

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-056

XXXXXXXXXX.

XXXXXXXXXX, FN (former)

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 on December 15, 2008, upon receipt of the applicant's completed application, and subsequently prepared the final decision for the Board as required by 33 CFR § 52.61(c).

This final decision, dated July 16, 2009, 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 record by changing his RE-4 (not eligible to reenlist) reenlistment code to RE-3 (eligible for reenlistment with waiver) so that he can reenlist in the armed forces.

On January 20, 1989, the applicant was honorably discharged by reason of unsuitability due to financial irresponsibility, with a JMH¹ separation code and the RE-4 reenlistment code. At the time of his discharge, he had served three years, five months, and two days in the Coast Guard.

The applicant alleged that his unsuitability discharge due to financial hardship was unjust. He stated that although he discovered the alleged error in 1989, it is in the interest of justice to consider the application even though more than three years have passed because he was unaware of the meaning of the separation and reenlistment codes at the time of discharge.

¹ Pursuant to Chapter 2 of COMDTINST 1900, a JMH separation code is assigned when a member is discharged by reason of unsuitability due to financial irresponsibility. This provision also mandated the assignment of an RE-4 reenlistment code.

SUMMARY OF THE RECORD

The military record indicates that the applicant served on active duty in the Navy prior to enlisting in the Coast Guard. He enlisted in the active duty Coast Guard on August 19, 1985 and was discharged on January 20, 1989.

The applicant's military record shows that on May 15, 1986, August 14, 1986, and January 7, 1987, the applicant was counseled about his excessive indebtedness. On May 3, 1988, the applicant was counseled about his continued trend of continued non-payment of his debts and he was referred to a financial advisor. On May 5, 1988, the applicant was counseled by a financial advisor. On August 25, 1988, August 29, 1988, and September 15, 1988, the applicant was counseled about his continued non payment of debt and financial problems.

On October 4, 1988, the applicant's officer-in-charge (OIC) placed the applicant on a six-month probationary period due to financial irresponsibility. During this probationary period, the applicant was supposed to make payment of rent in full and on time, to make payment of all utilities in full and on time; to make payment of all charge accounts in full and on time, to make payment of back rent owed to previous landlords in full and on time; and to cease writing insufficient fund checks. The applicant was warned that any violation of the terms of the probation would result in immediate discharge. The applicant acknowledged the probation with his signature.

On November 8, 1988, the OIC suspended the applicant's probation because the applicant had not made any effort to pay ERA realty for back rent. ERA realty wrote the OIC a letter date November 2, 1988, complaining that the applicant still owed back rent. The OIC noted that the applicant had made no effort to repay the debt until he was contacted by the realtor. The OIC stated that the applicant's failure to contact the realtor to make arrangements for payment of the back rent was a violation of probation. He was told that as a result of the violation administrative separation proceedings would begin.

On November 9, 1988, the OIC informed the applicant that the OIC was recommending that the applicant be discharged from the Coast Guard by reason of unsuitability due to financial irresponsibility. The OIC informed the applicant of the following:

You have been counseled by this command numerous times on your continued trend of non-payment of debts . . . you were placed on six months probation on 4 October 1988. There was a list of items for you to comply with which you did not do so.

You received counseling until the problem became a matter in which you were told that you were being considered for discharge. This command then set up and gave you time off to seek counseling from the financial advisor at K.I. Sawyer AFB. This counseling gave you a set "budget" to follow based on your income and debts. You chose to ignore this and continued your trend of non-payment of the debts on which you already owed while also incurring new debts.

You were directed to report to your supervisor if you were having any other problems concerning your finances. You also chose to ignore this and your supervisor found out through outside sources that you incurred more debts and also had not paid any of your household bills, i.e. rent, phone, electric, gas. You also knowingly wrote checks on an account that had no funds.

An undated letter from the applicant about the proposed discharge is in the military record. The applicant stated that he wanted to clear up the problem so that he could continue his career in the Coast Guard. He claimed that he had paid his back rent in full, that he did not realize at the time that he was writing non-sufficient fund checks, which happened only once, and that he always paid his bills. He denied that he had a continuous trend of non-payment of debts. He stated that his bills had become larger than he had expected. He stated that none of his utilities had been disconnected except for the heat and telephone. He indicated that he had taken care of all of his financial problems. He stated that his problems began with a checking account and a lack of knowledge about finances and budgets. The applicant stated that he believed he had gained the confidence to solve his financial problem and to continue in the Coast Guard.

