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

Application for the Correction of
the Coast Guard Record of:

**BCMR Docket No. 2010-223**

**Xxxxxxxxxxxxxxx**
**xxxxxxxxxxxxxxx**

## FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case after receiving the applicant's completed application on August 2, 2010, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated May 19, 2011, 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, who was honorably discharged on March 22, 1993, asked the Board to correct his discharge form, DD 214, to show that he was discharged as a [redacted] pay grade E-5), instead of a seaman apprentice [redacted] pay grade E-2), and that he was assigned an RE-1 reenlistment code (eligible to reenlist), instead of an RE-4 (ineligible).

The applicant stated that [redacted]/E-5 was the highest rate and pay grade he held in the Coast Guard but that his rate and pay grade were reduced pursuant to the sentence of a court-martial. The applicant alleged that prior to the incident that resulted in a court-martial, his conduct and performance were exceptional and he had received several citations and commendations.

The applicant stated that he was tried and punished by court-martial because he drove a Government vehicle with two subordinates as passengers away from his office's area of responsibility and totaled it. Then, he "was not truthful during the investigation" because he was trying to hide the involvement of one of his subordinates, who was [redacted] He stated that he was convicted of destruction of Government property, interfering with an investigation, and making false statements under oath.

The applicant stated that his misconduct showed that he was a very immature young man at the time but that over the past 20 years he has matured and become a successful business man with a wonderful family. He stated that he volunteers in his community and strives to teach his children to make good decisions and be accountable for their actions. He stated that he is asking the Board to restore his rating and pay grade and to upgrade his reenlistment code out of pride because "the years of constructive, value-added service [he gave to his] country were discredited by a few, stupid acts that [he regrets] making."

## SUMMARY OF THE RECORD

The applicant enlisted for four years on September 26, 1988, at age 18. He advanced to [redacted] on July 27, 1990, and the [redacted] on January 1, 1992. His performance evaluations were good up until the spring of 1992 and he received a few commendations and awards. On April 6, 1992, when he had been ordered to take a Government vehicle to [redacted] the applicant instead drove the Government vehicle to a [redacted]; drank alcohol with two subordinates; drove the vehicle recklessly at an unsafe speed; totaled the vehicle against a tree; conspired to solicit an employee of a towing company to claim that the employee had provided the applicant with alcohol after the accident; falsely denied the presence of one of his subordinates in the vehicle; and pretended that he had inspected the vessel as ordered.

The applicant was charged with many violations of the Uniform Code of Military Justice (UCMJ). His enlistment was extended involuntarily for six months while the charges pended. However, he was advised on August 19, 1992, that he would not be recommended for reenlistment once the extension ended and that he had 15 days to appeal this decision by his commanding officer (CO). He appealed his CO's decision about reenlistment on September 1, 1992, in an 11-page letter to the Commandant. He argued that his training, qualifications, and record of good performance before April 1992 warranted his retention. He submitted statements in support of his retention. However, his CO recommended denial of the appeal because the applicant had falsely sworn at a mast that one of the subordinates was not in the car and that he and the other subordinate had drunk just a couple of beers each at lunch, whereas "the three of them had shared a case of beer just before the accident." The CO noted that the applicant had been stopped for speeding on November 7, 1991, after consuming "a few beers" and that the police officer had delivered the applicant directly to the command instead of charging him with driving under the influence. The District Commander also recommended that the applicant's appeal be denied. On November 6, 1992, the Commandant advised the command that no action would be taken on this matter until the disciplinary proceedings were complete.

At a trial by special court-martial on November 10, 1992, the applicant pled guilty to several charges and was found guilty on eight counts, including conspiracy, making false official statements, unauthorized absence, and misappropriation and negligent destruction of Government property. His sentence included confinement for four months; a $1,000 fine; forfeiture of $300 pay per month for four months; and reduction in rate and pay grade from [redacted] E-5 to [redacted]/E-2. The convening authority reduced his period of confinement to 70 days.

On December 3, 1992, the applicant's CO informed the Commandant that on November 10, 1992, "it was discovered that a significant amount of historical data had been deleted from a program and workstation at this unit. Backup disks for this data were inexplicably overwritten. … CCGD5 (ole) is currently conducting an investigation. … The evidence to date indicates that [the applicant] is the primary suspect in this destruction of government property case."

