

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2007-145

**XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX**

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 Chair docketed the case on June 20, 2007, upon receipt of the completed application, and subsequently prepared the final decision as required by 33 C.F.R. § 52.61(c).

This final decision, dated March 13, 2008, is approved and 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 upgrade his RE-4 (not eligible for reenlistment) reenlistment code to RE-1 (eligible for reenlistment) so that he can reenlist in the Army National Guard.

The applicant alleged that he did not discover the alleged error until April 3, 2007. He stated that even if the Board finds his application to be untimely, it should waive the three-year statute of limitations in the interest of justice so that he can join the Army National Guard.

Prior to joining the Coast Guard, the applicant had served from October 7, 1980 through October 6, 1983 on active duty in the Army. He was released from the Army into the Reserve with an RE-1 reenlistment code. Later on December 4, 1984, he joined the Army National Guard where he served until October 6, 1986.

SUMMARY OF RECORD

On March 3, 1987, the applicant enlisted in the Coast Guard for four years. On June 27, 1987, the applicant requested to be discharged from the Coast Guard for the convenience of the government. In his request, he claimed that his recruiter had misled him into believing that he would have a rate within one year. The applicant claimed that after he enlisted, he learned that he would be required to attend an "A" school or strike (perform on-the-job training) to receive a

rate. The applicant stated that the wait for an "A" school was approximately 18 months and that with his low test scores he only qualified for one "A" school without a waiver and for three others with a waiver. He stated that none of the rates for which he was potentially eligible interested him. He stated that he asked the recruiter about his test scores before enlisting, but was told to wait until he got to recruit training to get his scores.

In his request for a convenience of the government discharge, the applicant also complained about the length of time it took for his family to receive government housing as well as the poor condition of the premises when it was delivered to him. He also stated that he suffered from motion sickness when exposed to diesel fumes.

On August 31, 1987, the Commandant disapproved the applicant's request for a discharge by reason of convenience of the government. He stated that there were no provisions in effect under which the applicant was eligible for an early release from active duty.

The record indicates that the applicant brought four cans of beer aboard a cutter on October 23, 1987, a violation of Article 92 of the Uniform Code of Military Justice (UCMJ).

On October 28, 1987, the applicant missed ship's movement by failing to return to the cutter upon the expiration of his liberty, a violation of Article 87 of the UCMJ.

The record also indicates that the applicant brought two bottles of wine aboard the cutter on October 30, 1987, a violation of Article 92 of the UCMJ.

On November 2, 1987, the applicant's commanding officer (CO) punished him at captain's mast for the two orders violations and for missing ship's movement. The CO punished the applicant by imposing 45 days of restriction and 45 days of extra duty, reducing him to pay grade E-1, and taking \$350 per month for two months in forfeitures.

On November 20, 1987, the CO informed the applicant that he had initiated action to discharge the applicant from the Coast Guard because of his involvement in two alcohol incidents. One such incident occurred on October 23, 1987 and the other on October 30, 1987. The CO advised the applicant that he could object to the proposed discharge, that he could submit a statement in his own behalf, and that he could consult with counsel.

On November 21, 1987, the applicant acknowledged notification of the proposed discharge, expressed a desire not to submit a statement, and waived his right to consult with counsel.

On November 25, 1987, an administrative remarks entry (page 7) was placed into the applicant's record documenting his violation of Article 92 of the UCMJ on October 23, 1987, by bringing four cans of beer aboard the cutter. The page 7 also documented this event as the applicant's first alcohol incident. The applicant acknowledged the entry with his signature.

On November 25, 2007, a second page 7 was placed into the applicant's record documenting his violation of Article 92 of the UCMJ on October 30, 1987 by bringing wine

aboard the cutter. The entry documented this event as the applicant's second alcohol incident. The applicant acknowledged this entry with his signature.

On January 13, 1988, the Commandant approved the applicant's discharge from the Coast Guard by reason of unsuitability due to alcohol abuse.

The applicant was discharged honorably on February 17, 1988 with an RE-4 reenlistment code. The same day, the applicant signed a page 7 entry acknowledging his unsuitability discharge and his RE-4 reenlistment code.

