

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2006-188

XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX

FINAL DECISION

AUTHOR: Ulmer, D.

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 on September 29, 2006, upon receipt of the applicant's completed application and military records.

This final decision, dated May 31, 2007, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant asked the Board to correct his military record by upgrading his 1967 general discharge under honorable conditions to an honorable discharge. He also requested that evidence of a special court-martial conviction for assault be removed from his record.

APPLICANT'S ALLEGATIONS

The applicant alleged that his general discharge is unjust because it resulted from racial discrimination and because he was sexually assaulted while on active duty and his commanding officer (CO) failed to do anything about it.

The applicant further alleged that his court-martial conviction for assault should be removed from his record because it too resulted from racial discrimination and was based on lies from members of the Coast Guard who were prejudiced against him. He further alleged that these members demonstrated their dislike for him by putting feces on his bunk. The applicant stated that because of the unfair treatment he received due to his race and the alleged sexual assault, he has been diagnosed with and suffers from post traumatic stress disorder (PTSD). He also stated that the untimeliness of his application should be excused because of the PTSD. In support of his allegations, he submitted a January 13, 2006, psychiatric report from the Department of Veterans Affairs (DVA). The psychiatric report stated that the applicant told the

examiner that he had been sexually assaulted in 1966 and that the command failed to take any action after the applicant reported it.

The DVA psychiatric report also states that subsequent to the sexual assault, the applicant was hospitalized for ten days in a metropolitan (Baltimore) hospital and that since that time he has required psychosocial support for major depression in addition to medications. Under "History of Present Illness" the psychiatrist wrote:

The veteran worked for the most part as a ticket agent for a bus company (Trailways). He stopped working in 1988 because of "mental stress". The veteran expressed gratitude to Dr. [K], who in 1988 established the diagnosis of post traumatic stress disorder secondary to sexual assault. This veteran has been afflicted all along with signs and symptoms of PTSD, mostly characterized by intrusive recollections of events on a daily basis, nightmares more than three times per week in frequency, difficulty concentrating and completing tasks, persistent symptoms of increased arousal, irritability, as well as post-military stressors in the area of avoidance of the stimuli associated with trauma and numbing general responsiveness. This veteran continues to avoid situations or people which arouse recollection, and he cannot watch movies that depict sexual assaults or sexual content type of material.

With respect to the applicant's mental status examination, the DVA psychiatrist wrote the following:

This is an alert male looking in accordance to his chronological age. His behavior remains in general appropriate to the structure and the manner of this interview and situation. This veteran was casually dressed, appropriately groomed, maintaining good personal hygiene. His posture was normal but movements were slow. The veteran was using a wheelchair because of the severity of pain across the lower extremities . . . On several occasions, the veteran was tearful. No hallucinations or delusions were present. No obsessive or ritualistic behavior was detected. Mood was reported by the veteran as anxious and depressed, assessed by this interviewer as moderately anxious and depressed. He denied suicidal or homicidal ideations, intentions or plans. Emotional expression or affect was generally constricted throughout the interview but congruent to thought content and mood. Thought processes were logical, coherent and goal oriented. Cognitive functions - the veteran was fully oriented to person, place, time and purpose. There are no deficiencies of cognition or memory but concentration and attention are moderately impaired. Insight and judgment are well preserved.

The psychiatrist diagnosed the applicant as suffering from PTSD and major depression linked to PTSD and current physical difficulties. The psychiatrist stated that after reviewing the applicant's file, the electronic medical records, and medical literature, "it is reasonable to conclude that the veteran's allegations of manifesting PTSD linked to the service are more likely than not."

SUMMARY OF THE COAST GUARD RECORD

The applicant enlisted in the Coast Guard on June 7, 1965.

On October 20, 1966, the applicant signed an administrative remarks (page 7) entry acknowledging that the Coast Guard was considering discharging him by reason of unsuitability due to his lack of aptitude, his inability to manage his financial affairs, his inability to refrain from dishonorable relations with women, and his possible character and behavioral disorders. The applicant agreed to be examined by a psychiatrist.

