

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-144

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 after receiving the applicant's completed application on May 8, 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 received a general discharge under honorable conditions from the Coast Guard on June 23, 2002, for misconduct, asked the Board to correct his record by upgrading his discharge to honorable so that he will be able to use his educational benefits under the Montgomery G.I. Bill (MGIB).¹

SUMMARY OF THE APPLICANT'S MILITARY RECORD

On September 28, 1998, the applicant enlisted in the Coast Guard for four years. During boot camp, he was counseled about the MGIB and signed a form, DD 2366, on which he declined to disenroll from the MGIB program and was therefore enrolled. The form provides thirteen numbered sentences of information about the program, the ninth of which states that a member must receive an honorable discharge to be entitled to benefits under the MGIB. Upon completing boot camp, the applicant was assigned to a cutter.

¹ 38 U.S.C. § 3001 *et seq.* Under 38 U.S.C. § 3011(b), upon enlistment on active duty, a member is automatically enrolled for MGIB benefits and deductions are made from his basic pay, unless the member makes an election under subsection (c)(1). Subsection 3011(c)(1) states that a member "may make an election not to receive educational assistance under this chapter. Any such election shall be made at the time the individual initially enters active duty as a member of the Armed Forces. Any individual who makes such an election is not entitled to educational assistance under this chapter." Under 38 U.S.C. § 3011(b), unless members purposefully disenroll themselves from the program at the time they first enlist on active duty, the Service deducts \$100 from their pay each month for the first 12 months or until a total of \$1,200 has been deducted, and they become eligible for educational benefits.

On June 2, 1999, the applicant was counseled about his poor performance on a Page 7 Administrative Remarks entry in his record. The Officer in Charge counseled the applicant about his “behavior and attitude problem” and warned him that “any future incidents may lead to disciplinary action.”

On June 24, 1999, the applicant was charged with having a female minor in his barracks room overnight in violation of Articles 92 and 134 of the Uniform Code of Military Justice (UCMJ). On June 28, 1999, the applicant received non-judicial punishment (NJP) “for engaging in an inappropriate relationship and adultery.” He was awarded 14 days of restriction to the cutter with extra duties.

On October 5, 2000, the applicant was counseled on a Page 7 about his poor performance as a lookout watchstander. He was advised that any further improper watchstanding would result in the revocation of his qualification and disciplinary action.

On November 3, 2000, the applicant was counseled on a Page 7 about his poor work performance. He was given extra military instruction and advised that any further incidents would result in disciplinary action.

On January 31, 2001, the applicant, who had advanced to seaman, was placed on performance probation. The Page 7 counseling entry states the following:

1. This is to inform you that for the previous six months, your performance has been unsatisfactory compared to your peers in your pay grade. You are considered to be on performance probation because of your inability to adhere to the Coast Guard core values. You must take stock of your actions that have caused this situation to develop and take corrective action. Your performance must improve over the next six months, or you will be considered for discharge.
2. The reasons you are being placed on performance probations are:
 - a. Your inability to adhere to the Coast Guard core value of Honor. Specifically, your failure to be truthful and forthright. When asked for your location and whereabouts on a day that you had been released from duty to attend to your sick wife, you lied about your location to a commissioned officer and four different petty officers.
 - b. Your inability to adhere to the Coast Guard core value of Devotion to Duty. Specifically, your failure to stand a proper watch. You have been counseled, per CG-3307 of 13 SEP 01, on your improper and inattentive standing of a lookout watch. Your improper watchstanding endangered the entire ship, and when you were assigned additional duties, you failed to perform these properly.
 - c. Your inability to adhere to the Coast Guard core value of Devotion to Duty. Specifically, your poor work performance. You have been counseled, per CG-3307 of 03 NOV 00, on your unsatisfactory quality of work while priming and painting hand rails. When instructed properly, you again failed to complete the task correctly and were assigned 8 hours of EMI as a result.
3. To be taken off performance probation you must improve your performance by:
 - a. Demonstrating a strong commitment to [the cutter] through improved watchstanding and work performance.
 - b. Being truthful, forthright, and respectful to all commissioned officers and petty officers.

4. You have been removed from the HS "A" School list until your performance improves and you are removed from performance probation.

Another Page 7 dated January 31, 2001, states that on a recent duty day the applicant had requested and been granted liberty to care for his wife, who he said was ill. However, several shipmates saw the applicant and his wife at a night club that evening. When he was questioned the next day about his activity that evening, he lied even though he was told he had been seen at a night club. The applicant was assigned extra military instruction and received a very low mark of 2 in the performance category "Integrity" on his performance evaluation dated January 31, 2001.

