

**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. 2004-083**

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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 March 18, 2004, upon receipt of the applicant's completed application and military records.

This final decision, dated December 16, 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 upgrading his 1960 Undesirable Discharge. He did not indicate the type of discharge he wanted.

**APPLICANT'S ALLEGATIONS**

The applicant requested an upgrade of his discharge as a matter of clemency. He recognized the seriousness of his conduct while in the military, but stated that he has led a productive life since his discharge. He submitted several letters from individuals attesting to his post-service good behavior and accomplishments.

**SUMMARY OF THE RECORD**

On September 2, 1959, the applicant enlisted in the Coast Guard and was discharged on September 16, 1960.

On February 17, 1960, the applicant was taken to captain's mast (non-judicial punishment) under Article 15 of the Uniform Code of Military Justice (UCMJ) for violations of Article 86 (unauthorized absence) and Article 87 (missing ship's movement). He was punished with two weeks of extra duty.

On April 18, 1960, the applicant was taken to captain's mast for violations of Article 86 (unauthorized absence for 17 1/2 hours) and Article 92 (disobeying an order) of the UCMJ. He was punished with two weeks of restriction.

On May 10, 1960, the applicant was taken to captain's mast for a violation of Article 117 (provoking speech and gestures) of the UCMJ. He was punished with three days of confinement on bread and water.

On May 21 & 23, 1960, the applicant was tried by a special court-martial for several violations of Article 92, Article 127 (communicating threats), Article 121 (larceny) and Article 134 (miscellaneous offenses). He was convicted of at least one specification of each charge. He was sentenced to a reduction in rate to pay grade E-1, forfeiture of \$60.80 per month for four months, and confinement at hard labor for four months.

On June 8, 1960, the applicant was admitted to a hospital for a psychiatric examination because the Coast Guard intended to discharge him from the Service with an Undesirable Discharge.

On June 14, 1960, the Commandant referencing a May 31, 1960, letter from the applicant's commanding officer (CO), ordered the applicant to be discharged by reason of unfitness after he completed his term of confinement. The Commandant also ordered that code 28B (repeated military offenses including those resulting in courts-martial) be shown as the reason for discharge in item 11c (reason and authority for discharge) on the applicant's DD Form 214, in accordance with Personnel Instruction N. 77-56. In the reference line of this letter, the Commandant indicated that the CO's May 31, 1960 letter with enclosures was "confidential [and] obscene." A memorandum from the Enlisted Personnel Separation and Advancement Division dated June 14, 1960 was stapled to a copy of the Commandant's letter, and it stated in fact that papers related to the applicant had been "processed and transferred for file to the Intelligence Division."

On June 17, 1960, a Board Medical of Survey (BMS) made the following pertinent finding about the applicant's health:

1. [The applicant] is unable to perform the duties of his rating by reason of . . . Character Disorder, antisocial type.

The BMS reported that the applicant's condition existed prior to his enlistment and was not aggravated by his service. The BMS recommended the following:

(1) That the [applicant] be separated from the USCG in accordance with the provisions set forth under Article 12-B-6(g) USCG Personnel Manual.<sup>1</sup>

(2) That any charges pending against the [patient] be dropped, as further disciplinary measures would neither benefit the patient nor the Coast Guard.

On June 21, 1960, the applicant signed a "Certificate Relative to a Full and Fair Hearing" in which he waived further processing under the Physical Disability Evaluation System. He stated as follows, in relevant part:

[W]ith full knowledge of the recommendations of the Board of Medical Survey convened in my case and with full knowledge of my rights in this matter[,] I hereby certify that I do not demand a hearing before a physical evaluation board and request that I be separated from the United States Coast Guard as soon as possible.

On June 29, 1960, the Commander, Third Coast Guard District, forwarded the BMS to the Commandant and recommended that after completing his sentence of confinement, the applicant be discharged with an Undesirable Discharge by reason of unfitness.

On July 7, 1960, the commandant approved the applicant's discharge upon completion of his period of confinement and directed that Code 28B be placed on line 11c of the DD Form 214.

Prior to the completion of his confinement, the applicant wrote an undated letter to the Commander, Third Coast Guard District, in which he stated that he had been informed that upon his release from confinement, he would be discharged from the Coast Guard with an undesirable discharge. The applicant stated that prior to being confined he was under the impression that he would be given a General Discharge Under Honorable Conditions. He stated that had he known he would receive an

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<sup>1</sup> The earliest version of the Personnel Manual available to the Board does not contain a 12-B-6(g), but it does contain a 12-B-16(g) which authorizes a discharge by reason of unsuitability for personality disorders.

Undesirable Discharge, he would have requested legal assistance and a hearing before an administrative discharge board (ADB). He further stated the following:

Since I did not appear before a board of officers, I must have waived my rights. I never remembered being afforded an opportunity to do this. I did sign a paper on board the cutter in the presence of the Executive Officer [XO] , , , which I now believe to be waiver of my rights. When I signed this paper I was told it was for an administrative discharge with no mention of an Undesirable Discharge being made. In view of this I believe I would be getting a General Discharge Under Honorable Conditions.

