DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

[redacted]

BCMR Docket No. 2016-045

FINAL DECISION

This is a proceeding under the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. After receiving the applicant's completed application and military records on January 14, 2016, the Chair docketed the case and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated November 4, 2016, 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 [redacted]/E-5)[1] who was honorably discharged after nine months of service on April 3, 1989, asked the Board to remove derogatory information from his record. The applicant explained that in BCMR Docket No. 237-90, the Board directed the Coast Guard to correct his reason for discharge, separation code, and reentry code from "unsuitability," JMD, and RE-4 to "convenience of the government," JND, and RE-3X, and the Coast Guard issued him a new DD 214 with this information. However, derogatory comments about him remained in his record in other documentation of his discharge. The applicant alleged that this derogatory information was a consequence of his "declaring that [he] would exercise [his] legal rights and the EEO system by [his] USCG superiors who considered such action a threat to their careers." He stated that the derogatory information is continuing to harm his career. In support of these allegations, the applicant submitted a copy of the Board's decision in Docket No. 237-90, which is summarized below, and the following:

a) A CG-3307 ("Page 7") dated August 19, 1988, counsels the applicant about failing to observe standard safety precautions when working on electrical equipment. The applicant signed this Page 7.

[1] The applicant was enlisted as an [redacted] in 1988 because he had served four years in the Navy from 1983 to 1987.

b) A Report of Mental Status Evaluation dated December 8, 1988, states that the applicant's behavior was aggressive but that his thinking process and thought content were normal and that he was "psychiatrically cleared for any administrative action deemed appropriate by command."

c) A memorandum dated February 6, 1989, from the Chief of Physical Training at the Coast Guard's training center shows that during a swimming test, the applicant was unable to perform rhythmic breathing, a prone glide, a prone glide with kick, or treading water. It also indicates, on a scale of 5 (high) to 1 ("lacks") that he lacks motivation. It indicates that he has the necessary motor skills to past the swim test and that "[g]iven time s/m will pass swim test," but it indicates that he did not have a positive attitude and did not exhibit self-confidence.

d) A Page 7 dated February 7, 1989, counsels the applicant about being late for work and not wearing the proper uniform and assigns him to "extra military instruction" due to the infractions. The applicant signed this Page 7.

e) A memorandum from the applicant's commanding officer (CO) to the applicant dated February 9, 1989, advises him that the CO is initiating his discharge "due to unsuitability for failure to meet minimal swimming requirements. … On 23 January 1989 you submitted a special request for discharge due to your inability to swim. A review of your record did not show the required [form] acknowledging your ability to swim. This error, on the recruiter's part, may excuse you from a charge of fraudulent enlistment. … On 06 February 1989, you were administered the swim test … [and] you did not pass the minimal swimming requirements. … As this is your second special request submitted for discharge and as the instructor at TRACEN Cape May indicated a lack of motivation on your part in learning how to swim, I do not believe you will be amenable to swimming lessons." (The applicant acknowledged receiving this notification in a memorandum also dated February 9, 1989. He waived his right to submit a written statement and to consult a lawyer.)

f) A memorandum from the CO to the Commandant, dated February 16, 1989, states that although the swimming instructor had reported that the applicant could eventually learn to swim, given the applicant's previous attempts to be discharged and his "less than stellar performance to date, I do not believe he is worth our time." The memorandum states that the applicant had had financial problems due to changing his name and closing his bank account to avoid overdraft penalties; that he had requested discharge due to financial hardship in October 1988; and that he had told the Executive Officer that his intention was "to leave by whatever means available." Based on this discussion, the applicant was referred for a mental health evaluation, which had shown that he was mentally responsible. Then the applicant had submitted a request for a transfer to another rating, and when the command investigated the possibility, the applicant stated that "he never expected to get approval and he withdrew it." The CO stated that on January 23, 1989, the applicant submitted another request for discharge based on his inability to swim. Therefore, a test was conducted and "[a]s expected he failed the test and his lack of motivation was noted by the instructor. … I recognize that we could probably outlast him on this issue, however this will probably not lessen his attempts to leave the service. As noted in enclosures 8-10, he is willing to try anything to get transferred or discharged. Based on his service thus far and the tremendous administrative burden he will be

wherever he goes, I recommend discharge. … I further recommend that his discharge code be such that he is not eligible for re-entry into the service. … [He] is very aware of the UCMJ—he has managed to walk a fine line in pursuit of becoming an administrative burden without taking any action which would warrant NJP."

