

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

Application for Correction
of the Coast Guard Record of:

BCMR Docket No. 2010-069

**XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX**

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 upon receipt of the applicant's completed application on January 4, 2010, and subsequently prepared the final decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated September 23, 2010, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

RELIEF REQUESTED AND ALLEGATIONS

The applicant asked the Board to upgrade his general discharge under honorable conditions (general discharge) to an honorable discharge and to change his RE-4 (not eligible to reenlist) reenlistment code to an RE-1 (eligible for reenlistment). The applicant asked the Board to grant his request for an honorable discharge so that he is eligible to use MGIB educational benefits.

The applicant began a two-year period of active duty on November 2, 1999. Through a series of extension agreements, he extended his enlistment for a total of four years and five months, which would have amounted to a total of six years and five months of active duty if it had all been served. However, on December 19, 2005, the applicant was discharged with a general discharge under honorable conditions, by reason of misconduct, with a JKN¹ separation code and an RE-4 (not eligible to reenlist) reenlistment code. At the time of his discharge, the applicant had served six years, one month, and eighteen days on active duty.

The applicant stated that a June 2005 special court-martial conviction is the only blemish in his record of service. As a result of that conviction, he was sentenced to 60 days' restriction, reduced to pay grade E-2, forfeiture of \$456 per month for 12 months, and hard labor without confinement for 90 days. The applicant stated that his sentence did not include a punitive

¹ A JKN separation code is assigned to a member whose involuntary discharge is directed by established directive when the member has established a pattern of misconduct consisting solely of minor disciplinary infractions. Separation Program Designator (SPD) Handbook.

discharge. He stated that he is aware that the conviction looks very bad and that he is still embarrassed by it; but he has learned from his mistakes and has made great strides in improving himself. He wants to complete his education. He submitted a letter from a CWO2 and a letter from a LT, both written in 2004, supporting his then application for the warrant officer program. The recommendations are very positive.

The applicant stated that he discovered the alleged error on May 15, 2005 and that it is in the interest of justice to waive the three-year statute of limitations because “[he] has been working on this for the past 2 years and [he] would truly like to be given another chance.”

PERTINENT EXCEPTS FROM APPLICANT’S MILITARY RECORD

On November 1, 2005, the applicant’s commanding officer (CO) informed the applicant that he was recommending that the commandant discharge the applicant from the Coast Guard with a general discharge due to misconduct. The applicant was convicted at a special court-martial of being an accessory after the fact,² making a false official statement,³ counterfeiting United States currency,⁴ passing counterfeit United States currency,⁵ and making a false statement to a federal investigator,⁶ all violations of the Uniform Code of Military Justice (UCMJ). The CO told the applicant that due to the serious nature of the offenses, he was initiating the administrative discharge without a probationary period. The applicant was informed that he could submit a written statement in his own behalf, that he could disagree with the CO’s recommendation and his rebuttal would be forwarded with the discharge recommendation, and that he could consult with a lawyer.

On November 1, 2005, the applicant acknowledged the notification to discharge him and requested an opportunity to consult with military counsel.

The applicant submitted an undated letter in response to the proposed discharge in which he requested an honorable discharge and a RE-1 (eligible for reenlistment) reenlistment code. The applicant stated in his letter that other than the court-martial, he had no other disciplinary actions during the six years he had been in the Coast Guard. He noted the good he had done by assisting with youth sports, volunteering to participate in various educational programs, participating in Habitat for Humanity projects, and installing new play ground equipment at a local academy. The applicant stated that he needed an honorable discharge so that he could retain his MGIB benefits. He also requested an RE-1 reenlistment code so that he could serve in the military again.

² This conviction was for hiding the automobile of an individual who was wanted by the authorities for the attempted possession of cocaine.

³ This conviction was for telling a special agent that he never gave counterfeit currency to anyone, when he knew the statement was false.

⁴ This conviction was for counterfeiting currency.

