

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-083

XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX

FINAL DECISION

This is a proceeding under 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 applicant's completed application on February 6, 2009, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated October 22, 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 military record by upgrading his 1976 General discharge under honorable conditions to an Honorable discharge. He alleged that he was discharged because of racism. He submitted no evidence to support his allegation. He admitted that he knew the character of his discharge in 1976 but did not explain why he did not apply to the Board sooner or why the Board should excuse the untimeliness of his application.

SUMMARY OF THE RECORD

On February 25, 1974, at the age of 17, the applicant enlisted in the Coast Guard for four years. Following boot camp, the applicant attended radarman "A" School and graduated on October 18, 1974, as a seaman (SN/E-3) with the RD designator (SNRD).

On November 2, 1974, the applicant reported aboard the CGC GLACIER, an icebreaker. He advanced from SNRD/E-3 to third class radarman (RD3/E-4) on March 1, 1975. On June 19, 1975, the Executive Officer of the GLACIER notified the applicant that after three months' observation of the applicant's performance, he had been found incompetent. Therefore, in accordance with Article 5-C-38 of the Personnel Manual, he would be observed for ten days, during which time he had to demonstrate that he was qualified to retain his rate and designator. If he did not, he would be reduced in rate and the command would recommend removal of his designator.

On July 1, 1975, the applicant received non-judicial punishment (NJP) at a captain's mast for failing to obey a lawful order "to clean in Ops Head" on June 27, 1975. He was awarded a reduction in rate, which was suspended for four months.

On July 6, 1975, the applicant was reduced in rate to SNRD due to incompetence pursuant to Article 5-C-38 of the Personnel Manual. The Executive Officer noted that after the applicant was warned that he was at risk of being reduced in rate due to incompetence as an inport watchstander, which was his primary duty as an RD3, he was observed for ten days. His performance was not acceptable, and the senior watch officer had judged him incompetent.

On September 9, 1975, the commanding officer (CO) of the GLACIER recommended that the applicant's RD designator be removed for incompetence. He stated that the applicant had been counseled on several occasions by his supervisor, by the division officer, and by the department head "in an attempt to discover an underlying reason for his poor performance." He noted that after the applicant was reduced from RD3 to SNRD on July 6, 1976, the applicant "made no attempt to regain RD3 and refuses to become involved in CIC team training. His peers consider him a hindrance to operations in CIC, and his work group supervisor prefers being one man short to having [the applicant] on the watch list. Since being reduced in rate, [the applicant's] performance has deteriorated to such an extent that he was removed from the CIC watchstanding rotation on 20 August 1975. At the present time, he is considered qualified to perform cleanup and maintenance work only." The CO attributed the applicant's poor performance to a lack of motivation and lack of pride in his work. In addition, he noted that the applicant had not shown any interest in earning a different rating designator. The CO noted that it might be advisable to transfer the applicant to another unit "for a second opinion of his performance, although it is felt that this would merely prolong the inevitable."

On October 22, 1975, the Commandant authorized the removal of the applicant's RD designator due to incompetence. On November 1, 1975, the applicant's RD designator was removed. On November 14, 1975, he was transferred to the CGC BURTON ISLAND as an SN.

On January 12, 1976, the CO of the BURTON ISLAND took the applicant to mast for failing to obey a lawful order on the mess deck and for using contemptful and disrespectful language to a superior petty officer who was performing his duty as Master at Arms on January 8, 1976. He was awarded NJP of restriction to the cutter for 14 days and forfeiture of \$75.

On March 1, 1976, the applicant was taken to mast for missing morning muster twice and for willfully disobeying an order on February 22, 1976. He was awarded NJP of reduction in rate to seaman apprentice (SA/E-2), forfeiture of \$150, and restriction to the cutter for 21 days.

Also on March 1, 1976, the Executive Officer of the BURTON ISLAND advised the applicant in writing that he was being considered for an administrative discharge due to unfitness under Article 12-B-12 of the Personnel Manual. The notification states that if the applicant was convicted or awarded NJP one more time, the command would initiate his discharge.

On April 12, 1976, the applicant was taken to mast for having left his place of duty without authority and for having absented himself from the unit without authority for several hours. He was awarded NJP of a forfeiture of \$150 and restriction to the cutter for 21 days.

