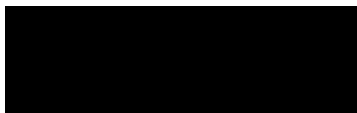


**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2014-002



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 October 28, 2013, and assigned it to staff member [REDACTED] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated August 1, 2014, 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, who received a general discharge under honorable conditions from the Coast Guard on March 15, 1993, following his civil conviction for burglary, asked the Board to upgrade his discharge. He argued that he was convicted of a crime that he did not commit and that he never admitted guilt.

Regarding the delay in submitting his application, the applicant stated that he discovered the alleged errors in his record on October 10, 1993, and argued that it is in the interest of justice to waive the untimeliness because he feels that "I have been an excellent citizen of the United States since this error^[1] (20 years)."

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard as a seaman recruit (SR) at the age of 19 on January 22, 1990. On December 29, 1990, he was awarded non-judicial punishment (NJP)² for absenting himself from his unit without authority. His sentence included 14 days restriction but it was suspended for 6 months.

¹ The Board presumes that the applicant is referring to his March 15, 1993, discharge.

² Article 15 of the Uniform Code of Military Justice (UCMJ) provides NJP as a disciplinary measure for minor offenses under the UCMJ.

On July 12, 1991, the applicant was arrested by civil authorities for possession and consumption of alcohol by a minor and disorderly conduct. He was found guilty on both charges and was sentenced to 20 hours of community work service.

On July 31, 1991, the applicant was awarded NJP for burglary and was awarded 21 days restriction and 21 days of extra duty.

On August 13, 1991, the applicant was awarded NJP for the July 12, 1991, incident. He was found to have brought discredit upon the armed forces after being arrested for fighting in public and assault. His sentence included 21 days restriction and 21 days of extra duty.

On December 10, 1991, the applicant was counseled about his lack of motivation towards advancement.

On July 24, 1992, the applicant was counseled on regarding his failure to obey an order issued by a superior. The Administrative Remarks (Page 7) states that the applicant used an official government vehicle for his personal use.

On December 15, 1992, the applicant was arrested by civil authorities and charged with burglary. He was convicted on December 30, 1992, after pleading guilty, and was sentenced to one year in jail followed by three years' probation.

On December 30, 1992, a Page 7 was placed in the applicant's record to document that he had received a special evaluation and was being counseled regarding an "unsatisfactory" mark in conduct and a mark of "2" in integrity, respecting others, motivation towards advancement, and setting an example.³ The special evaluation had been prepared following his December 30, 1992, civil conviction for burglary.

On January 21, 1993, the applicant's CO notified the applicant by memorandum that he was recommending his discharge from the Coast Guard for misconduct because of his December 30, 1992, conviction for burglary. The applicant signed the memo and indicated that he had been informed of the reason for the recommended discharge; did not desire to consult with an attorney; did not object to the discharge; had declined to submit a statement in his own behalf; and did not waive the right to be given an administrative discharge board.⁴

On January 21, 1993, the applicant's CO requested permission from the Commandant to discharge the applicant for misconduct due to his conviction for burglary. The CO also noted the applicant's numerous NJPs, his alcohol incident, and counseling about his lack of motivation and failure to follow orders.

³ Coast Guard enlisted members are evaluated in a variety of performance categories on a scale of 1 (worst) to 7 (best). They also receive marks for conduct (satisfactory (S) or unsatisfactory (U)) and for advancement (recommended (R) or not recommended (N)).

⁴ The applicant was not entitled to an administrative discharge board (ADB) because only members with more than eight years of active duty are normally entitled to an ADB before being administratively separated. Article 12.B.18. e. of the Coast Guard Personnel Manual.

On March 2, 1993, the Commandant issued orders for the applicant to receive a general discharge for misconduct with an HKB separation code denoting conviction by civil authorities, in accordance with Article 12-B-18 of the Personnel Manual.

On March 15, 1993, the applicant was given a general discharge “under honorable conditions” for misconduct in accordance with Article 12-B-18 of the Personnel Manual with an HKB separation code and an RE-4 reentry code (ineligible to reenlist).⁵

Following his discharge, the applicant petitioned the Discharge Review Board (DRB)⁶ to have his general discharge under honorable conditions upgraded to honorable. On October 10, 2000, the DRB found that the applicant’s general discharge with an RE-4 was proper and should stand as issued. The Commandant approved the DRB’s recommendation.