On October 25, 1966, the applicant was evaluated by the chief of psychiatric services at a United States Public Health Service (USPHS) hospital. The USPHS psychiatrist's impression was that of an angry young man who had some undesirable character traits but who was not mentally disturbed. The USPHS psychiatrist further stated "the sum total of the [applicant's] personality assessments does not entitle the examiner to call [the applicant] mentally disturbed so that we could give him a medical diagnosis . . . In fact he does not seem to be distressed enough to warrant any kind of medication." The report noted that the applicant was not sleeping well due to nightmares of being placed in front of a firing squad and indicated that occasional medication for sleeping could be prescribed.

On October 28, 1966, the applicant was punished with twenty days of correctional custody at a captain's mast for two violations of Article 92 of the Uniform Code of Military Justice (UCMJ) by failing to maintain a contact number and for unauthorized use of a government vehicle. He was also punished for speeding, a violation of Article 134 of the UCMJ.

From December 28, 1966 to January 11, 1967, the applicant was hospitalized with low back pain that he claimed was incurred while lifting weights. The applicant was evaluated by an orthopedist and diagnosed with mild low back pain and possible malingering. While hospitalized, the applicant was also evaluated by a civilian neuropsychiatrist. The neuropsychiatric report commented that the applicant stated that "[he] can't work all of his life" and that he needed a job that required no bending or kneeling. The report further noted the applicant's comments that he was filled with hate, that he believed that he had been unfairly treated by his command, and that he still suffered with back pain. The neuropsychiatrist's agreed with the previous psychiatric report and offered his impression that the applicant was in a paranoid state at that time, but that he was not sure that it could be called a psychosis. He also stated that the applicant's back pains were psychophysiological. Subsequent to the two consultations, the applicant was discharged from the hospital fit for duty.

On January 10, 1967, the USPHS psychiatrist prepared a report on the applicant at the request of his defense counsel who was assigned to represent the applicant against charges of assault and communicating a threat. The USPHS psychiatrist wrote the following in pertinent part:

[The applicant] has been seen by two different psychiatrists over the past several months, myself and Dr. [L], an outside non-military psychiatrist. I have seen this man on two different occasions and the most recent one was January 9, 1967, I

have felt all along that while this man has had a great deal of difficulty in living and following the rules of social order, that he is primarily not suffering from a mental disease. In other words, he is responsible for his actions and does not have significant psychological difficulties to disable him in any way. Also I felt that he could stand trial for any disciplinary action that was needed. Dr. [L], on the other hand, felt that this man suffered from a paranoid state or what might be called a paranoid personality^[1] according to the American Psychiatric Association Manual. Because of our differences of opinion, we did have a conference in an effort to resolve our differences of opinion. Because I have known the patient over a longer period of time and am directly responsible for military personnel here as a Public Health Service officer, I feel the report leaving from the hospital to the Coast Guard should be as follows:

That the [applicant], while suffering from some traits of a personality disorder does not show significant psychopathology to warrant a psychiatric diagnosis or disease. Also, that he is responsible for his actions and that he should be allowed to stand trial for any disciplinary action pending against him.

On January 12, 1967, the applicant was readmitted to the hospital for treatment and evaluation of maxillary facial infected inclusion cyst. The applicant was discharged on February 8, 1967 in a fit for duty status.

On February 20, 1967, the applicant was convicted under Article 128 of the UCMJ at a special court-martial of two specifications of assault against two different service members by striking at them with a cardboard cutting device. He was sentenced to three months of confinement at hard labor and reduced to pay grade E-1.² During his confinement, the applicant received a psychiatric evaluation on March 23, 1967, that determined that he did not have a mental disease and that cleared him psychiatrically for any appropriate administrative action.