On May 27, 1976, the applicant was taken to mast for having skipped morning muster twice. He was awarded a forfeiture of \$100 per month for two months.

Also in May 1976, the District's Civil Rights Officer conducted an investigation after the applicant sent letters to his congressional representatives complaining of racial discrimination aboard the BURTON ISLAND. On May 28, 1976, the Civil Rights Officer informed the applicant by letter that his investigation had found no evidence substantiating the applicant's claims. He noted that he had interviewed six other minority personnel aboard the BURTON ISLAND, who did not support the applicant's allegations of racial discrimination "of either a general nature or against you specifically." He informed the applicant of his right to file a formal complaint to the Commandant or the Director of Civil Rights of the Department of Transportation.

On June 1, 1976, the applicant was transferred from the BURTON ISLAND to Coast Guard Base Terminal Island in California.

On June 3, 1976, the District Commander sent the Commandant the following report about the applicant's complaint of racial discrimination:

1. This report details the results of an investigation of [the applicant's] complaint of racial discrimination aboard the CGC BURTON ISLAND WAGB-283. The investigation was undertaken as directed by references a and b which forwarded requests for information from the offices of Congressman John H. Rousselot 26th District CA, and Senator John V. Tunney, CA.
2. [The applicant] was interviewed by the District Civil Rights Officer on Monday 24 May 1976. He was unavailable prior to that time because his presence was required at a UCMJ Article 32 hearing for charges of possession of cocaine and conspiracy to purchase narcotics. In the course of this interview, [the applicant] stated that he believed he was singled out and unfairly treated because of his race. He further alleged general racial discrimination against black and Puerto Rican personnel aboard BURTON ISLAND.
3. An informal investigation of these complaints was undertaken aboard the CGC BURTON ISLAND under the provisions of reference c to determine if racial discrimination did occur. The information for this determination was gathered from [the applicant's] Service Record and private interviews with other minority personnel aboard BURTON ISLAND as well as discussions with the Commanding Officer, Executive Officer and Civil Rights Representative. On the basis of the information thus gathered, it is concluded that there is no indication of racial discrimination aboard BURTON ISLAND and that [the applicant] was not subject to racial discrimination. [The applicant] has been the subject of an above average number of administrative actions and non-judicial punishments but the cause appears to be his inability to accept the normal requirements of a military organization and a tendency to blame his problems on racial bias rather than his own actions.
4. The facts on which these conclusions are based are:
 - a. [The applicant] reported aboard CGC GLACIER as an SNRD in November 1974. He was advanced to RD3 in March 1975. In June 1975, he was awarded NJP of a suspended reduction in grade to SNRD for failure to obey a lawful order. In July 1975 he was reduced in grade to SNRD

for incompetence in rate. In September 1975 his designator was removed for further deterioration in performance.

b. In November 1975, [the applicant] was transferred from CGC GLACIER to CGC BURTON ISLAND in order to provide a new environment in view of his difficulties aboard GLACIER.

c. While serving aboard BURTON ISLAND, [the applicant] was awarded the following Non Judicial Punishments:

- (1) 12 Jan 1976. Restriction of 14 days and \$75.00 forfeiture of pay for disobedience of a lawful order and disrespect to a superior petty officer.
- (2) 01 March 1976. Reduction in rate to SA, forfeiture of \$150.00 and restriction for 21 days (suspended for 3 months) for two counts of missing muster and two counts of disobedience of a lawful order.
- (3) 01 March 1976. Counseled regarding possible administrative discharge by reason of unfitness.
- (4) 07 April 1976. Suspension of previous restriction vacated for unauthorized absence from place of duty.
- (5) 07 April 1976. Charged with violation of Article 92 CG Regulation for using a controlled substance – cocaine. Charged with violation of a lawful general regulation by possessing hashish, a controlled substance. Violation of Article 81 conspiring to commit an offense under the UCMJ in violation of a general regulation by possessing cocaine, a controlled substance. These charges are currently the subject of a UCMJ Article 32 hearing to determine what if any court-martial action will be taken.
- (6) 12 April 1976. Awarded \$150.00 forfeiture of pay for one month and 21 days' restriction (suspended for three months) for absence from place of duty without authority.
- (7) 27 May 1976. Awarded NJP on two counts of missing muster. Forfeiture of \$100.00 per month for two months.

