

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2004-043

XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX

FINAL DECISION

ANDREWS, Deputy 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 BCMR docketed the case on December 22, 2003, upon receipt of the applicant's completed application and military records.

This final decision, dated September 9, 2004, is 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 received a general discharge under honorable conditions from the Coast Guard on March 22, 1988, for illegal drug abuse, asked the Board to correct his record by upgrading his discharge to honorable. He stated that he is trying to improve his life and would like an honorable discharge so that he can get educational benefits under the GI Bill.

SUMMARY OF THE RECORD

On April 21, 1986, the applicant enlisted in the Coast Guard for four years. He completed boot camp and was assigned to a cutter. In 1987, he applied for and was enrolled in "A" School to become a petty officer.

Laboratory records indicate that on January 11, 1988, the applicant provided two urine specimens for urinalysis and that both tested positive for morphine.

On February 22, 1988, the applicant's commanding officer (CO) at "A" School informed him in writing that he was requesting authority from the Commandant to award him a general discharge for drug abuse. The CO also informed the applicant that he had a right to consult an attorney and to submit a statement in his own behalf. In response, the applicant signed an acknowledgement of the CO's notice. In it, the applicant indicated that he understood the ramifications of a general discharge, that he had been "provided the opportunity to consult with an assigned military lawyer," and that he did "not desire to make a statement in writing in my own behalf."

On February 25, 1988, the CO asked the Commandant for authority to award the applicant a general discharge for drug abuse. The CO cited the positive urinalyses and informed the Commandant that the applicant had been advised of his rights and had waived them.

On March 16, 1988, the Commandant ordered the CO to award the applicant a general discharge for drug abuse within thirty days, pursuant to Article 12-B-18 of the Personnel Manual.

On March 22, 1988, the applicant was discharged. His DD 214 shows that he received a general discharge for misconduct with an RE-4 reenlistment code (ineligible), pursuant to Article 12-B-18 of the Personnel Manual.

VIEWS OF THE COAST GUARD

On May 4, 2004, the Judge Advocate General (TJAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief in this case.

TJAG argued that the applicant's request was untimely and that he had not submitted any evidence to show that it is in the interest of justice for the Board to waive the three-year statute of limitations.

Regarding the merits of the case, TJAG argued that the applicant has failed to submit any evidence to overcome the presumption that his superiors acted lawfully, correctly, and in good faith in awarding him a general discharge for drug abuse. *Arens v. United States*, 969 F.2d 1034, 1037 (1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 5, 2004, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 days. No response was received.

APPLICABLE LAW

Under Article 12-B-18.b.(4) of the Personnel Manual in effect in 1988, the Commandant could separate a member for misconduct due to drug abuse as follows:

Drug abuse. The illegal, wrongful, or improper use, possession, sale transfer, or introduction on a military installation of any narcotic substance, intoxicating inhaled substance, marijuana, or controlled substance, as established by 21 U.S.C. 812. Any member involved in a drug incident will be separated from the Coast Guard with no higher than a general discharge. However, in truly exceptional situations, commanding officers may recommend retention of members E-3 and below involved in only a single drug incident.
...

Under Article 12-B-18.e.(1), a member with less than eight years of active service who was being recommended for a general discharge for misconduct was entitled to (a) be informed of the reasons for the recommended discharge, (b) consult an attorney, and (c) submit a statement in his own behalf.

Under Article 20.C. of the current Personnel Manual, any member involved in any "drug incident" is subject to an administrative discharge with no greater than a general discharge under honorable conditions.

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. The applicant was discharged on March 22, 1988. Therefore, he knew or should have known of the alleged error in his record in 1988. His application was untimely.
3. Pursuant to 10 U.S.C. § 1552(b), 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 should conduct a cursory review of the merits of the case and consider the reasons for the delay. *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).
4. The applicant did not explain why he delayed seeking an upgrade of his discharge. He stated only that he wants his discharge upgraded now so that he can receive educational benefits.

5. A cursory review of the merits of this case indicates that the applicant was properly discharged with a general discharge in accordance with Article 12-B-18 of the Personnel Manual after his urine tested positive for morphine use. The record indicates that he was afforded all due process, and the applicant has submitted no evidence to show that the Coast Guard committed any error or injustice in discharging him.

6. Therefore, the Board finds that it is not in the interest of justice to waive the statute of limitations in this case.

7. Accordingly, the applicant's request should be denied.

ORDER

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

Julia Andrews

James E. McLeod

Marc J. Weinberger