

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2015-033



FINAL DECISION

This is a proceeding under the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case after receiving the applicant's completed application on February 12, 2015, and assigned it to staff member [REDACTED] to prepare the draft decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated October 9, 2015, 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 seaman apprentice (SA/E-2) who received a general discharge under honorable conditions for "misconduct" due to illegal drug use on April 13, 2007, asked the Board to upgrade his reentry code on his discharge form from an RE-4, which means the applicant is ineligible to reenlist, to an RE-1 so that he may reenlist in another branch of the military.

The applicant alleged that he only incurred one drug incident, which "did not rise to the level of abuse" and so he should not have been discharged for drug abuse. He also alleged that the urinalysis that showed he had used an illegal drug was improper in that there was not a "valid chain of custody." He alleged that another seaman was tested at the same time that he was and that their urine samples were mixed up. The applicant noted that one medical report mentioning marijuana use in his record also states that he is a "white male," although the word white is crossed out, and another report states that he does not meet the criteria for drug abuse or dependence.

The applicant also complained that he was improperly charged with an unauthorized absence (UA) when he tried to drive across the country to reach his new assignment, which was to attend "A" School in California. The applicant stated that as soon as he realized he would not reach the school in time, he called his prior command and was told to return, which he did within 24 hours.

The applicant alleged that as an African American, he was discriminated against while serving in the Coast Guard. As evidence of this, he pointed out that the term “white male” appears on his medical record even though he is African American.

The applicant also alleged that he was told that he could remain in the Service if he would just comply with certain stipulations and that he was only discharged because he refused. Therefore, he argued, he must be fit for service or he would not have been offered an opportunity to remain on active duty. The applicant alleged that because he was fit for service, he should have received an RE-1, or at least an RE-3 (eligible with waiver), but instead he received an RE-4, which is preventing him from reenlisting in another branch of the military. He argued that the RE-4 is unjust, does not accord him the benefit of the doubt, and is not “fair play.”

Finally, the applicant stated that there should be no statute of limitations when it comes to justice as his reason for why the Board should find that it is in the interest of justice to consider his application despite its untimeliness.

SUMMARY OF THE RECORD

On June 27, 2006, the applicant enlisted in the Coast Guard. Upon enlistment, the applicant signed a form CG-3307 (“Page 7”), acknowledging having been counseled about the Coast Guard’s drug policy. The Page 7 states that the applicant was “...advised that the illegal use or possession of drugs constitutes a serious breach of discipline...If my urine test detects the presence of illegal drugs, I will be subject to an immediate general discharge by reason of misconduct.”

After completing boot camp, the applicant was assigned to a unit in [REDACTED]. According to a report of an investigation dated March 2, 2007, on November 16, 2006, the applicant received orders to report to FS “A” School no later than January 21, 2007. Although he departed his unit on January 5, 2007, the applicant did not report on time and was declared absent without leave (AWOL). On January 23, 2007, he contacted his prior command and was ordered him to return to [REDACTED]. On January 25, 2007, the applicant reported to Coast Guard Sector [REDACTED] and submitted to a voluntary urinalysis.

On January 26, 2007, the applicant was admitted to a hospital due to suicidal ideations. The admission report states that he is a “white male,” but the word “white” is crossed out. The report notes that he “had positive marijuana screen on admission but states that he has not smoked marijuana.” The applicant was discharged from the hospital on January 30, 2007. The psychiatric findings were “decreased mood, decreased sleep, helplessness, hopelessness, suicidal ideations and positive marijuana use.” The discharge report notes that he is African American and was no longer feeling suicidal.

The applicant’s urine sample was sent to Tripler Army Medical Center for testing. On February 6, 2007, the applicant’s urinalysis results returned, showing that the applicant’s urine, identified by his social security number on the bottle, had tested positive for THC, a metabolite

of marijuana, at a level of 191 ng/ml, which is far above the military cutoff for a positive result, 15 ng/ml.

