
> … I feel strongly enough about this matter that I would rather be discharged, than be affiliated with an organization that condemns a group of individuals… .
>
> Again, although I do not object to this discharge, I am not a homosexual, and I have never engaged in, nor attempted to engage in, any homosexual acts.

On July 30, 1987, the applicant was evaluated by a physician who noted that there was no evidence to support a clinical finding or psychiatric diagnosis and that no further assessment or psychological testing was necessary.

On July 31, 1987, the applicant's CO issued a memorandum to the Commandant recommending that the applicant be administratively discharged by reason of unsuitability in accordance with Article 12.B.16. of the Personnel Manual. In support of his recommendation, he noted that the applicant had openly admitted to being a Class III homosexual and that his discharge was warranted under the applicable regulations.

On August 7, 1987, the Commandant directed that the applicant be discharged by reason of unsuitability in accordance with Article 12.B.6. of the Personnel Manual. The authorized separation code and narrative reason for separation were JML (homosexuality) and unsuitability.

On August 17, 1987, the applicant signed an administrative remarks (page 7), acknowledging that his security clearance would be terminated and made the following acknowledgment:

> I acknowledge termination for cause of my security clearance and that unless eligibility for a security clearance is subsequently reinstated, I will not be eligible for reenlistment except as authorized by the Commandant.

On September 10, 1987, the applicant was honorably discharged from the Coast Guard for unsuitability with a reenlistment code of RE-4. On this date he signed a page 7 in which he made the following acknowledgment:

> I acknowledge that I have been informed that I am not being recommended for reenlistment and the reason [thereof], and that an entry to that effect has been made in my service record. …

VIEWS OF THE COAST GUARD

On August 17, 2004, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he adopted the findings of the Coast Guard Personnel Command (CGPC) and recommended that the Board grant the applicant's request. In its memorandum to the JAG, CGPC recommended that the applicant's DD214 should be corrected by (a) changing his separation program designator (SPD) code from JML to JDP[3]; (b) changing the narrative reason for separation from unsuitability to separation for miscellaneous/general reasons, and; (c) changing his reenlistment code from RE-4 (ineligible for reenlistment) to RE-1 (eligible for reenlistment).

JAG stated that when considering the applicant's case under the Equity Standard of Review set forth in 33 C.F.R. Chapter 1 § 51.7, it is clear that the policies governing discharge for homosexuality have changed substantially since the applicant's discharge. Accordingly, JAG noted that under current policy the applicant would not be prohibited from remaining or enlisting in the service because he was not a homosexual nor had he ever engaged in a homosexual act.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 18, 2004, the Chair sent a copy of the views of the Coast Guard to the applicant and invited him to respond within 30 days. No response was received.

APPLICABLE LAW

Article 12.B.16.b.6. of the Coast Guard Personnel Manual (at the time of the applicant's discharge), stated that when an enlisted person was determined to be Class III homosexual, discharge was authorized under this article by reason of unsuitability.

Article 12.B.33.a.6. (at the time of the applicant's discharge) stated that Class III homosexuals were defined as those cases where the enlisted member:

> a. Exhibits, professes or admits to homosexual tendencies, or habitually associates with persons known to be homosexuals, but there is no evidence that the member has, while on active duty in the Coast Guard, engaged in

---

[3] Upon inquiry by the BCMR staff, the Coast Guard stated that the proposed JDP code was erroneous, as it does not exist in the SPD handbook.

homosexual acts, or has proposed or attempted to perform an act of homosexuality.

b. Prior to entering the Coast Guard, exhibited, professed, or admitted to homosexual tendencies, or habitually associated with persons known to be homosexuals, or who engaged in one or more homosexual acts or proposed or attempted to perform an act of homosexuality, but there is no evidence that the member has, while on active duty in the Coast Guard, engaged in or proposed or attempted to perform an act of homosexuality.

Article 12.B.33.a.7. (at the time of the applicant's discharge) stated that when processing service members classified as Class III homosexuals, commanding officers were directed to take one of the following actions:

a. Recommend retention in the Service and forward the case to Commandant (G-PE) for final action where it is deemed that the evidence fails to support the allegation against the member or the circumstances of the case fully justify such a recommendation.

b. Advise the member concerned of the basis for classification as a Class III homosexual, the contemplated actions to be taken, and inform the member, in writing, of the right to counsel, and, if the member has 8 years of total active and/or inactive military service, of the right to appear before a board.

Commandant Instruction M1900.4C (at the time of the applicant's discharge) stated that a member receiving a separation code of JML received a narrative reason for separation of Unsuitability – Homosexual tendencies and a reenlistment code of RE-4.

Article 12.E.1. of the current Coast Guard Personnel Manual states, in pertinent part, that under the current "Don't ask, don't tell" policy of the armed services, the suitability of a person will be judged on their conduct and ability to meet the required standards of duty performance and discipline. A member's sexual orientation is considered a personal, private matter and is not a bar to continued service unless manifested by homosexual conduct. The Personnel Manual further states that a member may only be separated if credible information about homosexual conduct exists. Credible information does not exist if the only information known concerns an associational activity, such as, going to a gay bar, possessing or reading homosexual publications, associating with known homosexuals, or marching in a gay rights rally in civilian clothes.

