

DEPARTMENT OF TRANSPORTATION  
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of  
Coast Guard Record of:

BCMR Docket  
No. 1999-147

FINAL DECISION

██████████ Deputy Chairman:

This is a proceeding under the provisions of section 1552 of title 10, United States Code. It began on July 9, 1999, upon the Board's receipt of the applicant's application for correction of his military record. The application was not complete, however, until the Board received the applicant's military record on September 14, 1999.

This final decision, dated July 26, 2000, is signed by the three duly appointed members who were designated to serve as the Board in this case.

The applicant, a former fireman damage controlman (FNDC; pay grade E-3), asked the Board to upgrade his General Discharge Under Honorable Conditions to an Honorable discharge. He also requested that his RE-4 (not eligible for reenlistment) reenlistment code be upgraded.

The applicant began active duty in the Coast Guard on January 8, 1980, and was discharged on May 30, 1983 with a General Discharge Under Honorable Conditions, by reason of misconduct, with an RE-4 reenlistment code. He spent three years, four months, and 22 days on active duty in the Coast Guard. Prior to beginning active duty in the Coast Guard, the applicant spent one month and 11 days in the delayed entry program.

**SUMMARY OF RECORD AND SUBMISSIONS**

The applicant provided the following statement:

This letter is to inform you of an injustice done to me by the U.S. Coast Guard. I was given a general discharge and a reenlistment code of RE-4 by my superiors aboard the USCGC ██████████. My superiors were clearly thinking about the reduction of enlisted personnel at that time. They did not understand the severity of the marital problems I was having at that time, and denied my various attempts to get counseling and a hardship transfer.

I tried within the three years after my discharge to have my military record corrected, but I was informed by an individual within the Veterans Administration that it could not be changed. My proficiency scores

during and after my enlistment were good enough to have my case considered for correction. Another reason it should be considered is that my discharge wasn't based on drugs or alcohol, it was based on misconduct based on my marriage problems at that time. I would like the board to consider my application based on the injustice done to me at that time, and the accomplishments I have achieved since that time.

In support of his application the applicant submitted various complimentary letters that he has received in his civilian employment. The letters thanked the applicant for participating in blood drives, acknowledged his safety awareness by noting that he had not been injured on the job in the past five years, and congratulated him for submitting a useful idea.

### **Applicant's Military Record**

On February 10, 1983, the applicant's CO notified the applicant that he was being recommended for discharge from the Coast Guard under the provisions of Article 12-B-9 (unsatisfactory performance) of the Personnel Manual. The CO recommended that the applicant be discharged with a General Discharge Under Honorable Conditions. The CO gave the following reasons for recommending the applicant's discharge.

"a. You are creating an unacceptable administrative burden on the command due to continuing minor military and disciplinary infractions.

"b. You are carrying below average performance of duty marks.

"c. You have failed to maintain job skill proficiency by non-application.

"d. You have not adapted socially to military life."

The CO also noted that the applicant had been counseled approximately 20 times, between February 1982 and February 1983, on matters such as a lack of initiative and leadership habits, pursuit of a hardship discharge and of a divorce and custody of children, an humanitarian reassignment, an eviction, and tardiness. In addition the CO informed the applicant that he had been placed on report for committing eight different offenses under the Uniform Code of Military Justice.

The applicant acknowledged the proposed discharge, objected to the discharge, submitted a statement in his behalf, acknowledged that a General Discharge Under Honorable Conditions could be prejudicial in civilian life, and acknowledged that he could consult with a military lawyer.

In his statement in response to the proposed discharge, the applicant stated that he wanted to make the Coast Guard a career. He stated that at the time of the discharge recommendation his family situation had been resolved. He further stated that his marks were sufficient to earn him an Honorable Discharge instead of a General Discharge.

