

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2017-105

████████████████████
████████████████

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case after receiving the applicant's completed application on March 8, 2017, and assigned it to staff member ██████████ to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated October 19, 2017, 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 asked the Board to correct his military record by upgrading his discharge under other than honorable conditions (OTH) from the Coast Guard on April 9, 1998, to an honorable or general discharge.¹ He stated that his eight years of service was honorable as evidenced by the fact that he held leadership positions and was "respected by all." He argued that a single lapse of judgment should not change the characterization of his entire service. He added that his family has served honorably in the Coast Guard for generations. The applicant stated that he discovered this error or injustice on October 27, 2015, but did not provide an explanation for this delay.

SUMMARY OF THE APPLICANT'S MILITARY RECORD

On April 3, 1990, the applicant enlisted in the Coast Guard. He earned the quartermaster (████) rating and advanced to ██████. Before the incident that led to his discharge, the applicant

¹ There are five types of discharge: three administrative and two punitive. The three administrative discharges are honorable, general under honorable conditions, and under other than honorable (OTH) conditions. The two punitive discharges may be awarded only as part of the sentence of a conviction by a special or general court-martial. A special court-martial may award a bad conduct discharge (BCD), and a general court-martial may award a BCD or a dishonorable discharge.

received various negative Page 7s in his record.² These Page 7s included entries regarding failure to comply with weight standards, failure to follow orders, having a negative attitude, damaging Coast Guard property when he “jousted” with a baseball bat and when he kicked a space heater that was making an annoying noise, killing a bird inhumanely, and missing formal personnel inspections. He also received non-judicial punishment (NJP) on March 9, 1992, for returning from liberty in such an intoxicated state that he was unable to get to his bunk without assistance. He was awarded fourteen days’ restriction to his ship and fourteen days of extra duty, both suspended for six months on condition of good behavior.

On November 14, 1997, a Report of Offense and Disposition was created regarding the applicant’s actions on or about January 20, 1997. The applicant had been accused of violating Uniform Code of Military Justice (UCMJ) Article 121, larceny; UCMJ Article 78, accessory after the fact; and UCMJ Article 107, false official statements. He was accused of larceny for wrongfully stealing shop tools worth approximately \$3,000, which were the property of the Coast Guard. Regarding the accessory after the fact charge, the applicant was accused of knowing that certain tools belonged to the Coast Guard, knowing that they had been stolen, and then hindering the apprehension of those responsible for the theft by failing to report his knowledge of the stolen tools. He was accused of making a false official statement with the intent to deceive when he made a declaration about these matters on February 6, 1997. On the report, the applicant indicated that he wished to be represented by an attorney and he signed the document on December 1, 1997.

On December 5, 1997, the applicant’s Commanding Officer received the Preliminary Inquiry Officer’s memorandum regarding the allegations against the applicant and a Reserve member involved in the incident, SA E. The memorandum states that the applicant and SA E had been advised of their rights in the presence of witnesses and both acknowledged their rights with their signatures. The Findings of Fact state that on January 22, 1997, tools worth approximately \$3,000 were discovered to be missing. After a thorough search, all personnel were informed that the tools could be returned. After a “reasonable amount of time,” the Coast Guard Investigative Service (CGIS) was asked to conduct a formal incident investigation. CGIS’s investigation identified two suspects, the applicant and SA E. Both suspects confirmed in written statements that they had colluded to steal the tools and had sold them to an automotive repair garage in order to generate extra personal funds, which were divided equally. The Preliminary Inquiry Officer recommended that the charges be disposed of at Mast, but the Executive Officer recommended trial by Special Court-Martial, and the Commanding Officer referred the case to a Special Court-Martial.

On January 13, 1998, the applicant was formally charged with violating UCMJ Article 121, larceny; UCMJ Article 81, conspiracy; UCMJ Article 108, sale of military property; and Article 134, receipt of stolen property. The Article 121 charge states that the applicant stole tools and tool carrying packs with a value of \$3,243. The Article 81 charge states that the applicant conspired with SA E to commit larceny of Coast Guard property in order to sell the property for a profit. The Article 108 charge states that the applicant sold Coast Guard property without proper authority for \$350 to an auto repair business. The Article 134 charge states that the applicant wrongfully

² An Administrative Remarks record entry, form CG-3307, better known as a “Page 7,” is used to document a member’s notification of important information, achievements, or counseling about positive or negative aspects of a member’s performance in the member’s military record.

received shop tools and carrying packs worth \$3, 243, which were the property of the Coast Guard and he knew that they had been stolen.

On February 12, 1998, the applicant submitted a request for an OTH discharge for the good of the service in lieu of undergoing trial by court-martial. He stated that a trial by court-martial could lead to a bad conduct or dishonorable discharge. He stated that he had consulted with a Navy attorney who fully advised him “of the implications of such a request” and he added that he was “completely satisfied with the counsel” he had received. He acknowledged that his request stemmed from the “misconduct contained in the court-martial charges.” He stated that he wished to be administratively discharged rather than tried by a court-martial. The applicant acknowledged that, should his request be approved, he would receive an OTH discharge, which could deprive him of nearly all veterans’ benefits and could cause him to experience prejudice in civilian life. He stated that he attached a sworn statement on his behalf with the request and that he made the request voluntarily. Lastly, he asked his Commanding Officer to review his records for all eight years of service and to exercise discretion in making his determination. The applicant signed the request, which was witnessed by his attorney.