On May 7, 2001, the applicant was counseled on a Page 7 about failing to work when his supervisors were not present. The applicant was given extra military instruction and advised that any further incidents would result in additional disciplinary action.

On July 12, 2001, the applicant was counseled about his poor performance on a Page 7, which states that he had ignored his work and had to be asked continually to complete assigned tasks, which he failed to accomplish.

On March 1, 2002, the applicant was arrested by police in [REDACTED], and charged with child abuse. The report of his arrest states that he had bitten his two-year-old daughter, leaving a bruise on her leg, to try to teach her not to bite her brother.

On March 5, 2002, the applicant's command was notified that an audit of the command's Government Citibank Mastercard accounts had revealed that the applicant had used his card for a cash advance, that he had a balance of \$343.39 that was more than 120 days overdue, and that his account had therefore been canceled and closed.

On April 1, 2002, the applicant was counseled on a Page 7 about a complaint the command had received from a pediatric doctor at an Air Force hospital. The doctor complained that the applicant had "used inappropriate behavior, mannerisms, and/or language" with the emergency room staff.

Also on April 1, 2002, the applicant was counseled on a Page 7 about failing to keep his barracks room tidy.

On April 4, 2002, the applicant was counseled on a Page 7 as follows:

This adverse entry is a compilation of events that demonstrate significant discrepancies in your performance. Specifically your quality of work, monitoring of work, communicating, integrity, loyalty, responsibility, setting an example and carrying your share of the work load.

04 MAR 02: While working aton [aid to navigation] CG 21430 parted a tag line. Being responsible for the daily check offs for CG21430, [the applicant] falsified the check off sheet and when questioned replied that the tag line was on the boat. When confronted with the fact there was no tag line onboard, [he] had no explanation.

08 MAR 02: [The applicant] failed to clean the bilge of CG 21430 as directed. At four times during the day, member was properly instructed and falsely reported completing the task, attempting once to cover up some of the grime with battery boxes.

27 MAR 02: [A petty officer] handed out tasks this date for all of the deck force. When the QM2 went to check on their progress, he noted [the applicant] had not been where he was assigned for over 45 minutes. After checking with all supervisors it became apparent that [the applicant] had not been using the allotted time effectively.

01 APR 02: [A petty officer] assigned a painting project to deck force at 0900 and proceeded to get underway. [The applicant] avoided this by asking a different supervisor if he could work on a lead line. When the BM3 returned from being underway at 1130 he discovered what had happened and found that [the applicant] did not have the materials to work on the lead line. [The applicant] admitted this and that he only worked on the line for 10 minutes. When questioned, [he] could not explain where he was or what he was doing for 2 ½ hours.

On April 4, 2002, the applicant was charged with violating Articles 92, 107, and 134 of the UCMJ by being derelict in his duties and failing to obey orders, by gundecking 21 check-offs and employing other deceptions on assigned tasks, by improperly using his Government credit card and failing to pay a debt that was eight months overdue, and by bringing discredit upon the Coast Guard through his behavior in the hospital emergency room.

On April 25, 2002, the Group Commander initiated the applicant's discharge "for unsuitability."² In a memorandum to the Coast Guard Personnel Command (CGPC), he wrote that the applicant had become "a tremendous burden to this unit and his fellow shipmates" and appended to the recommendation twelve Page 7s regarding the applicant's poor performance and conduct and the report of his arrest for child abuse. The Group Commander noted that the applicant's "court date has been set for 7 May 2002." He recommended that the applicant receive a general discharge.

On April 30, 2002, the Group Commander notified the applicant that he had initiated the applicant's discharge because of his lack of military aptitude and performance and his "refusal to adhere to military rules and regulations." The Group Commander noted that Commander, CGPC would determine what type of discharge the applicant would receive. The applicant acknowledged receipt of this notification the same day. He indicated that he disagreed with the recommendation for discharge but would not submit a statement on his own behalf.

On May 10, 2002, the District Commander forwarded the discharge package to CGPC "strongly recommending approval" based on the applicant's "trend of unsatisfactory performance" and "disregard for the Coast Guard's core values."

On May 21, 2002, the State dropped the charge of child abuse against the applicant.

On May 23, 2002, CGPC ordered the applicant's command to discharge him for misconduct on June 21, 2002, with a general discharge³ due to his frequent involvement of a discreditable nature with military and/or civilian authorities, pursuant to Article 12.B.18. of the Personnel Manual.

