

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2019-196


SA (former)

FINAL DECISION

This is a proceeding under the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the applicant's completed application on January 29, 2019, and this decision of the Board was prepared pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated August 21, 2020, 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, a former seaman apprentice (SA) who served in the Coast Guard from November 1, 1988, to September 21, 1989, asked the Board to correct Block 12.c. (Net Active Service This Period) of his DD 214 to show all of his active service. He stated that Block 12.c. currently shows that he served for 00 years, 03 months, and 12 days, but argued that it should reflect the total time that he spent on active duty. The applicant argued that when he accepted his general under honorable conditions discharge, he was told by his Commanding Officer (CO) that he "would receive the full benefits" of his entire enlistment, and not just 3 months and 12 days.

In support of his request, the applicant submitted a copy of a DD 214 documenting his active service, which is included in the Summary of the Record below.

The applicant stated that he discovered the alleged errors in his record on February 10, 2019, but did not explain why he waited 30 years after receiving his DD 214 before discovering the error and applying to the Board.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on November 1, 1988. On January 15, 1989, less than a week after he completed recruit training, the applicant was arrested by civilian police for breaking and entering a jewelry store on January 14, 1989, with the intent to commit larceny. Following his arrest, he was confined to jail and remained there during multiple arraignments

and a trial, where he was convicted of breaking and entering with intent to commit larceny. He was sentenced by a State court and received 9 months in jail (with credit for 219 days served), followed by 3 years of probation, and was required to pay restitution of \$3,131.69 and \$700 in fines and costs. On August 10, 1989, the applicant submitted a memorandum to the Commandant in which he acknowledged that he had been advised by his Commander that he was being recommended for a general discharge by reason of misconduct and that he waived his rights to consult with legal counsel; to submit statements on his own behalf; and his rights to a hearing before an administrative discharge board.

On August 24, 1989, the applicant was released from jail due to overcrowding and was administratively assigned to a Coast Guard station pending the outcome of discharge proceedings. On August 25, 1989, his Group Commander recommended to the Commandant that the applicant be discharged from the Coast Guard by reason of misconduct with a general discharge. On August 30, 1989, the District Commander endorsed the request to discharge the applicant, noting that the applicant's actions "render him unsuitable for further successful service."

On September 21, 1989, the applicant was discharged from the Coast Guard for misconduct. His DD 214 shows that he had served from November 1, 1988, to September 21, 1989, and Block 12.c shows that his net active service was 00 years, 3 months, and 12 days. The DD 214 also shows that his Character of Service was Under Honorable Conditions, and Block 29 (Dates of Time Lost During This Period) shows the period January 16, 1989, to August 23, 1989 (220 days) as "time lost" due to his incarceration.

VIEWS OF THE COAST GUARD

On February 11, 2020, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion and adopted the findings and analysis in a memorandum submitted by the Commander, Personnel Service Center (PSC). PSC argued that the application is untimely and because there is no error or injustice.

PSC argued that there is no error or injustice in the applicant's record because his DD 214 correctly shows the amount of time that he served on active duty and accounts for the time that he spent in jail following his conviction for breaking and entering with intent to commit larceny. PSC noted that the time he spent in jail is not creditable as active duty time because according to the Coast Guard Pay Manual, "Personnel arrested and detained by civil authorities while on authorized leave or liberty who are released without trial, no reparation having been made, are not entitled to credit for service from the date and hour of expiration of leave or liberty to the date of return to their unit if subsequently tried and convicted by a court martial for any offense based on the same facts (notwithstanding the fact that the charges and/or specifications may be different) which necessitated their absence in the hands of civil authorities."

The JAG argued that the Coast Guard has not committed any error or injustice because the applicant's DD 214 is correct. The JAG argued that his creditable service is reduced because he was arrested by civil authorities 5 days after reporting from recruit training and remained in confinement until completion of his sentence. The JAG added that the applicant did not provide

sufficient evidence of an agreement with his Commanding Officer for him to accept a General discharge in exchange for creditable service. Even if he had, Coast Guard policy does not permit the applicant to receive creditable service for the time he was absent without leave while in civil confinement. Therefore, the service credited on his DD 214 is accurate per Coast Guard policy.

The JAG argued that the Coast Guard is not bound by any promises that the applicant's CO may have made regarding him receiving the full benefit of his entire enlistment period from November 1, 1988, to September 21, 1989. The JAG argued that any such promises, if made, do not negate the Coast Guard's right to deny creditable service while the applicant remained in civil confinement.

