

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2016-038

██████████
██████████

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 upon receiving the applicant's completed application and military records on February 1, 2016, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated December 2, 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 was discharged under other than honorable (OTH) conditions on April 26, 1956, asked the Board to upgrade his discharge to a general discharge based on the facts surrounding his discharge. The applicant alleged that in March 1955, he "was accused of disobeying a lawful order to not assist two teenagers that were drowning." He stated that he risked his life and saved two boys but thereafter he was harassed and bullied by the senior staff at his unit in ██████████. He alleged that he was denied leave to address family issues at his home in ██████████ and, being only 21 years old, took it upon himself to leave. The applicant alleged that he was not given a "fair shake." The applicant argued that his discharge should be upgraded based on his overall service record because he was a good sailor and because of his willingness to risk his life to save the two boys.

The applicant stated that he did not apply earlier because he was told his OTH was permanent and only in 2015 did a veteran's advocate recommend that he apply for an upgrade.

In support of his allegations, the applicant submitted the following:

- A letter from a County Veterans Services Officer dated December 15, 2015, states that the applicant is a respectable county resident who had a local child care business for 43 years and a "great candidate for consideration of a discharge upgrade."

- Three newspaper articles and a news release from March 1955 indicate that while in sick bay due to a virus, the applicant heard two boys screaming for help, noticed that a boat was in trouble about three-quarters of a mile from shore, and jumped in the bay in “semi-delirium” to rescue them. A Coast Guard patrol boat overtook him and “only after they had pulled him aboard did they become aware of his mission.” They heard the distress calls and saved the endangered boys. The applicant was hospitalized and treated for shock and exposure.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on July 21, 1953, at age 19. After recruit training, he advanced from seaman recruit (SR) to seaman apprentice (SA) and was assigned to a cutter. On December 4, 1953, he was punished at mast for violating Article 86 of the Uniform Code of Military Justice (UCMJ) by failing to report for duty. He was awarded five days of restriction to the cutter with two hours of extra duty for five days. In March 1954, the applicant advanced to seaman (SN).

On July 13, 1954, the applicant was temporarily assigned to an air station for training as an aviation machinist’s mate. On October 15, 1954, the applicant was punished at mast for violating Article 134 of the UCMJ for being “disorderly in quarters and communicating a threat. Creating a nuisance.” He pled guilty and was reduced in rate from SN to SA. His training was canceled “by reason of lack of petty officer qualities [and] general unsuitability.” The applicant was transferred to another air station and re-advanced to SN.

On March 3, 1955, the applicant was punished at mast for violating Article 134 of the UCMJ for failing to get up at reveille and awarded three days’ restriction.

On March 22, 1955, the applicant was punished at mast for violating Articles 92, 95, and 134 of the UCMJ for “[d]isorder and neglects to the prejudice of the good order and discipline ... and failure to obey order or regulation ... and [breaking] from arrest and confinement.”

On April 6, 1955, the applicant was punished at a Summary Court-Martial for violating Articles 91 and 92 of the UCMJ by disobeying a direct order from his supervisor to return to barracks and failing to obey regulations regarding privately owned vehicles on base. He pled guilty and was punished with restriction to base for thirty days. The sentence was reviewed and approved.

On August 17, 1955, the applicant’s commanding officer (CO) advised the Commandant in a memorandum that on August 13, 1955, the wife of another member had accused the applicant of forcible rape in the living room of her home that day. She had reported the rape to the local police as well. The applicant had been on liberty that day, and when he returned to base on August 14, 1955, he was delivered into the custody of the police and confined pending a Grand Jury. The applicant posted \$1,000 bail and was released.

On November 1, 1955, the applicant was punished at mast for violating Article 86 of the UCMJ for being absent without leave (AWOL) while assigned to night duty. He was restricted to base for seven days.

On November 29, 1955, the applicant was punished at mast for violating Article 91 of the UCMJ for disobeying a lawful order and showing disrespect for a petty officer. He was assigned four days of extra duties.

Also on November 29, 1955, the Grand Jury issued a finding of “no true bill” and so did not indict the applicant for rape.

On December 5, 1955, the applicant was punished at mast for violating Article 86 of the UCMJ for being AWOL on December 2, 1955. He was assigned two days of extra duties.

On January 4, 1956, the applicant’s CO advised the Commandant that he had convened an investigation into the desirability of retaining the applicant because of his numerous offenses. He noted that the applicant had been repeatedly arrested for reckless driving, and his license had been suspended by civil authorities on December 31, 1955.

On February 17, 1956, the applicant was reported as AWOL because he was confined by local police following another arrest. The applicant returned to base in the morning on February 19, 1956, and was placed “in restricted status pending disciplinary action.” However, later that morning, he was again reported as AWOL with “whereabouts unknown.” On February 26, 1956, the applicant surrendered himself at the air station. He was sent to the stockade to await trial.