On February 13, 2007, the applicant acknowledged his rights in writing and was advised of the charges against him. He voluntarily signed a statement saying that he understood the charges against him but argued that he should not have been deemed AWOL because he had “stayed in contact with” his [REDACTED] unit and the “A” School during his trip. He alleged that he had not used marijuana but had been “in the environment of wrongful substance usage.” He claimed that his travel allowance had not been properly explained to him and noted that he had returned to his unit after being told on January 24, 2007, that his orders to “A” School had been cancelled. He noted that he had explained to his command the personal and financial problems that had prevented him from reaching “A” School. He stated that he had spent his travel allowance on “vehicle parts, food, and lodging” and that he did not report to school on time due to “weather and dead of family” (sic). The applicant stated that he had experienced a lot of racism and that “the Coast Guard is not for me.” He stated that he “would like to request a general discharge.”

The investigating officer recommended that the applicant be charged with being AWOL for three days; dereliction of duty; disobeying an order by misusing travel funds; not traveling to “A” School; knowingly using illegal drugs; and wrongful use of a controlled substance. He recommended that the charges be disposed of at mast and that the applicant be processed for discharge due to misconduct.

On March 12, 2007, the applicant was taken to mast and awarded non-judicial punishment (NJP) for violation of Articles 86, 92, and 122a of the Uniform Code of Military Justice (UCMJ).

On March 20, 2007, the applicant was evaluated by the Navy Counseling and Assistance Center at Naval Hospital [REDACTED]. Based on his responses to the screening questions, he did not meet the criteria for a diagnosis of substance abuse or dependency. The applicant was recommended to participate in IMPACT, a program to help patients who have become concerned about a potential substance abuse problem, but he declined.

On March 28, 2007, the applicant’s command informed him in writing that he had initiated action to discharge the applicant for illegal marijuana use as shown by a positive urinalysis result. He advised the applicant that he had a right to confer with an attorney regarding the proposed general discharge and that he had a right to submit a statement on his own behalf. The same day, the applicant signed a form waiving his right to consult an attorney, waiving his right to submit a statement, acknowledging that a general discharge might cause prejudice in civilian life, and stating that he did not object to being discharged.

On March 28, 2007, the applicant’s command recommended to Commander, Personnel Command that the applicant receive a general discharge for misconduct due to use of illegal drugs based on the urinalysis result.

On April 5, 2007, the Personnel Command issued separation orders for the applicant to receive a general discharge for misconduct with a JKK separation code, denoting involvement with illegal drugs. The applicant was discharged on April 13, 2007, with a general discharge for misconduct, a JKK separation code, and an RE-4 reenlistment code (ineligible to reenlist).

Following his discharge from active duty, the applicant applied to the Discharge Review Board (DRB). He alleged that he had been mistreated in the Coast Guard and wanted to enlist in a different branch of the military. On September 27, 2010, the DRB's decision not to change the applicant's reentry code or his separation code was approved. The character of service on his DD 214 was corrected from "general" to "under honorable conditions." On March 7, 2011, the Coast Guard informed the applicant of the DRB's decision and provided him with information and an application for applying to the BCMR.

VIEWS OF THE COAST GUARD

On July 22, 2015, the Judge Advocate General (JAG) submitted an advisory opinion in which he recommended that the Board deny the requested relief. In so doing, he adopted the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC).

PSC stated that the evidence of record shows the applicant was discharged due to a drug incident in accordance with policy and the applicant submitted the application in an untimely manner with insufficient evidence to overcome presumption of regularity accorded the drug incident and the general discharge for misconduct. PSC noted that the applicant's RE-4 reentry code was issued in accordance with his separation code and that to be discharged with an RE-4 and JKK requires only one drug incident and not any particular "level of abuse.". Therefore, PSC recommended that the Board deny the request for relief.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On July 27, 2015, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within thirty days. No response was received.

APPLICABLE REGULATIONS

Article 20 of the Personnel Manual in effect in April 2007 (COMDTINST M1000.6A) contains most of the regulations regarding suspected illegal drug use by members of the Coast Guard. Article 20.A.1.a. states that "[s]ubstance [sic] abuse undermine[s] morale, mission performance, safety, and health. They will not be tolerated within the Coast Guard." Furthermore, Article 20.C.1.a. states that "Coast Guard members are expected not only to comply with the law and not use illegal drugs, but also, as members of a law enforcement agency, to maintain a lifestyle which neither condones substance abuse by others nor exposes the service member to accidental intake of illegal drugs."