5. The events of 07 April 1976 which [the applicant] alludes to as the “final straw” are somewhat misrepresented in his letter. [The applicant] did not return to the vessel of his own volition. At about 1030 that morning, the duty officer aboard BURTON ISLAND was notified by the Long Beach Naval Security Office that [the applicant] was in custody. He was taken into custody for possession of narcotics by the Naval Station Security Patrol. This incident led to the charges previously noted which are still being investigated.

6. Private interviews were held between the Civil Rights Officer and minority personnel to determine if they had experienced or were aware of racial discrimination aboard the BURTON ISLAND. None of the personnel indicated awareness of any discrimination nor did they express any complaint with treatment they received on the BURTON ISLAND. Each individual was asked if he had any knowledge of racial discrimination toward [the applicant]. No situations were cited indicating racial prejudice. One man did state that [the applicant] seemed “to get people down on him more than other people.”

7. In view of a stated hostility by [the applicant], it appears probable that his continued presence aboard BURTON ISLAND would create unacceptable problems for the unit. In view of this situation and the serious nature of the narcotics violations under investigation, [the applicant] has been transferred to Base Terminal Island.

8. [The applicant] has been advised of the results of this investigation and counseled as to his right to file a formal complaint of discrimination in accordance with reference c. A copy of the letter so advising him is enclosed.

On June 10, 1976, the applicant was absent from his place of duty without authorization. He returned to Base Terminal Island the next day, but absented himself again from June 17 to 18,

for a few hours on June 27, and from June 28 to 29. At mast on June 30, 1976, he was awarded NJP of 14 days of restriction to base with extra duty.

On July 30, 1976, the applicant went AWOL again. He did not return to Base Terminal Island until August 2, 1976.

On September 20, 1976, the applicant was convicted at summary court-martial of being AWOL three times in violation of Article 86 of the UCMJ and of failing to obey a lawful general regulation two times in violation of Article 92. He was sentenced to confinement for 15 days at hard labor, forfeiture of \$150 in pay, and reduction to seaman recruit (SR/E-1).

On September 21, 1976, the CO of Base Terminal Island notified the applicant that he was recommending that the applicant receive a General discharge for the convenience of the Government because of his below average marks since July 1975, his frequent involvement with military authorities, and the "unacceptable administrative burden [the applicant's infractions had] on the command and your two previous units." The CO also notified him that he had a right to consult a lawyer and to submit a statement on his own behalf. In response, the applicant acknowledged the notification, acknowledged having consulted a lawyer, objected to being discharged, and submitted the following statement on his own behalf:

1. I am submitting this statement in that I desire to finish my enlistment with the Coast Guard rather than to be discharged from the Coast Guard at this time. My service record discloses that my marks before my transfer to the Coast Guard Cutter BURTON ISLAND were suitable. I had few, if any, problems at the Coast Guard Training Center or aboard the Coast Guard Cutter GLACIER. On the BURTON ISLAND I was a victim of personal prejudice on the part of many individuals aboard that vessel. A reputation seemed to follow me as a result of this and followed me to Base Terminal Island upon my transfer to that unit.
2. Concerning my frequent disciplinary infractions, most of these were minor and were directly related to the harassment I did receive aboard the BURTON ISLAND and Terminal Island. My service record discloses only one Captain's Mast occurring aboard the GLACIER.
3. It is my feeling that were I to be transferred to a unit on the East Coast where there is a more adequate representation of minorities, I will be able to finish out my enlistment without further disciplinary or administrative problems. My record discloses that absent preconceived notions on the part of my command, I would be able to function adequately in the Coast Guard.
4. At a recent General Court-Martial, I was found not guilty of conspiracy to possess cocaine. There was just no evidence whereby I could be convicted of that offense. It is quite apparent that one of the reasons for my discharge has also been the command's feelings that I did commit the offense even though I was found not guilty of any such offense. Many of my Captain's Masts occurred pending action on the charges against me when individuals were prejudiced against me because of these pending charges and I found it difficult to concentrate on any work because of these pending charges.
5. I feel that, given a fresh start, without existing prejudice individuals have against me, I can be an asset to the Coast Guard for the remainder of my enlistment. I would further ask that should you feel that I should indeed be discharged from the Coast Guard, that my discharge be an Honorable one rather than a General discharge. The reasons for such a request are stated above, my recent low marks being the result of racial prejudice against me and prejudice against me as a result of charges of which I was ultimately found not guilty. I should certainly not be penalized with a General discharge for an offense for which I was found not guilty.

