

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2004-132

XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX

FINAL DECISION

Author: Hale D.

This proceeding was conducted under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The case was docketed on June 2, 2004, upon the Board's receipt of the applicant's completed application and military records.

This final decision, dated February 10, 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, a seaman second class (SN2) who served on active duty in the Coast Guard Reserve during World War II, asked the Board to upgrade the character of his discharge from "under honorable conditions" to honorable.

The applicant alleged that he should have received an honorable discharge, but his discharge was characterized as "under honorable conditions" without cause. He alleged that he only had "one incident" during his service and that all of his other service was "a credit to the Coast Guard."

The applicant stated that the Veterans Service Officer at his local Veterans Service Office recently pointed out to the applicant that he was discharged "under honorable conditions" but he feels that his discharge should be upgraded to honorable in keeping with current Coast Guard regulations.

SUMMARY OF THE EVIDENCE

The applicant was inducted into the Coast Guard Reserve on December 10, 1942, and began serving on active duty on March 29, 1943. His term of enlistment was 3 years.

The applicant's service record shows that he served on the Coast Guard cutters *Southwind*, *Manhasset*, *Evergreen*, and *Northland*, in addition to serving at several land-based Coast Guard stations. His record also indicates that he was awarded and entitled to wear the American Area Ribbon, the World War II Victory Ribbon, and the American and European-African-Middle Eastern Area Campaign Ribbon.

The applicant's service record notes several instances of misconduct that resulted in various levels of discipline:

In May 1944, the applicant was arrested by the shore patrol for intoxication and was given 20 hours of extra police duty at the deck court or captain's mast¹ conducted on June 2, 1944.

In July 1944, while assigned to the Coast Guard cutter *Southwind*, the applicant was apprehended by naval authorities and declared a "straggler" after he was absent over leave (AOL) for 3 days. However, there is nothing in the applicant's record which indicates that he was disciplined for this incident.

From September 25 - 27, 1944, while assigned to the cutter *Southwind*, the applicant missed the sailing of his ship when he was AOL for 2 days. On October 20, 1944, he was convicted by summary court-martial and was ordered to pay \$20 per month for 4 months.

On December 13, 1944, the applicant was charged with being AOL for 6 hours, 55 minutes, and was sentenced by deck court to be confined for 10 days, to pay \$10 per month for 2 months, and to perform 20 hours of extra police duty. The period of confinement was later remitted.

On June 12, 1945, while assigned to the cutter *Manhasset*, the applicant was taken to deck court and given 7 days confinement for being "drunk in a public place and breaking arrest."

¹ In the 1940s, a "deck court" was held for such misdemeanors as are today handled by captain's mast. In the Coast Guard, a nonjudicial punishment (NJP) proceeding under Article 15 of the Uniform Code of Military Justice is referred to as "captain's mast" or simply "mast." The legal protection afforded an individual subject to NJP proceedings is more complete than is the case for nonpunitive measures, but, by design, is less extensive than for courts-martial

On January 17, 1946, the applicant pled guilty at a deck court hearing to charges of (1) willfully, and with disrespectful tone, disobeying a lawful order issued by a Chief Petty Officer (CPO); and (2) illegally appropriating and using a government vehicle. He was ordered to pay the sum of \$18 per month for 2 months and to perform 40 hours of extra police duties.

The applicant's service record indicates that he was awarded perfect marks for conduct (4.0) on 18 out of the 26 performance evaluations he received while in the service. He received one conduct mark of 0.0 for the three-month period ending September 27, 1944, which included the time he was absent over leave from the *Southwind*. The applicant's Termination of Service form (NAVCG 2500-C) indicates that his average proficiency mark was 2.48 and his average conduct mark was 3.23.

On March 21, 1946, the applicant was discharged from the Coast Guard Reserve, having served 3 years, 3 months, and 7 days on active duty. His Termination of Service form indicates that he was issued an honorable service button and an honorable service emblem but not an honorable discharge button. The reason cited for his discharge is "expiration of enlistment." The form is signed by the applicant. The applicant's Notice of Separation and Certificate of Discharge also indicate that he was discharged "under honorable conditions."

VIEWS OF THE COAST GUARD

On September 8, 2004, the Judge Advocate General (TJAG) 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.

CGPC stated that the Board should waive the statute of limitations in this case in the best interest of justice. He stated that there is a discrepancy in the applicant's record, which would affect the applicant's characterization upon discharge. Specifically, CGPC noted that the applicant's final average marks as listed in his service record are 2.48 for Proficiency and 3.23 for Conduct. However, CGPC recalculated the applicant's marks and determined that he should have received final average marks of 2.57 for Proficiency and 3.46 for Conduct. CGPC noted that the regulations governing the minimum final averages for honorable discharges were changed in 1983. Accordingly, under Article 12.B.2.f.d. of the Coast Guard Personnel Manual, after June 30, 1983, the member must have a minimum characteristic average of 2.5 in each factor over the period of enlistment to receive an honorable discharge.

Moreover, CGPC noted that under 33 C.F.R. Chapter 1 § 51.7, Equity Standard of Review, it would be fair and in the best interest of the government to upgrade the applicant's discharge from "under honorable conditions" to "honorable." CGPC stated that given the applicant's conduct and proficiency marks, the discrepancy, and the applicant's service history, it is unlikely that the applicant would have received a general discharge under current policy. CGPC also took into consideration the applicant's current age and the period of time in which the applicant served.

