DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of Coast Guard Record of:	BCMR Docket
XXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXX	**No. 2002-109**

FINAL DECISION

ULMER, Chair:

This is a proceeding under the provisions of section 1552 of title 10 and under section 425 of title 14 of the United States Code. It was docketed on May 28, 2002, upon the Board's receipt of the applicant's request for correction of his military record.

This final decision, dated February 19, 2003, is signed by the three duly appointed members who were designated to serve as the Board in this case.

The applicant, XXXXXXXXXXXXXXXXXXXX asked the Board to upgrade his general discharge under honorable conditions by reason of misconduct to an honorable discharge. He stated that he believed that his discharge should be upgraded based on his post-service employment and accomplishments. According to his resume, he has attended college and taken a course in welding. He is currently an employee for a government contractor who provides services to the Commander in Chief of the Atlantic Fleet. He did not provide the date in which he discovered the alleged error.

The applicant enlisted in the Coast Guard on April 29, 1985. He was discharged from the Coast Guard on July 25, 1986 with a general discharge under honorable conditions by reason of misconduct due to drug abuse. He was issued a separation code of HKK (misconduct - drug abuse) and a reenlistment code of RE-4 (not eligible for reenlistment).

On April 29, 1986, the applicant was awarded non-judicial punishment for use of cocaine. His punishment included reduction in rate and forfeiture of $200 pay per month for two months.

On May 21, 1986, the applicant's commanding officer (CO) notified the applicant that action had been initiated to discharge the applicant from the Coast Guard because his urine specimen had tested positive for cocaine during a random screening on April 4, 1986. The applicant by his signature acknowledged the proposed discharge, understood that he would be given a general discharge under honorable conditions, waived his right to submit a statement and his right to consult with a lawyer, and he did not object to the discharge. The Commandant approved his discharge in July 1986.

Views of the Coast Guard

On October 24, 2002, the Chief Counsel submitted an advisory opinion on behalf of the Coast Guard. The Coast Guard recommended that the Board deny the request because it was untimely. 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 filed his application more than 12 years after the statute of limitations had expired.

The Chief Counsel stated that it is not in the interest of justice to excuse the untimely filing. In this regard, the Chief Counsel 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 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 Chief Counsel stated that the applicant has failed to offer substantial evidence that the Coast Guard committed either an injustice or error in discharging him with a General Discharge based on misconduct.

The Chief Counsel stated that no one has a right to remain in the armed forces unless a specific statute or regulation grants that right. He said that the applicant was accorded all of the rights to which he was entitled. He stated that the applicant was provided proper notice, opportunity to consult with legal counsel, and the opportunity to make a statement, which he waived. The Chief Counsel stated that absent 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.

The Chief Counsel stated that post-service conduct alone, is an insufficient basis on which to upgrade a discharge. See Department of Transportation Memorandum from the General Counsel dated 07 July 1976 "BCMR and 'Clemency'".

The Chief Counsel recommended that this application be denied for lack of timeliness or alternatively it should be denied for lack of merit.

Applicant's Response to the Views of the Coast Guard

On October 29, 2002, a copy of the views of the Coast Guard was sent to the applicant for him to submit a response. No response was received 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. The applicant had been discharged for approximately 16 years before he filed this application with the Board. 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. Untimeliness can be waived if the Board finds that it is in the interest of justice to do so. The Board, in determining whether to waive untimeliness, "should consider the reasons for the delay and the plaintiff's potential for success on the merits, based on a cursory review, as factors in the interest of justice analysis." See Dickson v. Secretary of Defense, 68 F.3d 1396 (D.C. Cir 1995).

4. The applicant did not provide the date on which he discovered the alleged error, but he should have discovered it on the date of his discharge in 1986. He failed to tell the Board how he discovered the alleged error or why the error could not have been discovered within three years after his discharge from the Coast Guard.

5. Additionally, the Board finds that, based on a review of the evidence in this case, it is unlikely that the applicant would prevail on the merits.

6. A cursory examination of the merits indicates that the applicant is not entitled to relief. The applicant did not allege any specific error or injustice on the part of the Coast Guard, nor did he present any proof that the Coast Guard had committed an error or injustice by discharging with a general discharge under honorable conditions due to misconduct. According to a 1976 General Counsel memorandum, good post-service conduct is not a sufficient basis on which to upgrade a discharge. In addition the applicant's military record indicates that he was awarded non-judicial punishment for use of cocaine.

7. Accordingly, it is not in the interest of justice to waive the statute of limitations in this case. The application should be denied as untimely and for failure of proof.

[ORDER AND SIGNATURES ON NEXT PAGE]

ORDER

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

Julia Andrews

Gloria Hardiman-Tobin

David H. Kasminoff