

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2015-051

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 March 11, 2015, 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 January 8, 2016, 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 discharge characterized as "Under Other Than Honorable Conditions" (OTH) from the Coast Guard on November 5, 2003, asked the Board to upgrade his discharge from OTH to "Honorable" and his reenry code from RE-4 (ineligible to reenlist) to RE-1 (eligible). He also asked that his "KFS [separation code] be upgraded to a KEB"¹ and that his narrative reason for separation be upgraded from "Triable by Court Martial" to "Early Release – Other." His DD 214 currently shows that he received an OTH discharge in accordance with Article 12.B.21. of the Personnel Manual, COMDTINST M1000.6A.

The applicant stated that he was very young when he was in the Coast Guard, was not aware of the consequences of an OTH discharge, and argued that his command failed to fully explain the potential ramifications of his OTH discharge. He also argued that he was not given a "proper chance" to correct his youthful mistakes, nor was proper corrective action taken by his command after the first sign of his conduct issues. The applicant also argued that although his command stated that his discharge was the result of a series of events, his record does not contain

¹ There is no KEB in the Separation Program Designator (SPD) Handbook, but KFS denotes a voluntary discharge allowed by established directive when separated for conduct triable by court martial for which the member may voluntarily separate in lieu of going to trail. The SPD Handbook also states that an RE-4 reenlistment code and a narrative reason for separation of "Triable by Court Martial" must be assigned to members being discharged with the KFS separation code.

any NJPs, letters of counseling, reductions in rank, etc., to support the assertion that he had a pattern of conduct issues. Finally, the applicant argued that the Coast Guard did not follow proper policies and procedures when it separated him. Specifically, he argued that the Coast Guard failed to provide him with a formal warning pursuant to CG Form 1-CG-3307; that he was not counseled that he was at risk of separation due to his performance, as required by Articles 1.B.9.c. and 1.B.13.j. of the current Military Separations Manual; and that he did not receive formal notification that he would never be able to reenlist, would lose benefits, and had a right to appeal, as required by Article 1.B.5.b. of the current Military Separations Manual.

In support of his application, the applicant submitted several pages from the current Coast Guard Military Separations Manual, as well as copies of numerous contractor licenses, certificates of completion, and certificates of qualification related to his current trade as a licensed plumber.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on October 10, 2000, and after recruit training he attended and completed the [REDACTED] "A" School to earn the [REDACTED] rating.²

On May 1, 2001, a Page 7³ was placed in the applicant's record to document counseling that he was being referred to the Command Collateral Duty Addictions Representative (CDAR) because he had consumed alcohol as a minor, lost consciousness, and lost control of his bodily functions. The Page 7 documented this as his first alcohol incident. He was referred for alcohol screening and advised about the consequences of a second such incident.

On August 29, 2001, a Page 7 was placed in the applicant's record to document counseling for being late to work on August 24, 2001.

On October 17, 2002, a Page 7 was placed in the applicant's record to document counseling that he had failed to pay for charges to his government travel card.

On April 30, 2003, a Page 7 was placed in the applicant's record to document counseling that he had repeatedly failed to wear closed toe shoes while using the base physical fitness center.

On June 26, 2003, the applicant was arrested by local police and charged with driving under the influence of alcohol (DUI) and leaving the scene of an accident. He negotiated with the owner of the vehicle to pay for the damage and the judge held the charges in abeyance pending the payment of the damages.

² "A" School is the Coast Guard's advanced training school where members are trained in their chosen specialty (rate). Class "A" schools range in length from five weeks to five months, depending on the career field.

³ A Page 7 (CG-3307, or Administrative Remarks) entry documents any counseling that is provided to a service member as well as any other noteworthy events that occur during that member's military career.

On July 31, 2003, the applicant removed a government vehicle without authority from the Base. On August 1, 2003, the vehicle was involved in a hit and run accident and the applicant created a public disturbance while intoxicated by threatening to kill and/or inflict bodily harm to witnesses to the accident. The next morning, he reported that the vehicle had been struck at a local gas station while he had been pumping gas, and he filed a false police report.

On August 2, 2003, the applicant was absent without authority for 2.5 days.

On August 8, 2003, the applicant disobeyed an order to attend a psychological screening that was scheduled for him.

On August 12, 2003, the applicant failed to appear in local district court after not making the court-ordered payments for the damage he had caused on June 26, 2003.

