DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2003-150

Xxxxxxxxxxxxxxxxxxx
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FINAL DECISION

[redacted]

This proceeding was conducted under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The BCMR docketed the application on January 12, 2004, upon receipt of the applicant's application form and military records.

This final decision, dated September 23, 2004, is signed by the three duly appointed members who were designated to serve as the Board in this case.

RELIEF REQUESTED

The applicant asked the Board to upgrade one of his conduct marks from 3.8 to 4.0 and to remove evidence of "own misconduct [in] July 1967." The applicant submitted two application forms. On the first, he alleged that at a captain's mast in July 1966, he was awarded ten hours of extra duty and a heavy work and watch load. He stated that he discovered the error in 1966, but feels that it is in the interest of justice for the Board to waive the three-year statute of limitations because he paid for his mistake and would feel better if he had marks of 4.0 for conduct "across the board."

On the second application form, the applicant stated that he did not purposely wreck his 1962 TR3 Triumph one-half mile from his base. He alleged that he felt coerced to sign a statement and that he was not given legal representation. He alleged that the car accident was just an accident, but his enlistment was extended by 26 days and he paid a fine of $250.

In response to queries from the Chair, the applicant provided some elaboration. He stated that the "situation was coerced" and that he was never offered legal representation or advised of his right to appeal the determination. He alleged he was never told that the line of duty determination could cause him "problems down the line." He alleged that, although his conduct was described as "willful," he did not intend to wreck the car. However, he signed something because he was an enlisted member in a room full of officers and did what he was told to do. He admitted that he "should have pursued [the] issue years ago" but that it has become "a matter of principle now" and that he feels he is "serving a life sentence for [a] minor car accident."

SUMMARY OF THE RECORD

On April 26, 1965, the applicant enlisted in the Coast Guard for four years.

On May 6, 1966, the applicant went to a captain's mast (non-judicial punishment, or NJP) for violating Article 128 of the Uniform Code of Military Justice (UCMJ) by committing "assault consummated by a battery in that [he] on board [the cutter] on or about 4 May 66 unlawfully struck [another member] with his fist." According to the mast form, the applicant was assigned five days of extra duty.

On July 31, 1966, the applicant received a mark of 3.8 (out of 4.0) for conduct on his performance evaluation. All other conduct marks in his record are 4.0.

On June 15, 1967, the applicant was apparently injured in an automobile accident and did not return to duty until July 10, 1967.

On July 6, 1967, the applicant's commanding officer (CO) transferred him and his records to a shore unit for administrative purposes because he was on "no duty status." The CO noted that if the applicant became qualified to resume duties, he should be returned to the cutter or assigned to a shore unit in "the [redacted] area … because of pending criminal charges against him."

On November 21, 1967, the CO sent the Commandant a letter forwarding the police report of the applicant's arrest for reckless driving and court records of his conviction and sentence, which he indicated included a $100 fine and the loss of his driver's license for 60 days.[1] The CO noted that the Coast Guard's own investigation was still pending.

[1] The attachments to this letter are not in the applicant's military record.

On January 19, 1968, the Final Approving Authority approved the finding of the investigative report that the injuries sustained by the applicant on June 15, 1967, "were not incurred in the line of duty and were due to his own misconduct."[2]

On January 24, 1968, the CO asked the Commandant to extend the applicant's enlistment for 25 days because the applicant "sustained injuries which were due to his own misconduct." The end of the applicant's four-year enlistment was reset as May 20, 1969.

On May 20, 1969, the applicant received an honorable separation upon the expiration of his enlistment and was transferred to the Reserve. His DD 214 indicates that the period from June 15 to July 10, 1967 was unpaid time lost. A form CG 3309 in his record states that his enlistment "was extended for 25 days for misconduct from 15 June to 10 July 67."

In 1975, the applicant sought benefits from the Veterans' Administration (VA). The VA asked the Coast Guard for a line of duty determination regarding the car accident and was told that two letters in his file dated January 19 and 24, 1968, showed that the applicant's injuries were sustained due to his own misconduct.

VIEWS OF THE COAST GUARD

On May 3, 2004, the Judge Advocate General (TJAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief in this case because of its untimeliness and lack of merit.

TJAG argued that the application should be denied for untimeliness because the applicant "has not provided *any* cause, no less the good cause required by law, to excuse his failure to timely file." Moreover, TJAG argued that the applicant "has failed to offer any evidence that the Coast Guard committed either an injustice or error in assigning him a mark of 3.8 in conduct on a 4.0 scale, or in finding that the injuries he suffered as a result of driving his vehicle recklessly were due to his own misconduct." TJAG pointed out that "[a]bsent strong evidence to the contrary, government officials are presumed to have carried out their duties correctly, lawfully, and in good faith." *Arens v. United States*, 969 F.2d 1034, 1037 (1990); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979). TJAG concluded that the Board should not waive the statute of limitations because the applicant "offers no substantive reason for the 31-year delay in taking action and lacks any reasonable chance of prevailing on the merits."

