

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2014-174


FA (former)

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 after receiving the completed application and military records on July 24, 2014, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated May 8, 2015, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant—who received an other than honorable (OTH) discharge from the Coast Guard on June 8, 1990—asked the Board to upgrade his discharge so that he will be eligible to receive benefits from the Department of Veterans' Affairs for his bilateral foot condition and hearing and vision problems, which, he alleged, he incurred on active duty.

SUMMARY OF THE RECORD

On January 5, 1987, the applicant enlisted in the Coast Guard. He attended recruit training, was assigned to a cutter, and advanced to FN/E-3.

On May 9, 1988, the applicant was punished at mast for abandoning the watch while on duty. He was awarded 5 days' restriction to the cutter and extra duties for 10 days.

On August 3, 1988, the applicant was punished at mast for failing to report for duty as a mess cook aboard his cutter on July 30, 1988. He was awarded 7 days' restriction and 5 days' extra duties.

In 1989, the applicant was charged with the following offenses under the Uniform Code of Military Justice (UCMJ):

1. Conspiracy to steal blank military ID cards, in violation of Article 81, UCMJ.
2. Theft of blank military ID cards, in violation of Article 121, UCMJ.
3. Conspiracy to forge military ID cards, in violation of Article 81, UCMJ.
4. Forgery of military ID cards, in violation of Article 134, UCMJ.
5. Wrongfully presenting a forged military ID card, in violation of Article 134, UCMJ.
6. Conspiracy to make a false claim against the Government by forging a marriage certificate, in violation of Article 81, UCMJ.
7. Forgery of signatures on a marriage license with the intent to defraud, in violation of Article 123, UCMJ.
8. Making a false claim against the United States by signing and submitting a Basic Allowance for Quarters (BAQ)/ Dependency Information Form stating that he had married, in violation of Article 132, UCMJ.
9. False swearing to an investigator about how he got the forged ID card, in violation of Article 134.

In a pre-trial agreement, the applicant agreed to plead guilty before a military judge to the charges numbered 1, 3, 5, 7, 8, and 9, above, in exchange for certain Government concessions. The Government agreed to withdraw the other charges and to limit the applicant's sentence to four months of confinement at hard labor, to reduction in pay grade by one grade, and to forfeiture of one-half of the applicant's pay for four months. In addition, the Government agreed not to impose a punitive discharge as part of the sentence if the applicant agreed to waive his right to an Administrative Separation Board and to request an administrative OTH discharge.

On January 4, 1990, the applicant was tried at special court-martial. In accordance with the pre-trial agreement, he pled guilty to the six charges and was sentenced to reduction in rank to E-2 and four months of hard labor with confinement and forfeiture of \$300 per month for four months. In addition, the applicant submitted a request for "a discharge under other than honorable conditions for the good of the Service." He noted that he had received the advice of an attorney and was requesting the OTH discharge because of the criminal charges against him. He acknowledged that his attorney had advised him that the OTH discharge would "deprive [him] of virtually all veterans' benefits based upon my current period of active service" and that he could "expect to encounter substantial prejudice in civilian life."

On March 26, 1990, the applicant's CO submitted a recommendation to the Personnel Command that the applicant be discharged under "other than honorable" (OTH) conditions for the good of the Service pursuant to the applicant's request and pre-trial agreement. The CO noted that the applicant's medical records were at the brig where he was confined and that he had undergone a pre-separation physical examination on March 23, 1990.

On April 16, 1990, Commander, Maintenance and Logistics Command for the Atlantic Area forwarded the CO's memorandum and recommended that it be approved. He noted that a special court-martial had been completed and that he was satisfied that the applicant had received the advice of competent and qualified legal counsel in making his decision to request the OTH. He noted that submission of the request for an OTH "complies with the appended pretrial agreement between the member, his counsel, the detailed trial counsel, and the convening authority wherein it was stipulated that he would request and agree to accept an administrative

discharge under other than honorable conditions by reason of misconduct whether or not a punitive discharge was to be adjudged by the court. I am satisfied with the manner in which this request is being submitted and that he fully understands the impact the character of discharge may have upon him in civilian life.”

On April 26, 1990, the Coast Guard Personnel Command issued orders for the applicant to receive an OTH discharge in accordance with Article 12-B-21 of the Personnel Manual.

On May 22, 1990, the Convening Authority approved the sentence of the special court-martial.

On June 8, 1990, the applicant received the OTH discharge “for the good of the Service” in accordance with Article 12-B-21 of the Personnel Manual then in effect.

VIEWS OF THE COAST GUARD

On October 22, 2014, the Coast Guard submitted an advisory opinion recommending that the Board deny relief in this case. The Coast Guard stated that the applicant was counseled by his attorney about the fact that he would be deprived of virtually all veterans’ benefits if he accepted an OTH discharge and that he did so as part of a pre-trial agreement. The Coast Guard noted that the applicant did not claim that any error occurred in these procedures that would warrant relief and that the applicant is “seeking correction simply to obtain eligibility for benefits he is not entitled to.”

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 3, 2014, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within thirty days. No response was received.

APPLICABLE LAW

Under Article 12-B-21 of the Personnel Manual in effect in 1990 authorized OTH discharges for the good of the Service as follows:

An enlisted member may request a discharge under other than honorable conditions for the good of the Service in two circumstances: in lieu of UCMJ action if punishment for alleged misconduct could result in a punitive discharge or at any time after court-martial charges have been preferred against him or her. This request does not preclude or suspend disciplinary proceedings in a case.

Article 12-B-21 further requires the member to be assigned counsel to advise the member about the consequences of such a request, including the loss of veterans’ benefits.

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, or reasonably should have discovered, the alleged error or injustice.¹ The applicant requested and knew he was receiving a discharge under other than honorable conditions in 1990. Therefore, his application is untimely.
3. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.² In *Allen v. Card*, 799 F. Supp. 158 (D.D.C. 1992), the court stated that the Board should not deny an application for untimeliness without “analyz[ing] both the reasons for the delay and the potential merits of the claim based on a cursory review”³ to determine whether the interest of justice supports a waiver of the statute of limitations. The court noted 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.”⁴
4. The applicant provided no explanation for his delay in seeking correction of his discharge and no argument about whether it is in the interest of justice for the Board to excuse his delay except to note that he would be eligible for veterans’ benefits if the Board upgraded his discharge.
5. A cursory review of the merits of this case shows that the applicant’s OTH discharge is neither erroneous nor unjust. The record shows that the OTH discharge was awarded at his request so that he could avoid prosecution and sentencing on significant criminal charges that could have resulted in a long term of incarceration and a bad conduct or dishonorable discharge. The record contains no evidence that substantiates the applicant’s allegations of error or injustice in his official military record, which is presumptively correct.⁵ His desire for veterans’ benefits does not convince the Board that his OTH discharge is erroneous or unjust. Based on the record before it, the Board finds that the applicant’s 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.

¹ 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.

² 10 U.S.C. § 1552(b).

³ *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

⁴ *Id.* at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396, 1405 n14, 1407 n19 (D.C. Cir. 1995).

⁵ 33 C.F.R. § 52.24(b).

ORDER

The application of former FA [REDACTED] USCG, for correction of his military record is denied.

May 8, 2015

