

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2003-070

FINAL DECISION

██████████ Chair:

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 received on June 17, 2002, and docketed on April 21, 2003, upon receipt of the applicant's completed application for correction of his military record.¹

This final decision, dated December 18, 2003, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant asked the Board to correct his military record by removing all references to lost time for the period April 16, 1996 to April 29, 1996 from his DD Form 214 and by removing all references from his military record that indicate he was absent

¹ Although requested several times, the Board never received the applicant's records from the Coast Guard. The Board was informed by the Personnel Records Center that the record had been checked out by the Coast Guard. The Coast Guard subsequently informed the Board that it was unable to locate the applicant's military record. The Board informed the applicant of this situation and asked to be provided with any copies of his military record that may be in his possession. On April 15, 2003, the Board received copies of what appears to be the applicant's official military record from the applicant. He stated that he had obtained it from his private counsel and expected it to be returned to him. On the FRONT outside COVER of the military record is the statement "U.S. Coast Guard . . . Personal Data" and on the back cover is the Commandant's address and the statement - "IF FOUND, PLACE IN NEAREST MAILBOX AND RETURN FOR RETURN BY OFFICIAL MAIL." The applicant also provided the Board with a certified copy of his military record that he obtained from his defense attorney.

without leave (AWOL)² for this period. He further requested that, if his record is corrected, he receive pay and allowances for this period.

APPLICANT'S ALLEGATIONS

The applicant alleged that that he was not AWOL for the period April 16, 1996 to April 29, 1996, but was on authorized leave.³ He alleged that Commander, Coast Guard Personnel Command (CGPC) had authorized his retirement effective July 1, 1996.⁴ He further claimed that Commander, [REDACTED] Coast Guard District, had approved his request to travel outside the continental United States during the period April 10, 1996 to June 30, 1996. The applicant stated that while on authorized leave in xxxxxx he heard that he was AWOL, after which he returned immediately to the [REDACTED] Coast Guard District.

SUMMARY OF THE RECORD AND SUBMISSIONS

On November 9, 1994, the applicant requested voluntary retirement, effective July 1, 199x. In his letter requesting retirement, he indicated that his place of residence would be xxxxxxxxxxxxxx.

² Unauthorized absence and AWOL are used interchangeably throughout his decision.

³ Article 7.a.2.a. of the Personnel Manual defines leave as "the authorized absence of an individual from a place of duty, chargeable against such individual in accordance with applicable law."

Article 7.A.5.b. of the Personnel Manual states that district commanders, commanders of maintenance and logistics commands, commanding officers of Headquarters units, commanding officers of district units or such officers as they may designate may grant any amount of regular leave to which officers and enlisted personnel may be entitled.

⁴ Article 12.C.1.b. of the Personnel Manual states that [CGPC] issues orders containing the effective retirement date, the laws governing the retirement, and travel authorization. The provision also states that all non-disability retirements occur on the first day of a calendar month with the member usually detaching on the last day of the preceding month. It further states that if the member detaches earlier, the time between detachment and the effective retirement date is charged as annual leave.

Article 12.C.1.c.1. (Leave in Connection with Retirement) of the Personnel Manual states "At their discretion leave-granting authorities may grant earned or advance leave accompanying retirement orders . . ." Subsection 2. states, "If authorities grant leave in connection with retirement, complete the member's records before he or she departs on leave, except for the final date entries, and endorse retirement orders to show the amount of leave granted. The retirement processing station subsequently completes all documents in the Service member's official record on the effective retirement date and transmits the member's copies of these documents to him or her.

On November 9, 1994, the applicant's commanding officer (CO), Facilities Design and Construction Center ██████ recommended approval of the applicant's retirement request.

On January 6, 1995, the Commander, Coast Guard Personnel Command (CGPC), informed the applicant that his request for retirement had been approved and had been placed in the file for July 1, 199x. CGPC further informed the applicant that "you will be considered for retirement on that date in accordance with the regulations and policies contained in the [Chapter 12 of the Personnel Manual]."