VIEWS OF THE COAST GUARD

On February 7, 2014, the Judge Advocate General (JAG) of the Coast Guard adopted the findings and analysis in a memorandum prepared by the Personnel Service Center (PSC) and recommended that the Board deny relief in this case. PSC argued that the application is untimely and that the applicant was properly discharged for misconduct after he was convicted by civil authorities for burglary. PSC also noted that the applicant had been awarded NJP on several occasions and argued that his record clearly supports his general discharge under other than honorable conditions.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On February 26, 2014, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 days. No response was received.

APPLICABLE LAW

Under Article 12-B-18.b. of the Coast Guard Personnel Manual in effect in 1993, the Commandant could separate a member for misconduct due to a conviction for civil authorities as follows:

Conviction by foreign or domestic civil authorities. A member subject to discharge because of conviction by civil court may be processed for discharge even though an appeal of that conviction has been filed or an intent to do so has been stated. However, the Service generally will delay executing the approved discharge pending outcome of the appeal.

⁵ The five authorized types of discharge are Honorable, General, Under Other than Honorable Conditions, Bad Conduct, and Dishonorable. Bad conduct and dishonorable discharges are only awarded by court-martial. Article 1.B.2.c. of the Military Separations Manual.

⁶ 10 U.S.C. § 1553 provides the Secretary with the authority to establish a board to review discharges or dismissals from the Service. Part 51 of Title 33, Code of Federal Regulations (CFR), established the Coast Guard Discharge Review Board (DRB) and sets forth the procedure for seeking review after a member has been separated from the Coast Guard.

Under Article 12-B-18.e.(1) of the manual, a member with less than eight years of active service who was being recommended for a general discharge for misconduct was entitled to (a) be informed of the reason for the recommended discharge, (b) consult an attorney, (c) object to the discharge, and (d) submit a statement in his own behalf.

These regulations remain essentially the same under Article 1.B.17.e. of the current Separations Manual.

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. The applicant received his general discharge in 1993, and the DRB issued its response to the applicant's request to upgrade his discharge on October 10, 2000. Therefore, his application is untimely.⁷
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."⁸ 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."⁹
4. The applicant argued that it is in the interest of justice to consider his application because he has "been an excellent citizen of the United States since this error." This argument is not compelling because it does not show that he was unable to apply to the Board timely.
5. A cursory review of the merits of this case indicates that the applicant was properly given a general discharge for misconduct, in accordance with Article 12-B-18 of the Personnel Manual then in effect, with an HBK separation code and an RE-4 reentry code after his civil conviction for burglary. His record shows that he received due process as provided in Article 12-B-18.e.(1) of the Personnel Manual then in effect. These records are presumptively correct under 33 C.F.R. § 52.24(b).¹⁰ The Board notes that the applicant submitted no evidence to support his request, and the record contains no grounds for upgrading his discharge. The applicant's request cannot prevail on the merits.

⁷ See *Ortiz v. Secretary of Defense*, 41 F.3d 738, 743 (D.C. Cir. 1994) (holding that the 3-year statute of limitations runs from the date of the decision of the DRB).

⁸ *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

⁹ *Id.* at 164, 165; see also *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

¹⁰ 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.").

6. The Board notes that the applicant was 22 years old when he committed the offense for which he was discharged and he has borne the consequences of his burglary conviction for a long time. However, the delegate of the Secretary informed the Board on July 7, 1976, by memorandum that it “should not upgrade a discharge unless it is convinced, after having considered all the evidence ... that in light of today’s standards the discharge was disproportionately severe vis-à-vis the conduct in response to which it was imposed.”¹¹ Under Article 1.B.17.b. of the Military Separations Manual in effect today, a member convicted by civil authorities may receive a general administrative discharge for misconduct. Therefore, the Board is not persuaded that the applicant’s general discharge for misconduct is disproportionately severe in light of current standards.

7. Based on the record before it, the Board finds that the applicant’s request for correction of his general discharge for misconduct cannot prevail on the merits. 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 ON NEXT PAGE)

¹¹ Memorandum of the General Counsel to J. Warner Mills, et al., Board for Correction of Military Records (July 7, 1976).

ORDER

The application of former SA  for correction of his military record is denied.

August 1, 2014

