

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

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Application for the Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2004-068**

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**FINAL DECISION**

 This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The application was docketed on February 12, 2004, upon receipt of the applicant's completed application and military records.

This final decision, dated October 28, 2004, is signed by the three duly appointed members who were designated to serve as the Board in this case.

**APPLICANT'S REQUEST**

The applicant asked the Board to correct his military record by changing the reason for his Honorable Discharge from discharge by reason of unsuitability (personality disorder) to discharge by reason of hardship.

**APPLICANT'S ALLEGATIONS**

The applicant alleged that he was told during a December 1, 1970 psychiatric evaluation that he would receive a hardship discharge. He further stated the following:

When I was called to the yeoman's office to pickup my discharge papers the E-5 yeoman presented me with a [G]eneral [D]ischarge, which I would not sign. The yeoman sent for the CDR [commander] [H] and explained that I would not sign these papers. CDR [H] told him it was to be an Honorable Discharge and to type it up as such. I believe the yeoman did not change [section 11c. on the DD 214N] to reflect what Dr. [E] conveyed

to me and to correlate with 13a [character of service] on the DD 214 N. I am uncertain as to whether this was an inadvertent or deliberate mistake.

### SUMMARY OF THE RECORD

On February 24, 1969, the applicant enlisted in the Coast Guard for four years. Subsequently, on December 1, 1970, he received a psychiatric evaluation because of his preoccupation with family/marital issues. Dr. E noted in the psychiatric report that the applicant had been in the Coast Guard for approximately two years and that his family problems started after he became married. He stated that the applicant was preoccupied with his marital situation and saw no solution to the problem other than to get out of the Coast Guard. The report indicated that the applicant had given some thought to "taking his son to go to Canada, to disappearing, [and] to suicide."

Dr. E diagnosed the applicant as suffering from "Passive-aggressive personality, dependent type" and "Situation reaction, manifested chiefly by depression." He recommended that the applicant be administratively discharged "as soon as possible." He stated that if the discharge were not granted that the applicant would likely act out or attempt suicide. Dr. E stated in the report that "a hardship discharge would also be appropriate."

Dr. E stated that there were no disqualifying mental or physical defects that were rated as disabilities under the Veteran Administrations Schedule for Rating Disabilities, and that the applicant was mentally responsible, both to distinguish right from wrong and to adhere to the right.

On December 14, 1970, the applicant's commanding officer (CO) advised the applicant that he would be administratively processed for discharge due to a character and behavior disorder. The applicant was advised that he could make a statement in his own behalf. The applicant signed an endorsement on the December 14, 1970 letter advising the CO that he did not desire to make a statement.

On December 16, 1970, the CO recommended to the Commandant that he approve discharging the applicant under Article 12-B-10(b)(2) of the Personnel Manual. The CO stated that the applicant's performance had been above average and had only began to decline when the applicant became preoccupied with his family problems after returning from a deployment.

On December 31, 1970, the applicant was punished at captain's mast (non-judicial punishment) for an unauthorized absence from December 21, 1970 until

December 31, 1970. His punishment included restriction to the cutter for 30 days and extra duties for 30 days.

On January 7, 1971, the Commandant approved the applicant's discharge by reason of unsuitability under Article 12-B-10 of the Personnel Manual.

On January 8, 1971, the applicant was discharged from the Coast Guard with an Honorable Discharge due to unsuitability under Article 12-B-10 of the Personnel Manual, with an RE-4 (not eligible for reenlistment) reenlistment code.

### **VIEWS OF THE COAST GUARD**

On May 28, 2004, the Judge Advocate (TJAG) of the Coast Guard submitted an advisory opinion recommending that the Board grant partial relief as recommended by the Commander, Coast Guard Personnel Command (CGPC). CGPC recommended that the reason for the applicant's discharge be changed to Convenience of the Government by reason of condition, not a disability that interferes with performance of duty.

With respect to the applicant's contention that he should have received a hardship discharge, TJAG stated that the applicant has not offered sufficient evidence to show that he qualified for or requested a hardship discharge. However, he stated after reviewing the applicant's file, he supports changing the reason for the applicant's discharge to "Convenience of the Government" because it more appropriately characterizes the reason for discharge.

TJAG attached a memorandum from the Commander, Coast Guard Personnel Command (CGPC) as Enclosure (1) to the advisory opinion. He stated that he adopted the facts and analysis provided by CGPC in that memorandum. CGPC stated that the record does not support the applicant's allegation that he should have been discharged due to hardship. He stated that according to Article 12.B.7 of the Coast Guard Personnel Manual that was in effect at the time of the applicant's discharge, members applying for such a hardship discharge were required to submit a request in writing accompanied by two different affidavits substantiating the hardship and establishing that the hardship occurred after the member entered the Service. CGPC stated that

[t]here is no evidence that the Applicant ever requested a hardship discharge during the separation process, and with the exception of the doctor's statement that a hardship discharge would be appropriate, the available record does not indicate that the applicant met the criteria for a hardship discharge.

CGPC stated the application was not timely, but indicated that it would be in the interest of justice for the Board to waive the three-year statute of limitations. With respect to the merits of the application, CGPC stated that although the applicant's unsuitability discharge was appropriate under Article 12-B-10 of the Personnel Manual in effect at the time, it is in the interest of justice to change the reason for the applicant's discharge to one denoting discharge for the Convenience of the Government by reason of condition, not a disability interfering with the performance of duty. According to CGPC, Article 12-B-6 (Convenience of the Government) of the Personnel Manual, then in effect, did not provide for condition, not a disability interfering with the performance of duty, as a basis for a Convenience of the Government discharge. However, CGPC stated that after the applicant's discharge, the Personnel Manual was amended to add condition, not a physical disability interfering with the performance of duty, as a basis for a Convenience of the Government discharge under Article 12-B-12 of the Personnel Manual.

