

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2002-119

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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 application was received on May 29, 2002, and docketed on June 24, 2002, upon the BCMR's receipt of the applicant's military records.

This final decision, dated March 13, 2003, 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 asked the Board to correct his record to make him eligible for educational benefits under the Montgomery GI Bill (MGIB)¹ by "waiver of [his] remaining 2 weeks [of] active duty." He completed just 2 years, 11 months, and 14 days of active duty, instead of the 3 full years required under 38 U.S.C. § 3011(a).

The applicant alleged that his failure to qualify for MGIB benefits was unjust because his separation date was set by the Coast Guard without regard for his MGIB eligibility. He stated that he had no control over when he was separated and was allowed no input into the decision. He alleged that he was separated early because he was sent to a station and "left to fend for [him]self with no leadership."

SUMMARY OF THE RECORD

On June 27, 199x, the applicant enlisted in the Coast Guard for four years. On the same day, he signed a Statement of Understanding regarding MGIB benefits. It

¹ 38 U.S.C. § 3001 *et seq.*

informed him that he could disenroll from the MGIB program within two weeks of his enlistment; that if he did not disenroll, he would be enrolled in the program and \$100 would be deducted from his pay per month for his first twelve months of active service; and that to be eligible to receive MGIB benefits, he must complete at least 48 months of active duty² and receive an honorable discharge. The applicant also signed a statement acknowledging that he had been counseled about the MGIB program.

The applicant completed basic training, entered the food service specialist rating, and was assigned to a station. On February 19, 199x, the officer in charge (OIC) of his station made an entry in his record indicating that he had arrived two hours late for work and stated that he had overslept. He noted that it was the second time in a month that he had arrived late and that any future incidents might result in disciplinary action.

On May 31, 199x, the OIC made an entry in the applicant's record advising him that he was "progressing" and not recommended for advancement. He stated that to gain his recommendation for advancement, the applicant must learn to meet sanitation standards, to plan and serve meals in a timely fashion, and to account for the inventory.

On August 15, 199x, the OIC noted that the applicant had been counseled about his performance on July 22, 199x, because he had failed to remove food from the freezer in time for the station's noon meal and he had failed to pack a cooler properly for another station's meal.

On September 10, 199x, the OIC made an entry in the applicant's record reporting that he had lied to his superior on September 5, 199x, about whether he had completed preparing the salad bar.

On November 9, 199x, the OIC noted that while the applicant was in charge of galley cleanup, barbecue sauce had spread from a broken container across the galley floor and out the door "well before" the evening meal. However, he had ignored the problem and ignored a request from the Officer of the Day to clean it up. Instead, he played foosball. After his first attempt to clean it up, residue and puddles of barbecue sauce remained on the floor. The OIC stated that after the residue was brought to the applicant's attention, he "failed to properly clean the deck after two more attempts." The OIC warned him that further incidents might result in disciplinary action.

On December 1, 199x, the OIC gave the applicant a low mark of 2 (out of 7) for "integrity" on a semi-annual evaluation because he had bounced many checks in the community and failed to tell the truth about a speeding ticket. The applicant also received a mark of 2 for "setting an example" because of his poor food preparation,

² It is unclear why the form stated that the applicant needed to complete 48 months of active duty to be eligible for MGIB benefits when the statute requires only 36 months of active duty. 38 U.S.C. § 3011(a).

lateness for appointments, and “excessive cigarette and game playing breaks.” The OIC noted that the applicant had received similar evaluation marks while working at the Group office. The applicant was not recommended for advancement and was advised of improvements he needed to make to receive a recommendation for advancement, including arriving at work on time; avoiding excessive cigarette breaks, games, and other distractions from work; completing a basic math correspondence course; and producing better meals.

On December 15, 199x, the applicant was charged with violating Articles 92 (failure to obey order or regulation), 107 (making a false official statement), and 109 (wasting or destroying property) of the Uniform Code of Military Justice (UCMJ) by failing to store food in a freezer, which resulted in spoilage, and by making a false statement about the date the food had been returned by another station. On January 14, 199x, in lieu of taking the applicant to mast, the OIC placed him on performance probation. The OIC informed the applicant that during the previous twelve months, his performance had been unsatisfactory and that he had to improve his performance during the following six months or face discharge.

On February 5, 199x, the applicant was taken to mast on charges of violating Articles 92 and 107 of the UCMJ by serving breakfast one-half hour late on January 26, 199x, and by lying to a superior officer about whether he had bathed the day before. The record indicates that he was informed of his right to reject NJP but accepted it and rejected the opportunity to be represented at the mast. The OIC awarded him extra duties for 14 days and fined him 3 days’ pay.

