DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2008-087

XXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXX

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 March 7, 2008, upon receipt of the applicant's completed application, and subsequently prepared the final decision for the Board as required by 33 CFR § 52.61(c).

This final decision, dated November 25, 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 correct his record by changing his RE-4 (not eligible to reenlist) reenlistment code to RE-3 (eligible for reenlistment with waiver). The applicant enlisted in the active duty Coast Guard on July 2, 1984. He was honorably discharged on May 13, 1988, by reason of "general demobilization reduction in authorized strength," with a corresponding KCC (general demobilization) separation code, and an RE-4 reenlistment code. At the time of his discharge he had served three years, ten months, and twelve days on active duty.

The applicant stated that at the time of his discharge, he did not understand what the RE-4 reenlistment code meant. He stated that because he had an honorable discharge, he did not realize until a recent visit to an Army recruiter that the RE-4 was a bar to reenlistment. He stated that he has matured since his discharge from the Coast Guard, approximately twenty years ago.

The applicant stated that he discovered the alleged error on January 29, 2007, and he asserted that it is in the interest of justice to consider his application because "[a]t the time of discharge it was not explained to me what the consequences [were] of having an RE-4 and my discharge was done in a rush and I wasn't fully aware of what was going on. I wish to have this upgraded so that I may serve in the U.S. Army."

SUMMARY OF THE RECORD

The applicant's military record indicates that he enlisted in the active duty Coast Guard on July 2, 1984.

On February 11, 1988, the applicant requested an early release from active duty pursuant to ALCOAST 014/87.

On March 18, 1988, the Commandant approved the applicant's discharge by reason of convenience of the government and directed his discharge within 60 days from the date of the message approving said discharge.

On April 11, 1988, the applicant signed an administrative remarks entry (page 7) informing him that his commanding officer (CO) had not recommended him for reenlistment and that he had 15 days to appeal the CO's decision not to recommend him for reenlistment. The page 7 stated in pertinent part:

> This serves as notification that [the applicant] is not recommended and as such not eligible for reenlistment and will be assigned reenlistment code RE-4. [The applicant] has exhibited a lack of adaptability for military life and a disregard for rules, regulations and standards expected of military personnel. He has failed to perform in a trustworthy manner as a watch stander and has been unreliable in performing other assigned duties. While assigned to port operations marine safety information system, [the applicant] hid case files and failed to take action to process cases drastically curtailing the efficiency of that section. He adversely affects others with whom he is assigned to work by setting a poor example and failure to carry out assigned tasks.

On April 26, 1988, the applicant appealed the CO's determination that he was not recommended for reenlistment. He argued that his entire work history was not taken into account or was possibly unknown by his supervisors at the time of the recommendation. He stated that during his 15 months in the Port Operation Department he quickly adapted to and qualified for the duties to which he was assigned. He further stated the following:

> There are a number of inaccuracies in the stated reasons for not recommending me for reenlistment. One prime example had to do with my duties in the Port Operations MSIS. For a month during this assignment I was the only MSIS operator and, in addition, was required to stand command duty watch 12 hours every other day. This and not my inability to do the work led to the decline in MSIS efficiency. I take pride in my appearance and have always complied with standards in the Coast Guard Uniform Regulations and feel that individual misinterpretation resulted in the counseling I received and not any failure to comply on my part.
>
> I meet all the requirements for reenlistment contained in [the Personnel Manual] except for the recommendation of the [CO]. I do not feel that the command has

> anything personal against me, but simply made a recommendation based on incomplete, inaccurate and, to some degree, uninformed information.
>
> . . . However, I realize that, like everyone else, I have made mistakes. However, I have done nothing to warrant denying me the opportunity to return to the military or other federal service in the future . . . I want to enlist in the Coast Guard Reserve, something the assigned reenlistment code prevents.

