

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2015-069



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 application after receiving the applicant's completed application and military records on March 25, 2015, and prepared the draft decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated January 8, 2016, 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 an other than honorable (OTH) discharge from the Coast Guard on November 11, 1989, asked the Board to upgrade his character of discharge. He alleged that he received the OTH discharge only because he refused to sign a form stating that he was homosexual. The applicant noted that he received three Good Conduct Medals and a Meritorious Unit Commendation with an "O" device while in the Service. In support of his request, the applicant submitted a copy of his DD 214, which shows that he received the OTH discharge "For the Good of the Service" with a KFS¹ separation code and an RE-4 reentry code under the authority of Article 12.B.21. of the Personnel Manual.

The applicant argued that it is in the interest of justice for the Board to consider his request because he is attempting to obtain benefits from the Department of Veterans' Affairs (DVA).

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on April 19, 1976. He trained to become a  and advanced to the rank /E-6.

¹ The KFS separation code denotes an administrative separation under Article 12.B.21. of the Personnel Manual in lieu of trial by court-martial. Separation Program Designator Handbook.

On April 13, 1987, the applicant signed a handwritten statement pursuant to an investigation of his conduct. He wrote that he had been advised of his rights by the lieutenant who was investigating his conduct and who had also reviewed with him the articles of the Personnel Manual concerning homosexuality. The applicant stated that he could not dispute the allegations against him, but he had been drinking far too much alcohol “the couple of times I got out of line and made a fool of myself.” He noted that following one party, he had attempted to drive home but passed out in his car and crewmates stopped him from driving home. He wrote, “Now I more than most fully understand that actions, such as the allegations made against myself cannot be tolerated in a military life style. Why what has happen[ed] did, I don’t really know or understand. ... I would like to talk to a professional to help sort out all that is going through my head, and if found needed go through an alcohol program. ... I’ve never had to be afraid of others or of showing affection. I have seven brothers, coming from a large family the effect of being outgoing and unafraid of touching other, just seemed natural at the time. Just like holding onto one of the guys here and letting them cry because something wasn’t right at home. I just don’t know if given the chance to stay in [the Coast Guard] there will be many self changes required and made by myself, as I am the only one who knows.”

On May 28, 1987, a neuropsychologist advised the applicant’s command in a memorandum that the applicant had undergone a mental health evaluation to determine his fitness for duty; that the “evaluation did not reveal the presence of any serious psychopathological or other mentally impairing condition”; that the doctor could offer an opinion concerning the applicant’s sexual orientation; and that the applicant “denie[d] a homosexual orientation or engaging in homosexual behavior” but admitted to having an “alcohol problem,” attributed his problems to alcohol addiction, and claimed to have abstained from drinking alcohol for four months. The doctor reported that “[f]rom a psychiatric standpoint, this military member is qualified for continued worldwide active duty service.”

On July 28 and 29, 1987, the applicant appeared before an Administrative Discharge Board (ADB) and was represented by counsel. According to the report of the ADB, five male members testified that they had witnessed the applicant propositioning them or other male members by offering oral sex and offering money or special privileges in exchange. The ADB noted that the witnesses had retracted their statements but had admitted under oath to the ADB that they had retracted their statements “to protect [the applicant’s] career and not because the statements were untrue.” The applicant had not denied making the alleged proposals but had stated that he could not recall making them and would never have done so deliberately. The ADB noted that the applicant had previously been investigated in 1984 for making homosexual propositions to three junior enlisted members and inappropriately touching two other members. The ADB noted that the applicant had also incurred an alcohol incident by engaging in an extended argument with a superior officer while under the influence of alcohol and was undergoing counseling. The ADB also noted that the applicant had received three Good Conduct Medals since his enlistment in 1976 and had never been convicted or received NJP.² The ADB recommended that the applicant receive an honorable discharge for unsuitability due to homosexual tendencies for the “convenience of the government.”

² The applicant’s record contains a Court Memorandum dated June 3, 1981, showing that he received NJP for failing to obey an order, but the punishment was suspended on condition of good behavior.

On February 16, 1988, the Chief Counsel of the Coast Guard noted that the ADB had found that the applicant had “made proposals to commit acts of homosexuality on more than one occasion, including offers of money for participation by the other person, that he was intoxicated at the time of these proposals and that there is no evidence that [he] has committed any overt homosexual act, other than the touching of other men with the back of his hand in the groin, thigh and hip areas.” The Chief Counsel noted the ADB’s recommendation that the applicant be honorably discharged by reason of unsuitability due to “homosexual tendencies.” The Chief Counsel noted that there was disagreement whether the applicant had actually performed a “homosexual act” and should be classified as Class II rather than a Class III homosexual, but there was strong evidence that he had sexually propositioned and inappropriately touched several junior enlisted men. The Chief Counsel found that the applicant had been afforded all of the rights to which he was entitled, that proper procedures had been followed, and that the ADB’s findings and recommendations were supported by substantial evidence.