Finally, CGPC noted that the applicant's discharge should be upgraded pursuant to Article 12.B.2.f.f. of the Coast Guard Personnel Manual, which states

in any case in which a general discharge or discharge under other than honorable conditions is warranted, the [Coast Guard] may award the member an honorable or general discharge, as appropriate, under certain conditions.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 14, 2004, the BCMR sent the applicant a copy of the views of the Coast Guard and invited him to respond within 15 days. The applicant responded on September 20, 2004, and stated that he agreed with the Coast Guard's recommendation.

APPLICABLE LAW

On July 8, 1976, the General Counsel of the Department of Transportation established the following policy concerning the upgrading of discharges:

[T]he Board should not upgrade discharges solely on the basis of post-service conduct. ... This emphatically does not mean that the justness of a discharge must be judged by the criteria prevalent at the time it was rendered. The Board is entirely free to take into account changes in community mores, civilian as well as military, since the time of discharge was rendered, and upgrade a discharge if it is judged to be unduly severe in light of contemporary standards. ...

During World War II, the Coast Guard functioned under the auspices of the Navy, pursuant to 14 U.S.C. §§ 1, 3. However, the applicant was discharged from the Coast Guard in 1946, after it had reverted to the Department of the Treasury and operated under its own rules. Executive Order No. 9666, December 28, 1945.

Under Article 4592 of the Coast Guard's 1934 Personnel Instructions and ALCOAST (P) 101, issued on June 12, 1946, the following were the criteria for receiving an "honorable" character of discharge: "(1) Discharge at expiration of enlistment, or for extended enlistment, or for the convenience of the government; (2) Average of marks for enlistment, or enlistment as extended, not less than 2.75 in proficiency in rating and 3 in conduct; and (3) Never convicted by general Coast Guard court or more than once by a summary Coast Guard court, or more than twice by a Coast Guard deck court [captain's mast]." Members who did not meet these standards could receive service characterizations of "good," "indifferent," "undesirable," "dishonorable," or "bad conduct."

Article 584(4) of the 1940 regulations provided that honorable discharges were awarded under any of five conditions: expiration of enlistment; convenience of the government; hardship; minority (age); and disability not the result of own misconduct. A general discharge could be awarded "for the same [five] reasons as an honorable discharge and issued to individuals whose conduct and performance of duty have been satisfactory but not sufficiently deserving or meritorious to warrant an honorable discharge."

Today's standards for discharge appear in Article 12.B.2.f.1.b. of the Coast Guard Personnel Manual (COMDTINST M100.6A). An enlisted member may receive an honorable discharge if his or her service is characterized by "[p]roper military behavior and proficient performance of duty with due consideration for the member's age, length of service, grade, and general aptitude"; and through June 30, 1983, the member's final average evaluation mark must have been at least 2.7 [out of 4.0] for performance of duty and at least 3.0 for conduct.

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 concerning this matter pursuant to section 1552 of title 10 of the United States Code.
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 discharge was characterized as "under honorable conditions" in 1946, but alleged that he did not notice the character of his discharge until March 2004. However, the Board finds that the applicant knew or should have known the character of

his discharge in 1946, when he signed his Termination of Service and received his Certificate of Discharge. 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 CGPC has determined that the applicant's character of discharge was unjust. Therefore, the Board finds that it is in the interest of justice to waive the statute of limitations in this case.

4. The applicant's service record does not support his allegation that his service in the Coast Guard Reserve during and after World War II met the criteria for receiving an honorable discharge. He was discharged upon his expiration of enlistment, and his proficiency in rating mark was 2.57 and his conduct mark was 3.46.² Pursuant to the regulations in effect at the time of the applicant's discharge, he was required to have earned a minimum final average of 2.7 in proficiency and 3.0 in conduct. In this case, the applicant received a 2.57 for proficiency and a 3.46 for conduct. Moreover, he was convicted by deck court 4 times and by summary court martial once. Therefore, the applicant did not meet the criteria to obtain an honorable discharge.

5. Discharges characterized as "under honorable conditions" were authorized under Article 583 of the 1940 Regulations for the United States Coast Guard upon the expiration of a member's enlistment, and the applicant's record supports his receipt of this less than fully honorable characterization of discharge. However, the Coast Guard revised the regulations governing the relationship between final conduct and proficiency marks and discharge in 1983. Accordingly, CGPC noted that the applicant *would have* received an honorable discharge under the 1983 change to the Coast Guard Personnel Manual, because under that revision the member must have a minimum characteristic average of 2.5 in each factor over the period of enlistment. In this case, the applicant had a 2.57 in proficiency and a 3.46 in conduct.

6. The delegate of the Secretary has held that, in considering the character of a discharge, the Board may "take into account changes in community mores, civilians 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

² These numbers reflect the proficiency and conduct marks as recalculated by CGPC.

contemporary standards.”³ Therefore, and in light of the fact that the applicant’s marks meet the criteria for an honorable discharge under current standards, the Board concludes that it is in the interest of justice to upgrade the applicant’s discharge.

7. Accordingly, relief should be granted.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

³ Policy concerning the upgrading of discharges, from The General Counsel of the Department of Transportation, July 8, 1976

ORDER

The application for correction of the military record of former seaman second class, XXXXXXXXXXXXXXXXXXXX, USCGR, is hereby granted.

His records shall be corrected to show that he received an honorable discharge from the Coast Guard Reserve on March 21, 1946.

James G. Parks

Dorothy J. Ulmer

Darren S. Wall