On May 9, 1988, the CO recommended that the Commandant deny the applicant's appeal of the CO's decision not to recommend the applicant for reenlistment. The CO stated that the applicant did not present anything in his appeal to refute the facts contained in his service record or to alter the CO's evaluation of his suitability for reenlistment.

On May 13, 1988, the applicant's DD Form 214 shows that he was discharged from the Coast Guard. The applicant's military record reveals that upon discharge his overall final marks averages were: military 3.7; teamwork, 4.2; work, 4.0; leadership, 3.6, representing the Coast Guard, 4.0, and human relations, 3.9.

The Commandant denied the applicant's appeal of the CO's determination that he was not recommended for reenlistment. The date on the Commandant's message denying the applicant's appeal appears to be June 3, 1988.

Applicant's Disciplinary and Counseling Record

On August 27, 1987, the applicant was punished at captain's mast for failing to yield to a sentry and for violating an order by possessing weapon in his room. He was ordered to forfeit $100 per month for one month and he received an oral admonition.

On September 30, 1987, his eligibility period for a good conduct award was terminated because he had received a mark of 2 in conduct that was a result of the August 27, 1987 captain's mast.

On December 3, 1987, a page 7 was placed in the applicant's record counseling him that on November 19, 1987, he failed to properly relieve the command desk watch.

On February 10, 1988, the applicant was counseled on his failure to maintain and meet grooming standards.

On March 31, 1988, a page 7 was placed in the applicant's record documenting a mark of 3 in conduct due to his failure to conform to the rules, regulations, and military standards that were noted in earlier counseling entries. The running of his then-eligibility period for a good conduct award was terminated.

Applicant's Medals and Training Record

The applicant's DD Form 214 shows that he earned the Good Conduct award for period of service ending July 1, 1987. He also earned the Coast Guard Sea Service Ribbon and the Coast Guard Rife Marksmanship Ribbon. A page 7 dated April 13, 1988 states that the applicant was authorized the Coast Guard Meritorious Unit Commendation for the period April 26, 1986 to December 31, 1987.

The applicant completed the 11-week GM "A" School and the 1-week Magazine Sprinkler System course.

VIEWS OF THE COAST GUARD

On July 15, 2008, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief. In recommending denial of relief, the JAG argued that the application was untimely because it was filed more than 17 years after the applicant's discharge from the Coast Guard. 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 was aware or should have been aware of his RE-4 reenlistment code when he was discharged in 1988. In this regard, the JAG noted that on May 13, 1988 the applicant was issued a discharge certificate that showed the RE-4 reenlistment code. The JAG further noted that prior to his discharge, the applicant was informed by and acknowledged on a page 7 that he was not recommended for reenlistment, which the applicant appealed. The appeal was denied on June 3, 1988. Therefore, the JAG argued that the applicant should have filed his BCMR application no later than June 1991.

The JAG stated that the applicant's claim that he did not discover the alleged error until January 2007 does not overcome the fact that the applicant was informed through a page 7 of the CO's decision not to recommend him for reenlistment. The JAG noted that the applicant did not provide any evidence that warranted the excusal of his failure to file a timely application for correction.

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. The JAG further stated the following:

> [Commander, Coast Guard Personnel Command's (CGPC)] thorough review of the applicant's service record did not reveal any evidence to support Applicant's claim. Applicant's record reflects an overall average performance throughout his

enlistment which deteriorated during his last year, culminating in a [CO's] [non-judicial punishment]. Furthermore, applicant failed to provide any further documentation to reflect his activities, accomplishments, and conduct over the past twenty years which would be needed for the Coast Guard to consider such upgrade. Finally, although claiming a desire to enlist in the U.S. Army, the applicant has also failed to provide the documentation to support his alleged dealings with the Army, or the Army's desire to reenlist him following an upgrade of his reenlistment code.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On July 17, 2008, the Board sent a copy of the Coast Guard views to the applicant for a reply. The Board 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. To be timely, an application for correction of a military record must be submitted within three years after the alleged error or injustice was or should have been discovered. See 33 CFR 52.22. The alleged error occurred at the time of the applicant's discharge from the Coast Guard on May 13, 1988. The applicant claimed that he did not discover the error until January 2007 upon visiting an Army recruiter. However, he should have discovered it at the time of his discharge. In this regard, the Board notes that upon discharge the applicant was given a DD Form 214, which he signed that showed the assignment of an RE-4 reenlistment code. Moreover, on April 26, 1988, the applicant appealed the RE-4 reenlistment code, which was denied on June 13, 1988. Therefore, the Board finds that the applicant knew or should have known of the alleged error at the time of his discharge in 1988.

