DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2006-089

Xxxxxxxxxxxxxxxxxxxx
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FINAL DECISION

[redacted]

This proceeding was conducted under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case on April 7, 2006, upon receipt of the application and the applicant's military records.

This final decision, dated November 21, 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 upgrading his general discharge from the Coast Guard Reserve for "shirking" on September 2, 1974, to an honorable discharge. The applicant alleged that he agreed upon enlistment in the Reserve to drill one weekend per month and to perform active duty for training (ADT) for two weeks per year. However, his assigned command scheduled him to perform more drills than the number he had agreed to and initiated his general discharge when he refused to perform the excess drills.

Regarding the delay in his request for relief, the applicant alleged that he discovered the alleged error in his record in 2006. However, he also wrote that he started the process years ago but was unable to follow up and did not think that he had any rights. He decided to request relief now because he knows that he does have rights and because his own actions did not cause his discharge.

SUMMARY OF THE APPLICANT'S MILITARY RECORD

On June 21, 1971, the applicant enlisted in the Coast Guard Reserve for six years and immediately began five months of initial ADT. The Statement of Understanding he signed that day states the following in pertinent part:

> I do further understand that satisfactory participation shall consist of:
> (1) Satisfactory completion of the initial period of active duty for training.
> (2) Attendance at and satisfactory participation in at least 48 scheduled drills or training periods each anniversary year and satisfactory service on active duty for training of not less than 14 consecutive days each anniversary year; …
> (3) Maintenance of a satisfactory rate of advancement during the full term of my enlistment …
> (4) Maintenance of satisfactory standards of professional performance, interest, adaptability, military behavior and appearance.

On November 20, 1971, the applicant was released from ADT and assigned to a Reserve unit in [redacted]. He received a separation form, DD 214, noting that his service had been honorable. His Annual Retirement Point Statement for the anniversary year ending on June 20, 1972, shows that he performed four drills each in December 1971 and January, February, March, April, and May 1972. On June 11, 1972, the applicant was counseled in writing about having missed his scheduled drills that day. However, the Annual Retirement Point Statement shows that he made them up by performing two drills before the end of his anniversary year on June 20, 1972. On July 1, 1972, the applicant advanced to seaman (pay grade E-3). His marks at [redacted] were 3.3 (out of 4.0) for proficiency, 3.3 for leadership, and 4.0 for conduct.

The applicant's Annual Retirement Point Statement for the anniversary year ending on June 20, 1973, shows that he completed 13 days of ADT in August 1972 and that he performed no drills in the latter part of June 1972; four drills in July 1972; two in August 1972; and four each in September, October, November, and December 1972. On December 27, 1972, because the [redacted] unit was terminated, the applicant was reassigned to drill on a cutter based in [redacted]. He performed four drills in January 1973; eight in February 1973; none in March or April 1973; four in May 1973; and none in the first part of June 1973. Therefore, he completed a total of 38 drills during the anniversary year.

On May 19, 1973, the applicant's commanding officer (CO) advised him in a letter that his participation had not been satisfactory and ordered him to attend drill on May 27, 1973. On May 27, 1973, the CO informed the District Commander that the applicant had 8 unexcused drills that he needed to make up as well as his regular June drills but that the applicant claimed he could not perform the drills because of a work conflict. The CO stated that the applicant's appearance, attitude, and attendance were unsatisfactory and asked the applicant be transferred from the cutter to the active status pool. On May 30, 1973, the District Commander issued orders transferring the appli-

cant to the active status pool, but the orders were canceled following a further consultation with the applicant.

In June 1973, the applicant completed 12 days of ADT, which applied toward his anniversary year ending on June 20, 1974. On November 12, 1973, his CO sent him a letter concerning his "unsatisfactory participation in the Coast Guard Reserve." The CO noted that the applicant had not attended scheduled drills on November 10 and 11, 1973, and that he had accumulated 12 unexcused absences. The CO ordered him to attend drill on November 17, 1973.