Article 20.C.1.d. states that a unit CO should "investigate all incidents or circumstances in which the use or possession of drugs appears to be a factor, and take appropriate administra-

tive and disciplinary action.” Article 20.C.3.a. states that “Commanding officers shall initiate an investigation into a possible drug incident, as defined in Article 20.A.2, following receipt of a positive confirmed urinalysis result or any other evidence of drug abuse.”

Article 20.A.2.k. defines a “drug incident” as the intentional use of drugs, the wrongful possession of drugs, or the trafficking of drugs. It further states that “[t]he member need not be found guilty at court-martial, in a civilian court, or be awarded NJP for the conduct to be considered a drug incident” and that “[i]f the conduct occurs without the member’s knowledge, awareness, or reasonable suspicion or is medically authorized, it does not constitute a drug incident.”

Article 20.C.3.e. states that in determining whether a drug incident has occurred, the CO shall use “the preponderance of the evidence standard” and that a member’s admission of drug use or a positive confirmed urinalysis result may by itself be “sufficient to establish intentional use and thus suffice to meet this burden of proof.”

Article 20.C.4. states that if a CO determines that a drug incident did occur, the CO will do the following:

1. **Administrative Action.** Commands will process the member for separation by reason of misconduct under Articles 12.A.11., 12.A.15., 12.A.21., or 12.B.18., as appropriate. ...
2. **Disciplinary Action.** Members who commit drug offenses are subject to disciplinary action under the UCMJ in addition to any required administrative discharge action.
3. **Eligibility for Medical Treatment.** Members who have been identified as drug-dependent will be offered treatment prior to discharge. ...

Article 12.B.18.b.4. states that “[a]ny member involved in a drug incident ... will be processed for separation from the Coast Guard with no higher than a general discharge.” Article 12.B.2.f.2.a. states that a general discharge will be awarded when a member “has been identified as a user, possessor, or distributor of illegal drugs or paraphernalia.”

Furthermore, the Separation Program Designator (SPD) Handbook states that the correct SPD Code for those discharged due to misconduct in a drug related incident is JKK. This SPD Code designates RE-4 as the appropriate reentry code. The explanation for the JKK code states the following:

Involuntary discharge directed by established directive ... when member who commits drug abuse, which is 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 Section 812 of Title 21 of the United States Code, when supported by evidence not attributed to urinalyses administered for identification of drug abusers or to a

member's volunteering for treatment under the drug identification and treatment program.

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. Under 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22, an application to the Board must be filed within three years after the applicant discovers the alleged error or injustice or within three years of the issuance of a DRB decision. *See Ortiz v. Secretary of Defense*, 41 F.3d 738, 743 (D.C. Cir. 1994). The Coast Guard notified the applicant of the DRB's decision on March 7, 2011, 2010, regarding the applicant's discharge and reentry code and his right to apply to the BCMR. The applicant did not file a completed application with the Board until February 13, 2015. Therefore, the BCMR application is untimely.
3. The Board may consider an untimely application on the merits, if it finds 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 in assessing 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." 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." *Id.* at 164-65; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).
4. The applicant failed to explain why he could not have applied timely to the BCMR. His assertion that it is in the interest of justice to consider his application despite its untimeliness because he does not believe there should be a statute of limitations when it comes to justice is not compelling.
5. With respect to the merits, the applicant is not likely to prevail on his application for an upgrade of his reentry code. Under the SPD Handbook, JKK is the correct separation code for a member discharged due to a drug incident, and the only authorized reentry code is RE-4. Articles 20.C.4. and 12.B.18. of the Personnel Manual clearly state that a member involved in a drug incident will be processed for separation with no better than a general discharge for misconduct, and the JKK and RE-4 are the corresponding authorized codes. The applicant has submitted no evidence to support his claim that his discharge and reentry code are unjust.
6. Accordingly, the application should be denied because it is untimely and the applicant has failed to show that it is in the interest of justice for the Board to excuse his delay.

ORDER

The application of former [REDACTED] USCG, for correction of his military record is denied.

October 9, 2015

