

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2016-094

████████████████████
████████████████████

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 April 8, 2016, and assigned it to staff member ██████████ to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated January 27, 2017, 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 asked the Board to correct his military record by upgrading his general discharge under honorable conditions from the Coast Guard Reserve on April 10, 1970, to an honorable discharge. The applicant stated that he did not need to provide supporting evidence because his service record and discharge are enough to prove he should receive an honorable discharge. He argued it is in the interest of justice for the Board to consider the merits of his case because he was discriminated against and all of his complaints fell on deaf ears.

SUMMARY OF THE APPLICANT'S MILITARY RECORD

On March 25, 1965, the applicant enlisted in the Coast Guard Reserve for six years as a seaman recruit (SR/E-1). For six months beginning in March 1965, the applicant served on active duty to complete his initial training at Cape May, New Jersey, and aboard the USCGC ██████████. On May 10, 1965, he completed the Code of Conduct for Members of the Armed Forces course.

Upon completing six months of training, the applicant was assigned to the Seventh District to complete his obligated inactive service. However, he failed to drill regularly and had many unexcused absences.

On June 30, 1967, after the Selective Service System was advised of his [REDACTED] participation, the applicant was inducted into the regular Coast Guard for a period of two years. The applicant then served in Vietnam from [REDACTED] 1967, to July 16, 1968 aboard the [REDACTED]

On January 31, 1969, the applicant was recommended for advancement in rate and nominated to participate in the March 1969 servicewide examination for [REDACTED]. The applicant attended [REDACTED] "A" School from February 14 to May 9, 1969. His final mark was 90.87, and he ranked 13 out of 38. On February 4, 1969, the applicant voluntarily extended his active duty by 20 months, through February 28, 19[REDACTED]er to meet his service requirement to attend [REDACTED] 1.

On May 14, 1969, following "A" School, the applicant reported to Base [REDACTED], and was then transferred to the USCGC [REDACTED]. On December 12, 1969, the applicant was arrested and charged with drunken driving, negligence, and driving with an expired driver's license. He was acquitted of the charge of negligence and charged \$25 for driving with an expired license. A memorandum notes that the charge of drunken driving "will be decided at a later date by a Superior Court" and the resolution of this charge is not apparent in the record.

On February 27, 1970, his CO prepared an Administrative Remarks form ("Page 7") to document [REDACTED] that the applicant had been counselled concerning his conduct. The CO noted that there had been "numerous cases of dismissal or minor disciplinary violations in an effort to help him solve his family, financial, and [REDACTED] attitude problems" and [REDACTED] applicant continued to feel he was "being picked upon." The Page 7 outlined the following counselling sessions:

1. The Operations Officer counselled the applicant on October 1, 1969, later in October, 1969, January 29, 1970, and on February 17, 1970. Each time, the topic [REDACTED] was that the applicant must conform to the same regulations as everyone else. Personal problems the applicant was having with his mother and wife were also discussed. Following each of these sessions, the applicant was more cooperative for up to a few weeks – generally until he was given an unpleasant task.
2. The Executive Officer (XO) counseled the applicant on November 7, 1969, regarding his family and financial problems. The XO tried to assist the applicant in solving his difficulties. The applicant was advised that these problems must be corrected because they were adversely affecting his performance, and his current situation could not continue.
3. The CO, in the presence of the XO, counseled the applicant after every incident in which the applicant was brought to mast (discussed below). Each of these sessions discussed what was expected of the applicant, what was wrong with his current performance, what could be done to help the applicant with his family problems, and what would happen if he continued on his present course.

Also on February 27, 1970, the applicant's CO notified him that he was initiating the applicant's discharge for unsuitability based on his "past service performance and a psychiatric medical evaluation that [he] be discharged for reasons of emotional instability" pursuant to

10. January 16, 1970: Placed on report for failure to make muster and fail to appear at reveille. This charge was dismissed with a warning after determining that the applicant had been on a medication that had have incapacitated him.
11. February 18, 1970: Awarded 21 days' restriction and reduction to SN, suspended for six months, for failure to make muster due to failing to turn out after reveille, and for sleeping in another man's bunk during working hours. He was notified that the suspension would be vacated with any minor infraction.
12. February 18, 1970: While charges were being contemplated, the applicant "came running to [the CO] crying that he was being discriminated against because he was Puerto Rican." The CO noted that "Nothing could be further from the truth. He has been given every opportunity to get himself squared away."
 - a. On this date, the applicant was advised that the Coast Guard was considering initiating action for administrative discharge. The applicant indicated that he desired to be discharged from the service.
13. February 25, 1970: Placed on report for assaulting a petty officer in the performance of his duty. The suspension of reduction to SN was vacated. Awarded forfeiture of \$75 per month for two months. The CO noted that a more severe punishment was warranted due to the "viciousness" of the attack, but such action would be an inconvenience to the government due to the applicant's immediate transfer to base in [redacted].
14. February 27, 1970: The applicant climbed onto the radar platform on the mast and threatened to jump. Two men, one of whom was also [redacted], were able to convince him to come down after about an hour with the understanding that the applicant would be taken to talk with the Navy Chaplain.