The CO wrote in his letter to the Commander, ██████ Coast Guard District, that the applicant was recommended for discharge pursuant to Article 12-B-16 (unsuitability) of the Personnel Manual. In this letter, the CO elaborated on the reasons for requesting the applicant's discharge. He stated the following:

... The counselling (sic) cited in the letter of notification is a chronology of the applicant's appearance at request mast and reads as a constant failure on his part to deal with life and its problems on his own. Most recently [the applicant] has blamed his problems on his wife and the ships schedule . . . The lengthy listing of appearance at request mast is . . . presented . . . to show that there has been an extremely generous effort on the part of the command to help him through his troubles. Unfortunately, [the applicant] has failed to avail himself of the help tendered. He has refused to follow through on marriage counseling, which we scheduled. He did not avail himself of the psychiatric help available after his wife's alleged [attempted] suicide. He completely disregarded the advice and counsel of the Legal Assistance provided. . . . I am particularly concerned regarding his allegations that his wife has been identified as a child abuser by Child Protective Service for neglect. But, as in all other things, he has failed to provide any documentation or specifics by which we could help him ensure the well being of his children. Quite frankly, I am forced to seriously question [the applicant's]. . . veracity regarding ANY statement.

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The CO provided the following summary of the applicant's military offenses:

- "a. NJP [non-judicial punishment] 3 Sep 1982 – Art 92 Dereliction of Duty, Art 113 Asleep on watch, Art 132 Fraud against the U.S. (approx[imately] \$700.00 in unauthorized long distance phone calls charged to the ship from a third number); Awarded reduction from DC3 to FNDC, 14 days restriction and 14 days extra duty.
- "b. 5 Oct 1982 – UA [unauthorized absence] 0645-0805; dismissed with a warning
- "c. 11 Nov 1982 – UA 0900-0945; dismissed with a warning
- "d. 10 Jan 1983 – UA 0745 –0800, UA leaving assigned place of duty, failure to obey a lawful order of a petty officer, UA 1225-1240; dismissed with a warning."

With respect to his performance marks, the CO stated that '[a]lthough the applicant's marks are above the 2.7 minimum average for a General Discharge, based on his overall military record I recommend that an Honorable Discharge would be totally inappropriate, that a General Discharge is warranted in this case . . ."

The Commander, ██████ Coast Guard District, forwarded the command's recommendation to the Commandant for action. In his forwarding letter, the Commander stated that the applicant should receive a General Discharge Under Honorable Conditions for misconduct due to the applicant's frequent involvement of a discreditable nature with military authorities.

The Commander stated that the applicant's steady decline in proficiency<sup>1</sup> since joining the Coast Guard is inconsistent with his request to remain in the Service. The Commander stated that "[a]lthough [the applicant's] marks do not in themselves justify a general Discharge, his overall record . . . identifies a member who is unable or unwilling to perform to the least acceptable military standard and therefore should not be rewarded with an Honorable Discharge."

On March 3, 1983, the Commandant ordered the applicant to be discharged with a General Discharge Under Honorable Conditions by reason of misconduct, with an RE-4 reenlistment code. The Commandant also directed the Commander to offer the applicant the opportunity to make a new statement and consult with legal counsel, since the reason for his discharge was revised from unsuitability to misconduct. He further stated that if the applicant did not desire to make a new statement or consult with legal counsel that he should be discharged as directed. The applicant was discharged on May 30, 1983.

#### **Discharge Review Board (DRB)**

On June 24, 1984, the DRB, by unanimous vote, denied the applicant's request for an upgrade of his General Discharge. The DRB found that

[the] [a]pplicant was counseled frequently over a period in excess of six months concerning his AWOL, low performance, and family problems. He failed to overcome his deficiencies during that time. No evidence was found in the record or presented by the applicant to support a finding that his frequent involvement of a discreditable nature was outside his control or directly related to marital problems as he alleges. Applicant has failed to produce any evidence to substantiate his allegations of marital difficulty and failed to utilize the counseling services offered.

The DRB notified the applicant of its decision by letter dated November 1, 1984. The applicant was advised that he could appeal the DRB decision to the BCMR and he was provided with a DD Form 149 and the Board's address. The applicant did not file an application with the Board until July 1999.