33 C.F.R. Chapter 1 § 51.7, Equity Standard of Review. A discharge is presumed to be equitable unless an applicant submits evidence sufficient to establish that "[t]he policies and procedures under which the applicant was discharged differ in material

respects from policies and procedures currently applicable on a service-wide basis to discharges of that type, provided that current policies or procedures represent a substantial enhancement of the rights afforded a party in such proceedings, and there is a substantial doubt that the applicant would have received the same discharge if relevant current policies and procedures had been available to the applicant at the time of the discharge proceeding under consideration…"

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 10 U.S.C. § 1552.

2. An application to the Board must be filed within 3 years after the applicant discovers the alleged error in his record. 10 U.S.C. § 1552. The applicant signed and received his discharge documents indicating that his separation code was JML and his reenlistment code was RE-4 when he signed his Certificate of Release From Active Duty (DD214) in 1987, but alleged that he did not realize what the separation and reenlistment codes meant until he recently attempted to reenlist in the Armed Forces. However, the Board finds that the applicant knew or should have known the meaning of the separation and reenlistment codes when he signed his DD214. Also, the applicant received letters from his CO and the Commandant in July and August 1987, which clearly stated he was being discharged for being a Class III homosexual. Moreover, the applicant signed two additional documents that clearly stated he was ineligible for reenlistment. Thus, his application was untimely.

3. Pursuant to 10 U.S.C. § 1552, the Board may waive the 3-year statute of limitations if it is in the interest of justice to do so. To determine whether it is in the interest of justice to waive the statute of limitations, the Board should consider the reason for the delay and conduct a cursory review of the merits of the case. *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992). Although the applicant has not explained his delay, a cursory review of the merits of this case indicates that the JAG and CGPC have determined that the applicant's separation and reenlistment codes were unjust. Therefore, the Board finds that it is in the interest of justice to waive the statute of limitations in this case.

4. At the time of the applicant's discharge in 1987, the Coast Guard had delineated three categories of homosexuality. One of these categories (Class III) was reserved for individuals for whom "there is no evidence" that they engaged in or proposed or attempted to perform an act of homosexuality "while on active duty in the

Coast Guard." Another category (Class II) was for persons who have engaged in "one or more homosexual acts" while on active duty in the Coast Guard. (The phrase "homosexual acts" was not defined in the Personnel Manual.)

5. The Board notes that the Coast Guard's decision to discharge the applicant was not an arbitrary one. In the applicant's May 6, 1987, letter to his CO, the applicant specifically *requested* a discharge from the Coast Guard. Citing Article 12.B.33.a. of the Personnel Manual, the applicant stated that discharge was warranted because he "habitually associates … with persons known to be homosexuals" and "…this means that I am classified as a class III homosexual, to be discharged for unsuitability." In that same letter, the applicant reinforced that he was not a homosexual nor would he ever engage in any homosexual act. Nonetheless, the applicant actively sought a discharge by explicitly stating that he was a class III homosexual. The Coast Guard subsequently initiated action to discharge him administratively for unsuitability, and he was discharged shortly thereafter.

6. The Board finds that the Coast Guard committed no error at the time of the applicant's discharge in 1987. The applicant openly claimed to be a class III homosexual and clearly expressed his desire to be discharged from the Coast Guard under Article 12.B.16.b.6. that made class III homosexuality grounds for discharge. Although the Coast Guard was under no duty to grant the applicant's request, they nonetheless did so and discharged him for unsuitability. The Coast Guard informed the applicant by written notice on several occasions that he was being discharged for unsuitability and that he would be ineligible for reenlistment. The Coast Guard also afforded the applicant several opportunities to seek legal counsel, but the applicant chose not to do so.

7. The JAG and CGPC stated, and the Board agrees, that the policies and procedures under which the applicant was discharged differ substantially from the current policies and procedures applicable to matters of this nature. Under current Coast Guard policy, a member may not be discharged for an associational activity, such as, going to a gay bar, possessing or reading homosexual publications, or associating with known homosexuals. Under Article 12.E.1. of the current Personnel Manual, a member may only be discharged for homosexuality based on viable evidence of a homosexual act, a statement that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. In this case, the Board agrees with the JAG and CGPC that under current policy, the applicant would not be prohibited from remaining or enlisting in the Service because there is no evidence whatsoever that the applicant is a homosexual or has demonstrated a propensity or intent to engage in homosexual acts.

8. After careful review of the applicant's case, both the JAG and CGPC have concluded that the applicant is entitled to relief because the separation code, narrative

reason for separation, and reenlistment code are unjust in light of the Coast Guard's current policies. The Board agrees. Under the current "Don't ask, don't tell" policy of the armed services, the suitability of a person is judged on his or her conduct and ability to meet the required standards of duty performance and discipline. A member's sexual orientation and associations is considered a personal, private matter and are not a per se bar to continued service.

9. The Coast Guard recommended that the applicant's narrative reason for separation be recorded as "miscellaneous/general." The corresponding SPD codes are JND for involuntary separation or KND for voluntary separation. Because the record indicates that the applicant actively pursued his discharge, the Board finds that his separation code should be KND.

10. Accordingly, the applicant's request should be granted.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of former XXXXXXXXXXXXXXXXXXXX, USCG, for the correction of his military record is granted. The applicant's DD 214 shall be corrected as follows:

a. Separation Code: KND

b. Narrative Reason: Separation for Miscellaneous/General Reasons

c. Authority: 12.B.12.

d. Reenlistment Code: RE-1

The Coast Guard shall make these corrections by issuing a new DD 214 with the above corrections, rather than by issuing him a DD 215.

Harold C. Davis, MD

Audrey Roh

Marc J. Weinberger