

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2014-192

████████████████████
████████████████

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 August 14, 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 a discharge under other than honorable (OTH) conditions¹ from the Coast Guard on July 6, 1990—asked the Board to upgrade his discharge to general, under honorable conditions. The applicant stated that before his discharge, someone told him that his OTH discharge would become a general discharge after six months. He alleged that he discovered this did not happen on April 3, 2013, when he started working with some other veterans. The applicant alleged that he has “a good record and would like for this to be corrected.”

In a separate letter dated September 10, 2014, the applicant stated that he went AWOL in November 1989 because his girlfriend was pregnant and he decided to stay home with her. After a few weeks, he chose to return to the Coast Guard, but after Christmas, he struggled with his decision to leave his girlfriend while she was pregnant and so went AWOL again. The applicant also stated that while awaiting discharge, his assigned attorney instructed him to accept an OTH discharge. He alleged that the attorney told him that “due to my clean military record prior to these instances, my discharge would be upgraded to ‘honorable’ within one year, as previously mentioned. Being naïve in these matters, I followed his instructions.

¹ There are five types of military discharge for enlisted members. Three are administrative discharges: honorable; general, under honorable conditions; and under other than honorable (OTH) conditions. Two are punitive and may only be awarded by a court-martial: bad conduct discharge (BCD) and dishonorable discharge.

The applicant stated that he has not been in any legal trouble since his discharge. He has married, has two children, and owns a small business with five employees. The applicant asked the Board to take his prior military record and exemplary civilian record into consideration when deciding his case.

SUMMARY OF THE RECORD

On August 22, 1988, at age 18, the applicant enlisted in the Coast Guard. He attended recruit training, basic electronics school, and was assigned to a shore unit. From November 13, 1989, to December 20, 1989, the applicant was absent without leave (AWOL) from his unit for 38 days. Less than a week after he returned, the applicant went AWOL again for more than three months from December 26, 1989, to April 3, 1990. Whether he was apprehended or turned himself in is not clear from the records, but his medical records indicate that upon his return on April 4, 1990, he was incarcerated in a Navy brig pending trial by court-martial.

During a pre-separation physical examination on June 5, 1990, the applicant reported on his Report of Medical History that he was in good health and denied any history of illness, injury, or hospitalization. The doctor found that the applicant had no physical defects or diagnoses and was fit for separation. The doctor also noted that the applicant was a prisoner who had requested an OTH discharge in lieu of a punitive discharge and that he was mentally competent and accountable for his actions.

The only other discharge document in the applicant's record is his DD 214, which shows as "time lost" his two long unauthorized absences and his incarceration from April 4, 1990, to June 24, 1990. It also shows that the applicant received an 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 December 29, 2014, the Coast Guard submitted an advisory opinion recommending that the Board deny relief in this case. The Coast Guard stated that although the applicant's military record does "not contain any additional documentation regarding his discharge beyond his DD Form 214," his DD 214 clearly shows that he avoided a punitive discharge for his lengthy unauthorized absences. Contrary to the applicant's allegation that he had "a good record," the Coast Guard pointed out that the applicant served only about fifteen months before he first went AWOL and then incurred approximately seven months of "time lost" before he was discharged. The Coast Guard argued that the OTH character of the applicant's discharge is correct based on the large amount of "time lost." The Coast Guard also noted inconsistencies in the applicant's allegations.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 16, 2015, 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

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.² The applicant claimed that he discovered the alleged error in his record in 2013. He alleged that he believed until 2013 that his discharge had somehow been automatically upgraded in 1991. He first alleged that someone told him that his OTH discharge would be upgraded to a general discharge after six months. Then he alleged that his attorney told him his OTH discharge would be upgraded to an honorable discharge after a year. The Board finds, however, that the applicant knew his DD 214 showed an OTH discharge when he signed it 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.³ 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”⁴ 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.”⁵
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

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

³ 10 U.S.C. § 1552(b).

⁴ *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

⁵ *Id.* at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396, 1405 n14, 1407 n19 (D.C. Cir. 1995).

his delay. The Board finds no reason why the applicant could not have sought correction of the alleged error in his record more timely.

5. A cursory review of the merits of this case shows that the applicant's OTH discharge is neither erroneous nor unjust. The applicant's DD 214 shows that he received the OTH discharge pursuant to Article 12-B-21 of the Personnel Manual after extended periods of being AWOL, in violation of Article 86 of the Uniform Code of Military Justice. Under Article 12-B-21, members could request OTH discharges to avoid prosecution of criminal charges that would garner felony convictions and punitive discharges at court-martial. The applicant's DD 214 showing so much "time lost" and his OTH discharge is presumptively correct, and he has submitted no information or evidence that persuades the Board otherwise.

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 ON NEXT PAGE)

ORDER

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

May 8, 2015