On March 12, 1996, the Commander, ██████ Coast Guard District granted the applicant permission to travel to xxxxxxxxx for the period April 10, 1996 to June 30, 1996. The letter, with the subject - Authorization to Travel Outside the Continental Limits of the United States - stated the following: "In response to your request you are granted permission to travel to xxxxxxxxx for the period April 10, 1996 to June 30, 1996."

The applicant's leave and earnings statement (LES) for the period 1 through 30 April 1996 contains the following notation: "Pay/leave suspended from 0800, 16Apr96 to present due to unauthorized absence." His LES for the month of May 1996 contained the following: "Pay/leave suspended from 0800, 16Apr96 to 1114, 29 Apr 96 due to unauthorized absence."

In the military records submitted by the applicant is an unapproved "Standard Travel Order for Military Personnel." It indicates that if leave had been approved it would have begun on April 9, 1996 for 82 days INCONUS (0 days OUTCONUS), after which the applicant would have reported to Commander, ██████ Coast Guard District for separation.

On September 6, 199x in accordance with pleas pursuant to a pre-trial agreement, the applicant was convicted at a General Court-Martial (GCM) of numerous specifications of making false official statements, a violation of Article 107 of the Uniform Code of Military Justice (UCMJ) and one specification of stealing a government check, a violation of Article 121 of the UCMJ. He was sentenced to confinement for one year, to be reduced in rate from pay grade E-7 to pay grade E-4, and to pay a \$5,000 fine. As agreed to in the pre-trial agreement, the convening authority withdrew an unauthorized absence (AWOL) charge for the period April 9, 1996 to April 29, 1996, as well as other charges.

On October 31, 199x, after completing his confinement, the applicant was permitted to retire at pay grade E-7. The DD Form 214 noted two periods of lost time:

April 16, 1996 to April 29, 1996 and September 6, 1996 until June 25, 1997 (his period of confinement).

The Court of Military Appeals completed its review of the applicant GCM on April 21, 2000.

The military records before the Board contain no retirement or leave orders for the applicant.

VIEWS OF THE COAST GUARD

On August 22, 2003, the Chief Counsel of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request.

The Chief Counsel argued that the applicant's application was untimely and that the applicant failed to show that it was in the interest of justice to waive the untimeliness. The Chief Counsel stated that an application for correction of a military record must be filed within 3 years after the alleged error or injustice was discovered or should have been discovered, unless the delay is excused in the interest of justice. He stated that the applicant should have discovered the alleged error on his DD Form 214 when it was issued to him in 199x. He noted that the applicant's BCMR application does not explain why the applicant did not file his application earlier. The Chief Counsel argued that the statute of limitations should not be waived in this case because there is very little likelihood that the applicant will prevail on the merits of his claim.

The Chief Counsel pointed out that on or about September 6, 199x, the applicant was convicted at a General Court-Martial (GCM) of numerous specifications of making false official statements, a violation of Article 107 of the Uniform Code of Military Justice (UCMJ) and one specification of stealing a government check, a violation of Article 121 of the UCMJ. The Chief Counsel stated that as part of a pre-trial agreement, the convening authority withdrew an unauthorized absence (AWOL) charge for the period April 9, 1996 to April 29, 1996.

The Chief Counsel stated that the applicant is attempting to use the fact that the unauthorized absence charge was withdrawn to show that he was not absent without leave for the period April 9, 1996 to April 29, 1996. He stated that members who are absent without leave have their pay stopped and are charged with lost time regardless of whether they are prosecuted. With respect to the evidence offered by the applicant to prove he was on authorized leave the Chief Counsel argued as follows:

- (1) In light of Applicant's criminal record illustrating his willingness to lie whenever it is convenient to do so, the Board should view all self-serving assertions of the Applicant with the greatest skepticism.

