DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2018-171

[redacted]
SNQM

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on July 9, 2018, and assigned it to staff member [redacted] to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated June 21, 2019, 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 Seaman Quartermaster who received a general discharge "under honorable conditions" in 1997, asked the Board to correct his record by upgrading his discharge to honorable. The applicant was discharged for misconduct because of two offenses: a history of bounced checks and his actions concerning a party where he appeared aware that his subordinates were using marijuana.

The applicant alleged that the upgrade in discharge is warranted because it was part of a larger investigation into misconduct on the ship, and the investigation into his actions concerning the party where his subordinates consumed marijuana was conducted under "'witch-hunt-like' circumstances." He argued that, due to the pressures of the larger investigation, his subordinates felt coerced in their statements against him. As a result, he alleged, the non-judicial punishment (NJP) that led to his discharge was based wholly on hearsay and not fact. The applicant did not address the bounced checks that also affected his discharge in his BCMR application.

The applicant alleged that he did not have an opportunity to fully try his case before a court-martial because when he asked for advice from the JAG at the time of the incident, they recommended that he accept the general discharge to avoid a criminal prosecution. He believed that accepting NJP and a general discharge was in his best interests at the time, but he did not fully comprehend the benefits he would lose with a general discharge.

The applicant stated that the Board should allow this change, even though it is well over three years after the date of discharge, because he is a new father and a member of the American Legion. He would like his discharge upgraded to have his honor restored.

The applicant relied solely on his military record to support his request.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on October 18, 1994. During recruitment, the applicant signed a Page 7 indicating that he had been informed of the Coast Guard's drug policies. During recruit training, he acknowledged having received a "full explanation of the drug and alcohol abuse program." After training, the applicant advanced to quartermaster, third class (QM3/E-4). Award certificates and evaluations in his record show that he performed many of his duties well.

Financial Irresponsibility and Alcohol Issues

Documentation of the applicant's problems with check "bouncing" (writing checks with insufficient funds) begins with a Page 7 dated October 26, 1995, which states that he had written two checks at the Coast Guard exchange in [redacted], totaling $150.75 that were returned for insufficient funds. The applicant was notified of the incident and the $43.00 service charge three times. The applicant received financial counseling after the discovery. The Coast Guard warned the applicant that further financial issues could lead to discharge and garnished his wages until the debt was repaid.

In November 1995, the applicant wrote five checks at various Army and Air Force exchanges totaling $455.89 which were returned for insufficient funds, incurring $129.00 in service charges. The Coast Guard garnished the applicant's wages until the debt was repaid. The applicant was counseled about his conduct on a Page 7 dated January 3, 1996.

On December 12, 1995, the applicant was counseled on a Page 7 for having empty alcoholic beverage containers in his trash receptacle in his barracks room. He claimed that after an outing, he had brought the empty bottles to the barracks with the intention of recycling them. The charge of violating an order was dismissed at a Captain's Mast with a warning.

On February 27, 1996, the applicant was punished at mast for loaning his military identification, which indicated a legal drinking age, to an underage crew member so that the member could buy alcohol at local bars. An investigation had concluded that the applicant knowingly gave the member his military identification for this purpose. As punishment, the CO docked the applicant's pay by $200 per month for two months.

On March 14, 1996, the applicant wrote a check at the [redacted] Coast Guard exchange for $50.00 that was returned for insufficient funds. The applicant received two notices of past due payment, and his wages were garnished until the debt was repaid.

On April 18, 1996, the applicant wrote a $60.00 check aboard a cutter that was returned for insufficient funds. This check incurred $10.00 in fees, and the applicant's wages were garnished until the debt was repaid. After this incident, the applicant's CO took him to mast for financial irresponsibility. The applicant submitted a written statement saying that his overdrawn checking account issues were unintentional and honest mistakes. At mast, the CO found that while check bouncing is a common mistake and is often unintentional, the applicant's recurring issues warranted NJP. The CO placed the applicant on a six-month probationary period for unsatisfactory performance beginning August 13, 1996, and stated that if the applicant made no effort to improve his financial management skills, he would be processed for discharge.

