DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2010-247

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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 after receiving the applicant's completed application on September 7, 2010, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated June 3, 2011, 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 military record by upgrading his general discharge from the Coast Guard Reserve for "shirking" on October 29, 1976, to an honorable discharge. The applicant alleged that he had to resign from the Reserve because his work as a police officer conflicted with his Reserve duties. His civilian supervisor gave him the choice of losing his job or quitting the Reserve so he had to quit.

Regarding the delay in his request for relief, the applicant alleged that he discovered the alleged error in his record on August 12, 2010. On that date, he alleged, he learned that he could seek to have his discharge upgraded.

SUMMARY OF THE APPLICANT'S MILITARY RECORD

The applicant was a [redacted] until November 13, 1972, when he resigned. On March 9, 1973, he enlisted in the Reserve for six years and agreed to drill regularly and perform two weeks of annual active duty for training (ADT) for five years. The applicant drilled regularly and performed ADT during his first anniversary year, ending on March 8, 1974. During his second anniversary year, from March 9, 1974, to March 8, 1975, the applicant drilled and performed the ADT, but was absent for drills in June, October, and November 1974. During his third anniversary year, from March 9, 1975, to March 8, 1976, the applicant showed up for only one weekend of drills in December 1975, apparently in

response to a counseling session held on November 22, 1975. On that date, the applicant's commanding officer (CO) wrote the applicant a letter to memorialize a counseling session the applicant had with the executive officer about the applicant's failure to drill. The letter states that the CO would refrain from recommending an administrative discharge "by reason of accumulated absences" if the applicant performed 32 make-up drills and 8 regular drills by December 31, 1975. The CO wrote that the applicant was being allowed to make up the drills "in recognition of [his] previous record in the Coast Guard and of [his] career situation which was responsible for [his] absences."

On February 29, 1976, the applicant's CO advised the District Commander and the Commandant that the applicant's "performance and attendance have deteriorated to the point that he is no longer a useful member of this unit." The CO stated that on November 22, 1975, the applicant had agreed to a plan to make up for 32 absences and to participate regularly but had not shown up as agreed. The CO noted that the applicant had stated that his civilian employment as a police officer conflicted with his ability to drill. The CO stated that the applicant had asked for an administrative discharge.

The CO included with his recommendation a letter from the applicant dated February 29, 1976, in which he requested an administrative discharge for hardship. The applicant explained that on February 4, 1975, he had become a full-time police officer and that he had advised his Reserve unit that he would be unable to drill during his training at the police academy from March 14 to June 10, 1975. The applicant stated that after he graduated from the academy, he became a patrol officer and was scheduled to work many weekends, which prevented him from drilling. The applicant stated that his shift, which comprised four 10-hour days each week plus overtime, changed every four months, and that because more senior officers had preference in the assignment of shifts, the applicant's shift often included weekends.

On October 20, 1976, a Reserve administrator wrote a note stating that the CO's request for an administrative discharge had never been processed. Instead, the applicant had twice been offered an alternative drill schedule. However, he had refused to drill and had agreed to a general discharge. The Reserve administrator also noted that the applicant had been informed of his right to consult counsel and had declined the opportunity and stated that he wanted to be discharged. Therefore, the administrator recommended that "we change our minds from what we initially proposed and authorize discharge for shirking."

On October 26, 1976, the Commandant ordered the District Commander to discharge the applicant for "misconduct (shirking)" with a general discharge. October 29, 1976, the District Commander discharged the applicant and sent him a general discharge certificate with a letter advising him that he had been discharged from the Reserve due to misconduct.

VIEWS OF THE COAST GUARD

On January 5, 2011, the Judge Advocate General (JAG) submitted an advisory opinion in which he recommended that the Board deny the requested relief.

The JAG stated that the application is untimely and should be denied on that basis because "he provides no rationale for his approximately 30+ year delay" in applying to the Board. The JAG also stated that the applicant had not provided any relevant documentation or rationale to support his position that his general discharge should be upgraded.

In recommending denial, the JAG adopted the facts and analysis in a memorandum on the case prepared by the Personnel Service Center (PSC). PSC stated that "[t]here is nothing in the applicant's record to substantiate his claim that he made positive attempts to remain a viable asset to the CG Reserve despite his apparent predicament with his employer. Rather, that applicant's record only supports that he was given ample opportunity and warnings to remedy his situation before discharge would be authorized." Therefore, PSC concluded, the applicant received a general discharge for shirking in accordance with policy and he has failed to substantiate an error or injustice in his record.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 24, 2011, the applicant responded to the views of the Coast Guard. He stated that it was difficult and embarrassing to read the advisory opinion. His memory of the events is somewhat different, and he does not remember being given options, but he does not doubt the records. However, he clearly recalls that his civilian employer gave him no choice. He had to choose between his job as a police officer and attending Reserve drills. The applicant stated that he remembers enjoying his drills, which involved patrols in [redacted] But after seeing the records, he concluded that he "got what [he] asked for and deserved."

APPLICABLE REGULATIONS

Article 12-B-12(b) of the Personnel Manual in effect in 1976 authorized the Commandant to direct the discharge of an enlisted member for unfitness due to "an established pattern of shirking." Article 12-B-12(b) further provided that such a discharge "will not normally be initiated until a member has been counseled concerning his deficiencies and afforded a reasonable opportunity to overcome them." Article 12-B-12(a) stated that an enlisted member "may be separated by reason of unfitness with an undesirable discharge, unless the particular circumstances in a given case warrant a general or honorable discharge. Discharge by reason of unfitness and the type of discharge to be issued will be directed only by the Commandant."

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 10 U.S.C. § 1552.

2. An application to the Board must be filed within three years after the applicant discovers the alleged error in his record.[1] The applicant received his general discharge in 1976. Therefore, his application was untimely.

3. Pursuant to 10 U.S.C. § 1552(b), the Board may excuse the untimeliness of an application 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 to determine 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."[2]

4. The applicant stated that he did not previously apply to the Board because he was unaware of its existence. This explanation is not compelling as nothing prevented the applicant from complaining about his general discharge and discovering the existence of the Board sooner if he believed his discharge was erroneous or unjust.

5. A cursory review of the case indicates that it lacks potential merit. Although the applicant's civilian employment as a police officer interfered with his attendance at regular weekend drills, according to the Reserve administrator's letter dated October 20, 1976, the Coast Guard tried to accommodate him, to no avail, by offering alternative drill schedules. The applicant's Retirement Points Statements support the Coast Guard's decision to discharge him because of an established pattern of shirking. Under 33 C.F.R. § 52.24(b), the applicant's military records are presumptively correct,[3] and he has not submitted sufficient evidence to overcome the presumption. Therefore, the Board finds that his claim cannot prevail on the merits.

6. Accordingly, the Board will not excuse the application's untimeliness or waive the statute of limitations. The applicant's request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

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[1] 10 U.S.C. § 1552(b).

[2] *Allen v. Card*, 799 F. Supp. 158, 164-65 (D.D.C. 1992).

[3] 33 C.F.R. § 52.24(b); *see Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992) (citing *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979), for the required presumption, absent evidence to the contrary, that Government officials have carried out their duties "correctly, lawfully, and in good faith.").

ORDER

The application of former xxxxxxxxxxxxxxxxxxxxxx, USCGR, for correction of his military record is denied.