


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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2006-157

XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXX, FN/E-3 (former)

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 August 4, 2006, upon receipt of the applicant's completed application for correction.

This final decision, dated February 28, 2007, 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, a former fireman (FN) who served a little more than two years in the Coast Guard, asked the Board to correct his record by upgrading his 1979 discharge, which was issued "under other than honorable conditions." The applicant stated that he wants his discharge upgraded to "bring a little calmness" to his life, and he admitted that that the Coast Guard did not commit an error when it discharged him for being AWOL (absent without leave) for nearly a year. He further stated that he knows it was wrong to go AWOL and that he truly regrets having done so. He did not explain his long delay in seeking the requested correction.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on April 25, 1977. On July 31, 1978, he went AWOL from his cutter and the Coast Guard declared him a deserter on August 29, 1978. On July 17, 1979, he was apprehended by Coast Guard intelligence agents and charged with violating Article 85 of the Uniform Code of Military Justice (UCMJ). The charge sheet alleged that the applicant "did, on or about 0730, 31 July 1978, without

authority and with intent to remain away therefrom permanently, absent himself from his unit ... and did remain so absent in desertion until he was apprehended on or about 1122, 17 July 1979."

On August 2, 1979, the applicant submitted a request to the Commandant in which he asked to be discharged under Article 12.B.21. of the Coast Guard Personnel Manual in lieu of a trial by court martial.¹ In his request, he acknowledged that he was being represented by legal counsel, and that if his request was approved, he would receive a discharge under other than honorable conditions for the good of the Service in lieu of trial by court martial. In a supporting statement accompanying his request for discharge, the applicant further stated "I do not wish, or have any desire whatsoever, to stay in the United States Coast Guard," and "I want any discharge that provide [sic] to me knowing that it could ruin my civilian life. If under any circumstances that I cannot get a discharge I will go AWOL again until I receive a discharge."

On October 15, 1979, the Commandant approved the applicant's request to be discharged from the Coast Guard under other than honorable conditions for the good of the Service. On October 18, 1979, the applicant was discharged pursuant to Article 12.B.21. of the Coast Guard Personnel Manual. His DD 214 indicates that his character of service was "under other than honorable conditions."

VIEWS OF THE COAST GUARD

On December 14, 2006, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he adopted the findings of the Coast Guard Personnel Command (CGPC) and recommended that the Board deny the applicant's request. The JAG argued that the applicant failed to submit a timely application and failed to supply any justification for the lengthy delay. Moreover, CGPC stated that the applicant voluntarily requested a discharge in lieu of court martial after being AWOL for nearly one year. CGPC stated that the Commandant approved the applicant's discharge request and he was properly separated. Finally, CGPC stated, "Due to the lack of contradictory information from the applicant, the applicant's military record is presumptively correct and his discharge should stand."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 4, 2007, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 days. The BCMR did not receive a response.

¹ Article 12.B.21. of the Coast Guard Personnel Manual provides that "An enlisted member may request a discharge under other than honorable conditions for the good of the Service in lieu of action under the UCMJ if punishment for the alleged misconduct would result in a punitive discharge."

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.

2. An application to the Board must be filed within three years of the day the applicant discovers the alleged error in his record. 10 U.S.C. § 1552(b). The applicant was issued a DD 214 on October 18, 1979, with a discharge characterized as "under other than honorable conditions." This information is clearly marked on the DD 214 and thus he knew or should have known that he had received a discharge characterized as other than honorable in 1979. Therefore, the Board finds that the application was filed more than 23 years after the statute of limitations expired and is untimely.

3. Under 10 U.S.C. § 1552(b), the Board may waive the three-year statute of limitations 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 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 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, 165. See also *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

4. The applicant did not allege that his discharge from the Coast Guard was in error or unjust. In his application for correction, he merely stated that he knows it was wrong to go AWOL and that he wants his discharge upgraded to bring a little "calmness" to his life. He did not explain the long delay in seeking the requested correction.

5. A cursory review of the record indicates the Coast Guard committed no error or injustice in awarding the applicant a discharge under other than honorable conditions. The record indicates that the applicant went AWOL from July 31, 1978, until he was apprehended on July 17, 1979. On August 2, 1979, with the assistance of legal counsel, the applicant asked the Commandant for a discharge in lieu of court martial. He threatened to go AWOL again if not discharged. His request was granted and he was discharged shortly thereafter.

6. On July 8, 1976, the delegate of the Secretary established the following policy concerning the upgrading of discharges: "[T]he Board should not upgrade

discharges solely on the basis of post-service conduct.” The delegate of the Secretary stated that the Board *may* upgrade a discharge if it is judged to be unduly severe in light of contemporary standards. The Board notes that the applicant did not allege that his discharge characterized as under other than honorable conditions is unduly severe under modern standards. Moreover, the applicant could have received the same discharge under contemporary standards. In addition, under Article 85 of the UCMJ, he could have received a dishonorable discharge, forfeiture of all pay and allowances, and confinement for three years. Thus, his discharge under other than honorable conditions was lenient in light of the punishment which could have been imposed under Article 85 the UCMJ.

7. Accordingly, due to the lengthy delay 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 in this case. Although the Board notes that the applicant is regretful about his desertion, the case should be denied because it is untimely.

ORDER

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