On January 4, 1993, the CO informed the Commandant that the report of the investigation into the loss of data "indicates there is sufficient evidence to pursue disciplinary action against [the applicant]. … If the member will be discharged in the near future, I do not intend to pursue disciplinary action."

On January 14, 1993, the Commandant denied the applicant's appeal of his CO's decision not to recommend him for reenlistment.

On February 16, 1993, the CO sought permission from the Commandant to discharge the applicant from the Coast Guard, and on February 25, 1993, the Commandant approved the request. The applicant received an honorable discharge from the Coast Guard on March 22, 1993, and his DD 214 states that his discharge was for the "convenience of the government." His DD 214 also shows that he received an RE-4 reenlistment code and that he was discharged as a [redacted] in pay grade E-2.

## VIEWS OF THE COAST GUARD

On November 17, 2010, the Judge Advocate General of the Coast Guard recommended that the Board deny relief in this case. In so doing, he adopted the findings and analysis provided in a memorandum submitted by the Personnel Service Center (PSC).

PSC stated that the application is untimely and should be denied on that basis. However, regarding the merits of the case, PSC stated that in light of the applicant's offenses under the UCMJ, his honorable discharge with a JND separation code[1] and an RE-4 reenlistment code was appropriate and is still correct under today's standards. PSC stated that the applicant's guilty plea to violating Article 111 of the UCMJ is akin to a guilty plea to driving under the influence of alcohol and that Coast Guard regulations require the assignment of an RE-4 when a member is being discharged under such circumstances. PSC concluded that the applicant has failed to substantiate any error or injustice in his record.

## APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On December 9, 2010, the Board received the applicant's response to the views of the Coast Guard. The applicant stated that the rate, pay grade, and reenlistment code shown on his DD 214 have weighed on him for many years, and he is still embarrassed about the conduct that led to his discharge, and it would give him peace of mind if his military record were corrected to reflect the positive aspects of his years of service.

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[1] The JND separation code denotes an involuntary discharge for "miscellaneous/general reasons." Separation Program Designator (SPD) Handbook 2-64.

## APPLICABLE REGULATIONS

Article 12.B.12. of the Coast Guard Personnel Manual authorizes enlisted personnel to be discharged at the convenience of the Government for a number of reasons, including when the Commandant so directs for good and sufficient reasons.

Under the Separation Program Designator Handbook, a member involuntarily discharged for miscellaneous reasons under Article 12.B.12. of the Personnel Manual may receive either an RE-4 or RE-1 reenlistment code.

## 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 of the date the applicant discovers, or reasonably should have discovered, the alleged error in his record.[2] The applicant was discharged in 1993 and knew that he had been reduced in rate and assigned an RE-4 at that time. Therefore, his application was not timely filed.

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 (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 applicant did not justify his long delay in requesting correction of his record. However, his request does not depend upon an allegation of error but on a plea for clemency based upon the passage of time and his post-service conduct.

5. The Board's cursory review indicates that the applicant's case cannot prevail on the merits. The applicant submitted no evidence to support his claim of exemplary post-service conduct. Even if he had done so, however, post-discharge conduct alone is not a proper basis for correcting a record.[5] The applicant received an honorable discharge despite his offenses, and the

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[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 164-65; s*ee Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

[5] *See* Memorandum of the General Counsel to J. Warner Mills, *et al.*, Board for Correction of Military Records (July 8, 1976) (instructing the Board with respect to upgrading discharges that it should not upgrade them based on the veterans' post-discharge conduct alone and "should not upgrade a discharge unless it is convinced, after having considered all the evidence … that in light of today's standards the discharge was disproportionately severe vis-à-vis the conduct in response to which it was imposed."

Board finds insufficient grounds in the record to justify upgrading his reenlistment code or to grant clemency on the reduction in rate from [redacted] which he received as part of his sentence.

6. Accordingly, the Board will not excuse the application's untimeliness or waive the statute of limitations. The applicant's request should be denied.

**[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]**

**ORDER**

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