On April 25, 1967, the commanding officer informed the applicant that the command intended to recommend to the Commandant that the applicant be administratively discharged from the Coast Guard under Article 12-B-10 of the Personnel Manual due to inaptitude apathy, defective attitude, inability to expend effort constructively, and financial irresponsibility.

On April 25, 1967, the applicant signed a statement in which he acknowledged that he had been informed of the proposed discharge, that he had been counseled regarding the matter, that he did not wish to submit a statement on his behalf, and that he was in complete accord with the proposed action.

¹ Paranoid personality disorder is not a mental disease, defect, or disability. See Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, p. 685 and Coast Guard Medical Manual.

² During the applicant's confinement at Fort Meade, he wrote to his CO and senators on numerous occasions seeking a discharge from the Coast Guard. In none of his correspondence did the applicant state that he had been the victim of a sexual assault.

On April 25, 1967, the CO recommended that the Commandant discharge the applicant for unsuitability, due to inaptitude, apathy, defective attitude, inability to expend effort constructively, and financial irresponsibility. The CO provided the following narrative with respect to the applicant:

[The applicant] was assigned to this station after boot camp, reporting 24 August 1965. He performed well, though slow, until August 1966. His slowness was attributed to a slight degree of immaturity, his superiors believing this would pass with time. Since then he has been a continual liability to the command due to his inaptitude, in combination with apathy. He can be trusted to perform only the most menial and simple tasks and then must be afforded constant supervision. Minor incidents involving infractions of regulations were overlooked in an effort to straighten him out and no official records were kept.

He has been a constant problem because of his relationships with other people, both civilian and military. He is always involved with women, married and single, to the extent that his life has been threatened on occasion. He is presently serving a sentence of confinement arising from an altercation over an enlisted man's wife. He has large financial obligations which he is unable to discharge and it is apparent that these obligations will continue to increase. His chances for advancement are nil . . . Counseling has proved to be of no value as [the applicant] seems to be incapable of managing his life in an orderly manner and seems little interested in his assigned duties or his relationship with the service.

The CO noted that the applicant had an average mark of 2.8 in proficiency and 3.08 in conduct, but that he expected that the applicant would receive marks of 1.0 in both proficiency and conduct once his special court-martial conviction had become final.

On April 28, 1967, the Commander, Fifth Coast Guard District recommended to the Commandant that the applicant be discharged due to misconduct by reason of frequent involvement of a discreditable nature with military authorities and by reason of an established pattern of dishonorable failure to pay just debts, rather than by reason of unsuitability. The Commander recommended that the applicant be discharged with a general discharge and that he surrender his uniform upon separation.

On May 5, 1967, the Commandant directed the applicant to be discharged from the Coast Guard with a general discharge due to unsuitability under Article 12-B-10 of the Personnel Manual.

On May 19, 1967, the applicant signed an administrative remarks entry stating that he agreed with the findings that he was physically qualified for release from active duty. The applicant was discharged from the Coast Guard on May 19, 1967.

VIEWS OF THE COAST GUARD

On February 20, 2007, the Board received an advisory opinion from the Office of the Judge Advocate General (JAG). He recommended that the applicant's request for relief be denied because it was untimely and for lack of proof of error or injustice.

The JAG argued that the applicant has failed to show by a preponderance of the evidence why it is in the interest of justice to excuse his thirty-six year delay in filing an application with the Board within three years of his discharge from the Coast Guard. The JAG stated that the applicant's explanation that he did not file his application sooner because he suffers from PTSD is not good cause for failing to file his application within the time required. He further argued that based upon a cursory review of the merits it is not likely that the applicant will prevail on his claim. See *Allen v. Card*, 799 F. Supp. 158, 166 (D.D.C. 1992) (In determining whether it is in the interest of justice to waive the statute of limitations, the Board should "consider the reason for the delay and the plaintiff's potential for success on the merits, based on a cursory review.") In this regard the JAG argued that a review of the record reveals that the applicant was properly separated from the Coast Guard.