In the early morning hours of August 1, 1996, [redacted], police arrested the applicant for driving while intoxicated (DWI). The command appointed an investigating officer, who reported that the applicant had taken his shipmate's car for a drive and that, while the applicant knows his alcohol limits, the fact that he had not eaten anything since breakfast that morning before drinking and the five-percent alcohol content of the beer he drank had impacted the applicant's alcohol tolerance. The investigation concluded that, as a result of his actions, the applicant was absent without leave for 56 minutes on August 1, 1997. At mast, the applicant's CO assigned him 45 days of restriction with extra duties aboard the cutter as NJP in addition to any civilian punishment.

On August 13, 1996, the applicant was advised on a Page 7 that his arrest for DWI on August 1, 1996, had constituted his "alcohol incident" and that if he incurred another "alcohol incident," he could be discharged.

A Page 7 in the applicant's record states that he successfully completed his probation for financial irresponsibility without further financial incident on December 14, 1996.

On April 30, 1997, the applicant signed a check for $150.00 at the Navy exchange that later bounced. The Coast Guard investigated this incident in conjunction with a March 1997 party (discussed below), and during an interview on June 27, 1997, the applicant stated that the check had bounced because he was unaware of when a payroll deduction would impact his account. The exchange mailed the applicant a notification of non-payment and granted a grace period of 30 days to settle the debt. The applicant submitted a $150.00 money order via postal mail to settle the debt, but the exchange did not receive the payment in time. There is evidence in the record of the money order and its submission to the post office, but the applicant admitted in a July 9, 1997, interview that he did not call to follow up with the exchange to make sure the payment was received.

The investigating officer concluded that the applicant honestly believed he had the money in his account to make the purchase and that there may not have been enough time for his money order to reach [redacted] within the 30-day period. However, the investigating officer concluded that the applicant was delinquent in not knowing when the deduction in pay would impact his account.

March 1997 Drug Incident

The applicant was discharged after an investigation into events surrounding a party in early March 1997 attended by the applicant and his direct subordinates at the house of a seaman who was his subordinate.

On June 26, 1997, the applicant acknowledged in writing that he had been advised of his Miranda/Tempia rights, including his right to remain silent and his right to counsel. He also acknowledged that he was suspected of violating Article 92 (failing to obey an order) and Article 112a (use or possession of a controlled substance) of the Uniform Code of Military Justice (UCMJ). He indicated that he did not desire to consult an attorney and desired to make a statement for the investigation.

According to the investigating officer's (IO's) report, dated June 28, 1997, the applicant submitted to a series of interviews. In the first interview on May 29, 1997, the applicant admitted that he was at the party where marijuana was present and observed one of his subordinate seamen using a bong and marijuana. According to the IO, the applicant stated that he had held the seaman's bong briefly, was aware that it contained marijuana, and had attempted to leave the party as soon as he realized the bong's contents. The applicant also stated that he was aware of this particular seaman's drug use and that two other seamen under his command had approached him regarding this seaman's repeated drug use. During this interview, the applicant denied any personal use of marijuana and stated that he had observed three other seamen, besides the one who had handed him the bong, using marijuana at the party.

In a subsequent interview on June 27, 1997, the applicant told the IO that he had approached the seaman who had used the bong about his drug use and that the seaman had seemed "uncaring." The applicant confirmed again that he was at the party and noted that the seaman in question admitted to the applicant that he was "high."

As part of the June 27, 1997, interview, the applicant submitted a written statement to the IO in which he reiterated that he had never used marijuana and that his consistently clean urinalysis tests supported this claim. He again confirmed that he was at the March 1997 party and that the seaman with the drug problem had handed him the bong and admitted to the applicant that he was high. The applicant stated that he took the passage of the bong as an "invitation to participate" but did not take the seaman up on the offer. Instead, he reprimanded the seaman for the trouble he could get into and left the party shortly thereafter. The applicant stated that he was not sure how impaired the seaman was or if contraband was present, adding that the situation was uncomfortable enough that he wanted to be away from it. Next, the applicant stated that two other seamen had approached him about the seaman with the drug problem and that, while he was confronting the seaman, the other two had informed the chain of command about the incident. He stated that he regretted staying silent after this realization and that he did not inform the chain of command because he was trying to help a friend, the seaman with the drug problem. In this statement, the applicant denied having accused anyone of illegal drug use apart from the seaman who handed him the bong, and stated that the seamen making accusations against him were doing so because of his friendship with the seaman with the drug problem. He closed by saying that he desired to

not attend his captain's mast because the situation was already quite intense and he did not want to add more stress to his life.

