DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2011-188

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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 June 16, 2011, 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 March 16, 2012, 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 received a general discharge under honorable conditions from the Coast Guard on March 14, 1986, for illegal use of cocaine, asked the Board to upgrade his "discharge status." The applicant stated that his general discharge has prevented him from being employed by State and municipal governments.

SUMMARY OF THE RECORD

On January 23, 1984, at age 20, the applicant enlisted in the Coast Guard as a seaman recruit (SR). On his enlistment application, he denied ever having used illegal drugs. During recruit training on February 2, 1984, the applicant signed another statement:

> Member was given a full explanation of the drug and alcohol abuse program by the Command Drug and Alcohol Program Representative (D&A Rep) this date in compliance with Article 20-B-1, CG PERSMAN COMDTINST M1000.6 (old CG-207).

On May 7, 1984, the applicant signed the following statement for his record:

> I have been advised that the illegal use or possession of drugs constitutes a serious breach of discipline which will not be tolerated. Also, illegal drug use or possession is counter to esprit de corps, mission performance and jeopardizes safety. No member will use, possess or distribute illegal drugs or drug paraphernalia.

Upon completing boot camp, the applicant advanced to seaman apprentice (SA/E-2) and was assigned to a cutter. On September 11, 1984, the applicant failed to return to the cutter from liberty, missed the sailing of the cutter, and was absent without leave (AWOL) until he returned on September 30, 1984. On October 22, 1984, he was counseled about failing to report for duty, refusing to come on deck when summoned, and vomiting due to intoxication.

On November 1, 1984, the applicant was punished at mast for his unauthorized absence from September 11 to 30, 1984, and for missing ship's movement. His punishment included reduction in rate from E-2 to E-1, restriction to base for 45 days with extra duties, and forfeiture of $393.00.

On November 26, 1984, he was counseled about viewing all criticism as a personal attack, failing to improve his performance in response to counseling, and requiring an inordinate amount of supervision to complete tasks. The Executive Officer of the cutter noted that he had been "a problem from his first day aboard, [and] he is presently a liability to the deck force and the ship as a whole."

On February 1, 2005, the applicant was placed on report "for spending the night as an unauthorized guest in the barracks. … He has little or no concept of why rules and authority exist in the military, and even less respect for the same." The applicant was placed on performance probation.

The applicant was transferred to [redacted]. Following a random urinalysis conducted on November 29, 1985, the applicant's urine tested positive for cocaine. On January 16, 1986, the applicant was punished at mast. He admitted to the offense and was reduced in rate from E-2 to E-1.

On January 21, 1986, the applicant's commanding officer advised him that he had initiated the applicant's general discharge due drug abuse. The commanding officer advised the applicant that he had a right to consult a lawyer, to object to the proposed discharge, and to submit a statement on his own behalf. On January 23, 1986, the applicant acknowledged the notification and the opportunity to consult a lawyer, objected to the discharge, waived his right to submit a statement, and acknowledged that with a general discharge he "may expect to encounter prejudice in civilian life."

On January 23, 1986, the applicant's commanding officer recommended that he receive a general discharge for misconduct because of the urinalysis results. The Group Commander endorsed this recommendation on January 28, 1986, and the District Commander endorsed it on February 5, 1986.

On February 13, 1986, the Commander, Personnel Command issued orders for the applicant to receive a general discharge for misconduct with an HKK separation code denoting drug abuse in accordance with Article 12-B-18 of the Personnel Manual.

On March 14, 1986, the applicant was awarded a general discharge "under honorable conditions" for misconduct in accordance with Article 12-B-18 of the Personnel Manual with an HKK separation code and an RE-4 reentry code (ineligible to reenlist).

In 1991, the applicant applied to the Discharge Review Board (DRB) for an honorable discharge and upgraded reentry code. He stated that he needed his discharge upgraded to become an attorney. The DRB found that there were no grounds for upgrading the applicant's general discharge and reentry code. The DRB's decision was approved by the Commandant.

On July 6, 1992, in response to his inquiry, the applicant was advised that he had not received a copy of the DRB's decision because the DRB's repeated correspondence to the applicant about his hearing date had been returned by the Post Office as unclaimed. The President of the DRB advised the applicant that he could apply to the BCMR if he was dissatisfied with the decision of the DRB. However, the BCMR has no record of receiving an application from the applicant at that time.

VIEWS OF THE COAST GUARD

On September 14, 2011, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief in this case. In so doing, he adopted the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC).

The PSC pointed out that the application is untimely since the applicant was discharged in 1986. The PSC also noted that under the current Separations Manual, any member involved in a drug incident is discharged "with no higher than a general discharge." The PSC concurred with the finding of the DRB that there are no grounds for upgrading the applicant's discharge or reentry code. The PSC argued that the applicant's record "is presumptively correct with the administrative discharge … for drug use. The applicant has failed to substantiate any error or injustice with regards to his record." Therefore, the PSC recommended that the application be denied.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 20, 2011, 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 1986, the Commandant could separate a member for misconduct due to drug abuse as follows:

> Involvement with drugs. Any member involved in a drug incident as defined in article 20-A-2h., … will be processed for separation from the Coast Guard with no higher than a General Discharge.

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 reason for the recommended discharge, (b) consult an attorney, (c) object to the discharge, and (d) submit a statement in his own behalf.

These regulations remain essentially the same under Article 1.B.17. of the current Coast Guard Separations Manual.

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, or reasonably should have discovered, the alleged error in his record or within three years of a decision by the DRB.[1] The applicant was discharged in 1986 and was informed of the reasons for his discharge at that time. In addition, he received the decision of the DRB in 1992. Therefore, his application is untimely.

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."[2] 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."[3]

4. The applicant did not explain or justify his long delay in seeking an upgrade of discharge and reentry code.

5. A cursory review of the merits of this case indicates that the applicant was properly awarded a general discharge for misconduct, in accordance with Article 12-B-18 of the Personnel Manual then in effect, with an HKK separation code and an RE-4 reentry code after his urine tested positive for cocaine use during a random urinalysis. His record shows that he received due process as provided in Article 12-B-18.e.(1) of the Personnel Manual then in effect. These records are presumptively correct under 33 C.F.R. § 52.24(b).[4] The Board notes that the applicant submitted no evidence to support his request, and the record contains no grounds for upgrading his discharge or reentry code. The applicant's request cannot prevail on the merits.

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[1] 10 U.S.C. § 1552; 33 C.F.R. § 52.22; *Ortiz v. Secretary of Defense*, 41 F.3d 738, 743 (D.C. Cir. 1994).
[2] *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).
[3] *Id*. at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).
[4] *See Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992) (citing *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979), for the required presumption, absent evidence to the contrary, that Government officials have carried out their duties "correctly, lawfully, and in good faith.").

6. The Board notes that the applicant was young when he committed the offense for which he was discharged and he has borne the consequences of his drug use for a long time. However, the delegate of the Secretary informed the Board on July 7, 1976, by memorandum that it "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."[5] Under Article 1.B.17. of the Separations Manual in effect today, members whose urine tests positive for cocaine are discharged for misconduct with no better than a general discharge. Therefore, the Board is not persuaded that the applicant's general discharge for misconduct is disproportionately severe in light of current standards.

7. Based on the record before it, the Board finds that the applicant's request for correction of his general discharge for misconduct cannot prevail on the merits. 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]

[5] Memorandum of the General Counsel to J. Warner Mills, et al., Board for Correction of Military Records (July 7, 1976).

ORDER

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