DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2021-027

[redacted]
SN (former)

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on February 11, 2021, and assigned the case to the Deputy Chair to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated October 1, 2021, 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, a former Seaman (SN/E-3) who was discharged under "other than honorable" (OTH) conditions on August 19, 2000, asked the Board to correct his record by changing his reenlistment code from RE-4 (ineligible to reenlist) to RE-3Y (eligible for reenlistment except for disqualifying factor; unsatisfactory performance).

The applicant stated that he was discharged from the Coast Guard in accordance with policy. However, he argued that his reenlistment code is unjust for two reasons. First, the applicant argued that his reenlistment code is unjust because his discharge was based on one incident. He stated that he did not have any other negative or unfavorable incidents in his record. Second, the applicant argued that his reenlistment code is unjust because the Coast Guard failed to consider his positive performance after he was informed that he was being discharged. For example, he stated, he completed a significant amount of over-time in an effort to remain in the Coast Guard.

To support his request, the applicant submitted several Coast Guard awards and commendations. He also submitted approximately ten letters of recommendation from fellow Coast Guard members. In the letters, the applicant was described as hard-working, helpful, professional, motivated, respectful, and dedicated to his career. Many of the letters confirmed the applicant's assertion that he completed a significant amount of over-time. Many of the letters also recognized that the applicant had made a mistake, but recommended that he be retained in the Coast Guard and given a second chance.

The applicant also provided several documents to demonstrate his post-service conduct. He provided documentation that he completed his bachelor's degree in 2004. Additionally, he provided several commendations and letters of recommendation from his post-service careers as an employee of FedEx, a highway patrol officer, and a teacher.

Regarding the delay in his application, the applicant stated that he did not have access to all of his Coast Guard records to submit in a timely manner. He stated that in 2007, he moved abroad and taught oversees for about a decade. While he was abroad, his mother and brother stored many of his personal belongings including his Coast Guard documents. He stated that it was not until 2018 when he moved back to the United States that he retrieved his belongings and was able to submit his application.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on August 10, 1998. Following recruit training, he was stationed aboard a cutter.

Just over two years later, on August 18, 2000, the applicant was discharged for the good of the service in accordance with Article 12.B.21. of the Coast Guard Personnel Manual. His DD-214 shows "under other than honorable conditions" as the character of discharge; "triable by court martial" as the narrative reason for separation; RE-4 (ineligible for reenlistment) as his reenlistment code; and KFS (triable by court martial) as his separation code. The applicant signed his DD-214.

On March 9, 2005, the applicant submitted an application to the Discharge Review Board (DRB) in which he requested that his OTH discharge be upgraded to honorable. He argued that his discharge was inequitable because it was based on a single incident, it failed to consider his positive performance after he was informed that he was being discharged, and it did not take into account the threats that he had received from a fellow Coast Guard member.

On May 11, 2005, the DRB convened to review the propriety and equity of the applicant's discharge. The DRB stated that after thoroughly reviewing his record of service and all available documentation, it was determined that the applicant's discharge was carried out in accordance with Coast Guard policy. Specifically, the DRB determined that the applicant's OTH discharge was appropriate due to his repeated drug use. However, the DRB determined in a split decision that the applicant's reenlistment code should be upgraded from RE-4 to RE-3Y. The majority of the DRB determined that the change to the applicant's reenlistment code was appropriate because he could be a productive member of the military. The majority cited numerous supportive comments from fellow Coast Guard members, documents/letters of reference from school administrators, and letters from his post-service employer, which the applicant had submitted.

On August 12, 2005, the president of the DRB approved the proceedings and recommendation of the DRB with the exception of the recommendation to upgrade the applicant's reenlistment code from RE-4 to RE-3Y. The president of the DRB determined that the applicant's DD-214 would stand as issued.

VIEWS OF THE COAST GUARD

On June 28, 2021, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC argued that the application is not timely. Regarding the merits of the case, PSC argued that the applicant failed to show that the Coast Guard committed an error or injustice. Further, PSC stated that there is no policy that allows for a former member's reenlistment code to be changed due to the passage of time or his post-service conduct.

The JAG reiterated that the applicant failed to show that the Coast Guard committed an error or injustice. The JAG acknowledged that the applicant provided ample evidence of his work ethic while his discharge was pending. However, the JAG stated that Coast Guard policy required that the applicant be discharged due to his involvement with illegal drugs. Further, the JAG acknowledged the applicant's commendable post-service conduct. However, the JAG argued that the applicant's education and employment is immaterial because the Board should not upgrade discharges solely on the basis of a member's post-service conduct.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On July 14, 2021, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. In his response, the applicant argued that it is just and proper for the Coast Guard to change his reenlistment code from RE-4 to RE-3Y.