Following this episode, he was taken to the Neuropsychiatric Service in [redacted] where he was evaluated. On February 27, 1970, a psychiatric evaluation was prepared, which determined that the applicant had an emotionally unstable personality, moderately severe. The examiner believed that the applicant suffered from a "preexisting, lifelong personality disorder." A recommendation was made that he be administratively discharged because of unsuitability on an expedited basis.

In addition, on March 7, 1970, the applicant received non-judicial punishment for being AWOL from his base for approximately 1 hour and 45 minutes. As a result, he was restricted to base for 7 days and received 90 days suspension. On March 25, 1970, he received another non-judicial punishment for being AWOL for 7 hours and 2 minutes. He was ordered to forfeit \$25 per month for one month and received 30 days suspension.

On April 10, 1970, the applicant received a General discharge due to unsuitability pursuant to Article 12-B-10 of the Personnel Manual. His final average performance marks were 2.87 for proficiency, 2.73 for leadership, and 3.55 for conduct. He earned the Vietnam Service Medal with two bronze stars, Republic of Vietnam Campaign Medal Ribbon Bar with Device, and the National Defense Service Medal.

In 1978, the applicant requested medical records from the Department of Veterans Affairs (VA). He stated that his date of treatment was 1970, and that he was treated in the hospital for a nervous condition. The VA sent [REDACTED] a copy of his DD 214.

On July 18, 1979, the applicant submitted a request to the VA asking for copies of his medical records. In the explanation, he stated that he “would like a copy of [his] medical records explaining the determination of [his] discharge.” He told the VA that he [REDACTED] a copy of his medical records for his personal use because he had “never seen it nor was [he] informed of the reasons for [his] “General Discharge” by the U.S. Coast Guard.” The VA informed him that his medical records were on loan to the [REDACTED] Regional VA office (the applicant was living [REDACTED] at the time), and provided information on how he could view those records at that location.

On March 10, 1982, a congressman made a request [REDACTED] half of the applicant seeking information regarding “his tour of duty and discharge.” On May 12, 1982, a copy of the sections of the applicant’s file pertaining to his discharge were forwarded to the congressman to be given to the applicant. On January 18, 1994, the applicant requested a copy of his DD 214, with the reason given as “misplaced through time.” The purpose stated was “determination of eligibility for VA guaranteed loan.” Most recently, on March 18, 2008, the applicant made an inquiry to the VA requesting information regarding the dates of his service in Vietnam.

[REDACTED] VIEWS OF THE COAST GUARD

On July 22, 2014, [REDACTED] Judge General (JAG) submitted a preliminary opinion in which he recommended that the Board deny relief and not consider the application due to its untimeliness [REDACTED].

In recommending denial, the JAG argued that pursuant to 31 C.F.R. § 52.22, [REDACTED] relief must be denied “unless the board finds that sufficient evidence has been presented to warrant a finding that it would be in the interest of justice to excuse the failure to file timely.” The JAG argued that the applicant presented no evidence to indicate why the Board should consider the untimely application.

In addition, the JAG argued that even if the Board finds that the applicant has satisfied his burden under 31 C.F.R. § 52.22, then the doctrine of laches would still bar this claim from consideration. This doctrine requires that the delay be unreasonable and unexcused and that there be a showing of prejudice. The JAG reiterated that there has been an unreasonable delay, in that the application is over forty years untimely, and that the delay is unexcused, because the applicant has offered no justification as to his untimeliness. The JAG also argued that the applicant’s delay has prejudiced the Coast Guard’s ability to respond because it “would be nearly impossible to find anyone even associated with this case, and even if found, to expect them to remember the details.” The JAG therefore recommended that the Board dismiss the application or, in the alternative, grant no relief.

The JAG also adopted the facts and analysis in a memorandum on the case prepared by the Personnel Service Center (PSC). PSC likewise argued that the application is untimely and

should not be considered past a cursory review. PSC argued that the Coast Guard followed all of the proper procedures according to Article 12-B-10 of the Personnel Manual in effect in 1970. These procedures included a psychiatric evaluation, a narrative summary prepared by the medical officer to describe the mental and physical conditions of the applicant, a statement that the applicant had the mental capacity to understand the action being contemplated (general discharge by reason of unsuitability), notification to the applicant in writing of the proposed discharge, and a direct issuance of a general discharge by the Commandant.¹ There is also no evidence that the applicant was discriminated against, as he claimed in his application. Therefore, PSC argued, the applicant has not provided any evidence to suggest that the discharge was erroneous or unjust, and his application should not be considered.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 24, 2016, the applicant responded to the views of the Coast Guard. He stated that he had not been advised to request a change in his discharge within three years of separation. The applicant claimed that he was told that his discharge would automatically become honorable after "a short period of time," which is why he chose not to make a claim previously.