#### **Views of the Coast Guard**

On April 6, 2000, the Chief Counsel submitted the views of the Coast Guard. He did not recommend that any relief be granted to the applicant. The Chief Counsel stated that the application was untimely. He stated that applicable regulations require that "an application for correction of a record must be filed within three years after the applicant discovered or reasonably should have discovered the alleged error or injustice." The applicant indicated on his correction application, that the date of discovery of the alleged error or injustice was May 18, 1985. The applicant's correction

<sup>1</sup> The applicant's marks page shows that on June 30, 1980 his marks were 3.4 in proficiency and 4.0 in conduct on a scale of 1 to 4 with 4 being the higher mark. On December 31, 1981, his marks were 3.3 in proficiency, 3.3 in leadership, and 4.0 in conduct. On September 3, 1982, the applicant's marks were 3.2 in proficiency, 3.0 in leadership, and 3.0 in conduct. On December 31, 1982, the applicant's marks were 3.1 in proficiency, 3.0 in leadership, and 4.0 in conduct.

application was filed approximately 13 years beyond the three-year statute of limitations period.

The Chief Counsel stated that it is not in the interest of justice to excuse the untimely filing. In this regard, the Chief Counsel stated that the BCMR's regulations require that an applicant filing an untimely request set forth reasons explaining why it is in the interest of justice to accept his application for correction. In making a determination whether to waive the statute of limitations, the Board must consider the reasons for the delay and make a cursory review of the potential merits of the claim. Dickson v. Secretary of Defense, 68 F.3d 1396 (D.C. Cir 1995). The Chief Counsel stated that the applicant has failed to offer substantial evidence that the Coast Guard committed either an injustice or error in discharging him with a General Discharge based on misconduct.

The Chief Counsel also asserted that this case should be denied due to laches. The Chief Counsel stated that because of the delay, the Coast Guard has been prejudiced because its ability to contact key witnesses has been severely hampered by the fact that they no longer serve in the Coast Guard and by the absence of key unit documents that have been destroyed pursuant to the paperwork disposition regulation.

The Chief Counsel stated that the applicant had failed to prove that the Coast Guard committed an error in discharging him from the Coast Guard. The Chief Counsel stated that the applicant's actions, as described by his CO, could reasonably be expected to bring discredit upon the Coast Guard. The Chief Counsel further stated that the applicant's CO did not act to discharge the applicant until the command had acted to assist him in solving his problems.

The Chief Counsel stated that no one has a right to remain in the armed forces unless a specific statute or regulation grants that right. He said that the applicant was accorded all of the rights to which he was entitled. The Chief Counsel stated that the applicant was provided proper notice, legal counsel and the opportunity to make a statement, which he did. The Chief Counsel stated that absent strong evidence to the contrary, government officials are presumed to have carried out their duties correctly, lawfully, and in good faith. Arens v. United States, 969 F.2d 1034, 1037.

The Chief Counsel stated that post-service conduct, alone, is an insufficient basis to upgrade a discharge. See Department of Transportation Memorandum from the General Counsel dated 07 July 1976 "BCMR and 'Clemency'".

The Chief Counsel recommended that this application be denied for lack of timeliness or alternatively it should be denied for lack of merit.

#### **Applicant's Response to the Views of the Coast Guard**

On April 25, 2000, the Board received the applicant's response to the views of the Coast Guard. He stated that his discharge by reason of misconduct was due to his marital problems.

The applicant requested that the Board waive the statute of limitations and consider the merits of his case. He stated that it would not have done any good to submit an application in 1983 because the Coast Guard was trimming its personnel due to budget constraints. He further stated as follows:

I should not have blamed the Coast Guard for my dismissal, but as I sit here and start to examine my past I find that it was clearly my fault. I only ask that the Board waive the Statute of Limitations, and allow my case more consideration. I would like them to consider that my proficiency marks at the time were not as bad, and I clearly made some mistakes in performing my duty. I know that it could have been better if I would not have -at the time- allowed my personal life to interfere with my duty responsibilities, but I was younger and unable to cope with my marriage problems.