On February 20, 1956, the applicant’s CO reported to the Commandant that the applicant had again been arrested for reckless driving and for driving on a suspended license. The CO listed the fact that the applicant was impaired by alcohol while driving as a “mitigating circumstance.”

On February 23, 1956, the District Commander forwarded the CO’s report to the Commandant, listed some of the applicant’s disciplinary problems, and recommended that the applicant be discharged for undesirability. According to a note in the record, the Commandant convened a Board of Investigation, which recommended the applicant’s discharge for undesirability due to unfitness.

On March 6, 1956, the applicant was tried at Special Court-Martial for violating Articles 86 and 134 of the UCMJ for being AWOL from February 17 to 19, 1956; for breaking restriction on February 19, 1956; and for being AWOL from February 19 to 26, 1956. He was sentenced to reduction in rate from SN to SA, forfeiture of \$67 per month for six months, confinement at hard labor for six months, and a Bad Conduct Discharge (BCD). However, a Court Memorandum dated March 29, 1956, shows that after legal review, the only part of the sentence that was approved was confinement at hard labor for two months because the applicant had been misadvised about the maximum sentence before pleading guilty, although the court had not imposed the maximum sentence.

On March 14, 1956, the Commandant directed the District Commander to discharge the applicant “with an UNDESIRABLE discharge by reason of unfitness.”

On April 25, 1956, the applicant was released from confinement, having completed his sentence, and transferred to a District Command “for the purpose of execution of Undesirable Discharge.”

On April 26, 1956, the applicant received an OTH discharge by reason of “unfitness” in accordance with Article 12-3-40A of Coast Guard Regulations. He had served two years, seven months, and seven days of active duty.

VIEWS OF THE COAST GUARD

On June 23, 2016, the Judge Advocate General of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief and adopted the findings and analysis provided in a memorandum on the case prepared by the Coast Guard Personnel Service Center (PSC). PSC stated that the application is untimely and should not be considered by the Board beyond a cursory review. PSC argued that the applicant did not justify the extreme untimeliness of his application. Regarding the applicant’s allegations, PSC stated that there is no evidence supporting the applicant’s claim that he was accused of disobeying a lawful order not to rescue the two teenagers.

PSC summarized the documentation of the applicant’s misconduct and noted that the Commandant had authority to direct the applicant’s undesirable discharge pursuant to Articles 12-3-34 and 12-3-40 of the Personnel Manual then in effect. PSC concluded, based on the applicant’s numerous offenses, that the applicant has not shown that his OTH discharge for unfitness was erroneous or unjust.

RESPONSE TO THE VIEWS OF THE COAST GUARD

On July 15, 2016, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to submit a response within thirty days. The applicant’s representative requested a ten-day extension of the time to respond on August 11, 2016, but no response was received.

APPLICABLE LAW

Article 12-3-33 of the Personnel Manual (CG-207) in effect in 1956 authorized administrative, “undesirable” discharges for members due to misconduct or “unfitness for reasons other than physical disability.” Article 12-3-40 states that the Commandant could direct the discharge of an enlisted member for unfitness if the member “has demonstrated that he is totally unfit for further retention and to rid the service of persons who are useless.” It states that such members are those who—

- (1) Give evidence of habits or traits of character manifested by anti-social or anti-moral trends, criminalism, chronic alcoholism, drug addiction, ... or misconduct.

- (2) Repeatedly commit petty offenses not warranting trial by courts-martial and there is reason to believe that they are not amenable to disciplinary action of a corrective nature.

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 over this matter under 10 U.S.C. § 1552(a).
2. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice.¹ The applicant received his OTH discharge in 1956. Therefore, the 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, 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." 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."³
4. Regarding the delay of his application, the applicant stated that he was unaware that his discharge could be upgraded until 2015. The Board finds that the applicant's explanation for his delay is not compelling because he failed to show that anything prevented him from inquiring about an upgraded discharge more promptly.
5. The Board's cursory review of the merits shows that the applicant's claim cannot prevail. His military record shows that he committed numerous criminal offenses while in the Service. He has submitted nothing to rebut this documentation, which is presumptively correct.⁴ The evidence that in 1955, while delirious due to a virus, he jumped into the bay to try to swim to a boat in distress, which resulted in two boys being rescued by a patrol boat, does not cast doubt on the OTH character of his overall military service and discharge.
6. Accordingly, the Board will not excuse the untimeliness of the application or waive the statute of limitations. The application should be denied.

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

² 10 U.S.C. § 1552(b).

³ *Allen v. Card*, 799 F. Supp. 158, 164-65 (D.D.C. 1992); *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

⁴ 33 C.F.R. § 52.24(b).

ORDER

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

December 2, 2016