On April 4, 1988, the Chief of the Personnel Services Division sent a memorandum to the Chief of the Office of Personnel regarding the ADB. He noted that each of the witnesses had testified that the applicant was in an extreme state of intoxication when he had propositioned them and might be able to curb his abuse of alcohol but that “his sexual preference is not a disease and will remain unchanged.” Therefore, he recommended that the applicant receive an honorable discharge for unsuitability.

On April 4, 1988, the Chief of the Office of Personnel approved the proceedings, findings, opinion, and recommendations of the ADB and ordered that the applicant receive an honorable discharge for unsuitability. On April 18, 1988, the Commandant directed the applicant’s CO to “[d]ischarge [the applicant] with an Honorable Discharge by reason of Unsuitability under Article 12-B-16 of the Personnel Manual provided no disciplinary action is pending. ... [The applicant] shall be advised of his eligibility for treatment for his alcohol abuse problems through the Veteran’s Administration.”

In June 1988, the Coast Guard responded to inquiries from U.S. Senators and Congressmen about the applicant. The Coast Guard advised them that the applicant had appeared before an ADB concerning alleged homosexual advances and was represented by appointed counsel. The Coast Guard explained that the ADB had found that the applicant exhibited homosexual tendencies and recommended that he be discharged with an honorable discharge by reason of unsuitability and that the Commandant had approved the findings of fact, opinions, and recommendations of the ADB on April 4, 1988. The Coast Guard noted that “[u]pon discharge, [he] may appeal his discharge by presenting his case to the Coast Guard Discharge Review Board.”

On June 22, 1988, the Commandant advised the Group Commander to delay the applicant’s discharge “due to further congressional review.”

On July 29, 1988, the Commandant advised the Group Commander that “after a thorough review of [the applicant’s] case, [Commandant] has decided that [he] shall be retained.” The applicant’s pending discharge was canceled.

On August 17, 1988, the Commandant directed the applicant's Group Commander to ensure that his conduct had been documented as an alcohol incident in his record and to refer him for screening and rehabilitation treatment.

On November 29, 1988, the applicant completed Level II alcohol rehabilitation treatment. He was directed to abstain from alcohol, to attend Alcohol Anonymous meetings at least three times per week, and to continue Antabuse medication for a year. He was advised that any evidence of drinking would result in an administrative discharge.

On October 2, 1989, the applicant was reassigned to another unit on temporary duty until his discharge because he did not have the necessary security clearance to work in the Group's operations center. His military personnel file, received from the National Personnel Records Center in St. Louis, contains no documentation concerning the reasons for his discharge in October 1989.

The applicant was discharged on November 11, 1989, and his DD 214 shows that he received an OTH discharge pursuant to Article 12.B.21. of the Personnel Manual with a KFS separation code, an RE-4 reentry code (ineligible for reenlistment), and "For the Good of the Service" as his narrative reason for separation. He had served more than 13 years on active duty.

VIEWS OF THE COAST GUARD

On October 2, 2015, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief.

The JAG noted that the application was not timely filed and that the applicant provided no justification for his long delay in seeking correction of his discharge. Therefore, the JAG argued, the application should receive only a cursory review.

Regarding the merits of the applicant's request, the JAG noted that the applicant submitted nothing to support his claim that he was discharged because he refused to sign a statement admitting to being homosexual. In addition, the JAG noted, the record shows that the applicant's scheduled discharge for "homosexual tendencies" in 1988 was canceled, and he was retained on active duty. He was discharged more than a year later.

The JAG noted that the applicant's claim that he was discharged because he refused to sign a document admitting to homosexuality "is contrary to the policies and procedures for discharging individuals solely on the basis of homosexuality that were in effect at the time" under the Personnel Manual. Likewise, the JAG noted, issuing an OTH discharge to a member solely on the basis of homosexuality would have been contrary to policy.

The JAG noted that the KFS separation code is assigned only to members who request discharge to avoid trial by court-martial in accordance with Article 12.B.21. of the Personnel Manual. Article 12.B.21., the JAG explained, allows a member to request an OTH discharge for the good of the Service in lieu of undergoing court-martial. The JAG argued that the applicant's DD 214 is presumptively correct and that the applicant "has not provided any evidence to the

contrary. ... The applicant has presented no evidence, other than his own statement, that his discharge was in any way connected to allegations of homosexuality. In fact, his assertion is contrary to the Coast Guard's policy on discharging members on the basis of homosexuality alone that was in effect at the time." Therefore, the JAG concluded, the applicant "has failed to meet his burden to demonstrate, by a preponderance of the evidence, that the Coast Guard committed an error or injustice in issuing him a DD-214 with an 'under other than honorable conditions' characterization of discharge." The JAG recommended denying relief.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 17, 2015, the BCMR sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. No response was received.