g) The CO enclosed with his memorandum (a) a written statement from a chief petty officer, dated January 30, 1989, who wrote that during a conversation the day before, the applicant had said he wanted out of the Coast Guard and that "he would do anything to get out, or to a land station, even if it meant going AWOL or using the racial discrimination ploy against the command to get what he wanted"; (b) a statement from a first class petty officer, dated January 30, 1989, who wrote that the applicant had "said he could not understand why the ship wouldn't allow him to transfer to shore duty. He said he was tired of all the hassles involved in trying to convince the XO to have him transferred or to discharge him. [He] said if the XO didn't arrange something for him soon that he would claim that he had been racially discriminated against. I told him that I thought that was not the proper method to get things done. [He] said he didn't care about anything or anybody and he would do whatever was necessary to get his way"; and (c) a statement from a third class petty officer, dated February 13, 1989, who wrote that the applicant had said he wanted to transfer to a shore unit or get discharged and that "he would do anything to accomplish this. He stated that he had three ways/choices to get out. 1. Fraudulent enlistment (becous [sic] he didn't sign anything saying he could swim). 2. To get kicked out for being a major 'fuck up'. 3. By using racial discrimination. He would state that he was and is being racially discriminated against. He stated that being black was to his advantage, and that even though it was wrong he didn't care what it took to get out becous the only person he was worried about was himself. When I pointed out to him that besides being wrong, this would not work becous he had already told us that he was just saying it to get out of the Coast Guard, he said that didn't matter becous it would strengthen his case to show that there was a conspiracy against him."

h) Although the applicant did not submit them, his record also contains the District Commander's endorsement of his CO's recommendation for discharge, dated February 27, 1989; separation orders; and a Page 7 dated April 3, 1989, regarding the applicant's discharge, all of which mention either his discharge for "unsuitability" due to his inability to swim or his RE-4 code or both.

i) The decision of the Discharge Review Board, dated January 16, 1990, which briefly summarizes some of the documents in the applicant's record and concludes that his discharge for unsuitability was equitable and proper and should stand as issued.

j) The decision of the BCMR, dated February 22, 1991, notes that a Navy recruiter had written a letter stating that the applicant was a "'stellar applicant' who would make 'immediate and long term contributions to the Naval Reserve.'" This decision upgrades the applicant's reason for separation, separation code, and reentry code on his Coast Guard DD 214 based on the following findings:

> 2. The applicant served with honor for four years in the United States Navy. He was discharged from the Navy with a preferred reenlistment code. After Navy service, he enlisted in the Coast Guard. His record in the Coast Guard showed some performance deficiencies.
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> 3. The applicant was unable to swim, as required by Coast Guard regulations, but the Service never counseled him that a formal probation period had commenced nor had it made an appropri-

> ate page 7 entry. Instead, his commanding officer asked for his involuntary separation on the ground that "I do not believe he is worth our time."
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> 3. [sic] The Navy, however, appears to regard the applicant as worth its time. Unfortunately, the RE-4 reenlistment code, which the Coast Guard assigned him on discharge, makes the applicant ineligible for reenlistment in the Navy.
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> 4. In view of the Coast Guard's error in failing to give him a probationary period within which to learn to swim, as required by subsection (c) of Article 12-B-16 of the Personnel Manual, the applicant's record should be corrected.

k) Numerous documents indicate that the applicant served successfully in the Naval Reserve and the Air Force Reserve after the BCMR amended his Coast Guard DD 214.

l) An email from the Coast Guard Personnel Service Center (PSC), dated July 3, 2013, states that the applicant had made a Privacy Act request regarding a report of the U.S. Office of Personnel Management (OPM), but that only OPM could change or remove an OPM report.

m) An email from OPM to the applicant, dated July 16, 2013, notes that he was seeking to correct a report based on "information that was gathered from your USCG military record during your OPM background investigation. The military record maintained in your background investigation was obtained from the National Personnel Records Center (NPRC) and OPM cannot delete or amend it."

n) A letter from NPRC to the applicant, dated November 18, 2013, forwards the applicant copies of his military records and a BCMR application form, DD 149, to seek correction of his military record.