The applicant argued that his reenlistment code should be upgraded based on his letters of recommendation. He stated that after learning of his discharge, he obtained letters of recommendation from several shipmates at his unit. He stated that these letters reflect sincere and relevant input on his service since his shipmates knew him well.

The applicant also argued that his reenlistment code should be upgraded in accordance with the DRB's majority decision, which was not approved. The applicant stated that after he explained his situation to the DRB in 2005, the majority voted in favor of upgrading his reenlistment code to RE-3Y.

Finally, the applicant addressed the delay in his application. He maintained that he submitted his application when he had all of the necessary paperwork. According to the applicant, his mother and brother had all of his military records that were pertinent to his request. However, both his mother and brother unexpectedly moved during the time he was compiling his paperwork to submit his application. He stated that he submitted his application as soon as he reasonably could under the circumstances.

APPLICABLE LAW AND POLICY

Article 12.B.21.a. of the Coast Guard Personnel Manual, COMDTINST M1000.6A, discusses discharges for the good for 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. 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. Send requests for discharge under other than honorable conditions for the good of the Service through the officer exercising general court-martial jurisdiction for his or her personal review and comment.

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 RE-4 reenlistment code with the KFS separation code for discharges in lieu of trail by court martial pursuant to Article 12.B.21. of the Personnel Manual.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions based on the applicant's military record and submissions, the Coast Guard's submission 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.[1]

3. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice.[2] The record shows that the applicant signed and received his DD-214 upon his discharge on August 18, 2000. Then, on March 9, 2005, the applicant timely submitted an application to the DRB. Shortly thereafter, on August 12, 2005, the president of the DRB approved the proceedings and recommendation of the DRB. Therefore, the preponderance of the evidence shows that the applicant did not file his application within three years of the decision of the DRB,[3] and his application untimely.

4. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.[4] 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

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[1] *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).
[2] 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.
[3] *Ortiz v. Secretary of Defense*, 41 F.3d 738, 743 (D.C. Cir. 1994).
[4] 10 U.S.C. § 1552(b).

and the potential merits of the claim based on a cursory review"[5] 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."[6] Pursuant to these requirements, the Board finds the following:

a. The applicant waited more than fifteen years after receiving a decision from the DRB to submit an application to the Board. Regarding the delay in applying to the Board, the applicant stated that he was unable to submit his application earlier because his family had all of his relevant military records. The Board finds that the applicant's explanation for the delay is not compelling because he failed to show that anything prevented him from seeking correction of the alleged error or injustice more promptly.

b. A cursory review of the merits of this case shows that the applicant's claim lacks potential merit. The applicant did not allege that the Coast Guard committed an error with respect to his reenlistment code. Instead, the applicant argued that his reenlistment code is unjust based on the totality of his military record and post-service achievements. In accordance with Article 12.B.21. of the Personnel Manual, a member can request an OTH discharge for the good of the service in lieu of undergoing trial by court-martial. In such instance, the SPD Handbook mandates a KFS separation code and an RE-4 reenlistment code. Further, the delegate of the Secretary advised the Board in 1976 that when exercising its equitable authority the Board "should not upgrade a discharge unless it is convinced… that in light of today's standards the discharge was disproportionately severe vis-à-vis the conduct in response to which it was imposed.[7] In 2010, ALCOAST 125/10 changed the default reenlistment code for members who are discharged prior to the end of their enlistment in most cases to RE-3. However, the reenlistment code associated with the KFS separation code was not changed. Presently, members who receive an OTH discharge for the good of the service in lieu of undergoing court-martial still receive an RE-4 reenlistment code. The disputed record is presumptively correct,[8] and the record contains no persuasive evidence that substantiates his allegations of error or injustice in his official military record.

5. Accordingly, the Board will not excuse the application's untimeliness or waive the statute of limitations to conduct a thorough review of the merits. The applicant's request should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

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[5] *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).
[6] *Id*. at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).
[7] *See* Memorandum of the General Counsel to J. Warner Mills, *et al.*, Board for Correction of Military Records (July 8, 1976).
[8] 33 C.F.R. § 52.24(b); *see Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992) (citing *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979), for the required presumption, absent evidence to the contrary, that Government officials have carried out their duties "correctly, lawfully, and in good faith.").

ORDER

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

October 1, 2021

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*The member concurred in the decision but was unavailable to sign. Pursuant to 33 C.F.R. 52.11(b), two members constitute a quorum.