(2) Applicant offers into evidence [a] Request for Voluntary Retirement that lists his proposed place of residence after retirement as XXXXXXXX and a letter approving that request. This evidence is irrelevant to the pertinent issue of whether Applicant was on authorized leave during the period 16 April to 29 April 1996.

(3) Applicant offers into evidence a letter authorizing his travel to xxxxxx during the period 10 April 1996 through 30 June 1996. While on the surface, this would appear to support applicant's assertion that he was not absent without leave, it does not. The requirement to receive authorization for overseas travel is a separate and distinct requirement in addition to the normal requirement to have leave approved in advance by an official authorized to do so. Coast Guard Personnel Manual, Chapter 16-J. In essence, Applicant's evidence merely shows that he was eligible to go to XXXXXXXX on leave during the period in question, not that he requested and received such authorization.

The Chief Counsel attached a memorandum from Commander, Coast Guard Personnel Command (CGPC) as Enclosure (1) to the advisory opinion. CGPC stated that the letter from District [REDACTED] granted the applicant permission to travel overseas, but not leave to be away from his unit. CGPC stated that such authority rested with the applicant's CO of the Facilities Design and Construction Center [REDACTED] the applicant having reported to that unit in 1990. He noted that the applicant offered no proof that his CO had granted him leave for the period under review.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 16, 2003, the BCMR received the applicant's response to the views of the Coast Guard. The applicant stated that he was told by his trial and appellate defense lawyers not to file a BCMR application until his court-martial and review were completed.

The applicant points to the fact that the BCMR was unable to obtain his original military record. He questions why the BCMR cannot use "its power" to simply request his personnel records. He alleged that the following documents would be in his military record:

"Permanent change of station orders (PCS) authorizing [his] retirement, were issued by the [REDACTED] (apru) having the authority to do so via Commandant (Mpc-sep-2) dated 6 January 1995.

"Personnel Management Information Form (PMIS) 14D, the computer form authorizing pay matters that I was: (a) authorized "terminal leave" i.e. using leave accrued commencing 10 April 1996 through 30 June 1996 where I would then be placed on the retired rolls. (b) Authorized "AO" leave (leave outonus) based on the letter from [REDACTED] (c) Effective retirement date of 1 Jul 9x. (app)."

The applicant stated that his past court-martial conviction is not relevant to the issue at hand, which is "was [he] on authorized leave or not[.]" He stated that the Coast Guard makes assumptions but it does not provide the Board with factual evidence. He stated that if the Coast Guard would produce his military record, it would contain the documents showing that he was on authorized leave during the period in question.

The applicant also denied that CO, Facilities Design and Construction Center [REDACTED] was his commanding officer. He alleged that he had been transferred to District [REDACTED] and was a member of that command at the time of the unauthorized absence.

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 section 1552 of title 10 of the United States Code.

2. The application was not timely. To be timely, an application for correction of a military record must be submitted within three years after the applicant discovered or should have discovered the alleged error or injustice. See 33 CFR 52.22. This application was submitted approximately five years after his retirement from the Coast Guard. The lost time is listed on his DD Form 214 and should have been discovered on October 31, 1997, the date he received it.

3. The Board may still consider the application on the merits, however, if it finds it is in the interest of justice to do so. The interest of justice is determined by taking into consideration the reasons for and the length of the delay and the likelihood of success on the merits of the claim. See, Dickson v. Secretary of Defense, 68 F. 3rd 1396 (D.D.C. 1995).

4. The applicant's DD Form 149 does not contain a date of discovery of the alleged error or an explanation why it is in the interest of justice to waive the statute of limitations in this case. However, in his reply to the advisory opinion he stated that he did not file his application sooner because he was told by his various defense counsels to delay doing so until his GCM review process was complete. In this regard, the

applicant did not state the date on which the GCM review was completed nor did he provide supporting statements from his defense counsel that they advised him not to file a BCMR application until his GCM review had been completed. The Board does not find the applicant's reasons for not filing his application sooner persuasive.