The OIC prepared a special evaluation to document the applicant’s NJP and performance and to notify him that he was not recommended for advancement because of unsatisfactory conduct. The applicant received marks of 2 in four performance factors for poor performance since December 1, 199x. His period of eligibility for a Good Conduct Medal was terminated. The OIC indicated that the applicant had been placed on report on December 15, 199x, for making a false official statement; had been placed on probation on January 14, 199x, in lieu of non-judicial punishment (NJP); and had been placed on report again on January 24, 199x, for making a second false official statement. The OIC indicated that the applicant had been awarded NJP.

On February 11, 199x, the OIC made an entry in the applicant’s record indicating that his room in the barracks had failed inspection by a Group Housing Officer on February 5, 199x. The applicant had been advised that a follow-up inspection would take place the next day, but his room still failed to meet the minimum standards of cleanliness and sanitation.

On March 5, 199x, the OIC noted that, during the month of February, the applicant had neglected to log quantities of food used for two days; burned the evening meal

one night (and bought pizza for everyone instead); failed to complete a weekend clean-up list; conducted personal business on a telephone while his work space was unsecured; and overcooked a noon meal.

On April 23, 199x, the OIC informed the applicant that he had initiated action to discharge him because he had been placed on report four times since December 199x and three times since he was placed on probation on January 14, 199x. (Apparently, the applicant had been placed on report on March 31st and April 20th but the investigations into those offenses were still pending). He advised the applicant of his right to submit a statement on his own behalf. The applicant waived his right to submit such a statement and indicated that he did not object to being discharged.

On April 27, 199x, the Group Commander recommended to the Coast Guard Personnel Command (CGPC) that the applicant be honorably discharged for unsatisfactory performance. The Group Commander stated that, since being placed on probation, the applicant had "not demonstrated any initiative to improve his performance." He stated that the applicant had reported for work late several times and been placed on report while on probation. He stated that most of the station's crewmembers would not eat at the dining facility when the applicant was on duty because he prepared meals that were "undercooked, overcooked, prepared late, or even not at all." He stated that the applicant had become a burden to other food service specialists at the station and had negatively affected station morale. The Group Commander stated that the applicant had been assigned to the Group for three weeks so that he could receive an unbiased evaluation. At the Group, however, the applicant required "direct supervision to prepare edible meals" and did not pay attention to directions well. The Group Commander stated that the applicant's aptitude scores had been too low to attend school to become a food service specialist but that he had received a waiver. He further stated, "I do not recommend that [the applicant] be evaluated for change of rate because of the limited rating selections due to his being color blind."

On May 1, 199x, the OIC made an entry in the applicant's record indicating that he had bounced a check.

On May 12, 199x, CGPC ordered the Group Commander to discharge the applicant no later than June 10, 199x, with an honorable discharge for unsatisfactory performance in accordance with Article 12.B.9. of the Personnel Manual.

On June 10, 199x, the applicant was honorably discharged for unsatisfactory performance in accordance with Article 12.B.9. of the Personnel Manual. He received an RE-4 reenlistment code, making him ineligible to reenlist. He had completed 2 years, 11 months, and 14 days of active duty.

VIEWS OF THE COAST GUARD

On October 31, 2002, the Chief Counsel of the Coast Guard recommended that the applicant's request be denied for untimeliness and lack of merit.

The Chief Counsel stated that the applicant's request was untimely since it was received more than three years after his discharge. 10 U.S.C. § 1552(b). He stated that the applicant had failed to provide any explanation for his delay. He further stated that the applicant has failed to prove, or even allege, that the Coast Guard committed any error in discharging him for unsatisfactory performance on June 10, 199x.

The Chief Counsel stated that any member of the service may be appropriately and administratively discharged prior to the end of an enlistment. *Rowe v. United States*, 167 Ct. Cl. 468, 472 (1964), *cert. denied*, 380 U.S. 961. Moreover, he argued, absent strong evidence to the contrary, the Board should presume that Coast Guard officials have performed their duties "correctly, lawfully, and in good faith." *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979). He stated that Article 12.B.9. permits the Coast Guard to administratively separate unsatisfactory performers who have been given a chance to improve their performance and whose unsatisfactory performance has been well documented. He stated that the applicant's supervisors had thoroughly documented his substandard performance with multiple record entries and performance evaluations. He argued that the "Board should conclude that Applicant had ample notice and opportunity to turn his performance around" so that he could have completed at least three years of active duty. He alleged that the record indicates that the applicant was "his own worst enemy" in that he failed to try to improve his performance.