CGPC attached to his memorandum a note from the Head of the Enlisted Separations Branch who stated that the "diagnosis given by the physician meets the description of personality disorder and adjustment disorder. But [there is] not enough documentation to certify [the diagnosis]."

#### **APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD**

On June 1, 2004, the BCMR sent the applicant a copy of the views of the Coast Guard and invited him to respond. No response was received.

#### **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 of this case pursuant to section 1552 of title 10 United States Code. It was not timely.

2. To be timely, an application for correction of a military record must be submitted within three years after the applicant discovered or should have discovered the alleged error or injustice. See 33 CFR 52.22.

3. The Board may still consider an untimely application on the merits, however, if it finds it is in the interest of justice to do so. In deciding whether it is in the interest to waive the statute of limitations, the Board should take into consideration the reasons for and length of the delay and the likelihood of the applicant's success on the merits of his claim. See Dickson v. Secretary of Defense, 68 F.3d 1396 (D.C. Cir. 1995).

4. The applicant's correction application was submitted approximately 30 years beyond the three-year statute of limitations. Although the applicant claimed that he did not discover the alleged error until he received and reviewed a copy of his military record in August 2001, he should have discovered the error on his DD Form 214N at the time of his discharge in 1971. It clearly states on the DD Form 214N that he was discharged due to unsuitability. The applicant offered no other explanation of why it would be in the interest of justice to waive the statute of limitations in his case.

5. Although the Board is not persuaded by the applicant's reason for not filing his application sooner, the Board must also consider the likelihood of the applicant's success on the merits of his claim in deciding whether the statute of limitations should be waived. The Board finds that it is likely that the applicant will prevail in obtaining some corrections to his military record. In this regard, the Board notes that the Coast Guard found merit in the application and recommended that the Board grant partial relief to the applicant. Under these circumstances, the Board finds that that it is in the interest of justice to waive the statute and to consider the claim in its entirety.

6. The Coast Guard did not commit an error by discharging the applicant due to unsuitability under Article 12-B-10 of the Personnel Manual, which was in effect at the time of the applicant's discharge. However, the Board further finds that the discharge by reason of unsuitability (personality disorder) constitutes an injustice in the applicant's record. The Coast Guard stated, and the Board agrees, that under the current Personnel Manual, the applicant would probably have qualified for a Convenience of the Government discharge due to condition, not a disability that interferes with the performance of duty. According to CGPC, a discharge on this ground was not available to the applicant in 1971. The Board further agrees with the Coast Guard that a discharge by reason of condition, not a disability more appropriately characterizes the circumstances under which the applicant was discharged. Although the psychiatrist diagnosed the applicant as suffering from a personality disorder, he also stated that the applicant's condition was a reaction to his marital situation, and he indicated that a "hardship discharge would also be appropriate." The Board notes that nothing in the record indicates that the Coast Guard inquired about or advised the applicant on the appropriateness of a hardship discharge, which probably explains why the applicant did not apply for one. In this regard, the Board notes that the applicant was a solid performer until he began experiencing marital/family problems.

7. Although the applicant alleged that he was told that he would receive a hardship discharge, nothing in the record supports his allegation, except Dr. E's statement in the medical report that a "hardship discharge would also be appropriate." Dr. E's statement clearly suggests that unsuitability due to a personality disorder was also a basis for discharge. Moreover, the applicant never applied for a hardship discharge, which would have required that he submit two different affidavits

explaining his hardship. Since the applicant never requested or submitted the necessary evidence to support a hardship discharge, this Board can make no decision on his claim that he should have been discharged by reason of hardship. On the other hand, the Board finds nothing in the military record indicating that the Coast Guard advised the applicant on the procedure for applying for a hardship discharge. We do not address whether the Coast Guard had a duty to counsel the applicant on applying for a hardship discharge, but we do note that the failure to do so contributes to our finding that the applicant's unsuitability (personality disorder) discharge constitutes an injustice.

8. The applicant did not challenge his RE-4 (not eligible for reenlistment) reenlistment code. However, it is the Board's policy to review the reenlistment code when it corrects the reason for discharge. The current Separation Program Designator Code (SPD) Handbook authorizes either an RE-3G or an RE-4 for a discharge by reason of condition, not a disability. The Board finds that the applicant's RE-4 reenlistment code should be upgraded to an RE-3G (eligible for enlistment except for disqualifying factor: condition, not a disability). The RE-4 is inconsistent with the applicant's average to above average performance record and the lack of any disciplinary problems, except for one minor infraction. In Docket No. 2004-015, the Board upgraded that applicant's reenlistment code from RE-4 to RE-3C noting the more favorable reenlistment code under today's regulation, noting that applicant's lack of any serious disciplinary problems, and noting his favorable performance. Applying the reasoning in BCMR No. 2004-015 to this case, the Board finds that RE-3G is the more appropriate reenlistment code for this applicant's situation. Any attempt by the applicant to reenlist with an RE-3G would require that he obtain a waiver.

9. Accordingly, the applicant is entitled to partial relief.

### **ORDER**

The application of former XXXXXXXXXX, XXXXXXXXXXXX, USCG, for correction of his military record is granted in part. His record shall be corrected to show that he was discharged from the Coast Guard under Article 12.B.12 of the Personnel Manual, for the Convenience of the Government, by reason of "condition, not a disability." His record shall be further corrected to show RE-3G as his reenlistment code.

No other relief is granted.

