

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2006-132

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

FINAL DECISION

████████████████████

This is a proceeding 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 June 16, 2006, upon receipt of the completed application and military records.

This final decision, dated February 15, 2007, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST FOR RELIEF

The applicant asked the Board to upgrade his 1943 ordinary discharge¹ to an honorable discharge. The applicant was a Reservist in the Coast Guard who was called to active duty on April 21, 1942. He was discharged by reason of physical disability on July 24, 1943.²

In support of his request for an upgrade of his discharge, the applicant stated that he earned an overall final average mark of 4 in conduct and 3.2 in proficiency (4 being the highest mark at that time) and that the character of his service was excellent. He further stated the following:

I live in the state of ██████████ and for a discount on my Home Owners property tax and car registration, I [need] my discharge [to] say

¹ In BCMR No. 132-096, the Board found that under the Personnel Manuals of 1934, 1940, and 1943, ordinary discharges were given only for "(1) unsatisfactory performance/conduct, and (2) misconduct/malingering."

² The applicant's military record does not contain a DD Form 214 discharging him from active duty. The United States Archivist prepared a Certificate of Military Service for the applicant on April 20, 2006.

Honorable.

I was under the impression that an ordinary discharge was honorable at the time of my discharge. I was disabled in the line of duty and discharged as a signalmen 2 class, that's 5 ratings higher than when I enlisted.

On October 2, 2005, the Judge Advocate General (JAG) relying on a memorandum from the Commander, Coast Guard Personnel Command (CGPC) recommended that relief be granted to the applicant. The JAG also adopted the facts and analysis provided by CGPC, which were attached as Enclosure (1) to the advisory opinion. In recommending relief, CGPC noted that the application was untimely, but appeared to accept the applicant's explanation that he did not discover the alleged error until January 2006 when applying for certain tax assessment discounts from the State of [REDACTED]. CGPC stated that a complete review of the applicant's record reveals no adverse actions during his enlistment and that his discharge was due to a physical disability. CGPC further stated:

Applying the standard currently in place for processing personnel for physical disability in conjunction with the applicant's service record, he most likely would be awarded an honorable discharge. In the interest of justice the Coast Guard recommends that the applicant be issued a new discharge certificate reflecting an honorable discharge from the Coast Guard Reserve.

On October 16, 2006, the Board received a statement from the applicant agreeing with the relief recommended by the Coast Guard.

FINDINGS AND CONCLUSIONS (analysis)

The BCMR has jurisdiction of this case pursuant to section 1552 of title 10 of the United States Code, but the application was not timely. To be timely, an application for correction must be filed within three years of the date the alleged error or injustice was, or should have been, discovered. See 10 U.S.C. § 1552; 33 CFR § 52.22. The applicant alleged that he did not discover the alleged error until January 2006 when applying for certain property tax discounts from [REDACTED]. He stated, however, that he thought at the time of his discharge that an ordinary discharge was an honorable discharge. There is no evidence in the military record to contradict the applicant's date of discovery. In this regard, the military record does not contain a DD Form 214 or other discharge document that is normally prepared and delivered to the applicant contemporaneous with his separation. With no such discharge documents in the military record, the preponderance of the evidence weighs in the applicant's favor that he did not discover

the alleged error until 2006. The Board accepts the applicant's statement given under penalty of perjury with respect to discovery of the alleged error.

Even if the applicant's declaration of when he discovered the error were not persuasive, the Board could still consider the application on the merits, if it found it 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," although "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. Based on a cursory review of the merits and the JAG's recommendation for granting relief, the Board finds that the applicant's application has strong merit and that it is in the interest of justice to waive the statute of limitations, notwithstanding the applicant's reasons, or lack thereof, for not filing his application sooner.

Upon a full review of the merits, the Board finds that the applicant's ordinary discharge should be upgraded to honorable. As noted in BCMR No. 132-096, under the Personnel Manuals of 1934, 1940, and 1943, ordinary discharges were given only for unsatisfactory performance, misconduct, or malingering. In BCMR 132-096, the Board found that the Coast Guard committed an error by discharging that applicant with an ordinary discharge due to a physical disability. The Board stated in that case that an ordinary discharge was not appropriate for a physical disability discharge. The Board having reviewed the applicant's military record is satisfied that there are no unfavorable personnel actions recorded therein and that his discharge was by reason of physical disability that was not due to his misconduct. The Coast Guard committed an error by discharging him with an ordinary discharge.

In addition, the Board agrees with the JAG and finds that it would be an injustice not to upgrade the applicant's ordinary discharge. The Board agrees with the advisory opinion that today a member discharged under circumstances similar to the applicant's would most probably receive an honorable discharge. Under Article 12.B.2.f. of the Personnel Manual, a member discharged today by reason of physical disability, with no disciplinary record and with final average factor marks of 4.0 in conduct and 3.2 in proficiency of rating would receive an honorable discharge.

The Board's application of the current standards for discharge to this case is consistent with the guidance provided by the Deputy General Counsel in a 1976 Memorandum entitled "BCMR and Clemency." In this memorandum the Deputy General Counsel, who was then the Secretary's delegate, stated that "the Board should not upgrade a discharge unless it is convinced, after having considered all the evidence . . . that in light of today's standards the discharge was disproportionately severe vis-a-vis the conduct in response to which it was imposed." After considering all the

evidence in the case, the Board is satisfied that physical disability was the sole ground for the applicant's discharge from the Coast Guard and that under current regulations he would receive an honorable discharge. The Board finds no basis for refusing to upgrade the applicant's ordinary discharge to an honorable discharge.

Accordingly, the Board finds that the Coast Guard committed an error and/or injustice in this case, and the applicant is entitled to relief.

ORDER

The application of former xxxxxxxxxxxxxxxxxxxx, USCGR, for correction of his military record is granted. The Coast Guard shall correct his record to show that he was honorably discharged from the Coast Guard.