The Chief Counsel alleged that the applicant had been accorded all due process under the regulations when he was discharged. Under Article 12.B.18.e. of the Personnel Manual, he stated, members with less than eight years of active service are entitled only to notification, an opportunity to submit a written statement, and an opportunity to consult with counsel if a less than honorable discharge is contemplated. The applicant was honorably discharged after being properly notified and after having waived his opportunity to object and to submit a statement on his own behalf. He alleged that there is no evidence that the applicant's separation date was selected intentionally to deprive him of MGIB benefits.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 4, 2002, the Chair sent the applicant a copy of the Chief Counsel's advisory opinion and invited him to respond. No response was received.

APPLICABLE LAW

Article 12.B.18.c. of the Personnel Manual provides that, if a member is found to be shirking, the commanding officer “must afford the member a reasonable probationary period to overcome deficiencies, before initiating administrative discharge.” It further provides that the period of probation should be at least six months. However, it also provides that, “commanding officers are authorized to recommend discharge at any time during the probation if the member is not making an effort to overcome the deficiency.”

Article 12.B.9.a. provides that members “whose performance demonstrates they cannot or will not contribute to supporting the Coast Guard’s missions will be discharged under this Article’s procedures”

Under Article 12.B.9.c. of the Personnel Manual, “[t]o discharge a member as an unsatisfactory performer, commanding officers must clearly show the member has been given the proper direction to improve his or her performance and adequate time to demonstrate he or she could become a productive Service member. In all cases, use the enlisted performance appraisal system in effect to identify the unsatisfactory performer for this Article’s purposes. However, the unsatisfactory performance pattern, the appraisal marks described must be supported by thorough documentation, including copies of Administrative Remarks, disciplinary action, and any other attempted corrective or training action.”

Article 12.B.9.d. provides that commanding officers must notify members in writing when their performance is such that it may result in a discharge for unsatisfactory performance if the trend continues for the next six months.

Article 12.B.9.e. provides that, after a commanding officer notifies a member of unsatisfactory performance in accordance with Article 12.B.9.d., he or she “closely observes the member (in most cases for six months), if [the member] has not substantially improved his or her performance, the commanding officer will notify him or her in writing of the proposed discharge action.” The notification must indicate what kind of discharge is being contemplated. The member must acknowledge the notification and indicate whether he objects to the proposed discharge and whether he will submit a statement on his own behalf. Only when a general discharge is contemplated does the member have a right to consult a military attorney.

Under 38 U.S.C. § 3011, Congress provided that to be eligible for MGIB benefits, a member must normally complete at least three years of active duty, have a high school diploma or the equivalent, and receive an honorable discharge. Members who enlist for four years but are discharged early “for the convenience of the Government”—such as a reduction in force (RIF)—may receive MGIB benefits if they have completed at least 30 months of active duty. 38 U.S.C. § 3011(a)(1)(A)(ii)(II)

The DVA's regulations for MGIB eligibility appear in 38 C.F.R. §§ 21.7042 and 21.7045. Section 21.7042, entitled "Basic eligibility requirements," provides that a veteran may receive the benefits if he has completed at least three years of continuous active duty, received a high school diploma, and received an honorable discharge. Section 21.7042(a)(5)(iv)(B) provides that if a veteran does not have three years of continuous active duty, he can still receive the benefits if he was discharged for the "convenience of the government ... [a]fter completing 30 continuous months of active duty if his or her initial obligated period of active duty is at least three years."

Title 38 C.F.R. §§ 21.7045, entitled "Eligibility based on involuntary separation ...," provides that a member of the Coast Guard on active duty after September 30, 1994, is eligible for MGIB benefits if he is involuntarily separated (as defined at 10 U.S.C. § 1141) with an honorable discharge; if, while on active duty, he elected to receive MGIB benefits and had \$1,200 deducted from his pay; and if he has a high school diploma. Under 10 U.S.C. § 1141, "involuntary separation" is defined for a regular enlisted member as being "denied reenlistment" or being "involuntarily discharged under other than adverse conditions, as characterized by the Secretary concerned." Under Enclosure (3) to COMDTINST 1900.2, discharges for unsatisfactory performance are not included on the list of reasons for involuntary discharge that qualify a member for transitional benefits and MGIB benefits.

Title 38 C.F.R. § 20.101(a)(5) provides that any decision by the DVA to deny MGIB benefits may be appealed to the Board of Veterans' Appeals.

