

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2018-108

████████████████████
FS3

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case after receiving the completed application on March 6, 2018, and assigned it to staff attorney ██████████ to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated December 7, 2018, 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 Food Service Specialist who was discharged “Under Honorable Conditions” on December 31, 1998, asked the Board to correct his record by upgrading his “General” discharge to “Honorable,” changing his narrative reason for separation from “Misconduct” to “Secretarial Authority,” and changing his separation code accordingly.

The applicant, through counsel, stated that while he was stationed aboard a cutter he was “found unconscious on a rec deck with a compromised air way.” He was unresponsive to verbal or physical stimuli and after sitting up to vomit he lost muscle control. He was unconscious for nearly two hours. The medical examination found no signs of trauma or injury. The applicant was transported to a medical clinic for care. He stated that within twenty-four hours of being found unconscious, his blood, urine, and feces were screened and all came back negative for any drugs or alcohol. When the applicant was conscious, he told the medical providers that the last thing he remembered was adjusting the volume on a television.

The applicant stated that following this incident, his command opened an investigation because, despite the negative toxicology reports, he was suspected of drug use. During the investigation, two members told the Coast Guard Investigative Service (CGIS) that the applicant “had discussed ecstasy with them before, but did not explicitly state that the applicant had used or even discussed using ecstasy.” The applicant stated that his living quarters were searched and a Snapple bottle was found. He stated that his command claimed the bottle contained ecstasy despite

the fact that the bottle was never tested. As a result, the applicant was found guilty of wrongful use or possession of a controlled substance at Mast. The applicant stated that his command then initiated an administrative separation against him. He provided a statement at the time continuing to deny that he had ever used or possessed any drug, let alone ecstasy. He was also subject to another round of toxicology screening and the results all came back negative once again. The applicant stated that he was nevertheless discharged on December 31, 1998, with the narrative reason for separation "Misconduct."

The applicant acknowledged that his application is untimely. However, he asserted that he "has been the victim of gross material error and injustice and deserves to have his case decided on its merits." He asserted that his command "made a material error of discretion by discharging him with a general under honorable conditions discharge by reason of misconduct." He argued that a review of the evidence shows that there was "no verifiable direct or circumstantial evidence" to indicate that the applicant was guilty of a drug offense. He stated that the sequence of events began because he suffered from a seizure alone on the recreation deck of the cutter. It was immediately assumed that he had passed out from alcohol or drugs and so comprehensive toxicology screenings were performed, but all of the results were negative. The applicant also claimed that no one CGIS interviewed had stated that the applicant had used any illegal substances; two members had stated that the applicant had "discussed" ecstasy at some point. He argued that the "comments are so vague that they could not possibly withstand any iota of legal reasoning or scrutiny." He further asserted that it is baffling that any reference to the Snapple bottle would be made at Mast when its contents were never tested for ecstasy or other illicit substances.

The applicant acknowledged that the legal standard at a Captain's Mast is "low because of the administrative nature of the proceedings." However, he argued that the fact that he was found guilty was so "grossly inappropriate that it offends one's sense of justice." He asserted that a medical reason for his seizure was not determined and so his command summarily assumed that his unconscious state must have been caused by drug use, despite the evidence indicating otherwise. The applicant claimed that the weakness of the command's case against him can also be seen with his discharge. He argued that if the command had actually had evidence of using or distributing ecstasy, then he surely would have received an other than honorable (OTH) characterization of discharge and not a General, Under Honorable Conditions discharge. The applicant stated that in the face of his erroneous and unjust discharge, he has excelled in the civilian world, earning multiple degrees and currently working as an educator.

In support of his application, the applicant provided several documents which are described below in the Summary of the Record. He also provided several character references. The first is from an Associate Pastor and Construction Manager at his church. He stated that he had worked with the applicant since 2016 when the applicant volunteered to assist in building a new children's facility. The Associate Pastor stated that since that project, the applicant has volunteered to take on other assignments in the church. He stated that the applicant was a "crucial member" of the team and that he is constantly helping the church to accomplish their mission. The second letter is from a friend who stated that he has known the applicant for over fifteen years. They had worked together and have remained friends since. He stated that the applicant worked "very hard to be successful at work while also making his family as a priority." He stated that when the applicant unexpectedly lost his wife, he endured the hardship with grace and composure and continued to

be the best father he could be. He stated that the applicant was a trustworthy and loyal friend. The next letter is from a family friend who stated that she has known the applicant for over ten years. She stated that the applicant has a strong moral character and that he treats others with courtesy and respect. She stated that he is always willing to help others and that he is dedicated to his career and family. She stated that he has become an asset to the whole community. The last letter is also from a family friend who stated that he had known the applicant for over ten years. He stated that the applicant has strong morals and that he is respectful and selfless. He stated that the applicant cares about his community as evidenced by his donating time and money to good causes.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on July 10, 1995.