In December 1973, the applicant received a performance evaluation with marks of 2.0 for proficiency, 2.0 for leadership, and 4.0 for conduct. On March 24, 1974, the applicant was taken to mast for having violated Article 92 of the Uniform Code of Military Justice on February 28, 1974, by disobeying a lawful order issued by a petty officer on board a cutter. His CO sentenced him to a reduction in pay grade to E-2.

Also on March 24, 1974, the applicant's CO recommended to the Commandant that the applicant be administratively discharged. He wrote that the applicant had missed 35 of his scheduled drills since June 21, 1973, unexcused, and still had 15 unexcused absences that he had not yet made up. The CO stated that the applicant had been counseled about unsatisfactory attendance and unexcused absences in May, September, and November 1973. The CO wrote that the applicant's "non-performance of assigned orders has followed a set shirking pattern, such that virtually every month, during the last six months, he has had to be telephoned at his home, if he can be found at all, on the day of his assigned drill and questioned as to why he failed to report on increment drill orders or [other] orders for that particular month." The CO also noted that on January 26, 1974, the applicant had reported aboard the cutter out of uniform and without properly groomed hair and had been ordered off the cutter and that on February 28, 1974, the applicant reported aboard the cutter without orders and was subsequently involved in an incident resulting in two violations of Article 92 and one violation of Article 91, (disrespect to a senior petty officer) although two of the three charges against him were later dismissed with warning at mast. The CO concluded that the applicant "has been nothing but a time-consuming administrative problem and a liability to the Coast Guard Reserve since his reporting to this Unit. He has had counseling and been given a more than reasonable opportunity to correct his deficiencies. For the benefit of the Service it is requested that he be issued a General Discharge for reason of shirking duty."

In June 1974, the applicant received marks of 1.9 for proficiency, 1.9 for leadership, and 3.3 for conduct. There is no Annual Retirement Point Statement in the applicant's record for the anniversary year ending June 20, 1974.

On July 10, 1974, the District Commander forwarded the CO's recommendation to the Commandant with his own recommendation that the applicant receive a general discharge for shirking.

On July 26, 1974, the Commandant ordered the District Commander to advise the applicant that he was being considered for a general discharge for shirking and to afford him a period of 30 days to submit a statement in his own behalf.

On August 2, 1974, the District Commander informed the applicant by letter that he was being considered for a less than honorable discharge due to shirking. The letter also states that the applicant could submit a statement in his own behalf within 30 days and that if no reply was received, "a General Discharge will be issued without further warning." A note on the letter indicates that it was sent by certified mail with return receipt requested. The address used was the same that the applicant used as his return address on his subsequent letter to the District Commander in September 1974. The applicant did not respond to this letter in the time allotted.

On September 2, 1974, the applicant received a general discharge for shirking in accordance with 33 C.F.R. § 8.6206(g)(2) and by order of the Commandant dated July 26, 1974. His command noted that he "was afforded an opportunity to make a statement in his own behalf concerning the action contemplated but failed to do so." He had completed 3 years, 2 months, and 12 days of military service. The applicant's final average marks were 2.74 for proficiency, 2.82 for leadership, and 3.86 for conduct. An Annual Retirement Point Statement in his record shows that the applicant earned 2 drill points during his final, partial anniversary year from June 21 to September 2, 1974.

