


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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2005-026

XXXXXXXXXXXXXX
XXXXXXXXXXXXXX, SN (former)

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 application was docketed on November 18, 2004, upon receipt of the applicant's completed application and military records.

This final decision, dated July 28, 2005 is 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 upgrade her 1986 general discharge under honorable conditions (general discharge) by reason of misconduct to an honorable discharge. She stated that she would like to receive educational benefits but the general discharge prevents her from doing so. The applicant's DD Form 214 indicates that she contributed to the Post-Vietnam Era Veterans Educational Assistance Program (VEAP). She stated that she is currently involved with many civic programs through her church and employer, and that a college degree would enhance her ability to serve the community.

The applicant indicated that she did not discover the alleged error with respect to the character of her discharge until October 1, 2004.

SUMMARY OF THE MILITARY RECORD

On July 25, 1983, the applicant enlisted in the Coast Guard for a period of four years.

On July 25, 1983, the applicant signed a statement in which she acknowledged the following:

I have been advised that the illegal use or possession of drugs constitutes a serious breach of discipline, which will not be tolerated. Also, illegal drug use or possession is counter to esprit de corps, mission performance and jeopardizes safety. No member will use, possess or distribute illegal drugs or drug paraphernalia."

On September 10, 1986, a laboratory report indicated that the applicant's urine had tested positive for cocaine.

On October 6, 1986, the applicant's commanding officer (CO) notified the applicant that action had been initiated to discharge her from the Coast Guard with a general discharge because her urine specimen had tested positive for cocaine during a base-wide screening. The applicant acknowledged by signature the proposed discharge, the right to consult with a lawyer, and the right to submit a statement in her own behalf. She also acknowledged that the CO recommended that she receive a general discharge under honorable conditions.

In her statement objecting to the discharge, the applicant asked to remain in the Coast Guard. She stated that if retained she would voluntarily seek rehabilitation and gladly take on extra duties as a rehabilitation counselor for any future problems that may arise for other Coast Guard personnel.

On October 7, 1986, the applicant was taken to captain's mast (non-judicial punishment) for the illegal use of drugs based on her urine specimen that tested positive for cocaine. Her punishment included a reduction in rate from pay grade E-4 to E-3 and forfeiture of \$250 pay for one month.

On October 22, 1986, the Commandant directed that the applicant be discharged with a general discharge due to misconduct, with a HKK (misconduct-drug abuse) separation code and an RE-4 (not eligible for reenlistment) reenlistment code.

VIEWS OF THE COAST GUARD

On April 15, 2005, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion and recommended that the Board deny the application because of untimeliness or lack of proof.

With respect to untimeliness, the JAG stated that an application for correction of a military record must be filed within three years after the alleged error or injustice was or should have been discovered, unless the delay is excused in the interest of justice. He stated that the applicant filed her application more than 14 years after the statute of limitations had expired.

The JAG stated that it is not in the interest of justice to excuse the applicant's untimely filing. In this regard, the JAG stated that the BCMR's regulations require that an applicant filing an untimely request set forth reasons explaining why it is in the interest of justice for the BCMR to accept his application for correction. In making a determination whether to waive the statute of limitations, the Board must consider the reasons for the delay and make a cursory review of the potential merits of the claim. Dickson v. Secretary of Defense, 68 F.3d 1396 (D.C. Cir 1995). The JAG argued that the applicant's statement that she did not discover the alleged error until October 1, 2004, is not credible because the evidence of record shows that she was well aware of the characterization of her discharge and submitted a statement in her behalf seeking to remain in the Coast Guard. Moreover, he argued that she should have discovered the alleged error on the DD Form 214 when it was issued to her in 1986.

With respect to the merits of her application, the JAG argued that she has presented no evidence that the Coast Guard erred in characterizing her service as it did, and instead relied on unsupported assertions that she is a community activist. The JAG stated that the applicant violated the core values of the Coast Guard by using illegal drugs and did not complete her obligated service honorably. The JAG concluded: "It is not in the interest of justice to waive the statutory three-year filing deadline in this case."

APPLICANT RESPONSE TO THE VIEWS OF THE COAST GUARD

On April 6, 2005, a copy of the views of the Coast Guard was sent to the applicant for a reply. The BCMR did not receive a response from the applicant.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's and Coast Guard submissions, the military record of the applicant, and applicable law:

1. The BCMR has jurisdiction over this matter pursuant to section 1552 of title 10, United States Code. The application is untimely.

2. To be timely, an application for correction of a military record must be submitted within three years after the alleged error or injustice was discovered or should have been discovered. See 33 CFR 52.22.

3. However, the Board may still consider an untimely application on the merits, if it is in the interest of justice to do so. In deciding whether it is in the interest of justice to waive the statute of limitations, the Board should take into consideration the length and reason for the delay and the likelihood of the applicant's success on the merits. See Dickson v. Secretary of Defense, 68 F.3d 1396 (D.C. Cir. 1995); Allen v. Card, 799 F. Supp. 158, 164 (D.D.C. 1992).

4. The applicant's application was submitted approximately 14 years beyond the statute of limitations. The applicant alleged that she did not discover the alleged error until October 1, 2004. However, in light of the fact that the general discharge was listed on her DD Form 214, which she signed at the time of her discharge, and her acknowledgement that her CO had recommended that she receive a general discharge prior to her discharge, the Board is persuaded that the applicant discovered or should have discovered the alleged error at the time of her discharge in 1986.

5. Due to the length of the delay and the lack of persuasive reasons for not filing her application sooner, the Board is required to conduct only a cursory review of the merits of this claim in deciding whether to waive the statute of limitations. In this regard, the Court stated in Card 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 conducting a full review of the case. See Allen v. Card at 164-165. Based on a cursory review, the Board finds the merits of the claim insufficient to justify waving the statute of limitations. The applicant did not allege any specific error or injustice on the part of the Coast Guard. Nor did she present any proof that the Coast Guard had committed an error or injustice by discharging her with a general discharge due to misconduct. Moreover, there is sufficient evidence in the record to support her general discharge by reason of misconduct. After being warned about the use of illegal drugs upon her entry into the Coast Guard, the applicant's urine tested positive for cocaine for which she was punished at captain's mast. Under Article 12-B-18.b.(4) of the Personnel Manual, the applicant could receive no higher than a general discharge for a discharge by reason of misconduct (drugs).

6. Accordingly, due to length of the delay, the unpersuasive reason for not filing her application sooner, and the probable lack of success on the merits of her claim, the Board finds that it is not in the interest of justice to waive the statute of limitations in this case and it should be denied because it is untimely.

[ORDER AND SIGNATURES ON NEXT PAGE]

ORDER

The application of former SN xxxxxxxxxxxxxxxxxxxx, USCG, for correction of her military record is denied.