TJAG also argued that the doctrine of laches should bar the applicant's claim because "the investigation completed as a result of Applicant's accident is no longer

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[2] The investigative report is not in the applicant's military record.

available for review" because of the applicant's 31-year delay. TJAG also stated that because of the long delay, the Coast Guard can no longer contact key witnesses, and "key unit documents … have been destroyed or disposed of under the paperwork disposition regulations." TJAG argued that the applicant "should not be rewarded in any way for his failure to process his claims in a timely fashion."

Finally, TJAG argued that the applicant has failed to submit any evidence to show that the Coast Guard committed any error or injustice in assigning him the conduct mark of 3.8 and in finding that his injuries were incurred as a result of his own misconduct. He pointed out that "the evidence that is available in the record supports both actions by the Coast Guard."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 5, 2004, the BCMR sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 days. On May 21, 2004, the applicant responded. Regarding the timeliness of his request, the applicant alleged that he has only recently had time to file his application. He alleged that previously he "was about to reenlist when then wife left me with 3 small children [and his] priorities changed."

Regarding the captain's mast in 1966, the applicant stated that it resulted from a confrontation with a fireman's apprentice, "who also spoke on my behalf," and that they were both equally at fault. He further alleged that his punishment "wasn't 5 days was 10 hours when out to sea, not rated, 10 extra hours more than excessive … ."

Regarding the line of duty determination, the applicant stated that he was never advised of the legal ramification and "realize[d] [it would be] cheaper to plead[] guilty and pay fine than to try and afford legal representation on E-4 pay."

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 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. 10 U.S.C. § 1552. Under *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994), the statute of limitations is tolled while a member serves on active duty. Therefore, to be timely, the applicant should have applied to the BCMR within three years of his separation on May 20, 1969. His application was not

filed until more than 31 years after the statute of limitations expired. Therefore, it was not timely.

3. Pursuant to 10 U.S.C. § 1552, the Board may waive the three-year statute of limitations if it is in the interest of justice to do so. To determine whether it is in the interest of justice to waive the statute of limitations, the Board must consider the length and reasons for the delay and conduct a cursory review of the merits of the case.[3]

4. The applicant alleged that he would have applied for relief earlier but his "then wife left me with 3 small children [and his] priorities changed." Assuming it is true that the applicant's wife left him with three small children to raise, the Board finds that the applicant has not provided adequate justification for his 31-year delay in applying to this Board. His children have long been grown. Moreover, the Board notes that although the applicant alleges he was not aware of the legal ramification of the finding that his injury was not incurred in the line of duty, he knew or should have known of the legal ramification at least by 1975, when the Veterans' Administration asked the Coast Guard about the accident, presumably after he applied for health care benefits.

5. Regarding the conduct mark of 3.8, the applicant alleged that it is in the interest of justice for the Board to change it to 4.0 because he paid for his mistake and would feel better if he had marks of 4.0 for conduct "across the board." The applicant has submitted no evidence to prove that his commanding officer erred in finding him guilty of committing assault and battery at captain's mast or in assigning him the 3.8 conduct mark. The record indicates that the applicant's conduct mark was properly lowered to reflect the fact that he got into a fistfight with a fellow member. The applicant has submitted no evidence to support his allegation that he was denied due process with respect to the mast or that the conduct mark of 3.8 is an unfair consequence of his misbehavior.

6. Regarding the determination that the injuries the applicant incurred in the car accident on June 15, 1967, were due to his own misconduct, the applicant alleged that he did not intend to crash the car, that it was just an accident, and that he was denied due process because, he alleged, he was not informed of the legal ramifications of the finding that his injury was not incurred in the line of duty and he was not afforded legal counsel. As TJAG correctly noted, absent evidence to the contrary, the Board presumes that members' military records are correct and that Coast Guard officers have acted lawfully, correctly, and in good faith.[4] The applicant has not submitted any evidence to support his allegations. The record indicates that the applicant was convicted of reckless driving in civil court and that the Coast Guard conducted its

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[3] *Dickson v. Sec'y of Defense*, 68 F.3d 1396 (D.D.C. 1995); *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

[4] 33 C.F.R. § 52.24(b). *See Arens v. United States*, 969 F.2d 1034, 1037 (1990); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

own investigation, which reasonably concluded—based on the police report and court records—in an official finding that his injuries were the result of his own misconduct (reckless driving) and therefore were not incurred in the line of duty.

7. Because the applicant has failed to justify his long delay in applying to this Board and has failed to submit any evidence to support his allegations of error and injustice, the Board finds that it is not in the interest of justice to waive the statute of limitations in his case, and his application should be denied.

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

ORDER

The application of xxxxxxxxxxxxxxxxxxxxxxxxxxxx USCG, for correction of his military record is denied.