Ten seamen submitted written statements about the applicant for the investigation. They all stated that they had never seen the applicant use controlled substances, and two said that they had never seen the applicant in the same room where a controlled substance was used. One could not recall if the applicant was present at the March party, and two stated that the applicant did not attend the March party.

The IO found that the applicant was aware of the seaman's drug use based on the applicant's own admission, though the extent of his knowledge was in doubt, since the statements from others under his command provided conflicting testimony. However, the investigating officer said, as a Petty Officer, the applicant had a duty to report adverse information about his subordinates to his supervisors and he did not do so in this case. The IO recommended that the charges against the applicant be disposed of at mast.

NJP, Appeal, and Discharge Proceedings

At a mast on July 17, 1997, the applicant's CO found that he had violated these articles of the UCMJ: Article 92, for failing to report marijuana use by a member of his crew; Article 112a, for wrongfully possessing marijuana; Article 123a, for writing a check with insufficient funds; and Article 134, for "conduct prejudicial to good order and discipline in the armed forces." The CO gave the applicant NJP, consisting of sixty days of restriction to the cutter, forfeiture of half his pay for two months, and reduction to pay grade E-3. The CO also noted that she was going to recommend that the applicant be discharged under other than honorable conditions.

On July 20, 1997, the applicant submitted an appeal of the NJP. He claimed that he had been punished for conduct that was not a punishable offense under the UCMJ and that the CO's findings had not been supported by evidence. He contested the finding that he had possessed marijuana, saying that he had never been warned that he was being charged with possessing marijuana and so had not opportunity to establish a defense. He claimed that he had clearly said "no" when asked if there was marijuana in the bong that he had been handed and that he had admitted only to being handed paraphernalia and immediately returning it to the seaman with a reprimand.

In his appeal, the applicant also contested the CO's addition of a violation of UCMJ Article 134. He pointed out that the written charge did not specify how he had violated this article, as required. Finally, he alleged a that the investigation had been flawed, that there had been a miscarriage of justice, and that his punishment was disproportionate to that given to seamen who had committed drug offenses. He asked that the charges under Articles 112a and 134 be dismissed and that the discharge proceedings be terminated.

On August 8, 1997, the applicant's CO notified him that he was initiating the applicant's discharge for misconduct and involvement in a "drug incident" and that he was recommending a general discharge, instead of a discharge "under other than honorable conditions." He advised the applicant of his right to consult an attorney and to submit a statement objecting to the discharge.

The applicant acknowledged this notification, objected to the discharge, and indicated that he would consult an attorney and submit a statement.

On August 9, 1997, the CO notified the applicant that his NJP appeal had been denied and forwarded him the Area Commander's August 8, 1997, response to the appeal. The Area Commander stated that he and a Coast Guard attorney had reviewed the appeal and noted that under Article 15 and the Military Justice Manual, a member may only appeal an NJP based on the punishment awarded being "unjust or disproportionate to the offense." He disapproved the CO's finding that the applicant had violated Article 134 charge because the written specification had not explained how the applicant had violated the article and, if the charge was based on the applicant's failure to report marijuana use by other members, it was multiplicious with the Article 92 charge. The Area Commander called the applicant's claim that he had not been warned about the possession charge and so could not establish a viable defense disingenuous because the applicant had attempted to avoid being present at his mast by waiving the right in writing and it was only because his CO had required his attendance that the applicant had been able to present a defense at all. In addition, he stated that the applicant was on notice that had he was suspected of involvement in a drug incident and had been questioned about the circumstances that led to him holding a bong. Regarding the conflicting statements on drug possession, the Area Commander stated that, while holding a bong is not the same as holding a marijuana leaf, it can qualify as a conveyance of marijuana equivalent to possession. He noted that the CO and others had reported that during the mast, when the CO asked the applicant, "What did you think was in the bong," the applicant had replied "marijuana." Therefore, the Area Commander upheld the possession charge. Regarding the applicant's allegation of inconsistent application of justice, the Area Commander stated that the CO was well within her rights to apply justice based on the facts of each case presented. He noted that there was evidence that the applicant had witnessed the seaman using marijuana on more than one occasion and that he had been the only petty officer present at the party and had "facilitated and tacitly endorsed use [of marijuana] by junior crewmembers. This makes your possession especially egregious."

