

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2011-046

XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX

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 upon receipt of the applicant's completed application on December 8, 2010, and subsequently prepared the final decision for the Board as required by 33 CFR § 52.61(c).

This final decision, dated August 18, 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 her record by changing the reason for her separation from "unsuitability" to "early release" or "discontinuance of active duty" so that she will have an opportunity to enlist in the Army National Guard. She also asked that the RE-4 (not eligible to reenlist) reenlistment code be removed from her record. The applicant enlisted in the Coast Guard on January 8, 1991, and was honorably discharged on September 15, 1992 because of unsuitability,¹ with a JMJ² separation code and an RE-4 reenlistment code.

The cause of the applicant's unsuitability discharge was her refusal to comply with a direct order in a search authorization issued by a military judge to provide a urine sample to be tested for marijuana. She stated that at the time she was 19 years old and made a mistake by refusing to provide a urine sample after her command obtained a search authorization directing her to do so. She stated that she thought at the time that the search authorization was based on a questionable health and welfare inspection of her apartment (which was leased to the Coast Guard) and that she vigorously disputed the basis for the search authorization. She stated that

¹ Article 12.B.16.b. states that the purpose for unsuitability discharges is to free the Service of members considered unsuitable for further due one of nine reasons, including "apathy, defective attitudes, and inability to expend effort constructively."

² The JMJ separation code means that a discharge was for unsuitability because of the member's apathy, defective attitudes, or inability to expend effort effectively.

her immaturity, frustration, and naiveté caused her to disobey the order, but she has learned from the irrationality and impertinence of her youth and believes that she has served a sufficient punishment. She stated that the RE-4 reenlistment code is preventing her from enlisting in the National Guard.

The applicant stated that she discovered the error on September 3, 2010. She stated that it is in the interest of justice to consider her application if more than three years have passed since discovery of the alleged error because she only recently learned that the RE-4 code rendered her ineligible to enlist in the National Guard.

Excerpts from the Applicant's Military Record

On June 4, 1992, the applicant's commanding officer (CO) informed the applicant that he had initiated action to discharge her from the Coast Guard due to misconduct because she had refused to provide a urine sample for drug testing.

On June 11, 1992, the applicant by her signature acknowledged notification of the proposed discharge, waived her right to submit a statement, and did not object to the discharge.

On this same date, June 11, 1992, the CO recommended that the Commandant discharge the applicant honorably by reason of misconduct due to her refusal to provide a urine sample when ordered to do so by a military judge. He noted that she was ordered to provide a urine specimen on two separate occasions and refused each time.

On August 14, 1992, the Commandant ordered the applicant to be discharged from the Coast Guard by reason of unsuitability under Article 12-B-16 of the Personnel Manual and that she should be assigned the JMJ separation code. The applicant was discharged on September 15, 1992.

VIEWS OF THE COAST GUARD

On March 3, 2011, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief as recommended by the Commander, Personnel Service Center (PSC). PSC stated that the application should be denied because it is untimely.

With regard to the merits, PSC noted that the applicant was punished at captain's mast for refusing to obey a lawful order from a military judge to provide a urine sample to a Coast Guard Investigative Service (CGIS) agent. PCS stated that if a member refuses a lawful order to provide a urine sample, that member is subject to disciplinary action under the Uniform Code of Military Justice (UCMJ), which could include processing for separation.

PSC noted that although the applicant was discharged because of unsuitability pursuant to Article 12.B.16 of the personnel Manual, under the current practice she would have received a discharge due to misconduct with a JKQ separation code under Article 12.b.18.b.3. of the Personnel Manual for violating a direct order.

PSC did not recommend changing the reason for separation from unsuitability to misconduct, because the change would make the applicant's record appear worse. PSC also stated that the applicant's "request to amend the information [on her DD 214] to an overall more favorable disposition . . . is unsubstantiated and not permitted within applicable policy under the prevailing circumstances related to her cause for discharge.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 28, 2011, the Board received the applicant's response to the views of the Coast Guard. She stated that while it is true that she learned that she could not reenter the service approximately 18 years after her discharge, she had asked recruiters and other military personnel about her situation on several occasions and was told that "they didn't know or they couldn't help me." She stated that she eventually found someone to help her appeal her discharge and reenlistment code. She stated again that she regretted her behavior and that she has matured since her 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. The application was not timely. To be timely, an application for correction of a military record must be submitted within three years after the applicant discovered the alleged error or injustice. See 33 CFR 52.22. The applicant stated that she discovered the alleged error on September 3, 2010. However, she should have discovered the error when she received her DD 214 because it shows clearly that she was discharged by reason of unsuitability with an RE-4 reenlistment code. If she believed that the basis for her discharge was incorrect or if she did not understand the meaning of the various codes on the DD 214, she should have raised the issue within three years of her discharge from the Coast Guard. The applicant's argument that that it is in the interest of justice to excuse her application's untimeliness because she learned only recently that an RE-4 is a bar to reenlistment is not persuasive.

3. Although the applicant's explanation for not filing her application sooner is not persuasive, the Board must still perform at least a cursory review of the merits to determine whether it is the interest of justice to waive the statute of limitations. 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 stated 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.

4. Based on a cursory review of the merits, the applicant is not likely to prevail on her claim. In this regard, the Board notes that the applicant admitted that she refused to provide a urine sample in accordance with a search authorization issued by a military judge. She was punished at captain's mast for disobeying a direct order and subsequently discharged due to unsuitability with an RE-4 reenlistment code. She did not object to the discharge after being provided an opportunity to do so. Nor has she provided any evidence in her application that supports a finding by the Board that the basis for her discharge and reenlistment code were in error."

5. Accordingly, it is not in the interest of justice to waive the untimeliness in this case and it should be denied because it is untimely.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