⁵ This conviction was for passing, with intent to defraud, counterfeit currency.

⁶ This conviction was for stating to a federal investigator that he had printed counterfeit currency on a personal computer owned by his in-laws, when in fact he had printed the counterfeit currency on his computer in his own home.

On November 7, 2005, the CO asked Commander, Coast Guard Personnel Command (CGPC) to discharge the applicant by reason on misconduct due to his conviction at a special court-martial. The CO stated that due to the seriousness of the offenses of which the applicant was convicted, he should be discharged with a general discharge. The CO stated that he did not desire to retain the applicant until his scheduled end of enlistment on April 1, 2006 because of the administrative and managerial burden such retention would create.

On November 18, 2005, CGPC approved the applicant's discharge from the Coast Guard with a general discharge by reason of misconduct. CGPC directed that the applicant be assigned separation code JKN. The applicant was discharged on December 19, 2005.

Discharge Review Board (DRB) Decision

On May 20, 2008, the applicant asked the DRB to review his discharge to upgrade his discharge to honorable and his reenlistment code to RE-1. On August 27, 2008, the DRB denied the applicant's request for an honorable discharge and RE-1 reenlistment code. The decision was approved on June 2, 2009.

Applicant's Performance Record

The applicant's performance marks averaged a 4.2 in leadership, 4.2 in professional qualities, 4.2 performance, and 4.0 in military behavior on a scale of 1 to 7. The special court-martial conviction is the only disciplinary action in his record. A page 7 notes that he had one alcohol incident during his active duty career. His DD 214 shows that he earned the Good Conduct Award (for the period ending February 11, 2002), a Team Commendation, the Coast Guard Unit Commendation Award, the Commandant's Letter of Commendation, the Global War on Terrorism Service Medal, the National Defense Service Medal, and the Coast Guard Pistol Marksmanship Ribbon.

VIEWS OF THE COAST GUARD

On May 7, 2010, the Board received an advisory opinion from the office of the Judge Advocate General (JAG) of the Coast Guard. The JAG concurred with the comments provided by the Commander, Personnel Service Center (PSC), which were attached as an enclosure to the advisory opinion.

PSC noted that the application was timely and stated his agreement with the findings of the DRB that the applicant's discharge was proper and equitable. PSC stated that the applicant did not challenge the DRB proceedings or allege that the proceedings were unjust.

PSC concurred with the findings of the DRB in their entirety. He noted that the Coast Guard is presumptively correct and the applicant has failed to substantiate any error or injustice with regard to his record.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 11, 2010, the Board sent the applicant a copy of the Coast Guard views and invited him to submit a reply. The Board did not receive a response from the applicant.

APPLICABLE REGULATIONS

Article 12.B.2.e. of the Personnel Manual states that sole criterion on which the Coast Guard characterizes service in the current enlistment or period of service is the member's military record during that enlistment, period of service, or any term extension the law or the Commandant prescribes or the member consents to.

Article 12.B.2.f. of the Personnel Manual states, "The Service will not necessarily deny a member an honorable discharge solely for a specific number of courts-martial convictions or actions under Article 15, UCMJ during his or her current enlistment or obligated service." Also, After June 30, 1983, to be eligible for an honorable discharge a member must have "a minimum characteristic average of 2.5 in each factor over the period of the enlistment." This section further states that a member who is discharged because of misconduct is eligible for an honorable discharge, depending on that member's proper military behavior and proficient performance of duty with consideration for his or her age, length of service, grade, and general aptitude.

Article 12.B.2.f.2. of the Personnel Manual states that depending on the severity of the misconduct, a member may be given general discharge.

Article 12.B.18.b.5. of the Personnel Manual authorizes a discharge by reason of misconduct because of "[d]iscreditable involvement with civil or military authorities.