On September 22, 1976, the applicant's CO recommended that the applicant receive a General discharge for the convenience of the government because his "history of repeated minor disciplinary infractions ... present[ed] an administrative burden to the command." He summarized the applicant's performance and disciplinary history and noted that the applicant had been "tried and acquitted by a General Court Martial on 10 September 1976 for conspiracy to possess cocaine." The CO stated that the applicant had been afforded legal counsel with respect to his pending discharge and that "it appears to be in the best interest of the Coast Guard to expeditiously discharge him under Article 12-B-6 rather than wait for another offense and recommend him in accordance with Article 12-B-12."

On October 6, 1976, the District Commander endorsed the CO's recommendation that the applicant receive a General discharge for the convenience of the Government. He wrote that the applicant's behavior had been contrary to his claim that he just needed a "fresh start" to complete his enlistment. Handwritten notes in the applicant's record indicate that the Coast Guard Headquarters advised the CO that the applicant should be discharged due to misconduct, not for the convenience of the Government.

On October 22, 1976, the CO notified the applicant in writing of his intent to recommend that the applicant receive a General discharge by reason of misconduct due to frequent involvement of a discreditable nature with military authorities. The CO noted that the applicant's performance marks had been low since July 1975 and that his frequent disciplinary infractions had placed an "unacceptable administrative burden on this command." The CO advised him that he had the right to consult an attorney and to submit a statement on his own behalf.

Also on October 22, 1976, the applicant acknowledged the notification and indicated that he did not object to being discharged but would submit a statement. The applicant submitted both his prior statement and a new statement, in which he wrote the following in pertinent part:

1. ... I have already expressed my feelings concerning any type of discharge from the Coast Guard ... This earlier statement sets forth my feelings as they exist at the present and I have attached a copy of that earlier statement as an enclosure to this statement.
2. However, I wish to reiterate that most problems I faced were the result of personal prejudices against me by the command of the USCGC BURTON ISLAND. This prejudice built up a reputation which followed me to C. G. Base Terminal Island. The record will show only one Captain's Mast occurring before my transfer to the BURTON ISLAND.
3. I only desire to finish my enlistment with the Coast Guard. Given a command without preconceived notions about me, I am certain that I would pose no further problem.
4. However, should your decision be to discharge me, I feel an Honorable Discharge would be more appropriate than a General Discharge. I have seen many other individuals whose records were worse than mine who have received Honorable Discharges from the Coast Guard. I would hope that the fact I was acquitted of conspiracy to possess cocaine will have no bearing on your decision on whether or not I should be discharged and the nature of such a discharge. I should not be punished for any acts of which I was found not guilty by receiving a General Discharge from the Coast Guard.

On October 28, 1976, the applicant's CO recommended that he be discharged for misconduct based on his frequent disciplinary infractions and frequent involvement of a discreditable nature with military authorities.

On November 4, 1976, the District Commander endorsed the CO's recommendation for discharge and stated that his review of the applicant's disciplinary record revealed that there was justification for discharging the applicant under Article 12-B-13, rather than Article 12-B-6 of the Personnel Manual.

On November 15, 1976, the Commandant authorized the applicant's command to discharge him within 30 days by reason of misconduct due to frequent involvement with military authorities under Article 12-B-13 of the Personnel Manual. The Commandant stated that the applicant should have the type of discharge to which he was entitled under Article 12-B-3 of the Personnel manual.

On November 17, 1976, the base Executive Officer noted that the applicant had refused to sign his discharge papers and so he told the applicant that if he did not agree with his discharge, he "had the right to appeal to the Board of Military Corrections."