The JAG stated that the applicant has failed to present sufficient evidence to support his claim that he suffered from PTSD while in the Coast Guard. The JAG further stated that the 2006 DVA evaluation report diagnosing the applicant's PTSD is not signed and does not contain any other information that allows the Coast Guard to determine its origin. The JAG also stated that there is no evidence in the record that the applicant was the victim of a sexual assault while in the Coast Guard. Nor is there any evidence in the applicant's record that permits the Coast Guard to conclude that the applicant's court-martial conviction was based on racial discrimination.

The JAG stated that should the Board excuse the applicant's untimely filing of his application, the Board should still deny relief. In this regard, the JAG stated that absent strong evidence to the contrary, it is presumed that Coast Guard officials carried out their duties lawfully, correctly, and in good faith. *Arens v. United States*, 969 F. 2d 1034, 1037 (D.C. Cir. 1990). According to the JAG, the applicant offers no evidence that the Coast Guard committed any error or injustice. Further, the record shows that the applicant was properly discharged from the Coast Guard after his conviction at court-martial and other incidents that resulted in disciplinary action.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On February 23, 2007, the BCMR received the applicant's reply to the views of the Coast Guard. He disagreed with the advisory opinion. The applicant stated that things were going pretty well for him in the Coast Guard until he began a relationship with a white woman. Then, according to the applicant, he was called the N word, human waste was placed in his bunk, and dead fish was put under his pillow. He stated that he reported each incident to his command but nothing was done.

The applicant wrote that in 1965 on Thanksgiving evening when his girlfriend brought him back to the base, a pistol was put to his head and he was sexually assaulted by four men; he provided names of three of the four. The applicant stated that he reported the assault to the duty officer, but rather than assisting him, the duty officer called the applicant the N word and told him to get away from him. The applicant stated that he also reported the assault to the CO but he did not do anything about it.

The applicant states that he was subsequently hospitalized due to trauma and placed on medication. He stated that he told his doctors about the assault and that it was written in his medical record. He stated when he attempted to obtain his hospital records several years after his discharge he learned that the records had disappeared from Johns Hopkins Hospital where they had been stored.

The applicant stated that after he was released from the hospital he returned to his unit where he continued to suffer abuse. The applicant stated that on return from an assignment to Thomas Point lighthouse he was pushed overboard and discovered two dead bodies. He stated that upon discovery of the dead bodies he began crying for help and apparently he was assisted by some men who were fishing nearby. The applicant stated that he and the other crewmembers went into shock. He stated that he was hospitalized for approximately six weeks at a Public Health Service hospital.³

With respect to the court-martial charges, the applicant stated that he overheard the two individuals that he was convicted of assaulting planning another sexual assault against him. As a result, he stated that he put a box cutter in his hand to protect himself. He denied that that he assaulted them.

The applicant stated that he was tried and sentenced to 90 days confinement at the Fort Meade stockade, where he was sexually assaulted again. The applicant stated that he has been living with the traumatic events for forty-two years and that his life has been severely affected. In this regard, he stated that he relives the traumatic events every day; that he is required to take medication for the remainder of his life; that he is under severe stress; and that he is not employable.

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.

³ In response to a 1999 DVA request for information about this assignment, the Coast Guard wrote "examination of personnel jacket does not mention any specific incident involving dead bodies in the Chesapeake Bay or that [the applicant] was involved in any kind of "special" duty or mission."

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 or should have discovered the alleged error or injustice. See 33 CFR 52.22. The applicant stated that he discovered the alleged error on May 19, 1967, the date of his discharge from the Coast Guard. Therefore, the application was submitted approximately thirty-three years beyond the statute of limitations. The applicant argued that the untimeliness should be excused because he suffers from PTSD and is under treatment by the DVA. However, a fairly recent diagnosis of PTSD does not explain why the applicant could not have filed an application sooner. Moreover, there is no medical evidence in the record that the applicant's PTSD or any other mental illness interfered with his ability to comply with the 10 U.S.C. § 1552 or the Board rules at 33 C.F.R., part 52.