On January 1, 1998, the applicant was seen for emergency medical care on board his assigned cutter at 1:15 a.m. The medical notes state:

PT was found unconscious on a rec deck, with compromised airway, airway established (positional). PT would not respond to verbal or painful stimuli. No sign of trauma, or other injuries. When PT was move [sic] he vomited. He would set himself up to vomit. During this time he would not respond to verbal or painful stimuli. Then he immediately loss [sic] muscle control. Pupillary response was initially perla but slow. During vomiting pupils became fully dilated and unresponsive. After vomiting pupils were fully constricted and unresponsive. Pupillary response continued to vary during the entire unconscious period, which lasted about 2 hrs. PT regained consciousness at 0245 and he was oriented X 3. PT last [remembers] falling asleep watching a movie at about 1230. He denies being hit on the head or any other trauma. Neurologically intact on exam. Flight surgeon contacted advised that [cutter] make best possible speed to Port ... and have PT evaluated by a [Medical Officer]. Samples of vomitus, urine and blood obtained. Monitor vitals until transported to Port.

The applicant was seen at the Medical Clinic in port later the same day. The notes reiterated the same story of the applicant last remembering falling asleep to a movie and waking up in medical care. He vomited again while in medical care and reported feeling better afterwards. He denied family history of heart disease, seizures, diabetes, or cardiac abnormalities. He also denied the use of recreational drugs. The notes state that his loss of consciousness was from an "unknown etiology." The applicant's command had asked that his blood, urine, and vomit specimens be hand delivered to the lab for analysis.

On January 1, 1998, at 2:20 p.m., the applicant's toxicology results were completed. He was tested for eight categories of narcotics, none of which were ecstasy and all of which came back negative.

On March 16, 1998, the applicant was charged with violating Article 112a of the Uniform Code of Military Justice (UCMJ), wrongful use or possession of a controlled substance. The detail of offense states that the applicant "had in his possession and did attempt to distribute the drug 'X' or 'Ecstasy' on board ... during the period between Oct/Dec 97."

The applicant was tried at Captain's Mast on April 1, 1998, and found guilty of violating UCMJ Article 112a. He was reduced in paygrade to E-3, restricted to base for 45 days, and ordered to forfeit \$500.

On April 6, 1998, the applicant was informed that his Commanding Officer (CO) was discharging him for misconduct due to the findings at Mast.

The applicant was subjected to another drug test on April 17, 1998. All of the results came back as negative.

The applicant provided a statement dated May 12, 1998, in his defense regarding the proposed misconduct discharge. He stated that he objected to the discharge. He asserted that he had never been in possession of ecstasy nor did he believe there was any credible evidence that he had. He stated that a Snapple bottle that had been found in his room was presented at Mast, but that empty glass bottle was never tested. The applicant stated that he had been subjected to urine, blood, and vomit screenings and all of tests had been negative for any controlled substance. The only other evidence presented at Mast was the statements of two members who stated that he had “discussed ‘X’ with them.” He added that he did not challenge the outcome of the Mast because he was told that appeals could only be based on disproportionate punishments and not claims of true innocence. The applicant stated that he had worked hard to be a valuable member of the Coast Guard and wished to remain in the service, particularly because he had not broken any UCMJ rules. He attached three endorsements from his command in support of his statement.

The applicant was screened for alcohol and drug dependence on August 6, 1998. Based on his responses, he was found to be not dependent on either alcohol or drugs. He was screened again in depth on September 3, 1998, at the request of his command. The applicant continued to proclaim his innocence and denied any substance use. After interviewing the applicant, reports, and his medical file, it was determined that he did not meet the criteria for substance abuse or dependence.

On November 20, 1998, the applicant’s CO requested that the applicant be discharged “by reason of misconduct due to involvement with drugs.” The CO stated that this involvement was the purpose for the applicant’s Mast on April 1, 1998.

The applicant was discharged under honorable conditions on December 31, 1998. The narrative reason for discharge on his DD 214 is “Misconduct.” His Separation Code is “JKK,” which denotes drug abuse or possession, and his reentry code is RE-4 (ineligible). He had a total of three years, five months, and twenty-one days of active duty service.

VIEWS OF THE COAST GUARD

On August 29, 2018, the Judge Advocate General of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant alternative relief in this case. In doing so, he adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC stated that the application was not timely because the applicant waited more than three years to file after discharge.¹ PSC stated that the applicant’s command requested a CGIS

¹ 10 U.S.C. § 1552.

investigation after he was found unconscious and suspected of ecstasy use. PSC stated that CGIS interviewed twenty-five members and “no substantial evidence of drug use by the applicant was gathered and any reports of drugs or drug use were hearsay.” Instead, over the course of the investigation, other members were found to have engaged in illicit drug use, one of whom was discharged. PSC asserted that the evidence that did exist was that the applicant’s blood, urine, and vomit was tested within twenty-four hours of falling unconscious and all came back negative for drugs or alcohol. PSC stated that in addition, his locker was searched and two empty alcohol bottles were found and tested, which came back negative for illicit drugs.