VIEWS OF THE COAST GUARD

On July 5, 2016, the Judge Advocate General of the Coast Guard submitted an advisory opinion adopting the findings and analysis provided in a memorandum on the case prepared by PSC and recommending that the Board grant substantial relief in this case.

PSC stated that although the application is untimely, based on the BCMR's decision in 237-90, relief should be granted by redacting certain portions of the memoranda dated February 9 and 16, 1989. PSC explained that "[t]he Board determined that the applicant's discharge was erroneous because he was not afforded a probationary period to learn to swim. Portions of [the two memoranda] therefore serve as an injustice upon review of the applicant's record due to the relief granted in [the decision for 237-90]. No further relief is recommended."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On July 12, 2016, the Chair sent a copy of the views of the Coast Guard to the applicant and invited him to submit a written response within thirty days. No response was received.

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.[2] The applicant was discharged in 1989, and he quickly applied to the DRB and the BCMR contesting his separation code, reentry code, and narrative reason for separation, which were corrected pursuant to BCMR No. 237-90 by the reissuance of his DD 214. Although he alleged that he did not know about the disputed documents, he acknowledged receiving the memorandum dated February 9, 1989, which was addressed to him; he knew at the time that he had undergone a mental health evaluation and swimming test; he signed the Page 7s dated August 19, 1988, and February 7, 1989, for entry in his record; and he was mailed the decisions of the DRB and the BCMR. Therefore, the Board finds that the preponderance of the evidence shows that the applicant knew about some of the contested documents in his record in 1989, and his application is untimely with respect to those documents. Other documents, however, such as his CO's memorandum to Commandant, the District Commander's endorsement, and the separation orders, he may not have known about until 2013, as he alleged.

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."[3] 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."[4]

4. The record shows that the Board granted substantial relief to the applicant in BCMR No. 237-90 by upgrading his separation code, reentry code, and narrative reason for separation on his DD 214, but that other documentation of his discharge in his record has largely negated the effect of the Board's decision because this other documentation also reveals that he was discharged for unsuitability due to his inability to swim. Therefore, the Board will waive the statute of limitations and consider the applicant's request on the merits.

5. With respect to the documents in the applicant's record that he has contested and/or that mention his discharge for unsuitability due to his failure to pass a swimming test, the Board finds the following:

a) The Page 7 dated August 19, 1988, which counsels the applicant about failing to observe standard safety precautions, was signed by the applicant, and he has submitted no evidence to refute it. Nor did the Board require removal of this Page 7 in the decision for 237-90. Therefore, this document should not be removed or redacted.

b) The Report of Mental Status Evaluation dated December 8, 1988, was included in the applicant's discharge package but was not created pursuant to his discharge for unsuitability. The applicant's military record contains many other medical records of

[2] 10 U.S.C. § 1552; 33 C.F.R. § 52.22.
[3] *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).
[4] *Id*. at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

which this is one, and he has not shown that this medical evaluation is erroneous or unjust. Nor did the Board require removal of this medical record in the decision for 237-90. Therefore, this document should not be removed or redacted.

c) The record shows that the applicant was given a swimming test at his request. He has not shown that the report of the test, dated February 6, 1989, is erroneous or unjust. Nor did the Board require removal of this test report in the decision for 237-90. Therefore, this document should not be removed or redacted.

d) The Page 7 dated February 7, 1989, which counsels the applicant about being late for work and not wearing the proper uniform, was signed by the applicant, and he has submitted no evidence to refute it. Nor did the Board require removal of this Page 7 in the decision for 237-90. Therefore, this document should not be removed or redacted.