The Area Commander stated that he was upholding the applicant's NJP for violating Articles 92, 112a, and 123a of the UCMJ. He noted that the discharge processing was not part of the NJP but an administration action required by Article 20 of the Personnel Manual whenever anyone was involved in a drug incident. He noted that the applicant had possessed marijuana and had chosen to socialize with marijuana users, despite having received thorough training in the Coast Guard's drug policies, and that the applicant's failure to report his subordinate's use of drugs had "allowed the situation to continue unchecked for far too long," which resulted in other members also losing their careers. The Area Commander noted that the applicant's punishment could have been more severe and upheld the punishment awarded by the CO as "an appropriate reflection of the serious nature of your misconduct."

On August 15, 1997, the applicant submitted a statement in response to the notification of discharge dated August 8, 1997. The applicant again objected, repeated some of the claims in his appeal of the NJP, and particularly contested the finding that he had violated Article 112a of the UCMJ by possessing a controlled substance. He claimed that he did not know what was in the bong and that any statement saying that he knew its contents or knew that any member of his crew was using drugs is incorrect. To account for the inconsistencies between this statement and the

ones mentioned previously, he accused the IO of misrepresenting his statements during his interviews. He wrote that the only proof of a controlled substance entering his possession was a test of the bong's contents conducted two to three months after the party, which is enough of a time lapse to cast doubt on his guilt. He added that his family had contacted a U.S. Senator's office to rectify this injustice and misrepresentation.

Regarding his violation of UCMJ 123a by bouncing checks, the applicant stated that the most recent offense was an honest mistake, and once he realized the error, he corrected it. He added that, even if a Coast Guard member is found unsuitable for financial mismanagement, he is still eligible for an honorable discharge.

On August 19, 1997, the applicant's CO recommended to Commander, Personnel Command that the applicant receive a general discharge for misconduct due to his involvement in a drug incident. She noted that he could also be discharged for unsuitability due to financial irresponsibility. The CO cited the applicant's prior history of financial instability, DWI, loaning his military ID to an underage colleague for the purpose of going to bars, and possession of empty alcoholic beverage containers in his barracks room as part of a pattern of misconduct that could no longer be tolerated by the Coast Guard. The CO also forwarded the applicant's statement objecting to the discharge to Commander, Personnel Command with her endorsement disagreeing with his statement.

On August 27, 1997, the Personnel Command directed the CO to discharge the applicant with a general discharge "under honorable conditions" for misconduct due to his involvement with drugs in accordance with Article 12.B.18. of the Personnel Manual.

On September 12, 1997, the Coast Guard discharged the applicant "under honorable conditions." His DD-214 shows that he was discharged for misconduct, was not eligible to reenlist, and had completed two years, ten months, and twenty-five days of active duty.

VIEWS OF THE COAST GUARD

On March 1, 2019, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which she recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC stated that the applicant did not provide a sufficient reason for his 21-year delay in filing the BCMR application, and it should be denied on these grounds alone. PSC claimed that the applicant had sufficient access to military justice because he admitted to having waived his right to a court-martial and wanted to waive his appearance before the Captain's Mast. PSC next pointed to the IO's summary of the applicant's statement on May 27, 1997, that he had held a bong with marijuana in it and argued that this evidence was enough for a finding that the applicant should receive a general discharge. Even if the statement was incorrectly transcribed, PSC argued, the applicant's inaction in the face of known drug use among his crew was enough of a violation of his duty to justify the CO's decision to recommend a general discharge. PSC added that the applicant's history of bouncing checks was also sufficient for a general discharge and that the only

reason his financial irresponsibility was not listed as a reason for discharge on his DD-214 was because the form provides space for only one reason for separation.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 5, 2019, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. No response was received.

APPLICABLE LAW AND POLICY

Checks and Indebtedness Policies

Article 8.L.4.d. of the 1997 Coast Guard Personnel Manual discusses indebtedness among enlisted members:

> Repeated complaints of indebtedness concerning an enlisted person, with no indication of satisfactory progress toward establishing an acceptable financial status, may be considered as evidence of unreliability. Commanding officers shall submit an Administrative Remarks, CG-3307, entry that the member is "unreliable due to the failure to pay debts." The entry shall also include a description of the circumstances surrounding the entry such as the dates, debts, and actions taken. Such an entry may be made for each succeeding marking period until the situation improves. Each time this entry is made, it will be considered when completing the member's next performance evaluation, particularly in the commanding officer's advancement recommendation.