3. Although the applicant's explanation for not filing his application sooner is not persuasive, 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.

4. Based on a review of the merits as discussed below, the applicant is not likely to prevail on his claim, and therefore, the Board is not obligated to waive the statute of limitations in this case. Although, the applicant argued that his general discharge should be upgraded to honorable because it resulted from racial discrimination, he has submitted insufficient evidence to prove that he was treated unjustly and/or that racial discrimination was the reason for his discharge, rather than his own disciplinary and performance record. The applicant's non-judicial punishment, special court-martial conviction for an assault on two other service members, and the CO's statement that he had been an administrative burden to the command formed a sufficient basis on which to award the applicant a general discharge.

5. The applicant also argued that his discharge should be upgraded because he was the victim of a sexual assault, which he allegedly reported but was ignored by the command. There is no evidence in the record to support the applicant's claim that he was ever sexually assaulted while in the Coast Guard. Therefore, the applicant has failed to submit sufficient evidence to prove that he was sexually assaulted while on active duty.

6. The applicant has presented no evidence, except for his own statement, that his referral to special court-martial for assault was racially motivated or that it was based upon lies. In this regard, he stated that he obtained the box cutters that he used in the assault for which he was convicted at court-martial for his own protection because he had overheard the victims of his assault allegedly planning a sexual assault on him (the individuals allegedly planning this sexual assault were different from those who allegedly sexually assaulted the applicant the first time). However there is no evidence in the record that the applicant was in fear of bodily harm and needed cardboard box cutters for self protection. Accordingly, insufficient evidence has been presented to prove any error or injustice with respect to his special court-martial conviction.

7. The applicant currently suffers from PTSD that the applicant attributes to the alleged sexual assault and the alleged discovery of dead bodies while on assignment near a lighthouse. However there is no evidence in the Coast Guard record that the applicant suffered from PTSD while in the Coast Guard. The psychiatric examinations performed while the applicant was on active duty are much more reliable than the 2006 DVA mental examination performed more than thirty years after the applicant's discharge from the Coast Guard. The Coast Guard psychiatric evaluations revealed that the applicant did not suffer from any mental disease or defect, although he may have had some undesirable personality traits, even the one neuropsychiatrist who stated at the time of examination that the applicant was then in a paranoid state, commented that he could not call it a psychosis. In addition, the March 1967 psychiatric evaluation that the applicant received while in confinement found the applicant to be free of a mental disease and could be processed for an administrative separation. The Board notes that on March 19, 1967, the applicant agreed that he was medically fit for separation from the Coast Guard.

8. The applicant's suggestion that his PTSD resulted from an alleged sexual assault that occurred while in the Coast Guard and the alleged discovery of dead bodies while out on an assignment to a lighthouse are not supported by the record. As noted above, there is no evidence of a sexual assault in the record, nor is there any evidence that the applicant was on an assignment that led to the discovery of dead bodies. The evidence of record does not support the applicant's suggestion that he was hospitalized as a result of the alleged sexual assault or that he was hospitalized after discovering dead bodies near a light house. According to the military record, the applicant was hospitalized once for complaints of low back pain incurred while lifting weights and once for a facial infected inclusion cyst. Therefore, the applicant has submitted insufficient evidence to prove that he suffered from PTSD while on active duty or at the time of his discharge.

9. The applicant received all due process to which he was entitled under the Coast Guard Personnel Manual. He was notified of the discharge and provided an opportunity to make a statement, which he declined.

10. Accordingly, due to the length of the delay and the applicant's lack of probable success on the merits of his claim, the Board finds that the application should be denied because it is untimely and because it lacks merit.

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

ORDER

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

Patrick B. Kernan

Donald A. Pedersen

Kenneth Walton