The JAG argued that following the decisions as set forth in *Arens* and *Sanders*,¹ as well as 33 C.F.R. § 52.24(b), the applicant bears the burden to establish that the Coast Guard committed the error or injustice. Here, the applicant asserts that he should have received credit for each day of his enlistment because he relied on his command's "promise" that he would get credit for those days if he accepted a general discharge. The JAG argued that there is no evidence whatsoever of this alleged promise either in the applicant's record or in his application.

The JAG added that even assuming *arguendo* the promise was made, the Coast Guard repudiates that promise. Citing *Goldberg v. Weinberger*², the JAG stated that the court addressed the issue of unauthorized statements (actions) by the government that were contrary to government policy upon which the plaintiff (applicant) later relied. The JAG argued that the *Goldberg* court ruled "The government could scarcely function if it were bound by its employees' unauthorized representations. Where a party claims entitlement to benefits under federal statutes and lawfully promulgated regulations, that party must satisfy the requirements imposed by Congress. Even detrimental reliance on misinformation obtained from a seemingly authorized government agent will not excuse a failure to qualify for the benefits under the relevant statutes and regulations." Here, the JAG argued, the applicant's command did not have the ability (or authority) to guarantee or promise that the applicant would receive creditable service for the days he spent in civil confinement, as policy did not permit such credit, and his command was not the owner or waiver authority for that policy.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 12, 2020, the BCMR sent the applicant a copy of the Coast Guard's recommendation and invited him to submit a response. The Board did not receive a response.

APPLICABLE LAW AND REGULATIONS

Article 2.C.4.d of the Coast Guard Pay Manual states that personnel arrested and detained by civil authorities while on authorized leave or liberty who fail to return to their units upon expiration of leave or liberty will be considered to be absent without leave (AWOL) from the

¹ *Arens v. United States*, 969 F.2d 1034, 1037 (1992); *Sanders v. United States*, 594 F.2d 804,813 (Ct Cl. 1979). 6 33 C.F.R. § 52.24 (b).

² *Goldberg v. Weinberger*, (2d Cir. 1976) 546 F.2d477.

date and hour of expiration of leave or liberty unless acquitted of the civil charges on which held, or unless the commanding officer determines that the person was entirely free from fault in connection with their arrest and detention. Under no condition will personnel in this category be granted an extension of leave.

COMDTINST M1900.4B, the Commandant's instructions for completing the DD 214, states that Block 29 (Dates of Time Lost During This Period) should contain the inclusive dates for all periods of time lost whether pay was forfeited or not, during the period from Block 12.a (Date of Entry) to the date of separation in Block 12.b., including "unauthorized absence and non-performance of duty due to civil arrest."

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions based on the applicant's military record and submissions, the Coast Guard's submission and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice.³ The applicant was discharged from the Coast Guard and received and signed his DD 214 on September 29, 1989. Therefore, although he claims that he was unaware of the amount of active duty shown on the form, the Board finds that the preponderance of the evidence shows that the applicant saw the entries on his DD 214 in 1989, and so his application is untimely.

2. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.⁴ In *Allen v. Card*, 799 F. Supp. 158 (D.D.C. 1992), the court stated that the Board should not deny an application for untimeliness without "analyz[ing] both the reasons for the delay and the potential merits of the claim based on a cursory review"⁵ to determine whether the interest of justice supports a waiver of the statute of limitations. The court noted 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."⁶ In accordance with this direction, the Board has conducted a cursory review of the merits and finds no reason to excuse the untimeliness of the application:

a. The applicant did not explain or justify why he waited more than 30 years after his discharge to request correction of his DD 214. He failed to show that anything prevented him from seeking correction of the alleged error or injustice more promptly.

b. The applicant has not submitted any evidence of error or injustice. His Notice of Separation (DD 214) is correct because it accurately documents his 3 months and 12 days of active duty time and the 220 days of "time lost" from January 16, 1989, to August 23, 1989, when he was either in police custody or serving time for breaking and

³ 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.

⁴ *Id.*; 33 C.F.R. 52.22.

⁵ *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

⁶ *Id.* at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

entering and attempting larceny. Article 2.C.4.d of the Coast Guard Pay Manual does not permit him to receive credit for active duty when he was actually absent without leave from the military and confined by civil authorities. This time lost is correctly recorded in Block 29 of his DD 214. The applicant's claim that his CO told him otherwise is unpersuasive and does not overcome the presumption of regularity.⁷

3. Accordingly, the Board will not excuse the application's untimeliness or waive the statute of limitations and his request should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

⁷ 33 C.F.R. § 52.24(b).

ORDER

The application of former SA [REDACTED], USCG, for correction of his military record is denied.

August 21, 2020