APPLICABLE POLICY

Article 12-B-21.a. of the Personnel Manual in effect in 1989 stated that "[a]n enlisted member may request a discharge under other than honorable conditions for the good of the Service in lieu of action under the UCMJ [Uniform Code of Military Justice] if punishment for alleged misconduct could result in a punitive discharge. A request for a discharge under other than honorable conditions for the good of the Service may be submitted by the member at any time after court-martial charges have been preferred against him/her."

Article 12-B-33.a. of the Personnel Manual in effect in 1989 provided that—

[m]embers who willfully or intentionally commit homosexual acts will not be retained in the Coast Guard. ... All socially unacceptable sexual acts should be punished in direct proportion to the seriousness of the offense itself. ... Commanding officers receiving information that a member of 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. ... Except where the members are brought to trial by court-martial or their cases are referred to administrative discharge boards, a complete report of the recorded facts shall be made to the Commandant (G-PE) by the most expeditious means. ... [A]dministrative decisions regarding the characterization of the member's discharge should be fair, but expeditious action should be taken to separate the member from the Coast Guard. ... While administrative separation procedures should normally be initiated in these cases, nothing in this policy will preclude the bringing of any homosexual to trial before a court-martial if the circumstances surrounding the commission of the acts show a depravity.

The article also divided homosexuals into classes for (a) "those cases accompanied by assault or coercion" (Class I); (b) those who had engaged in homosexual acts while on active duty but without assault or coercion (Class II); and (c) those who exhibit, profess, or admit to homosexual tendencies. For Class I, COs were to "prefer court-martial charges if warranted by the evidence" and if not, treat as Class II. For Class II, COs were to forward the matter to Com-

mandant and recommend retention if justified under the circumstances, but if not, consider the case for trial by court-martial or recommend the member for discharge. For Class III, COs could also recommend retention if justified under the circumstances, and if not, the member was to be informed of his right to counsel and to an ADB. In addition, those in Class III were discharged “for unsuitability and will not result in a discharge under other than honorable conditions.”

Article 12-B-18 of the Personnel Manual in effect in 1989 states that a member may be administratively discharged for misconduct due to homosexual acts and receive an OTH, general, or honorable discharge “as warranted by the particular circumstances of a given case.”

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 submission 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) an application to the Board must be filed within three years after the applicant discovers the alleged error or injustice in his record. The applicant has requested an upgraded discharge. Because he has known the character of his discharge since he received his DD 214 in 1989, the Board finds that his application is 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.”³
4. The applicant provided no justification for his delay in applying for correction of his discharge. He has not shown that anything prevented him from challenging his discharge more promptly. His desire for DVA benefits is not a compelling reason to excuse the untimeliness of his application.
5. The Board's cursory review of the merits shows that the applicant's request cannot prevail. His DD 214, which is presumptively correct, shows that he was discharged “for the good of the Service” under Article 12-B-21 of the Personnel Manual in effect in 1989. That article authorized members to request an administrative OTH discharge “for the good of the Service” when they had been charged with offenses under the UCMJ and wanted to avoid trial by court-martial. The criminal charges laid against the applicant in 1989 are not in the record.
6. Although the applicant alleged that he received the OTH discharge because he would not sign a paper admitting to homosexuality, this allegation does not comport with any of

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

the Coast Guard's policies or procedures for discharging homosexuals in 1989. There was no article in the Personnel Manual that required members to sign such an admission or that authorized an OTH discharge for members who would not sign such an admission. Instead, Article 12-B-33 of the Personnel Manual authorized either administrative discharges for members accused of homosexual acts or tendencies or trial by court-martial if the evidence warranted criminal charges, such as in cases of assault or coercion. That the Coast Guard followed these procedures is apparent from the discharge proceedings the applicant underwent in 1987, when the ADB recommended that he receive an honorable discharge for homosexual tendencies. However, the Coast Guard opted to retain the applicant on active duty in July 1988, and he was not discharged until more than fourteen months later in November 1989. What happened in the interim to cause him to request an OTH discharge "for the good of the Service" is not in the record, but he has submitted nothing to support his claim that his OTH discharge was erroneous or unjust.

7. Because there is no evidence supporting the applicant's claim, and his OTH discharge is presumptively correct, the Board finds no grounds for waiving the statute of limitations in this case. The applicant's request should be denied. However, if the applicant is able to submit documentary evidence showing that the criminal charges against him in 1989 concerned homosexuality, the Board will reconsider his request.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of former [REDACTED] [REDACTED] USCG, for correction of his military record is denied, but if he is able to submit documentary evidence showing that the criminal charges against him in 1989 concerned homosexuality, the Board will reconsider his request.

January 8, 2016