With respect to the drills that he did not attend, the applicant stated that the meetings were held on Sundays and "all [they] did was march around a cement drill field under the hot tropical sun with M-1 rifles on [their] shoulders. If [he] had wanted to be a rifle toting soldier, [he] would've joined the Army." He stated that he had asked to be taught about small boats and search and rescue because that is "what the Coast Guard is all about."

Regarding the alleged personality disorder, the applicant pointed out that it was not diagnosed until after he had completed a tour of duty in Vietnam. He alleged that his "problems, if you want to call them that, only reared their ugly head when [he] was posted aboard the USCG Cutter Courageous." He attributed these problems to his supervisor, a [REDACTED], who "utilized a seaman striker to undermine [his] [REDACTED] rate and made [the seaman] practically [the applicant's] boss." The applicant alleged that until he attacked this [REDACTED] the [REDACTED] harassed him "every day without fail and [his] cries of unfairness to the officers were met with accusations of laziness and lack of discipline."

In addition, the applicant stated that while he was trying out for drill team in boot camp, he overheard some petty officers comment that "they already had a [derogatory term for a person of Hispanic origins] in the drill team, therefore [he] wasn't chosen because one is enough." However, he mentioned this incident after noting his time in the Air Force ROTC while in college, and it unclear if this drill team try-out incident occurred during his Air Force ROTC service in college or in the Coast Guard.

APPLICABLE REGULATIONS

Under Article 12-B-10 of the Personnel Manual in effect in 1970, the Commandant may direct that an enlisted member be discharged by reason of unsuitability. According to Article 12-

¹ All requirements are enumerated in Article 12-B-10 of Personnel Manual in effect in 1970.

B-10(h), an individual must be issued an honorable or general discharge, as appropriate.² It further states that “an honorable discharge should only be issued to those individuals who have shown a sincere effort to maintain proper military behavior and to perform their duties in a proficient and industrious manner.”

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 must be filed within three years after the applicant discovers the alleged error in his record.³ The applicant received his general discharge in 1970. Therefore, his application is untimely.
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.”⁴
4. The applicant did not explain his delay in seeking an upgrade of his discharge. He argued that it is in the interest of justice for the Board to review the merits of his case because of his constant complaints and discrimination while in the Coast Guard. However, the Board finds that this argument is not compelling because nothing prevented the applicant from complaining about his general discharge and discovering the existence of the Board sooner if he believed his discharge was erroneous or unjust. The Board notes in this regard that the applicant made several inquiries regarding his discharge over the years but did not file an application until 2016. In addition to signing his DD-214 in 1970, he received copies of his DD-214 and portions of his records in 1979, 1982, and 1994. There is no evidence that the applicant was advised that his discharge would be automatically upgraded.
5. A cursory review of the case indicates that it lacks potential merit. The record shows multiple infractions spanning his time with the Coast Guard, including one arrest for driving under the influence of alcohol. While the applicant was having personal problems, the records indicate that the Coast Guard made every effort to accommodate and assist him. The applicant claims that he was discriminated against, but there is no evidence to substantiate this

² Article 12-B-10(h) notes that whether an honorable or general discharge is appropriate is determined under Article 12-B-3(a) or (b). Article 12-B-3(a) refers to honorable discharges, and (b) refers to general discharges. Under 12-B-3(b), it states that a general discharge is appropriate “When, based on the individual’s overall military record, the Commandant directs the issuance of a general discharge.”

³ 10 U.S.C. § 1552(b).

⁴ *Allen v. Card*, 799 F. Supp. 158, 164-65 (D.D.C. 1992).

claim, and he claims that he was being harassed by his supervisor who was also [REDACTED]. Given the lack of evidence supporting the allegation of discrimination and all of the non-judicial punishments awarded to the applicant, the [REDACTED] finds for disregarding the minimum [REDACTED] or an honorable discharge under the regulation. Therefore, the Board finds that the applicant's claim is unlikely to prevail on the merits.

6. Accordingly, the Board will not excuse the application's [REDACTED] liness or waive the statut[REDACTED] limitations. The applicant's request should be denied.

[REDACTED] [REDACTED] [REDACTED]
(ORDER AND SIGNATURES ON NEXT PAGE)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

ORDER

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

January 27, 2017