On September 6, 1960, the applicant's CO wrote to the Commander, Third Coast Guard District in response to the applicant's undated letter. The CO stated that the XO delivered a letter to the applicant advising him of his rights with respect to his proposed Undesirable Discharge. The CO stated that his XO advised him that the applicant had signed a letter waiving his right to an ADB. The CO attached a signed statement from the XO who stated in pertinent part:

On May 31, 1960, I personally served a copy of [the CO's] letter dated 31 May 1960, recommending [the applicant] for a discharge as undesirable from service in the United States Coast Guard. This letter detailed the basis of the recommendation for [the applicant's] discharge as undesirable. He read the letter carefully making several comments upon its content. He took particular exception to the information contained in paragraph 4 of this letter, which in essence alleged [his] propensity toward homosexuality. [The applicant] stated that he wanted more time to review the contents of the CO's letter . . .

The following day I inquired of [the applicant] whether he desired to reply, which was within his rights to make. I informed him that the letter as written by the [CO] was going to be submitted whether he made a reply or not. [The applicant] expressed his opinion [in] a reply, which I assisted him to draft. His typed reply was submitted to him on 1 June 1960, at which time he carefully read [it], stating that that was exactly his feeling on the matter, adding that he wanted out of the Coast Guard as soon as possible. He signed the letter, which was enclosed with the [CO's] letter of 31 May 1960 recommending his discharge as undesirable.<sup>2</sup>

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<sup>2</sup> Neither the CO's letter informing the applicant of his rights, nor the applicant's waiver of his right to a hearing before an administrative discharge board is in the military record. These documents appear to have been transferred to a confidential file per the Commandant's June 14, 1960 letter.

There is no doubt that he fully understood that the recommendation was his discharge as undesirable, not under honorable conditions.

In a letter dated September 7, 1960, the Commander, Third Coast Guard District, informed the applicant that he had determined based on consultation with the CO, that none of the applicant's rights had been violated and that he would be discharged with an Undesirable Discharge.

On September 16, 1960, the applicant was discharged from the Coast Guard with an Other Than Honorable Discharge (Undesirable Discharge). On the date of his discharge, the applicant's performance marks page shows that he had earned an average overall mark of 0 in proficiency and an average overall mark of 1.33 in conduct.

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

On July 20, 2004, the Judge Advocate General (TJAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request because it is untimely or for lack of proof.

With respect to untimeliness, TJAG stated that an application for correction of a military record must be filed within three years after the alleged error or injustice was discovered or should have been discovered, unless the delay is excused in the interest of justice. He stated that the applicant filed his application more than 40 years after the statute of limitations had expired.

TJAG stated that it is not in the interest of justice to excuse the untimely filing. In this regard, TJAG 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 for the BCMR 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). TJAG argued that the applicant offered no justification for not filing his application sooner and did not alleged that the Coast Guard committed a specific error or injustice by discharging him with an Other Than Honorable Discharge. "In sum, Applicant offers no substantive reason for his forty-three year delay in taking action, and [he] lacks any reasonable chance of prevailing on the merits [of his application]. It is not in the interest of justice to waive the statutory three-year filing deadline in this case."

TJAG attached a memorandum from the Commander, Coast Guard Personnel Command (GGPC) to the advisory opinion, stating that he adopted its fact and analysis. CGPC offered the following conclusions:

The applicant alleges no error in the proceedings that led to his separation, and I find no evidence of error or injustice in the record to recommend approval of the Applicant's request. The underlying reason for the Applicant's discharge was unfitness due to his character disorder, and the characterization of his discharge was based on his record of misconduct, which warranted an undesirable discharge (or "under other than honorable conditions'). While the record contains a minor discrepancy in stating that the Applicant was discharge "by reason of Special Court Martial" . . . the Applicant's remaining record accurately states that the applicant shall be discharged "with an undesirable discharge by reason of unfitness. While the record indicates that the applicant alleged at the time of his discharge that he was unjustly deprived of his right to a discharge board hearing, I believe the record refutes this allegation and am satisfied that [the] applicant was afforded full due process during the disciplinary and separation processes he underwent, and that he did not suffer an injustice.

[T]he applicant requests relief on the basis of "common decency." In support of his request, he provides ample evidence of his good citizenship subsequent to his discharge. However, the Applicant's Undesirable discharge was and is appropriate, and accurately reflects the character of the Applicant's period of service with the Coast Guard. The Applicant engaged in serious infractions that would very likely result in a discharge with the same characterization today. The Coast Guard has no policy, nor is it contemplating a policy, to upgrade the discharge of members based solely on their subsequent good behavior in civilian life. Persons earn a variety of veteran's benefits based on their honorable service, and to the extent these benefits to persons who did not earn them would be unsound policy. While the Coast Guard cannot support the applicant's request, we are glade that he has been able to improve his life since he left the service.