e) The memorandum from the applicant's CO dated February 9, 1989, which notified him of the initiation of his discharge, contains several references to the applicant's discharge for unsuitability due to his inability to swim. These references should be removed from the memorandum as they tend to negate the relief granted in 237-90. This memorandum should be redacted as shown in the documents attached to this decision.

f) The memorandum from the CO to the Commandant, dated February 16, 1989, initiating the applicant's discharge, contains several references to the applicant's discharge for unsuitability due to his inability to swim, to the mental health evaluation that was included to support the unsuitability discharge, and to the RE-4 reentry code. These references should be removed from the memorandum as they tend to negate the relief granted in 237-90. This memorandum should be redacted as shown in the documents attached to this decision.

g) The CO enclosed with his memorandum written statements from three petty officers concerning a conversation they had with the applicant about his desire to be discharged. The applicant has not submitted any evidence to show that these statements are erroneous or unjust. Nor did the Board require removal of these statements in the decision for 237-90. Therefore, these documents should not be removed or redacted.

h) The District Commander's endorsement of his CO's recommendation for discharge, dated February 27, 1989, recommends the applicant's discharge for unsuitability due to his inability to swim. This reference should be removed from the memorandum as it tends to negate the relief granted in 237-90. This memorandum should be redacted as shown in the documents attached to this decision.

i) The applicant's separation orders show that the Commandant authorized his discharge for unsuitability with a JMD separation code. These references should be removed from the separation orders as they tend to negate the relief granted in 237-90. The orders should be redacted as shown in the documents attached to this decision.

j) The Page 7 dated April 3, 1989, regarding the applicant's discharge, states that he was being discharged for unsuitability and had been assigned an RE-4 reentry code. These references should be removed from the Page 7 as they tend to negate the relief granted in 237-90. This Page 7 should be redacted as shown in the documents attached to this decision.

k) The decisions of the DRB and the BCMR, dated January 16, 1990, and February 22, 1991, respectively, contain substantial discussions of the circumstances of the applicant's unsuitability discharge and reentry code. Therefore, these decisions should be removed from the applicant's record as they tend to negate the relief granted in 237-90. However, the correspondence forwarding these decisions, which does not mention the nature of the applicant's discharge or reentry code, should remain in his record as evidence that he has already exercised his right to apply to these boards. In addition, no copy of *this* decision should be entered in the applicant's record. The Board notes in this regard that its rules at 33 C.F.R. § 52.65(c) state that "[u]nless doing so is likely to nullify the relief granted, copies of the final decision shall be placed in the military record of the applicant."

6. Accordingly, relief should be granted by redacting or removing certain documents from the applicant's record as stated in finding 5 above and shown on the attached documents. In addition, because the applicant's military record contains many duplicative copies of some of the disputed documents, these corrections should be made on all such copies, or the extra copies should be removed. The applicant's other requests for removal or redaction should be denied.

(ORDER AND SIGNATURES NEXT PAGE)

ORDER

The application of former [redacted] USCG, for correction of his military record is granted in part as follows and the attached documents are incorporated as part of this order:

1) The memorandum from his Commanding Officer dated February 9, 1989, which notified him of the initiation of his discharge, shall be redacted as shown in the documents attached to this decision.

2) The memorandum from his Commanding Officer to the Commandant, dated February 16, 1989, which initiated his discharge, shall be redacted as shown in the documents attached to this decision.

3) The District Commander's endorsement of the Commanding Officer's recommendation for discharge, dated February 27, 1989, shall be redacted as shown in the documents attached to this decision.

4) The separation orders issued by Coast Guard Headquarters to authorize his discharge shall be redacted as shown in the documents attached to this decision.

5) The Page 7 dated April 3, 1989, shall be redacted as shown in the documents attached to this decision.

6) The decisions of the DRB and the BCMR, dated January 16, 1990, and February 22, 1991, respectively, shall be removed from his record, but the correspondence forwarding the decisions, which does not mention the nature of his discharge or reentry code, shall not be removed. Nor shall a copy of this decision be entered in his record.

7) All duplicative copies of the documents listed above shall be redacted as shown in the documents attached to this decision, or they may be removed in their entirety.

No other relief is granted.

November 4, 2016

[redacted]