

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction
of Coast Guard Record of:

BCMR Docket
No. 1999-173

FINAL DECISION

Chairman:

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was docketed on September 1, 1999, upon the BCMR's receipt of the applicant's completed application.

This final decision, dated June 15, 2000, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant, a former fireman's apprentice (FA; pay grade E-2), asked the BCMR to grant him a waiver from his reenlistment code of RE-4 (not eligible for reenlistment) so he could join the National Guard.

The applicant was discharged from the Coast Guard on October 28, 1991. The application for correction was submitted to the Board on August 20, 1999, a date that was more than three years after the date the applicant was discharged by the Coast Guard.

VIEWS OF THE COAST GUARD

On May 5, 2000, the Board received the advisory opinion of the Coast Guard from the Chief Counsel of the Coast Guard. The advisory opinion recommended that the Board grant relief to the applicant. The Chief Counsel stated that the applicant's reenlistment code should be upgraded "because there was insufficient basis to assign Applicant a not eligible for reenlistment RE code at the time of his discharge."

The Chief Counsel declared that the application was untimely by approximately six years. However, the Chief Counsel found that it was in the interest of justice to excuse the delay and decide the case on the merits.

According to the advisory opinion, the Coast Guard committed an error in discharging the applicant for unsuitability due to inaptitude without affording him a probationary period as required by Article 12.B.16.c. of the Personnel Manual. The

error was harmless, however, according to the Chief Counsel, because the applicant "was in full agreement with the discharge decision." The applicant did not make a written statement or otherwise object to the discharge recommendation; he was, according to the Chief Counsel, desperate to leave the service "as quickly as possible."

The Chief Counsel stated that the applicant was hospitalized by reason of a suicide gesture that led to a diagnosis of adjustment disorder. In view of this, he probably would have been discharged for unsuitability due to personality disorder if his command had directed a medical examination. A personality disorder discharge does not require a probationary period.

The Chief Counsel recommended that the applicant's separation code be changed to JFX, "which is the contemporary equivalent of the Separation Code in effect at the time of Applicant's discharge for personality disorders, JMB."

The Chief Counsel also recommended that the applicant's reenlistment code be changed to RE-3G (Condition (Not Physical Disability) Interfering with Performance of Duties) from RE-4 (Not Eligible for Reenlistment). The following factors were mentioned by the Chief Counsel as justifications for upgrading the RE-4 code: applicant did not commit misconduct, applicant did not have any disciplinary incidents in his record, it is likely that the applicant will be able to convince his recruiting agent that his condition no longer exists, and reasonable doubt should be resolved in applicant's favor.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 4, 2000, the Board sent a copy of the views of the Coast Guard to the applicant with an invitation to submit a response thereto. On May 22, 2000, the Board received a response from the applicant stating that he had no objection to the recommendations of the Coast Guard.

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 BCMR has jurisdiction of this case pursuant to section 1552 of title 10, United States Code.

2. The application for correction in this case was received by the BCMR on August 31, 1999. The alleged error or injustice, the assignment of an RE-4 reenlistment code, occurred almost eight years earlier, on October 28, 1991. The application was not timely because it was not submitted within three years after the date of the alleged error or injustice. 10 U.S.C. § 1552(b).

3. The Board has the authority to waive that timeliness deadline and to consider the claim on the merits, if it concludes that it is in the interest of justice to waive the statute of limitation. Dickson v. Secretary of Defense, 68 F.3d 1396 (D.C. Cir. 1995). The

court in that case held that it was in the interest of justice to waive the timeliness deadline and decide the case on the merits if its failure to waive the deadline might be viewed as arbitrary and capricious.

4. The application in the current case should be decided on the merits. It is in the interest of justice to consider the merits of the case because only a limited amount of time has elapsed between the expiration of the statute of limitation and the receipt of the application, because no party was prejudiced by the delay, and because the Coast Guard did not object to the Board deciding the application on the merits.

5. The applicant enlisted in the Coast Guard on April 29, 1991, for four years. On July 25, 1991, he was admitted to a medical center after making a "suicide gesture." He was diagnosed as having "adjustment disorder with depressed mood." On September 12, 1991, his command initiated discharge proceedings against him for unsuitability due to inaptitude.

6. The Coast Guard erred in not affording the applicant a probationary period as required by Article 12.B.16.c., but the error coincided with the applicant's "manifest desperation to leave the service as quickly as possible." The Coast Guard's actions were humane if not technically correct.

7. Justice mandates that the applicant not be assigned an RE-4 reenlistment code because he received favorable evaluations on all the factors mentioned by the Coast Guard: (1) did not commit misconduct; (2) did not have any disciplinary incidents in his record; (3) it is likely that the applicant will be able to convince his recruiting agent that the disqualifying condition no longer exists; and (4) reasonable doubt, which should be resolved in favor of the applicant.

8. Accordingly, the applicant's record should be corrected by changing his reenlistment code from RE-4 (not eligible for reenlistment) to RE-3G (eligible for reenlistment, except for disqualifying condition: Condition (not physical disability) interfering with performance of duties. The applicant's separation code designator (SPD) should be changed to JFX, which is the contemporary equivalent of the JMB (unsuitability--personality disorders).

ORDER

The military record of [REDACTED] USCG, shall be corrected by changing the reenlistment code assigned to him from RE-4 (not eligible for reenlistment) to RE-3G (eligible for reenlistment except for disqualifying condition (not physical disability) interfering with performance of duties) and by changing the applicant's separation code to JFX.

No other changes shall be made to his record, and the narrative reason for separation shown on his DD 214, "Unsuitability," shall not be changed.