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

On August 17, 2004, the BCMR received the applicant's response to the views of the Coast Guard. He stated that he was immature when he entered the Coast Guard and that he made some bad choices. He alleged that while in confinement, he asked that his case be reviewed and was told that nothing could be done. Therefore, he was denied a basic right. He stated that he was not aware of the statute of limitations and believed the decision with respect to his discharge was forever until his wife began to investigate the matter. He stated that he would like to clear and restore honor to his name for his children and grandchildren.

The applicant asserted that the Coast Guard admitted that he was not given a hearing by the discharge board and that the statement he signed waiving his rights cannot be located. He further asserted that he was stunned to find out that the Coast Guard diagnosed him as having an anti-social character disorder. He stated that the Coast Guard issued him a Mariners document in 1967. He asked to be enlightened on the official diagnosis. He further stated the following:

At this time, I certainly understand the USCG's position on this matter, due to current events I would sincerely like to ask if you would consider letting me finish out my original contract . . . by serving in the construction field of military service. I would prefer the electrical part since that is what I'm trained for. I'm 63 years old and in excellent health. I would be honored to serve.

### **APPLICABLE LAW**

#### *Personnel Manual (CG-207) Effective November 27, 1967<sup>3</sup>*

Article 12-B-1 of this version of the Personnel Manual lists three types of administrative discharges. They are Honorable Discharge, General Discharge, and Undesirable Discharge. Article 12-B-2(14) defines an Undesirable Discharge as a discharge under other than honorable conditions for one or more of eleven reasons, including unfitness. A subcategory of unfitness is "frequent involvement of a discreditable nature with civil or military authorities." See Articles 12-B-4.

Article 12-B-12(b) states that an enlisted person may be considered for discharge by reason of unfitness to rid the Service of an individual whose military record is characterized by "Frequent involvement of a discreditable nature with civil or military authorities."

Article 12-B-14 of the Personnel Manual then in effect required that a member being processed for discharge with an Undesirable Discharge be notified of the proposed discharge, the basis for the discharge, and the right to present his case and appear in person before an ADB with counsel. The member was also to be advised that he could waive these rights.

### **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:

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<sup>3</sup> This is the earliest version of the Personnel Manual available to the Board.

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code.

2. The applicant requested an oral hearing before the Board. The Chairman, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. The application was not timely. To be timely, an application for correction of a military record must be submitted within three years after the alleged error or injustice was discovered or should have been discovered. See 33 CFR 52.22.

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

5. The applicant's application was submitted approximately 40 years beyond the statute of limitations. The applicant did not provide the date on which he discovered the alleged error, but he should have discovered it on the date of his discharge in 1960. He did not deny that he was aware of the Undesirable Discharge at the time of his discharge. Further, the applicant's explanation for why it is in the interest of justice to waive the statute is not persuasive. In this regard, the applicant asserted that it would be in the interest of justice for the Board to waive the statute and consider his untimely application based on common decency and the fact that he was not aware of the BCMR until recently.

6. 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. Based on a cursory review of the evidence in this case, it is unlikely that the applicant will prevail on the merits of his claim. Discharging the applicant by reason of unfitness due to repeated involvement with military authorities was an appropriate basis on which to discharge the applicant with an Undesirable Discharge.

Discharging the applicant with an Undesirable Discharge required that the Coast Guard advise him of his right to present his case to an ADB, as well as his right to waive the ADB. The Board notes that although an actual statement from the applicant waiving his right to an ADB is not in the service record, his CO and XO, in a letter to the Commander, Third Coast Guard District, dated September 7, 1960, stated that the applicant was provided with an explanation of his due process rights with respect to the Undesirable Discharge and that he waived those rights. The CO's and XO's



statements written contemporaneously with the applicant's discharge are sufficient to persuade the Board that the applicant was advised of and waived his rights with respect to his discharge, despite the applicant's contention to the contrary. Moreover, contrary to the applicant's contention, nothing in the military record indicated that the applicant was ever considered for anything other than an Undesirable Discharge.

7. The Board notes that during the applicant's administrative processing for an Undesirable Discharge, he was diagnosed as suffering from an anti-social personality disorder that could have been used as a basis for discharge, if the CO had chosen to do so. However, the applicant engaged in a pattern of misconduct for the entire time he was on active duty. He was punished at captain's masts on three different occasions and convicted by a special court-martial during his approximately nine months in the Coast Guard. He performed his duties in a poor manner, receiving an overall 0 mark in proficiency and an overall 1.33 mark in conduct. The applicant's pattern of misconduct and his poor performance marks justified the Coast Guard's decision to discharge him with Undesirable Discharge due to unfitness (repeated involvement with military authorities).

8. With regard to the applicant's post-service behavior and accomplishments, the Secretary's Delegate directed on July 2, 1976 "that the Board should not upgrade discharges solely on the basis of post-service conduct."

9. Therefore, based on the length of the delay, the lack of persuasive reasons for not acting sooner to correct his record, and the probable lack of success on the merits of his claim, the Board finds it is not in the interest of justice to waive the three-year statute of limitations in this case.

10. Accordingly, the applicant's request for relief should be denied.

**ORDER**

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