² Article 12.B.16.b. of the Coast Guard Personnel Manual states that a member may be discharged for unsuitability due to "apathy, defective attitudes, and inability to expend effort constructively."

³ Article 12.B.2 f.2.b.(2) of the Coast Guard Personnel Manual provides that a member may receive a general discharge "[w]hen based on the individual's overall military record or the severity of the incident(s) which results in discharge, Commander, (CGPC-epm-1) directs issuing a general discharge."

On June 21, 2002, the applicant received a general discharge “under honorable conditions” for misconduct with an RE-4 reenlistment code (ineligible for reenlistment).

On June 16, 2005, the applicant asked the Discharge Review Board (DRB) to upgrade his discharge and reenlistment code. He stated that he wanted to enlist in the Reserve. The DRB found that the applicant’s discharge was proper and equitable and recommended denial of his request on August 31, 2005. The Acting Commandant approved the DRB’s decision on November 21, 2005, and the applicant was notified of the denial of his application on November 22, 2005. The applicant was also notified of his right to apply to the Board for Correction of Military Records for further consideration.

VIEWS OF THE COAST GUARD

On September 30, 2009, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant’s request for untimeliness and lack of merit.

The JAG stated that the application was untimely because the applicant submitted it more than three years after his application to the DRB was denied and failed to explain his delay. The JAG stated that the applicant has “not provided any relevant documentation or rationale to support his position.”

APPLICANT’S 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 written response within 30 days. No response was received.

APPLICABLE REGULATIONS

Article 12.B.18.b. of the Coast Guard Personnel Manual in effect in 2002 stated that Commander, CGPC could direct the discharge of an enlisted member for misconduct because of the member’s “discreditable involvement with civil or military authorities,” abuse of a family member; established pattern of shirking, drug abuse, etc. Article 12.B.18.a. states that the type of such a discharge may be honorable, general, or under other than honorable (OTH) conditions. Article 12.B.18.c. states that the member must be afforded a probationary period before the discharge is initiated. Article 12.B.18.e. states that when initiating the honorable or general discharge for misconduct of a member with less than eight years of military service, the commanding officer shall

1. Inform the member in writing of the reason(s) for being considered for discharge (specifically state one or more of the reasons listed in [see] Article 12.B.18.b. supported by known facts).
2. Afford the member an opportunity to make a written statement. If the member does not desire to do so, the commanding officer sets forth that fact in writing over the member’s signature. If the member refuses to sign a statement his or her commanding officer will so state in writing.
3. Afford the member an opportunity to consult with a lawyer as defined by Article 27(b)(1), UCMJ, if contemplating a general discharge. If the member requests counsel and one is not avail-

able, the commanding officer must delay discharge proceedings until such time as counsel is available.

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 in this case filed his application more than three years after he knew or should have known of the alleged errors on his discharge form, DD 214, and more than three years after the decision of the DRB.⁴ Therefore, his application was not timely.
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."⁵
4. The applicant did not explain the delay of his application.
5. A cursory review of the merits of this case indicates that the applicant's general discharge for misconduct with an RE-4 reenlistment code was not unjust.⁶ The many negative Page 7s in the applicant's record strongly support the decision of Commander, CGPC to award the applicant a general discharge due to frequent involvement of a discreditable nature with military and/or civilian authorities pursuant to Article 12.B.18. of the Personnel Manual. The Board notes that it is not clear from the record whether the applicant was ever notified of his right to consult counsel under Article 12.B.18.e. because of the proposed general discharge. However, assuming *arguendo* that he was denied the right to consult counsel about his pending general discharge, the Board finds that this failure *per se* would not justify granting relief in this case because the applicant's long pattern of shirking and other misconduct amply justified his general discharge for misconduct. Therefore, based on the record before it, the Board finds that the applicant's claim cannot prevail on the merits.

⁴ Under *Ortiz v. Secretary of Defense*, 41 F.3d 738, 743 (D.C. Cir. 1994), a BCMR application is considered timely if it is filed within 3 years of the decision of the DRB, which has a 15-year statute of limitations.

⁵ *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).

⁶ For the purposes of the BCMRs, "[i]njustice", when not also "error", is treatment by the military authorities, that shocks the sense of justice, but is not technically illegal." *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976). The Board has authority to determine whether an injustice exists on a "case-by-case basis." Docket No. 2002-040 (DOT BCMR, Decision of the Deputy General Counsel, Dec. 4, 2002).

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 SN xxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is denied.