On November 9, 1988, the applicant's officer-in-charge (OIC) recommended that the Commandant discharge the applicant by reason of unsuitability due to financial irresponsibility. The OIC stated that the applicant had been counseled many times about his financial irresponsibility and he provided 12 enclosures documenting the counseling. The OIC also noted that the applicant had been placed on a six-month probationary period. In addition to comments similar to those in his letter to the applicant, the OIC wrote the following:

[The applicant] has been a good worker but is slow to comprehend most things. He does whatever asked and never questions the authority of his superiors. But I feel that he can no longer be trusted. He has shaded, evaded the truth whenever I or my XPO, have tried to assist him when he was being counseled on [his financial] matters. I feel I have no choice left but to recommend that he be given an administrative discharge for unsuitability due to financial irresponsibility.

On December 14, 1988, the applicant signed a statement waiving his right to an administrative discharge hearing. He was informed that he was entitled to a hearing because he could have received a discharge under conditions other than honorable. The letter also contained the signature of a legal officer that counseled the applicant.

On December 14, 1988, both the officer in charge and the Commander of Coast Guard Duluth recommended the applicant's discharge.

On December 22, 1988, CGPC approved the applicant's discharge from the Coast Guard and he was separated on January 20, 1989.

VIEWS OF THE COAST GUARD

On April 30, 2009, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief. The JAG noted that the application

was not timely. In this regard, the JAG stated that pursuant to 10 U.S.C. § 1552 (b) An application to the BCMR must be filed within three years of the day the applicant discovered the alleged error. The JAG stated that the applicant was discharge in 1989 and was well aware of his discharge status and his reenlistment code since then. The JAG noted that the statute of limitations may be waived in the interest of justice, but the applicant provided no rationale for his approximately 20 year delay in filing with the BCMR.

The JAG attached comments from the Commander, Personnel Service Center (PSC) as a part of the advisory opinion. PSC stated that the application should be denied because it was untimely and because it lacked merit. PSC further stated the following:

A review of the applicant's record supports that the Coast Guard complied with policies for processing individuals for financial irresponsibility. The applicant does not contend that his discharge was unjust, nor has he provided any evidence to support there was an error with his discharge or the assigned reenlistment code. The applicant contends that unsuitability is not the proper narrative reason for his discharge, however personnel processed under Personnel Manual, Article 12.B.16 for financial irresponsibility are processed for unsuitability.

Pursuant to the Separation Program Designator (SPD) Handbook, the only prescribed reentry code for unsuitability discharges . . . is an RE-4 . . . The applicant has not substantiated any error or injustice with the assigned code. Further, the applicant has not overcome the presumption of regularity with the processing of his discharge. The applicant was determined to be unsuitable for military service due to his financial irresponsibility.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 4, 2009, the Board sent a copy of the views of the Coast Guard to the applicant for his response. The Board did not receive a reply.

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. 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. This application was submitted approximately seventeen years beyond the statute of limitations. The applicant admitted that he discovered the alleged error on the date of his discharge from the Coast Guard. His statement that he was unaware of the meaning of the separation code and the reenlistment code does not explain why he did not take action sooner to obtain an understanding of the

meaning of the separation and reenlistment codes. The fact that he was discharged prior to the end of his service obligation for financial irresponsibility put the applicant on notice that he would encounter some problem attempting to reenter the service. The applicant's reason for not filing his application sooner is not persuasive.

3. 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.

4. With respect to a cursory review of the merits, the Board finds that the applicant is not likely to prevail. As indicated by the OIC's letter to the Commandant requesting the applicant's discharge, the applicant was counseled at least five times from May 15, 1986 to August 29, 1988 about his indebtedness, which included the non-payment of rent, non-payment of utilities, and writing insufficient fund checks. As directed by Article 16.B.16.c. the applicant was placed on probation for six months and given specific direction on what he was required to do to correct his financial problems, which included the payment of or making arrangements to pay back rent to previous landlords. On November 4, 1988, the applicant's probation was terminated because he violated the term of the probation by failing to contact a landlord to make arrangements to pay back rent. Article 16.B.16.c. of the Personnel Manual authorized CO to recommend discharge at any time during probation if the member is not attempting to overcome the deficiency. The CO did not commit an error or injustice by terminating the applicant's probationary period and recommending his discharge. Additionally, after consulting with counsel, the applicant waived his right to an administrative discharge hearing, where he could have put forth his case for retention.

5. According to the Chapter 2 of COMDTINST 1900, a discharge by reason of unsuitability due to financial irresponsibility mandated the assignment of an RE-4 reenlistment code. Therefore the code is not in error. Nor is it unjust as the applicant was provided with the necessary counseling to correct his financial irresponsibility. Moreover, the applicant has not presented any evidence about his financial situation since his discharge that would allow the Board to entertain changing the reenlistment code as a matter of equity. Therefore, the Board would be remiss in using its equity powers to change the applicant's reenlistment code in the absence of such evidence.

6. The application should be denied because it is untimely and because it lacks merit.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of former XXXXXXXX, xxxxxxxx, USCG, for correction of his military record is denied

Lillian Cheng

Nancy L. Friedman

Vicki J. Ray