On August 18, 2003, an ensign who had been assigned to investigate the alleged DUI and hit-and-run submitted a report to the commanding officer (CO). He found that although the applicant was not driving the vehicle at the time, he was responsible for it and had used it for unofficial, personal purposes. He noted that the applicant had been drinking that night but was not driving the vehicle at the time and so had not committed DUI. He found that the applicant had threatened and assaulted a witness and made a false official statement to the police. The officer recommended that the applicant be charged with the following charges under the Uniform Code of Military Justice (UCMJ): absence without leave (Article 86); failure to obey an order or regulation (Article 92, two specifications); providing false official statements (Article 107); damaging military property (Article 108); assault (Article 134); and disorderly conduct, drunkenness (Article 134).

On September 2, 2003, the applicant was absent without authority for two days. On September 3, 2003, he failed to appear in court on the charges of DUI and leaving the scene of an accident. The court issued a warrant for his arrest.

On September 5, 2003, the applicant's Executive Officer (XO) notified him that an arrest warrant had been issued and asked the applicant to discuss the investigation with him. The applicant subsequently emailed the XO that he would only take orders from selected individuals in his chain of command and that he did not intend to conform to base work schedules.

On September 8, 2003, the applicant was placed in pre-trial confinement. Numerous charges against him were referred for trial by court-martial on October 2, 2003.

On October 22, 2003, the applicant submitted a memorandum to his CO requesting to be discharged under other than honorable conditions for the good of the service in lieu of trial by court-martial. In the memorandum, he stated that he had consulted with a Navy attorney who "fully advised" him of the implications of such a discharge. He added that he was "completely satisfied with the counsel I have received." He also acknowledged that the OTH discharge "may deprive me of virtually all veterans' benefits based on my current period of active service, and I may encounter substantial prejudice in civilian life."

On October 28, 2003, the applicant's CO forwarded the applicant's request to the Coast Guard Personnel Command (CGPC) and recommended approval of the request for an OTH discharge. The CO noted that the applicant had committed numerous violations of the UCMJ as well as criminal offenses in the civilian community and his misconduct had a negative impact on the good order and discipline of the unit.

On October 30, 2003, CGPC authorized the applicant's separation for the good of service in lieu of trial by court martial and indicated that his DD 214 should show the KFS separation code and that the narrative reason for separation should be determined according to the SPD Handbook.

On November 5, 2003, the applicant was given an OTH discharge in accordance with Article 12.B.21. of the Personnel Manual with a KFS separation code, an RE-4 reenlistment code (ineligible to reenlist), and Triable by Court Martial as the narrative reason for separation.

On July 18, 2005, the applicant submitted a Request for Review of Discharge to the Coast Guard Discharge Review Board (DRB), asking the DRB to review his November 5, 2003, discharge. On October 19, 2005, the DRB reviewed the applicant's service record and unanimously determined that there were no errors in his record, and on January 10, 2006, the Commandant of the Coast Guard approved the DRB's recommendation that the applicant's OTH discharge by reason of Triable by Court Martial stand as issued. On January 18, 2006, the Administrator of the DRB forwarded a copy of the DRB's decision to the applicant and advised him of his right to apply to the BCMR for further consideration.

APPLICABLE LAW

Article 12.B.21.a. of the Coast Guard Personnel Manual in effect in 2003, states that an enlisted member may request a discharge under other than honorable conditions for the good of the Service 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. The officer who exercises general court-martial jurisdiction over the member concerned determines whether such proceedings will be delayed pending final action on a request for discharge.

Article 12.B.21.b. of the manual provides that a member who indicates a desire to submit a request for a discharge under other than honorable conditions for the good of the Service will be assigned a lawyer counsel.

Chapter 1 of COMDTINST M1900.4D, the manual for preparing DD 214s, states that the Coast Guard shall enter the appropriate reenlistment code to denote whether or not the member is recommended for reenlistment and shall use only the proper reenlistment code associated with a particular separation Code as shown in the SPD Handbook.

The SPD Handbook mandates the assignment of an RE-4 reenlistment code with the KFS separation code for discharges in lieu of trial by court martial pursuant to Article 12.B.21. of the Personnel Manual. It further states that the KFS code is to be used when there is a voluntary

discharge allowed by established directive when separated for conduct triable by court martial for which the member may voluntarily separate in lieu of going to trial.

SPD Code	Narrative Reason for Separation	RE Code	Separation Authority	Explanation
KFS	Triable by court martial	RE-4	12-B-21	Voluntary discharge allowed by established directive when separated for conduct triable by court martial for which the member may voluntarily separate in lieu of going to trial.

