

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2005-091

XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX, FN (Former)

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 April 8, 2005, upon receipt of the applicant's completed application and military records.¹

This final decision, dated February 8, 2006, is 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 changing his RE-3P² reenlistment code to one that would allow him to enlist in the Air Force.

The applicant enlisted in the Coast Guard on May 12, 1998, for a four-year term. He was discharged from the Coast Guard on March 1, 2000, by reason of physical

¹ Although the application was not docketed until April 8, 2005, the Board initially received the applicant's request in October 2004.

² RE-3P reenlistment code means that the applicant is eligible for reenlistment except for the disqualifying factor: physical disability. See COMDTINST M 1900.4D.

disability due to an anxiety disorder rated as 10% disabling, for which he received severance pay. He was given a JFL³ separation code and an RE-3P reenlistment code. At the time of his discharge he had served a total of one year, nine months, and twenty days on active duty.

The applicant alleged that the reason his reenlistment code should be changed is because of the "loss of commitment by the US Coast Guard of school. [T]he wait ended up being a two year wait so they said I would have the choice to stay in E-3 grade, but receive penalties or I could sign a document saying [that] I [would] receive an honorable discharge as time served duty fulfilled." He stated that he would like to serve his country and is trying to join the Air Force, but his RE-3P reenlistment code is hindering that effort. He provided no explanation why the Board should find it in the interest of justice to waive the statute of limitations, even though approximately four and a half years had elapsed at the time he filed his correction application with the Board.

SUMMARY OF RECORD

On October 14, 1999, a medical board (MB)⁴ was convened to evaluate the applicant's physical condition. The MB diagnosed the applicant as suffering from anxiety disorder. The MB found that he was unfit and would never be fit for duty. The MB also found that the applicant had a mathematics and reading disorder, neither of which is a ratable condition.

The applicant was notified that the MB had recommended a finding of unfit for duty and referred his case to the Central Physical Evaluation Board (CPEB)⁵. On October 18, 1999, the applicant acknowledged the findings and recommendations of the MB and his desire not to submit a statement in rebuttal.

³ JFL separation code is assigned for an involuntary discharge directed by established directive resulting from physical disability with entitlement to severance pay. It also designates RE-3P as the appropriate reenlistment code for this type of separation. See Separation Program Designator Handbook.

⁴ The purpose of a Medical Board is to evaluate and report upon the present state of health of any member who may be referred to the medical board by an authorized convening authority and provide a recommendation as to whether the member is medically fit for the duties of his or her office, grade, rank, or rating. See Chapter 3.A. of the Physical Disability Evaluation System Manual (COMDTINST M1850.2C).

⁵ The Central Physical Evaluation Board is a permanently established administrative body convened to evaluate on a records basis the fitness for duty of active and reserve members and the fitness for duty of members on the temporary disability retired list. See Chapter 4.A.1. of the Physical Disability Evaluation System Manual (COMDTINST M1850.2C).

On October 22, 1999, the applicant's commanding officer (CO) commented on the MB and agreed with the recommendation. The CO stated that the applicant's performance over the past year had been unsatisfactory. He explained that although the applicant was able to complete routine tasks if given very specific directions, when placed in stressful situations or when asked to complete tasks not detailed step-by-step, the applicant experienced difficulty. The CO stated that due to the applicant's difficulty with decision-making and judgment, he did not have the skills necessary to become a crewman or boarding team member. The CO further stated that the applicant's underway and inport watchstander qualifications had been revoked due to his inability to make sound decisions in stressful situations.

The CPEB met on December 13, 1999, and determined that the applicant was unfit to perform the duties of his grade. The CPEB recommended that the applicant be separated from the Coast Guard with severance pay, due to a 10% disability rating for anxiety disorder, not otherwise specified.

On January 2, 2000, the applicant accepted the CPEB's tentative findings and recommended disposition and waived his right to a formal hearing.

On January 18, 2000, the proceedings were reviewed by the Chief Counsel (now known as the JAG) and found to be correct and supported by the evidence of record.

On January 20, 2000, the Chief of the Administrative Division (for the Commandant) ordered the applicant to be separated from the Coast Guard with severance pay due to a physical disability.

VIEWS OF THE COAST GUARD

On August 26, 2005, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request to have his RE-3P reenlistment code changed.

In recommending denial of relief, the JAG argued that the application was untimely. He stated that applications for correction of military records must be filed within three years of the date the alleged error or injustice was, or should have been, discovered. 33 CFR § 52.22. He said that the Board may waive the statute of limitations and consider the case if an applicant presents sufficient evidence that it is in the interest of justice to do so. The JAG stated that the length of the delay, the reasons for the delay, and the likelihood of the applicant's success on the merits of his claim are factors to be considered in deciding whether to waive the statute of limitations. The JAG stated that the applicant offered no explanation or justification for his delay in discovering the alleged error or injustice within three years of his discharge. According to the JAG the applicant has not provided good cause for not filing his application sooner.

With respect to the merits of his claim, the JAG argued that the applicant has not presented any evidence supporting his claim that the Coast Guard erred in characterizing his service upon his discharge. To the contrary, according to the JAG, the record shows that the applicant was properly separated from the Coast Guard after a determination that the applicant had a physical disability that caused him to be unfit for duty. The JAG 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 (1992). Moreover, he stated that the applicant bears the burden of proving error under 33 C.F.R. § 52.24, and that he has failed to meet his burden in this case.

A memorandum from the Commander, Coast Guard Personnel Command (CGPC) was attached as Enclosure (1) to the advisory opinion. CGPC stated that the applicant's discharge was properly completed and accurately depicts the circumstances of the applicant's discharge. CGPC further stated that if the applicant wishes to enlist in the Air Force, he can apply at a local recruiting office where it would be left to the Air Force to decide if the applicant should be granted an enlistment waiver.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 29, 2005, the BCMR sent the applicant a copy of the views of the Coast Guard and invited him to respond. The Board did not receive a response from the applicant to the views 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 submissions, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code. The applicant's request is not timely

2. To be timely, an application or request 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. The statute of limitation on the applicant's claim expired on March 1, 2003, three years after his discharge from the Coast Guard.

4. However, the Board may still consider the application on the merits, if it finds 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 in assessing 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 stated 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." *Id.* at 164, 165. See also Dickson v. Secretary of Defense, 68 F.3d 1396 (D.C. Cir. 1995).

5. The applicant did not state the date on which he discovered the alleged error or injustice. However, the Board finds that he should have discovered it at the time of his discharge from the Coast Guard because the DD Form 214 clearly states the reason for the applicant's discharge and lists RE-3P as his reenlistment code. Moreover, the applicant did not provide the Board with any reason for an interest of justice waiver of the statute of limitations.

6. With respect to the merits of his claim, the Board finds that the applicant is not likely to prevail on them. The record establishes that the applicant was separated from the Coast Guard due to a physical disability and that his DD Form 214 was correctly prepared with the appropriate separation and reenlistment codes. There is nothing in the record to suggest that the reason for the applicant's discharge was other than physical disability due to an anxiety disorder. According to the Separation Program Designator Handbook, RE-3P is the appropriate reenlistment code for a separation by reason of physical disability.

7. The RE-3 reenlistment code does not prevent the applicant from reenlisting in the Air Force, but it does require that he obtain a waiver to do so. It is up to the Air Force to determine whether such a waiver should be granted.

8. Accordingly, due to the lack of reasons for not filing his application sooner and the probable lack of success on the merits of his claim, the Board finds that it is not in the interest of justice to waive the statute of limitations. The application should be denied because it is untimely.

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

ORDER

The application of former FN xxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is denied.