3. 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 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 argued that if his application is untimely, it would be in the interest of justice to excuse his untimeliness because the consequences of an RE-4 reenlistment code were not explained to him at the time of his discharge. However, the applicant stated in his appeal, "I have done nothing to warrant denying me the opportunity to return to the military or other

federal service in the future." This statement is sufficient to prove that the applicant was aware at the time of discharge that an RE-4 would probably prevent his return to the military. Yet, he did nothing about it for almost twenty years. The applicant's explanation for not filing his application sooner is insufficient to persuade the Board to waive the statute of limitations in the interest of justice.

5. However, as discussed in Finding 3, the Board must also perform a cursory review of the merits in deciding whether it is in the interest of justice to excuse the applicant's untimeliness. With respect to the merits of his claim, the Board finds based upon a cursory review that the applicant is not likely to prevail. COMDTINST M1900.4B (change 3) authorized either an RE-1 (recommended for reenlistment) or an RE-4 for a discharge by reason of general demobilization. The evidence of record supports the assignment of an RE-4 in the applicant's case. In this regard, the applicant failed to meet all of the necessary requirements for reenlistment under Article 1.G.5. of the Personnel Manual. Under this provision, not only must a member have the minimum performance factor averages, meet the physical qualifications, and be a citizen of the United States, but the member must also have the CO's recommendation for reenlistment. The CO did not recommend the applicant for reenlistment and provided justification for not doing so in a page 7 that the applicant acknowledged by signature on April 11, 1988. In that entry the CO stated that the applicant had ailed to adapt to military life; disregarded the Coast Guard's rules, regulations, and standards; was unreliable and not trustworthy; and had an adverse affect on those with whom he worked. In effect, the CO determined that the applicant's potential for continued service was poor. In addition, the applicant's service record suggests that during the last year of his service, he had a captain's mast and several negative page 7 entries. Furthermore, the CO stated that the applicant hid case files and failed to take action on them, which negatively affected the efficiency of the office to which he was assigned. The applicant was afforded due process through his appeal of the RE-4 reenlistment code, which was denied. The applicant has provided no evidence to overcome the presumption that the CO carried out his duties correctly, lawfully, and in good faith in not recommending the applicant for reenlistment.

6. The Commandant's message denying the applicant's appeal of his RE-4 reenlistment code appears to have occurred after the issuance of his DD Form 214. It would have been preferable to have the sequence of events reversed. However, the applicant has presented no evidence, and there is none in the military record, to suggest that the Commandant would have approved the applicant's appeal of his RE-4 reenlistment code. In addition, nothing in Article 12.B.5. of the Personnel Manual stated that the appeal of an RE-4 reenlistment code delayed the discharge of a member with less than 8 years of service. It is important to note that in this case the applicant was not challenging his discharge, and in fact he had requested to be discharged as part of a general demobilization of personnel. Therefore, even if his appeal of the RE-4 had been successful, the correction could have taken place after his discharge simply be correcting the DD Form 214.

7. The Board notes that the applicant requested an RE-3 reenlistment code so that he can join the Army. However, neither the then-regulation, nor the current one, authorizes an RE-3 reenlistment code for a discharge by reason of general demobilization.

8. Accordingly, the applicant's request for an upgrade of his RE-4 reenlistment code should be denied because the application is untimely and because of its lack of merit.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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