On September 23, 1974, the District Command received an undated letter from the applicant, though the postmark on the envelope indicates that it was mailed on September 19, 1974. The applicant wrote that the first weekend he reported to drill at [redacted] his assigned cutter was not even in port, and he was required to make up the weekend later without pay, which he would not do. The applicant further wrote that the subsequent drills he was accused of not performing "are due to the scheduling of excessive drills to me month after month by [LT B]." He claimed that he had been scheduled to drill two or three weekends per month instead of the one weekend per month he agreed to. He alleged that it was impossible for him to make up all the drills he had missed by drilling two or three weekends per month without pay. The applicant stated that he had met with a District officer to review his attendance record, and the District officer had concluded that he had been unjustifiably scheduled for extra drills and that he should not have to make them up. Thereafter, he was told to return to the cutter and that his attendance record would be wiped clean so that he could have a new start. The applicant stated that for a couple of months, he was properly scheduled to drill one weekend per month, but "then the double orders started coming again and again, and when I didn't perform both weekends a month, the make ups came with no

pay." The applicant also complained that he had studied to become a port security specialist but had been involuntarily switched to the boatswain's mate rating when he was transferred to the cutter. The applicant stated that since the cutter's command refused to honor his enlistment contract by scheduling him to drill just one weekend per month, he would like to be transferred to a new unit.

On September 23, 1974, the District Commander responded to the applicant's letter. He noted that the applicant's response was received "some seven days past the date which you promised me it would be received," and that the general discharge had been mailed to the applicant on September 20, 1974, with an effective date of September 2, 1974. He stated that he "held it in this office with the hopes that you would honor our conversation, which you apparently chose to ignore." He further wrote that "I don't feel it appropriate to challenge each point outlined by you in your letter. You were informed of the change in the Reserve Program with the promulgation of augmentation, you acknowledged this by signing a statement to this effect. You make no mention of your grooming standards for which you were counseled several times and which you chose to disregard. I can only appreciate your anxiety for the position your non-conformity now places you." The District Commander noted that the applicant's record had already been forwarded to Headquarters and that the applicant's letter would be forwarded as well.

VIEWS OF THE COAST GUARD

On August 8, 2006, the Judge Advocate General (JAG) submitted an advisory opinion in which he recommended that the Board deny the requested relief. In doing so, the JAG adopted the facts and analysis in a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC).

CGPC stated that the Board should deny relief because the application is not timely and because the applicant "failed to substantiate any justification for the delay." Moreover, CGPC stated, "there does not appear to be any discrepancy with regards to his record." CGPC alleged that the applicant's "contention that he was ordered to perform drills in excess of that required by his contract is not substantiated by … his record … There is no indication that the Applicant was treated unfairly or unjustly." CGPC pointed out that the applicant acknowledged the requirements of a reservist when he signed the Statement of Understanding upon enlistment, but he repeatedly failed to meet his obligations. CGPC stated that the applicant was counseled several times, put on notice of the proposed discharge, and afforded due process. CGPC stated that the applicant was discharged "in accordance with prescribed procedures."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 16, 2006, the applicant responded to the views of the Coast Guard. The applicant alleged that the fact that, when he missed drill on November 10 and 11, 1973, he was ordered to attend drill on November 17, 1973 supports his claim that "there were meetings going on every weekend which also backs up my claim that they wanted me to attend 2 weekends a month. So they were scheduling weekends every month in which I refused to do."

The applicant alleged that he was "never notified of any intent to be administered a General Discharge." He argued that the Coast Guard should be required to provide proof of every claim they have made, and that he has not seen such proof.

APPLICABLE REGULATIONS

Article 12-B-12(b) of the Personnel Manual in effect in 1974 authorized the Commandant to direct the discharge of an enlisted member for unfitness "to rid the Service of an individual whose military record is characterized by … an established pattern of shirking." Article 12-B-12(b) further provided that such a discharge "will not normally be initiated until a member has been counseled concerning his deficiencies and afforded a reasonable opportunity to overcome them." Article 12-B-12(a) stated that an enlisted member "may be separated by reason of unfitness with an undesirable discharge, unless the particular circumstances in a given case warrant a general or honorable discharge. Discharge by reason of unfitness and the type of discharge to be issued will be directed only by the Commandant."

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 10 U.S.C. § 1552.