Article 12.B.18. of the Personnel Manual states that commanding officers' (COs) must afford a member a reasonable probationary period to overcome deficiencies before initiating administrative action in cases of frequent discreditable involvement with civil or military authorities. The provision further provides that CO's "are authorized to recommend discharge at any time during the probation if the member is not making an effort to overcome the deficiency."

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the submissions of the applicant and the Coast Guard, the military record of the applicant, and applicable law.

1. The BCMR has jurisdiction of the case pursuant to section 1552 of title 10, United States Code. The application was not timely.

2. Under 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22, an application to the Board must be filed within three years after the applicant discovers, or reasonably should have discovered, the alleged error or injustice. Although the applicant in this case filed his application more than three years after he knew or should have known of the alleged error on his discharge form, DD 214, he filed it within three years of the decision of the Discharge Review Board, which has a

fifteen-year statute of limitations. Therefore, under *Ortiz v. Secretary of Defense*, 41 F.3d 738, 743 (D.C. Cir. 1994), the application is considered timely.

3. Although at the time of the applicant's discharge he had over six years of active duty, he was still serving in his first enlistment. His record reveals that the special court-martial convictions for being an accessory after the fact, making a false official statement, counterfeiting United States currency, passing counterfeit United States currency, and making a false statement to a federal investigator, are the only disciplinary proceedings in his record. His performance marks over the course of his career averaged above the 2.5 necessary to be eligible for an honorable discharge. He also had one alcohol incident in 2004.

4. Article 12.B.18 of the Personnel Manual authorizes the Coast Guard to discharge a member for misconduct whose involvement with civil or military authorities is discreditable. The applicant's crimes of making false official statements, counterfeiting and passing United States currency, and being an accessory after the fact to a crime, were acts that placed the Coast Guard, as well as the applicant, in an unfavorable light. Therefore the Board finds that the applicant could be processed for separation under Article 12.B.18 of the Personnel Manual. However, members being discharged for this reason are to be placed on probation and given an opportunity to overcome their deficiencies.⁷ With the approval of Commander, Coast Guard Personnel Command (CGPC), he was discharged without a probationary period. While Article 12.B.18.c. gives the Coast Guard the right to discharge members "at any time during the probation if the member is not making an effort to overcome the deficiency" upon the recommendation of the CO, it does not give the Coast Guard the authority to ignore the probationary period requirement all together. Therefore, the Coast Guard committed an error by not placing the applicant on probation.

5. However, the Board finds that even if the applicant had been placed on probation (his expiration of enlistment was April 1, 2006, and he was discharged on December 19, 2005) he would still have received a general discharge under honorable conditions upon discharge. Article 12.B.2.f.2. of the Personnel Manual states that depending on the severity of the misconduct, a member may be given general discharge. In this regard, the Board notes that the CO described the applicant's offenses as serious and in conflict with the Coast Guard's core values. The Personnel Manual also states that the issuance of an honorable discharge depends on proper military behavior and proficient performance of duty with due consideration to age, length of service, and general aptitude. The applicant's performance marks indicated that he performed well, except for an occasional low mark contemporaneous with the commission of his misconduct and the alcohol incident. However, the crimes of which he was convicted shows that he engaged in serious criminal conduct. At the time he committed the offenses, the applicant had been on active duty for approximately five years and was approximately 26 years old. He was old enough and had been in the Service long enough that his criminal acts cannot be attributed to youthful indiscretion.

6. The applicant's chain of command determined that he was not entitled to an honorable discharge because of the severity of the offenses for which he was convicted at a special court-martial. While the applicant had the overall average marks in each factor that were necessary for

⁷ Nothing in the military record shows that the applicant was placed on probation.

an honorable discharge, that fact alone does not persuade the Board that the general discharge is erroneous given the nature of the offenses of which he was convicted at special court-martial.

7. The applicant also asked to have his RE-4 reenlistment code upgraded. For the reasons discussed above, the applicant's misconduct supports the RE-4 reenlistment code.

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

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