When a servicemember fails to make progress in resolving an indebtedness issue, Article 8.L.4.f. applies:

> Unsatisfactory progress toward resolution of financial difficulty should be considered as evidence of an unacceptable standard of conduct which warrants consideration for separation from the Coast Guard or for a recommendation against reenlistment. Articles 12.A.15, 12.B.16, or 12.B.18 as appropriate.

Article 12.B.16. authorizes Commander, Personnel Command to discharge enlisted members for "unsuitability" due to "financial irresponsibility."

Article 12.B.2.f.(1.a.7) allows for an honorable or general discharge in unsuitability discharge cases. Article 12.B.16.d.(3) allows for general discharge for unsuitability as long as the discharge party has the opportunity to consult with a lawyer.

Article 12.B.16.c. of the 1997 Coast Guard Personnel Manual reads:

> Administrative discharge action for… financial irresponsibility will not be initiated until a member has been afforded a reasonable probationary period to overcome their deficiencies. When a command contemplates discharging a member for reasons contained in this paragraph [including financial irresponsibility], they shall counsel the member that a formal probationary period has commenced and make an appropriate CG-3307, Administrative Remarks, entry in the member's Personnel Data Record, acknowledged by the member in writing, that administrative discharge processing will be initiated unless the member shows significant improvement in overcoming the deficiency during the probationary period. The probationary period shall be for a minimum of 6 months. **Commanding officers are authorized to recommend discharge at any time during the**

> **probationary period if the member is not making an effort to overcome the deficiency** (emphasis added)…

Drug Policies

Article 20.A.2.k. of the 1997 Coast Guard Personnel Manual defines a "drug incident" as follows:

> Intentional drug abuse, wrongful possession of, or trafficking in drugs. If the use occurs without the member's knowledge, awareness, or reasonable suspicion or is medically authorized, it does not constitute a drug incident.

Article 20.C.1.b. states that COs "shall investigate all circumstances in which the use or possession of drugs appears to be a factor."

Article 12.B.18.b.(4)(a) states, "any member involved in a drug incident as defined in article 20-A-2.h… will be processed for separation from the Coast Guard with no higher than a general discharge."

The Manual for Courts-Martial United States states, regarding Article 112a of the UCMJ, that "awareness of the presence of a controlled substance may be inferred from circumstantial evidence."

Trial Procedure

Title 10 U.S.C. § 815(a) (UCMJ Article 15), states that "except in the case of a member attached to or embarked in a vessel, punishment may not be imposed upon any member of the armed forces under this article if the member has, before the imposition of such punishment, demanded trial by court-martial in lieu of such punishment."

The Manual for Courts-Martial United States states that being "attached to or embarked in a vessel" means that the member is assigned or attached to a vessel or embarked on a vessel as a passenger. *See* 10 U.S.C. 815(a).

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. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice.[1] The applicant waited until 2018 to submit his BCMR application even though he contested his "under honorable conditions" discharge multiple times before his separation from the Service. Therefore, the preponderance of the evidence shows that

[1] 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.

the applicant knew of the alleged error in his record—his general discharge "under honorable conditions"—in 1997, 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.[2] 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"[3] 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."[4]

4. Regarding the delay in applying to the Board, the applicant explained that he would like to have his honor restored as a new father and as a member of the American Legion, and an upgrade of his discharge to honorable would do just that. The Board finds that the applicant's explanation for the delay is not compelling because he failed to show that anything prevented him from seeking correction of the alleged error or injustice more promptly.

5. A cursory review of the merits of this case indicates that there is substantial evidence supporting the findings of the applicant's CO that the applicant had knowingly possessed marijuana, disobeyed orders by failing to report his subordinates' use of marijuana, and written numerous checks with insufficient funds. The applicant submitted no evidence that casts doubt on the CO's findings, and the record contains no persuasive evidence refuting the CO's findings, which are presumptively correct.[5] Based on the record before it, the Board finds that the applicant's claim that his general discharge "under honorable conditions" is erroneous and unjust cannot prevail on the merits.

6. 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 ON NEXT PAGE)

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[2] 10 U.S.C. § 1552(b).
[3] *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).
[4] *Id*. at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).
[5] 33 C.F.R. § 52.24(b); *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.").

ORDER

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

June 21, 2019

[redacted]