

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-173

XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX

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 upon receiving the applicant's completed application on June 15, 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 February 25, 2010, 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, who was discharged under other than honorable (OTH) conditions due to homosexuality on January 18, 1955, asked the Board to upgrade his discharge to honorable. He stated that he did not apply for an upgrade earlier because he did not know until 2008 that it was possible to have his discharge upgraded.

The applicant alleged that his OTH discharge was unjust because he "had no control over [his] genes or sexual preference." He stated that he enlisted "as a high school dropout" and never intended to embarrass the Coast Guard. In support of his request, the applicant submitted several letters from long-time friends and neighbors who lauded his character.

SUMMARY OF THE RECORD

On October 12, 1953, at age 17, the applicant enlisted in the Coast Guard for four years. Following recruit training, he served at Group Sandy Hook for several months and was transferred to the cutter JONQUIL on October 14, 1954.

On December 21, 1954, the applicant was admitted to a Public Health Service hospital in Norfolk, Virginia, for psychiatric evaluation. The diagnosis listed on the Final Medical Certificate dated December 31, 1954, is homosexuality. A Board of Medical Survey found him to be

unfit for duty and recommended that he be administratively discharged. The board reported the following:

This 18 year old white male C.G. was admitted to this hospital on 12-21-54 for NP observation. Accompanying the patient was a letter written and signed by him stating that he is a homosexual. ... He states that he has gotten along well in the Coast Guard but desires to get out of the Coast Guard because of his condition and states that he fears he may get in trouble if he remained in the Coast Guard. The patient states emphatically that he desires no treatment for his condition, and it is his firm conviction that there is nothing wrong with being the way that he is. ... He was seen by Dr. [T], the civilian psychiatric consultant, who was of the opinion that the patient [is] definitely homosexual and who further felt that by virtue of this condition he would be an undesirable person to keep in the Coast Guard.

On December 31, 1954, the commanding officer of the JONQUIL sent the Commandant a memorandum recommending his discharge as follows:

1. In accordance with [Article 12-B-12(5)c of the Personnel Manual], it is recommended that [the applicant] be discharged from the service for reason of homosexuality.
2. On 21 December 1954, [the applicant], of his own accord, reported to his division officer that he was a homosexual. This came as a complete surprise to his division officer and all other officers on board. He was advised that he was privileged to submit a statement requesting a discharge, and he submitted the enclosed statement.
3. ... Since being attached to this vessel his performance of duty and conduct have been satisfactory and no unusual reports have been received concerning his activities. ...
4. He stated that he has had no homosexual relations with any military personnel while attached to this vessel.
5. After being examined by medical authorities at USPHS Hospital, Norfolk, Virginia, he was returned to this vessel this date marked "Not fit for duty." He was granted thirteen (13) days accrued leave this date awaiting action by the Commandant. He was warned that if he were apprehended in homosexual relations in the interim, that it may affect the type of discharge he would receive.

The commanding officer attached to his memorandum a statement signed by the applicant and dated December 21, 1954, in which the applicant claimed to be homosexual.

On January 18, 1955, the applicant was discharged under other than honorable (OTH) conditions by reason of "unfitness" in accordance with Article 12-3-40A of Coast Guard Regulations. He was issued an "undesirable" discharge certificate. His final average marks (on a 4.0 scale) were 3.2 for proficiency in rating and 4.0 for conduct.

VIEWS OF THE COAST GUARD

On September 30, 2009, the Judge Advocate General of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant relief and adopted the findings and analysis provided in a memorandum on the case prepared by the Coast Guard Personnel Service Center (CGPSC).

CGPSC noted that the application is untimely but stated that his application should be considered on its merits “in the interest of equity.” CGPSC stated that under Article 12.E.4.1. of the current Personnel Manual, a member being discharged because of homosexuality receives either an honorable or a general discharge “unless aggravating circumstances are included in the findings.” Because there are no aggravating circumstances evident in the applicant’s case, CGPSC recommended that the applicant’s discharge be upgraded to honorable.

RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 5, 2009, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to submit a response within 30 days. No response was received.