VIEWS OF THE COAST GUARD

On November 6, 2007, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request. Attached to the advisory opinion as Enclosure (1) was a memorandum from the Commander, Coast Guard Personnel Command (CGPC), which the JAG asked the Board to accept as the Coast Guard's advisory opinion. CGPC recommended that relief be denied and offered the following:

1. The applicant's request is not timely, and he has not provided any justification for the delay in filing.
2. I find that the applicant's discharge was in accordance with Coast Guard policy for processing personnel for unsuitability . . . The applicant had two separate alcohol incidents for which he received punishment at [CO's] non-judicial punishment on November 2, 1987 . . . The applicant was advised of the discharge recommendation and he did not object to discharge and acknowledged that he was being recommended for a general discharge . . . The applicant was properly discharged with a RE-4 reenlistment code (not eligible for reenlistment). The only applicable code for discharges for unsuitability due to alcohol abuse is RE-4. [Separation Program Designator (SPD) Handbook]
3. A complete review of the applicant's record reveals that shortly after enlisting in the Coast Guard, the applicant indicated a reluctance to perform military service and he requested a discharge for the convenience of the government. The applicant's request was denied. The applicant contended misrepresentation by the recruiter when he requested discharge. However there is no substance to such claim that would mitigate or negate the actions that led to the applicant's discharge. Twice he brought alcohol onboard a Coast Guard vessel . . .
4. The record reveals that the Coast Guard afforded the applicant with the opportunity to conform to military service, and he was provided with counseling and mental health services. The applicant has not demonstrated an error or injustice with the processing of his discharge and the assignment of RE-4 reenlistment code is consistent with policy.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On December 14, 2007, the Chair sent the applicant a copy of the views of the Coast Guard and allotted him thirty days to submit a reply. The BCMR did not receive a response from the Applicant.

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. The application was not timely. An application 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. This application was submitted approximately sixteen years beyond the statute of limitations. The applicant claimed that he did not discover the alleged error until April 3, 2007. However, the applicant knew in 1988 that he was being discharged by reason of unsuitability due to alcohol abuse with an RE-4 reenlistment code. In this regard, his DD form 214, which he signed, contains the RE-4 reenlistment code. He also acknowledged the RE-4 reenlistment code by his signature on a page 7 dated February 17, 1988. Therefore, the applicant knew or should have known of the alleged error at the time of his discharge from the Coast Guard.

3. The applicant argued that even if his application fails to meet the statute of limitations, the Board should waive the statute and consider his application so that he could join the Army National Guard. The Board notes that, except for the applicant's statement, there is no evidence in the record that the applicant is eligible for enlistment in the National Guard or that the National Guard would consider enlisting him, even if he could prove an error with respect to his reenlistment code. Therefore, the Board is not persuaded to excuse the applicant's failure to file a timely application based solely on his statement that he now wishes to join the National Guard.

4. Even though the application is untimely, 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."

5. Based on a review of the merits, the Board finds that the applicant is not likely to prevail on his claim for a change in his reenlistment code. The applicant was advised of the reason for his discharge and provided the opportunity to make a statement as required by the Personnel Manual. The applicant did not object to the discharge and waived his right to make a statement in his own behalf and his right to consult with counsel. In addition, the Board is satisfied that the basis for the applicant's discharge, alcohol abuse, was in accordance with the Personnel Manual. Article 12.B.16.b.(5) of the Personnel Manual then in effect stated that

involvement in two or more alcohol incidents is a basis for an unsuitability discharge due to alcohol abuse. The applicant had two such incidents: one on October 23, 1987 and one on October 30, 1987.

5. In addition, the assignment of the RE-4 reenlistment code for the applicant's discharge by reason of unsuitability due to alcohol abuse was appropriate and in accordance with COMDTINST M1900.4B. The pertinent instruction does not contain the option of awarding an RE-1 reenlistment code for an unsuitability discharge due to alcohol abuse. Further, the RE-4 reenlistment code is supported by the applicant's two alcohol incidents and missing ship's movement for which he received NJP.

6. Therefore the Board finds that due to the length of the delay, the lack of a persuasive reason for not filing his application sooner, and the lack of probable success on the merits of his claim, it is not in the interest of justice to waive the statute of limitations in this case. The application should be denied because it is untimely and because it lacks merit.

7. Accordingly, the applicant's request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