2. An application to the Board must be filed within three years after the applicant discovers the alleged error in his record. 10 U.S.C. § 1552(b). The applicant received his general discharge in 1974. Although he stated that he discovered the alleged error in his record in 2006, the Board finds that he knew or should have known

of the general character of his discharge upon his discharge in 1974. Therefore, his application was untimely.

3. Pursuant to 10 U.S.C. § 1552(b), the Board may excuse the untimeliness of an application if 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 to determine 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 instructed 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 164-65.

4. Other than alleging that he did not previously know his "rights," the applicant did not explain why he waited more than thirty years to ask for his discharge to be upgraded. He has not provided a compelling reason for his long delay.

5. Under 33 C.F.R. § 52.24(b), the applicant's military records are presumptively correct, and he bears the burden of proving error or injustice in his records by a preponderance of the evidence. The applicant alleged that he was unjustly given a general discharge for shirking after he refused to perform more drills than the 48 that he obligated himself to perform annually upon his enlistment. However, the Board's review of the case has revealed no merit in the applicant's claims. His Annual Retirement Point Statement for the anniversary year ending on June 20, 1973, and his CO's letter to the District Commander dated May 27, 1973, show that by the end of that anniversary year he had 10 unexcused absences since he had earned only 38 drill points since June 21, 1972. Moreover, the record shows that when his command scheduled him for extra drills so that he could make up his unexcused absences, the applicant refused to attend.

6. The applicant alleged that his claim is proved by the fact that, when he missed his drill weekend of November 10 and 11, 1973, he was ordered to drill the following weekend. However, even assuming that some reservists were assigned to augment the crew of the cutter every weekend of the year, this fact would not prove that the applicant himself was scheduled to drill in excess of what was necessary for him to make up for his past unexcused absences from drill.

7. According to the CO's letter to the Commandant, by March 24, 1974, the applicant had accumulated 15 unexcused absences and he had missed 35 scheduled drills and make-up drills since June 21, 1973. The CO also wrote that the applicant's "non-performance of assigned orders has followed a set shirking pattern, such that virtually every month, during the last six months, he has had to be telephoned at his home, if he can be found at all, on the day of his assigned drill and questioned as to why he failed to report on increment drill orders or EIOD orders for that particular

month." The applicant's final Annual Retirement Point Statement indicates that he performed only two drills during his last three months in the Coast Guard.

8. The applicant alleged that he was never warned about his unsatisfactory performance or the proposed discharge. However, letters in his record show that he was counseled in writing about his unsatisfactory participation on May 19, 1973, and again on November 12, 1973, and that he was advised of his pending general discharge for shirking on August 2, 1974, and given thirty days to submit an objection to the discharge. The latter letter was sent to him by certified mail with a return receipt requested, and it was sent to the same address that the applicant used as a return address on the envelop in which he finally submitted his objection on September 23, 1974, more than three weeks late. Therefore, the Board finds that the applicant was timely counseled and received due process under Article 12-B-12 of the Personnel Manual then in effect.

9. The CO reported to the District Commander that the applicant had been "nothing but a time-consuming administrative problem and a liability to the Coast Guard Reserve since his reporting to this Unit." The applicant has submitted nothing to overcome the presumption of regularity afforded his CO's determinations and characterization of his service at [redacted]. He has submitted no evidence to support his claim that his general discharge for shirking is erroneous or unjust.[1]

10. Accordingly, the Board finds that it is not in the interest of justice to waive the statute of limitations in this case because the applicant failed to justify his long delay in seeking relief, and he cannot prevail upon the merits. Therefore, the applicant's request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

[1] According to *Sawyer v. United States*, 18 Cl. Ct. 860, 868 (1989), *rev'd on other grounds*, 930 F.2d 1577, and *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976), for purposes of the BCMRs under 10 U.S.C. § 1552, "injustice" is "treatment by military authorities that shocks the sense of justice."

ORDER

The application of former SA xxxxxxxxxxxxxxxxxxxxxxxxxxx, USCGR, for correction of his military record is denied.