Article 12.B.1.d. of the Personnel Manual provides that when determining whether a member should retain current military status or be separated administratively, the Service may evaluate the member's entire military record. Paragraph 3 states that “[i]f the Service decides to separate a member administratively, Article 12.B.2.e. applies in determining the type of discharge.” Article 12.B.2.e. of the manual states that the sole criterion on which the Coast Guard characterizes service in the current enlistment or period of service is the member’s military record during that enlistment, period of service, or any term extension the law or the Commandant prescribes or the member consents to.

VIEWS OF THE COAST GUARD

On September 3, 2015, 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 because it is untimely and the applicant did not provide any justification for the delay. The JAG argued that the applicant was properly discharged after consulting with appointed military counsel and electing to submit a request for an OTH discharge for the good of the service in an effort to avoid a trial by court-martial.

The JAG noted that the Coast Guard policies submitted by the applicant with his application to the BCMR and cited by him were not in effect at the time of his discharge. Furthermore, the JAG argued, the policies cited by the applicant are not applicable; nor did he provide evidence that the Coast Guard did not evaluate his entire military record in determining whether he should be retained or separated administratively.

In the attached memorandum, PSC argued that the applicant was properly discharged because after being faced with trial by special court-martial for his involvement in an accident with a military vehicle while intoxicated, and after consulting legal counsel, he requested an OTH discharge for the good of the service in lieu of going to trial. The request was approved, and he avoided trial and received his discharge. PSC noted that the OTH discharge was reviewed by the DRB in 2006, which unanimously found that there were no errors or injustice in the applicant’s record and that his discharge was administered properly and “equitable for his offenses.”

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 2, 2015, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 days. He responded on October 12, 2015, and disagreed with the Coast Guard’s recommendation. With regards to the timeliness of his application, the

applicant argued that his application is not untimely because, he alleged, he has 15 years⁴ from the date of discharge to request a correction to his military records, and that if he “really didn’t care or agree with what happened in November of 2003,” then he would not be fighting to correct his record.

With respect to the characterization of his discharge, the applicant stated that he requested a discharge from the Coast Guard only because he had been in a military jail for two months and wanted to avoid a trial by court-martial. He alleged that the command simply wanted to reduce their administrative burden and discharge him because, he alleged, there was “no evidence or paperwork” to show that the command tried to help or retain him.

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. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.⁵
3. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice⁶ or within three years of the decision of the DRB.⁷ The applicant received his DD 214 showing his OTH discharge on November 5, 2003, and he was mailed the DRB’s decision denying his request to upgrade his discharge on January 18, 2006. Therefore, the Board finds that his application is untimely.
4. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.⁸ 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”⁹ 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.”¹⁰

⁴ The BCMR has a three-year statute of limitations. 10 U.S.C. § 1552(b); 33 C.F.R. § 52.22.

⁵ *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

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

⁷ *Ortiz v. Secretary of Defense*, 41 F.3d 738, 743 (D.C. Cir. 1994) (holding that in discharge cases denied by the DRB, the BCMR’s three-year limitations period begins when the DRB issues a decision).

⁸ 10 U.S.C. § 1552(b).

⁹ *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

¹⁰ *Id.* at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

5. Regarding the delay of his application, the applicant argued that he has 15 years from the date of discharge to submit his application to the BCMR, and that the injustice warrants further review. The Board finds that the applicant's explanation for his delay is not compelling because he failed to show that anything prevented him from seeking correction of the alleged error or injustice more promptly. Nor is he correct in his assertion that the BCMR's statute of limitations is 15 years.

6. A cursory review of the merits of this case indicates that the applicant's claims are without merit. The record shows that he had committed numerous violations of the UCMJ, including misuse of a government vehicle, threatening a witness, disobeying orders, unauthorized absences, and making a false official statement. When he failed to show up for trial in a civil court, the court issued a warrant for his arrest, and his misconduct had a negative impact on the good order and discipline of his unit. The record also shows that pursuant to Article 12.B.21.b. of the Personnel Manual, he received the advice of legal counsel and voluntarily submitted a request for an OTH discharge rather than facing trial by court-martial. The applicant signed a statement acknowledging that he had been fully advised by his legal counsel of the implications of his request and understood that he would be deprived of virtually all veterans' benefits. The record shows that the applicant was properly discharged for the good of the Service pursuant to Article 12.B.21.a. of the Personnel Manual after he requested an OTH discharge because he was facing trial by court-martial. There is no evidence supporting the applicant's claim that the disputed information on his DD 214 is erroneous or unjust.

7. 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.

January 8, 2016