APPLICABLE LAW

Article 12-B-12 of the Personnel Manual (CG-207) in effect in 1955 authorized “undesirable” discharges for members due to “unfitness.” Article 12-B-12(f)(1) of the manual stated that homosexuality was a psychiatric problem and a condition “at variance with the normal, mature, adult sexual development,” but that “[b]arring psychosis, individuals should be held socially responsible and accountable for their acts. Those who have committed homosexual offenses should be held accountable for their failure of control.” Article 12-B-12(f)(2) stated that homosexual acts should be punished “to maintain proper order and morale” and because of “the corrective influence on the individual himself.” Article 12-B-12(f)(3) stated the following:

Known homosexual individuals are military liabilities and must be eliminated from the Service. Commanding officers receiving information indicating that a person in the Coast Guard possesses homosexual tendencies or has engaged in an act of homosexuality shall inquire thoroughly and comprehensively into the matter and ascertain all the facts and circumstances of the case, bearing in mind the peculiar susceptibility of such cases to possible malicious charges.

Article 12-B-12(f)(5) divided members into Class I, Class II, and Class III homosexuals. For Class I, which included members who had used force or coercion or who engaged in sex acts with a child under the age of 16, trial by court-martial was mandatory. For Class II, which included members who had “engaged in one or more homosexual acts or where evidence supports a proposal or attempt to perform an act of homosexuality,” members were to be tried by court-martial “unless the member shall, in writing, as provided for below, elect to receive the benefit of avoiding courts-martial proceedings by agreeing to be administratively discharged for undesirability by reason of unfitness.” Class III included “cases wherein personnel only exhibit, profess, or admit homosexual tendencies and wherein there are no specific provable acts or offenses, or courts-martial jurisdiction does not exist.” For Class III members, Article 12-B-12(f)(5)(c) encouraged “prompt administrative separation” after the member was “advised to submit a written statement, setting forth in fullest detail his history with reference to his [homosexual] condition. ... Likewise, such a person may be informed that he is privileged to submit his request for discharge under other than honorable [OTH] conditions for the good of the service, and upon receipt of such discharge request, all facts will be considered and decision made as to whether the separation should be under other than honorable conditions or a higher form.”

Article 12-B-3(a) stated that a member could be honorably discharged for a variety of reasons, including “unfitness,” based upon “[p]roper military behavior and proficient performance of duty with due consideration for the member’s age, length of service, grade and general aptitude. ... The individual must have made a minimum final average of 2.7 in proficiency and 3.0 in conduct.”

Current Law and Regulations

Under 10 U.S.C. § 654(b), military members may be discharged for homosexual acts or for admitting to homosexual orientation. Article 12.E. of the current Personnel Manual contains the Coast Guard’s policies regarding homosexuality. Article 12.E.1. describes the general policy established by the Secretary of Defense and summarizes it as “Don’s Ask, Don’t Tell” and “Don’t Pursue, Don’t Harass.”

Article 12.E.3. states that members may be separated for homosexual acts, homosexual marriage, or admissions or other statements indicating a propensity to engage in homosexual acts. Article 12.E.4. concerns the type of discharge that a member may receive under this policy:

Characterization of service will be determined in accordance with Articles 12.A.2. (for officers) and 12.B.2. (for enlisted members) subject to this guidance:

1. For both officers and enlisted members, a discharge shall be characterized as “Honorable” or “General (Under Honorable Conditions)” if the sole basis for separation is homosexual conduct unless aggravating circumstances are included in the findings.

2. For both officers and enlisted members, separation may be characterized as “Under Other Than Honorable Conditions” [OTH] only if there is also a finding that during the current term of service the member attempted, solicited, or committed a homosexual act under any of these aggravating circumstances:

- a. By using force, coercion, or intimidation;
- b. With a person under 16 years of age;
- c. With a subordinate in circumstances that violate customary military superior/subordinate relationships;
- d. Openly in public view;
- e. For compensation;
- f. Aboard a military vessel or aircraft; or
- g. In another location subject to military control under aggravating circumstances noted in the finding that adversely affect discipline, good order, or morale comparable to the impact of such activity aboard a vessel or aircraft.

Article 12.B.2.f.1.c. states that, to receive an honorable discharge prior to 1983, a “member must have made a minimum final average of 2.7 in proficiency and 3.0 in 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 over this matter under 10 U.S.C. § 1552(a).

2. 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.¹ The applicant received his OTH discharge in 1955. Therefore, the application is untimely.

3. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.² 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.”³

4. Regarding the delay of his application, the applicant stated that he was unaware that his discharge could be upgraded until 2008. The Board finds that the applicant’s explanation for his delay is not compelling because he failed to show that anything prevented him from inquiring about an upgraded discharge more promptly. However, a cursory review of the record reveals that the Coast Guard has recommended that the Board grant relief and that the applicant’s request will prevail on the merits. Therefore, the Board will excuse the untimeliness of the application and consider it on the merits.

5. The applicant alleged that his OTH discharge for homosexuality is unjust. In 1976, the Board received the following instruction regarding veterans’ discharges from the delegate of the Secretary, which he stated was to be “binding on the Board until specifically reversed by one of my successors”:⁴

[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 ... [T]he Board should not upgrade a discharge unless it is convinced, after having considered all the evidence ..., that in light of today’s standards the discharge was disproportionately severe vis-à-vis the conduct in response to which it was imposed.

Therefore, the Board must determine whether the applicant’s undesirable/OTH discharge is disproportionately severe in light of today’s standards.

6. The record shows that the applicant received an undesirable/OTH based solely on an admission of homosexuality. He signed a statement dated December 21, 1954, in which he wrote that he was homosexual, and he was discharged because of that confession. There is no evidence of misconduct or performance problems in his record, and his CO reported to the Com-

¹ 10 U.S.C. § 1552(b); 33 C.F.R. § 52.22.

² 10 U.S.C. § 1552(b).

³ *Allen v. Card*, 799 F. Supp. 158, 164-65 (D.D.C. 1992); see also *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

⁴ Memorandum of the General Counsel, U.S. Department of Transportation, to J. Warner Mills, et al., Board for Correction of Military Records (July 8, 1976) (on file with the Board).

mandant that the applicant's performance and conduct had been satisfactory. The applicant's final average marks met the requirements for an honorable discharge for unfitness.⁵

7. Types of administrative discharge are determined by regulation, not statute.⁶ The Board's comparison of current and 1955 Coast Guard regulations reveals that policies with respect to homosexuality and types of discharge have changed significantly since 1955. In 1955, members who admitted to homosexuality were "privileged" and encouraged to submit a written statement setting forth their sexual history "in fullest detail" and requesting a "discharge under other than honorable conditions for the good of the service."⁷ Under 10 U.S.C. § 654(b) and Article 12.E.3. of the current Personnel Manual, a member of the Coast Guard may still be discharged if he states that he is homosexual. However, a discharge because of homosexuality is normally honorable or general, depending upon the member's evaluation marks. Currently, OTH discharges are only awarded when a member has attempted, solicited, or committed a homosexual act under one of the aggravating circumstances listed in Article 12.E.4. of the Personnel Manual.⁸

8. Therefore, the Board finds that the applicant's undesirable/OTH discharge for having admitted to being homosexual is disproportionately severe in light of today's standards. Given his satisfactory performance and conduct while on active duty, the Board finds that in the interest of justice his discharge should be upgraded to honorable.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

⁵ U.S. COAST GUARD, CG-207, PERSONNEL MANUAL, Art. 12-B-3(a); U.S. COAST GUARD, COMDTINST M1000.6A, PERSONNEL MANUAL, Art. 12.B.2.f.1.c. (Change 41, 2007).

⁶ 10 U.S.C. § 1169 (2009) ("No regular enlisted member of an armed force may be discharged before his term of service expires, except--(1) as prescribed by the Secretary concerned; (2) by sentence of a general or special court martial; or (3) as otherwise provided by law."); see *Gay Veterans Assoc. v. Secretary of Defense*, 668 F. Supp. 11, 14-15 (D.D.C. 1987) (noting that by referring to the types of discharge in many statutes regarding veterans' benefits, "Congress has actually ratified the military's system of administrative discharges"), *aff'd*, 850 F.2d 764 (D.C. Cir. 1988).

⁷ U.S. COAST GUARD, CG-207, PERSONNEL MANUAL, Art. 12-B-12(f)(5)(c) (1955).

⁸ U.S. COAST GUARD, COMDTINST M1000.6A, PERSONNEL MANUAL, Art. 12.E.4. (Change 41, 2007).

ORDER

The application of former SN xxxxxxxxxxxxxxxxx, USCG, for correction of his military record is granted.

The Coast Guard shall correct his record to show that he received an honorable discharge and shall send him an honorable discharge certificate.

Bruce D. Burkley

Francis H. Esposito

Erin McMunigal