On November 26, 1976, the applicant received a General discharge due to misconduct because of his "frequent involvement of a discreditable nature with civil or military authorities," pursuant to Article 12-B-13 of the Personnel Manual. He was not recommended for reenlistment. The applicant's final average marks were 2.36 for proficiency, 3.02 for leadership, and 3.25 for conduct.

VIEWS OF THE COAST GUARD

On May 2, 2009, the Judge Advocate General (JAG) submitted an advisory opinion in which he recommended that the Board deny the requested relief because of the application's untimeliness and lack of merit.

The JAG noted that the applicant was well aware of his character of discharge in 1976 and provided no explanation for his long delay in seeking the requested correction. In addition, he stated that the applicant has not submitted any documentation to support his allegations.

The JAG also adopted the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC). The PSC stated that although the applicant complained of racial discrimination in May 1976 and was advised that he could submit a formal complaint, there is no evidence that he ever did so after the District's Civil Rights Officer found no evidence to support his complaint. The PSC stated that the applicant's allegation that he was discharged because of racial discrimination "is without merit" because the investigation did not substantiate any discrimination on the BURTON ISLAND.

The PSC stated that the applicant was initially processed for a "convenience of the Government" discharge, but based on a direction from Commandant (G-PE) the reason for discharge

was changed to misconduct. The PSC stated that its review of the record “does not reveal any error or injustice with the processing of his discharge.”

The PSC stated that during his two years and eight months of service, the applicant was punished at most seven times and convicted by summary court-martial once. He was also AWOL twice and lost his RD designator due to incompetence. “Based upon current standards, the applicant’s record fully supports the assigned character of service ‘Under Honorable Conditions.’ There is no basis for an upgrade to the applicant’s character of service.”

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 22, 2009, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 days. No response was received.

APPLICABLE REGULATIONS

Article 12-B-13 of the Personnel Manual in effect in 1976 authorized the Commandant to direct the discharge of an enlisted member by reason of misconduct for “frequent involvement of a discreditable nature with civil or military authorities.” The member could receive a discharge under other than honorable conditions, a General discharge, or an Honorable discharge “as warranted by the particular circumstances of a given case.” Members with less than eight years of service were entitled to notification of the reason for discharge, to counsel if a General discharge was to be awarded, and to submit a statement on their own behalf. According to Article 12.b.2.f.1.c. of the current Personnel Manual, prior to 1983, a member must have received final average marks of at least 2.7 in proficiency and 3.0 in conduct to receive an honorable discharge.

Under Article 12-B-3 of the Personnel Manual, a member had to have minimum final average marks of 2.7 in proficiency and 3.0 in conduct to receive an Honorable discharge. If not, the member could receive a General discharge.

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 10 U.S.C. § 1552.
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 applicant was discharged in 1976 and clearly knew that he had received a General discharge under honorable conditions at that time. Therefore, his application is untimely.
3. Pursuant to 10 U.S.C. § 1552(b), the Board may excuse the untimeliness of an application if 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 to determine 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 instructed 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 provided no explanation or justification for his long delay in seeking correction of his military record.

5. A cursory review of the merits of this case indicates that it lacks merit. Although the applicant alleged that his General discharge was a result of racial discrimination, he submitted no evidence to prove his allegations, and there is no supporting evidence in his military record. His record shows that he complained about racial discrimination while serving as a crewmember of the CGC BURTON ISLAND. However, after interviewing the applicant and other minority members of the crew, the investigator concluded that the applicant’s many NJPs resulted from his own misconduct rather than from any racial discrimination. In addition, the Board notes that his record contains ample evidence of the frequent misconduct that caused his discharge. These records are presumptively correct under 33 C.F.R. § 52.24(b). *See Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992) (citing *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979), for the required presumption, absent evidence to the contrary, that Government officials have carried out their duties “correctly, lawfully, and in good faith”). Based on the record before it, the Board finds that the applicant’s claim cannot prevail on the merits.

6. Accordingly, the Board will not excuse the application’s untimeliness or waive the statute of limitations. The applicant’s request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

Lillian Cheng

Francis H. Esposito

Janice Williams-Jones