5. The Board finds that it is unlikely that the applicant would prevail on the merits of his claim even if the Board were to waive the statute of limitations in this case. The applicant has not produced sufficient evidence showing that he was authorized leave by his CO for the period under review. While the Commander, [REDACTED] Coast Guard District granted permission for the applicant to travel outside the United States to XXXXXXXX between April 10, 1996 and April 29, 1996, he still needed specific permission from his CO or the CO's delegate to be away from the unit for the period April 16 to 29 April 1996. There is no evidence in the record that the applicant was granted leave to be away from his unit during this period. The Personnel Manual lists granting permission to travel overseas and the granting of authorized leave from one's place of duty as two separate actions. See, Chapter 7 and Chapter 16 of the Personnel Manual. The applicant has produced evidence showing that he was granted permission to travel overseas but nothing showing that he had permission to be away from his unit/duties.

6. The Board is persuaded in this finding by the fact that in the records submitted by the applicant, which appear to include his official military record, is an incomplete and unsigned "Standard Travel Order for Military Personnel," which if it had been approved by his CO would have authorized leave for the applicant beginning on April 9, 1996. Since this document was incomplete and unsigned, it had no force or effect.

7. The approval of the applicant's 199x request for retirement has no bearing on whether the period from April 16 to April 29, 1996 was "lost time" unless he had received retirement orders that contained an endorsement stating the amount of leave the applicant had been granted. Article 12.C.1.c.2 of the Personnel Manual states that if leave is granted in conjunction with retirement orders, such orders are to be endorsed to show the amount of leave granted. The applicant's record contains no retirement orders and therefore no endorsement showing a number of leave days granted.

8. The fact that the unauthorized absence charge was withdrawn as part of a pre-trial agreement does not prove that the applicant was on authorized leave during the period in question. According to Article 2.J.2.b of the Pay Manual, the administrative accounting for time in the military is not dependent on whether a member is charged and punished for unauthorized absence. It is simply a matter of whether the appropriate individual had granted permission for the applicant to be away from his duty station and, if not, whether the absence was excused or unavoidable. This provision further states that if the absence was not excused or unavoidable, the member

forfeits pay and allowances for the period of absence. There is nothing in the record showing that the period of absence was excused or unavoidable.

9. The applicant asserted that his military record would contain all of the evidence to prove that he was on authorized leave during the period in question. That possibility exists, but the Board is persuaded based on the military records submitted by this applicant that if such documents existed they would be in the record. After all, his retirement request, CGPC's letter conditionally approving that request, District [REDACTED] letter granting him permission to travel overseas, and his LESs were all in the record. The Board is persuaded that if there were other documents establishing that the applicant was on authorized leave they, too, would be in the military records that he submitted. If the applicant later discovers credible evidence that proves that he was authorized leave for the period in question, he should submit that evidence to the Board and request reconsideration of his case. The fact that the Coast Guard did not produce the applicant's official record does not entitle the applicant to a grant of relief, particularly in a case such as this, where it appears that the applicant and his defense counsel had possession of his official military record.

10. The applicant disagreed with the Coast Guard that his unit at the time of his unauthorized absence was CO, Facilities Design and Construction Center [REDACTED]. He claimed that he had been transferred to District [REDACTED] but does not state the date this transfer occurred. Nor did he submit permanent change of station orders or any other evidence that supports his allegation in this regard. Even if the applicant had been transferred to District [REDACTED] there are no approved and/or endorsed leave orders in the record.

11. Therefore, based on the length of the delay, the lack of a persuasive reason for not filing his application sooner, and the probable lack of success on the merits of his claim, the Board finds that it is not in the interest of justice to waive the statute of limitations in this case.

12. Accordingly, the application should be denied.

ORDER

The application of xxxxxxxxxxxxxxxxxxxx, USCG (Ret.), for correction of his military record is hereby denied.