Title 38 U.S.C. § 503(a) states, "If the Secretary [of the DVA] determines that benefits administered by the Department have not been provided by reason of administrative error on the part of the Federal Government or any of its employees, the Secretary may provide such relief on account of such error as the Secretary determines equitable, including the payment of moneys to any person whom the Secretary determines is equitably entitled to such moneys."

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. An application to the Board should be filed within three years after the applicant discovers the alleged error in his record. 10 U.S.C. § 1552(b). The applicant was discharged on June 10, 199x, and his application was received on May 29, 2002. Therefore, his application was untimely by less than one year.

3. Pursuant to 10 U.S.C. § 1552, the Board may waive the three-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 conduct a cursory review of the merits of the case and consider the reasons for the delay. *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992). The applicant did not explain why he delayed applying to the Board. However, the Board presumes that he applied when he decided that he wanted to return to school and needed MGIB benefits. Moreover, a cursory review of the merits of the case has revealed some evidence that, but for the applicant's color blindness, he might not have been discharged (see Finding 8 below). Therefore, the Board finds that it is in the interest of justice to waive the statute of limitations in this case.

4. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.31, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

5. The applicant asked the Board to make him eligible for MGIB benefits by waiving the statutory requirement under which he needed another two weeks of active service to be eligible. However, this Board does not administer MGIB benefits or determine which veterans are eligible for the benefits. The DVA, under its regulations at 38 C.F.R. part 20, administers the MGIB program and determines veterans' eligibility. The applicant did not indicate whether he has actually applied for MGIB benefits from the DVA and been denied them. The Board assumes, however, that he has been told either by the DVA or by the Coast Guard that he is ineligible for MGIB benefits.

6. Although the DVA determines veterans' eligibility for educational benefits, under 10 U.S.C. § 1552, this Board is able to correct a veterans' military record in ways that would qualify them for MGIB benefits under 38 U.S.C. § 3011 and the DVA's regulations. In the applicant's case, this Board would apparently have to add two

weeks of active duty that he did not actually perform to his military record; or—since he performed at least 30 months of active duty—change the cause of his discharge to one that would be interpreted by the DVA as a discharge for the “convenience of the Government”; or change his discharge to one that would be considered “involuntary” under 10 U.S.C. § 1141 by the DVA.

7. The applicant has neither alleged nor proved that the Coast Guard committed any error or injustice in discharging him for unsatisfactory performance under Article 12.B.9. of the Personnel Manual. The record indicates that after documenting and counseling him about his poor performance for several months, his OIC placed him on six months’ performance probation on January 14, 199x, in accordance with Articles 12.B.18.c. and 12.B.9.d. However, the record indicates, when the applicant made no attempt to improve during the first three months of his probation and continued to violate regulations, the OIC acted in accordance with Article 12.B.9.e. to notify him of his proposed honorable discharge for unsatisfactory performance. The applicant did not object to being discharged and did not submit any statement on his own behalf. The record indicates that he received all due process. Moreover, there is absolutely no evidence that the applicant was intentionally discharged early just to deprive him of MGIB benefits. He has submitted no evidence to show that he was entitled to remain on active duty after June 10, 199x.

8. Although the Coast Guard committed no errors in discharging the applicant for unsatisfactory performance on June 10, 199x, the Board notes that in recommending the applicant’s discharge to CGPC on April 27, 199x, the Group Commander stated, “I do not recommend that [the applicant] be evaluated for change of rate because of the limited rating selections due to his being color blind.” In stating this, he implied that, but for the applicant’s color blindness, he would have recommended that the applicant be evaluated to determine whether he was better suited for a rating other than food service specialist. The statement, however, does not prove that the applicant was discharged because of his color blindness: the record contains ample evidence indicating that he was discharged because he consistently refused to pay attention to his work and took too many cigarette and foosball breaks to perform his duties adequately.

9. The applicant has not proved that his Coast Guard record contains any error or injustice for this Board to correct. The record indicates that he alone bears the blame for his early discharge. However, if the applicant has not already applied to the DVA for MGIB benefits, he has nothing to lose by trying; and if he has applied but been denied the benefits by the DVA, he may appeal the denial to the Board of Veterans’ Appeals. Furthermore, under 38 U.S.C. § 503(a), the Secretary of the DVA is authorized to provide equitable relief to veterans who have been denied MGIB benefits under certain circumstances.

10. Accordingly, the applicant’s request should be denied.

[ORDER AND SIGNATURES ON NEXT PAGE]

ORDER

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

Julia Andrews

Stephen H. Barber

Christopher A. Cook