The applicant’s sworn letter on his own behalf is dated February 12, 1998. He stated that he had “no excuses or justification” for his actions. He explained that SA E had asked the applicant to drive a Coast Guard vehicle to SA E’s place of work, where the applicant assisted SA E in moving three boxes into SA E’s personal truck. The applicant stated that SA E opened the boxes and he knew that the assorted tools in the boxes belonged to the Coast Guard. Later that day, SA E sold the tools to an auto shop. Both SA E and the applicant received \$175 in exchange for the tools. The applicant added the following:

I know there was absolutely no justification for stealing the tools. It was a bad decision and an irresponsible act as a second class petty officer as well as a husband and father of three children. I am sorry for abusing the trust my command and the Coast Guard had placed in me. I am sorry for marring my family name as I am a third generation Coast Guard member. I am sorry for placing my family’s future in jeopardy. I cannot place blame on anyone else and am solely responsible for my actions. I did it because I was in serious financial difficulty, with a new baby, a heavy mortgage, and potential foreclosure looming. It was by far the stupidest thing I have ever done.

Also on February 12, 1998, the Officer in Charge of the applicant’s unit forwarded the request with an endorsement and highly recommended approval. On March 11, 1998, the Commanding Officer forwarded the request for discharge with a second endorsement, recommending approval and noting that, given the outcome of the investigation, the separation the applicant requested was “in the best interest of all parties concerned.” The Commanding Officer noted that the applicant’s physical examination had revealed no signs of psychiatric problems and that the applicant had agreed to reimburse the Coast Guard for the value of the stolen property. On March 17, 1998, a third endorsement was provided on the applicant’s discharge request by the District Commander. He stated that he concurred with the recommendation to approve the applicant’s request for an OTH discharge in lieu of trial by court-martial.

On March 11, 1998, the applicant’s attorney notified the Command that the applicant agreed to repay “his share of \$1,093.50 to the United States Coast Guard.”

On March 24, 1998, the applicant's Command received authority to discharge the applicant no later than April 21, 1998, with an OTH discharge for the good of the service in lieu of court-martial.

The applicant was discharged on April 9, 1998, after eight years and seven days of active duty. He received an OTH discharge with the separation code KFS³ and reentry code RE-4. The narrative reason for discharge was "for the good of the service." The applicant signed the DD 214.

VIEWS OF THE COAST GUARD

On August 8, 2017, the Judge Advocate General submitted an advisory opinion in which he adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC) and recommended denying relief.

PSC noted that the application is not timely, and therefore should not be considered by the Board beyond a cursory review. According to Article 12.B.21.a. of M1000.6A, the Personnel Manual in effect at the time of the applicant's discharge, an enlisted member may only request an OTH discharge for the good of the service in lieu of UCMJ action if the punishment could result in a punitive discharge or at any time after court-martial charges have been preferred against the member. Article 12.B.21.b. states that a member who submits such a request will be assigned a lawyer.

PSC argued that the applicant failed to show that an error or injustice exists in regards to the character of service he received on his DD 214. The applicant was "thoroughly counseled regarding his request" to receive an OTH discharge. PSC stated that the Coast Guard afforded him all due process throughout his discharge process. Therefore, no relief was recommended.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 16, 2017, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to submit a response within thirty days. No response was received.

APPLICABLE REGULATIONS

Under Article 12.B.21.a. of the Personnel Manual in effect in 1998, an enlisted member may request an OTH discharge in two circumstances: "in lieu of UCMJ action if punishment for the alleged misconduct could result in a punitive discharge or at any time after court-martial charges have been preferred against him or her." Under Article 12.B.21.b., a member who has submitted a request for an OTH discharge "will be assigned a lawyer counsel."

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:

³ According to the Separation Program Designator Handbook, the KFS code denotes discharge due to conduct triable by court-martial for which the member voluntarily separated in lieu of trial.

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.⁴ The applicant received his OTH discharge in 1998. Therefore, his application is untimely.
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.” 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.”⁵
4. The applicant did not explain his delay in seeking an upgrade of his discharge. The Board finds no evidence that anything prevented the applicant from complaining about his OTH discharge sooner.
5. A cursory review of the case indicates that it lacks potential merit. The applicant does not claim that his discharge was erroneous at the time; he merely asserts that it is unjust to allow a single lapse of judgment to affect his entire eight years of honorable service. But the applicant’s record reflects several significant lapses in judgment during his career, which culminated in serious crimes. He received all due process throughout the proceedings leading up to his discharge. He received counsel and noted in his request for an OTH discharge that he was “completely satisfied” with his attorney. According to the Personnel Manual in effect at the time, the applicant was able to request an OTH discharge in lieu of court-martial proceedings, which could have resulted in a bad conduct or dishonorable discharge. The applicant chose to request the OTH discharge, and his request was endorsed by his chain of command before it was approved. Therefore, the Board finds that the applicant’s claim is unlikely to 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.

(ORDER AND SIGNATURES ON NEXT PAGE)

⁴ 10 U.S.C. § 1552(b).

⁵ *Allen v. Card*, 799 F. Supp. 158, 164-65 (D.D.C. 1992).

ORDER

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

October 19, 2017