In the time preceding my problems, my service to the Coast Guard was excellent. I had taken and passed the E-5 servicewide examination (SWE)  
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... I did not have any problem with my superiors leading up to my assignment on [REDACTED] I believe that my superiors did everything possible to help me but as the time it was not good enough. Sometimes the best solution to a problem is a change in scenery.

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### APPLICABLE REGULATIONS

Article 12-B-2f. of the Personnel Manual (1982) stated, in relevant part, the following with respect to a General Discharge:

(2) General Discharge. A separation with a general discharge may be effected by the member's commanding officer or higher authority when the member is eligible for or subject to discharge and it has been determined that a general discharge is warranted . . . A general discharge will be issued to a member. . .

(d) When based on the individual's overall military record, the Commandant directs the issuance of a general discharge.

Article 12-B-18b. of the Personnel Manual stated that "[t]he Commandant may direct the discharge of a member for misconduct in any of the following cases: . . .

"(5) Frequent involvement of a discreditable nature with civil or military authorities."

## FINDINGS AND CONCLUSIONS

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

1. The BCMR has jurisdiction over this matter pursuant to section 1552 of title 10, United States Code. The application was untimely.

2. To be timely, an application for correction of a military record must be submitted within three years after the discovery of the alleged error or injustice. See 33 CFR 52.22. The Board may still consider the application on the merits, however, if it finds it is in the interest of justice to do so.

3. The applicant was discharged with a General Discharge Under Honorable Conditions approximately 16 years before he filed his application with the Board. Approximately one year after his discharge, however, he filed an application with the DRB for an upgrade of his discharge. The DRB denied that application on June 28, 1984, but advised the applicant that he could appeal that decision to the BCMR. The applicant should have filed his application with the Board three years after the DRB rendered its decision. The applicant did not file an application with the Board until some 13 years later. He has not provided an explanation for not doing so sooner, but rather argued that the Board should waive the statute of limitations because his discharge was not based on drug or alcohol abuse, because his performance marks were high enough to earn an Honorable discharge, and because of his good post-service conduct. These reasons do not explain why the applicant waited 13 years to bring this request to the Board.

4. In addition to the reasons for the delay, the Board must also perform a cursory review of the merits in deciding whether to waive the statute of limitations in the interest of justice. See Allen v. Card, 799 F. Supp. 158 (D.D.C. 1992).

5. In this regard, the applicant claims that marital problems were to blame for his discharge. However, as the DRB noted in its decision, the applicant did not present any proof as to these marital problems. Neither has he presented any to this Board. Even, the CO in his letter to the Commander requesting the applicant's discharge, questioned the applicant's veracity with respect to his alleged family problems.

6. Based on a cursory review of the evidence, the Board finds that the applicant's overall record is sufficient to support his General Discharge Under Honorable Conditions. In this regard, the Board notes that the applicant had four non-judicial punishments and numerous counseling entries about his performance and family situation in the year prior to his discharge. The Board questions the seriousness of the applicant's marital situation since he failed to follow through with the marital counseling offered by the command. In addition the applicant failed to follow through with producing the documentation to support a humanitarian assignment as requested by the command. Therefore, the Board finds that it is not in the interest of justice to waive the statute of limitations in this case.

7. One area of potential concern is the lack of documentation in the record showing that the applicant was given the opportunity, as directed by the Commandant, to submit a new statement and to obtain legal counseling after the reason for his discharge was revised from unsuitability to misconduct. However, the Board is not troubled by this given the opportunity the applicant had to raise such issues before the DRB and the untimeliness of his claim before this Board. Given these factors and the presumption of regularity, the Board finds that the Coast Guard officers carried out their duties with respect to the applicant lawfully, correctly, and in good faith.

8. The applicant has failed to prove an error or injustice. Accordingly, the applicant's request for relief should be denied because it is untimely and for lack of proof.

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[ORDER AND SIGNATURES ON NEXT PAGE]

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**ORDER**

The application of former  
correction of his military record is denied.

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