PSC stated that the standard of proof at Mast is preponderance of the evidence, meaning the CO must find that that it is more likely than not that the member committed the offense. PSC argued that there was “no evidence presented that the applicant ‘more likely than not’ used or distributed drugs or ecstasy.” PSC asserted that, to the contrary, the evidence from the toxicology reports shows that his blood, urine, and vomit tested negative for drugs as did the empty alcohol bottles in his locker. In addition, “not one interviewee stated that the applicant did for a fact use or distribute any illegal drugs.” PSC acknowledged that hearsay is permissible at Mast proceedings,² but argued the available evidence did not meet the preponderance of the evidence standard. PSC also stated that there was no evidence that the applicant was examined to determine any other causes for his possible seizure and loss of consciousness.

Although the applicant requested that his narrative reason for discharge be changed to “Secretarial Authority,” PSC claimed that the use of this narrative requires the involvement of the Department’s Secretary. PSC stated that there is no evidence that the Department of Transportation’s Secretary was involved in the applicant’s case. Therefore, PSC recommended alternative relief by upgrading the applicant’s discharge to Honorable, the separation authority to 12-B-12, COMDTINST M1000.6A, separation code JND,³ and narrative reason of separation “Separation for Miscellaneous/General Reasons.”

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 12, 2018, the Chair sent the applicant a copy of the Coast Guard’s views and invited him to respond within 30 days. The applicant, through counsel, stated that he concurred with the advisory opinion.

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 submission and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552.

² Military Justice Manual, COMDTINST 5810.1, Article 2.J.8.

³ According to the Separation Program Designation Handbook, a “JND” code denotes a “Service initiated discharge directed by established directive when a Service component does not have a Service reporting requirement for specific reasons and desires to identify reasons collectively ‘All other reasons’ which qualify a member for separation.” The associated reason is “Miscellaneous/General Reasons.”

2. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice.⁴ The applicant was discharged in 1998. Therefore, the preponderance of the evidence shows that the applicant knew of the alleged error in his record in 1998, and his application is untimely.

3. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.⁵ In *Allen v. Card*, 799 F. Supp. 158 (D.D.C. 1992), the court stated that the Board should not deny an application for untimeliness without “analyz[ing] both the reasons for the delay and the potential merits of the claim based on a cursory review”⁶ to determine whether the interest of justice supports a waiver of the statute of limitations. The court noted 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.”⁷ Although the applicant in this case did delay filing his application, the evidence of record reveals a significant, prejudicial error in his record, as explained below, and so the Board finds that it is in the interest of justice to excuse the untimeliness of the application.

4. The applicant alleged that his character and narrative reason of discharge are erroneous and unjust. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant’s military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.⁸ Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties “correctly, lawfully, and in good faith.”⁹

5. The Board finds that the applicant has proven by a preponderance of the evidence that his General discharge for drug abuse constitutes an injustice. It was proper for the applicant’s command to take blood, urine, and vomit samples when he was found unconscious, particularly in light of the fact that it was on New Year’s Day. However, the toxicology report came back negative from the samples taken that day and again when samples were taken after the applicant was found guilty at Mast. The Board does not have the applicant’s medical records, so it is not clear whether other potential causes of his symptoms were ruled out. But his CO apparently concluded based on his symptoms and his prior discussion of ecstasy with two other members that he had abused drugs. While it is possible that the CO considered other circumstances at Mast that are not in the record, the Board agrees with the Coast Guard that given the toxicology results and CGIS’s failure to find illicit drugs in his possession, there was insufficient evidence of drug abuse or possession to support the CO’s conclusion at Mast that the applicant had used or possessed illegal drugs. Therefore, the Board also agrees that the applicant has overcome the presumption of regularity afforded to his CO and proven by a preponderance of the evidence that it was at least an injustice, if not also an error, for him to have been discharged under honorable conditions for misconduct.

⁴ 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.

⁵ 10 U.S.C. § 1552(b).

⁶ *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

⁷ *Id.* at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

⁸ 33 C.F.R. § 52.24(b).

⁹ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

6. While this Board has the authority to change a narrative reason for separation to “Secretarial Authority” on behalf of the Secretary, the applicant stated in his response to the Coast Guard’s advisory opinion that he concurred with the recommended relief. Accordingly, alternative relief should be granted by upgrading the applicant’s discharge to Honorable, changing the separation authority to Article 12-B-12, COMDTINST M1000.6A, changing his separation code to JND, changing his narrative reason for separation to “Miscellaneous/General Reasons,” and changing his reentry code to RE-3, which is the default reentry code for separation code JND.¹⁰

(ORDER AND SIGNATURES ON NEXT PAGE)

¹⁰ ALCOAST 125/10 (issued March 18, 2010).

ORDER

The application of former FS3 [REDACTED], USCG, for correction of his military record is granted as follows: His military records shall be corrected and he shall be issued a new DD 214 with the following entries:

- His Character of Service, shall be “Honorable.”
- The Separation Authority shall be “Article 12-B-12, COMDTINST M1000.6A.”
- His Separation Code shall be “JND.”
- His Narrative Reason for Separation shall be “Miscellaneous/General Reasons.”
- His Reentry Code shall be RE-3.

December 7, 2018

