

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2018-139


SR (former)

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 April 25, 2018, and prepared the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated March 22, 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, who served in the Coast Guard from November 9, 1993, to March 31, 1995, asked the Board to upgrade his discharge from Under Honorable Conditions (UHC) to Honorable. The applicant stated that he “made a mistake under special circumstances” and “was not acting out of dishonor.” He stated that he was being treated for depression at the time of his separation and seeing a therapist twice a week. He alleged that his depression led him to smoke marijuana “only after failing with 2 other medications.” He stated that the two medications did not work and made him sleepy and that “[t]his went on for a few months with no improvement.” The applicant alleged that he told his chief that he had smoked marijuana and underwent urinalysis because he “believed it was time for me and my Coast Guard career to end and I have no hesitation to leave.” The applicant noted that he is now “on disability for depression” and he submitted a letter from the Social Security Administration dated February 2, 2018, stating that he receives a monthly benefit of \$1,079.60. He stated that he knew of the error and injustice in his record in 1995 but that his “depression, chemical imbalances and brain disease were not treatable at the time.”

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on November 9, 1993, and signed a Page 7 acknowledging that the “illegal use or possession of drugs constitutes a serious breach of discipline” and that if his urine tested positive for illegal drugs he would be “subject to a general discharge by reason of misconduct.” He also acknowledged on a Page 7 dated December 28, 1993, that he had received a “full explanation of the drug and alcohol abuse program.” The applicant

completed recruit training, advanced to seaman apprentice (SA/E-2), and was assigned to the Support Center on Governor's Island in New York.

On March 25, 1994, the applicant signed a Miranda/Tempia Warning regarding his rights and acknowledging that he was suspected of having violated Article 112a of the Uniform Code of Military Justice (UCMJ) by wrongfully using a controlled substance. In addition, the applicant's command counseled him on a Page 7 as follows:

This summarizes and documents counseling regarding the Coast Guard substance abuse policy witnessed by your supervisor At this counseling, I advised you that I was investigating an alleged violation of Article 112a, UCMJ, wrongful use of a controlled substance, and gave you a Miranda/Tempia Warning prior to our discussion. I presented you information from Chapter 20, CG PERSMAN about illegal drug use including indicators such as lifestyle, association with persons who use illegal drugs, personal illegal drug use/prescription drug abuse, and purchasing illegal drugs. Additionally, we discussed the Coast Guard urinalysis program, the Federal government's policy for a drug-free work environment, and avenues that a person with a drug abuse problem could privately seek for their own health and well-being. Finally, I stated that if you were either using illegal drugs or living in a lifestyle that indicated association with illegal drugs you were directed to stop. I further advised you that failure to heed this order was a violation of the UCMJ. You declined to submit to a voluntary urinalysis.

On January 5, 1995, the applicant participated in a random urinalysis with 24 other members of the command.

On January 6, 1995, the applicant was diagnosed with "2 weeks adjustment disorder with depression." He reported that he felt tense and had lost sleep and weight. He reported that his work performance had been "under par" and he had taken his frustrations out on his girlfriend. She had left him two weeks ago, which is when the symptoms began. He was referred to a counselor.

On January 10, 1995, the counselor reported that the applicant was feeling "better and is prepared to get on with life."

On January 18, 1995, the Naval Drug Laboratory in Jacksonville, Florida, reported that of the 25 urine samples taken on January 5, 1995, one had tested positive for THC, a metabolite of marijuana, and it was the sample labeled with the applicant's Social Security number. All the other samples tested negative for drug use.

On January 23, 1995, the applicant's counselor reported that he was "stronger emotionally, but facing charge of marijuana usage – had tested positive in urinalysis last week. Declares he is determined to grow up and order priorities."

Also on January 23, 1995, the applicant provided a second urine sample for testing.

On January 25, 1995, the counselor reported that the applicant "continue[d] to do well. Appears to be self-confident, perhaps manipulative and sometimes withholding."

On February 1, 1995, the counselor reported that the applicant “continues to improve from shock of break-up with girlfriend.”

On February 6, 1995, the Naval Drug Laboratory reported that the applicant’s urine sample dated January 23, 1995, had also tested positive for THC.

On February 10, 1995, the counselor reported that the applicant was upset and anxious and wanted out of the Coast Guard. The applicant was referred to a psychiatrist, who noted “agitation - [weight] loss – easily upset” and prescribed Xanax.

On February 13, 1995, the counselor noted that the applicant was “somewhat improved but still quite upset and wavering on his future in the USCG.”

On February 14, 1995, the counselor reported that the applicant was “upset over being denied license to operate heavy equipment vehicle due to drug record.” The applicant reported that the Xanax was having a soporific effect and that he would reduce the amount he was taking.

On February 15, 1995, the psychiatrist noted that the applicant was doing better and would reduce the amount of Xanax he was taking. The dispensary noted that he complained of “hating the Coast Guard and wanting out.” Also on February 15, 1995, the counselor noted that the applicant complained of irritability and anger because of tensions at the office. He noted a “psychosomatic response – fear of passing out.”

On February 16, 1995, the counselor reported that the applicant was feeling better but still a bit shaky. The applicant had “called personnel and was advised 2nd test came back positive for narcotic use. He is relieved and looks forward to discharge.”

On February 27, 1995, the counselor noted that the applicant’s level of distress had increased because he had been charged with being absent without leave (AWOL) and that he would likely be discharged for drug abuse. The counselor advised him to continue taking Xanax and “resist impulsive anger.”

On March 1, 1995, the applicant advised his counselor that he was being separated for drug abuse at the end of the month. They discussed “supportive therapy and behavior techniques.”

On March 6, 1995, the applicant’s commanding officer (CO) advised him in writing that he would be recommending that the applicant be discharged for misconduct due to his involvement with drugs and receive a general discharge. He advised the applicant that he had a right to consult an attorney and to submit a written statement. The applicant acknowledged this notification the same day, stated that he had consulted an attorney, and stated that he did not object to being discharged.

On March 7, 1995, the applicant’s CO sent the Personnel Command a memorandum recommending that the applicant receive a general discharge due to his involvement with drugs. He stated that “[u]rinalysis testing completed and submitted on 5 January 1995 and 23 January 1995 revealed unacceptable levels of THC” in the applicant’s urine. The applicant was being taken

to mast for violating Article 112a of the UCMJ because of his drug use and might be charged with violating Articles 86 and 92 “regarding an unrelated incident.” He noted that the applicant had been advised of his rights and counseled by an attorney.

On March 20, 1995, the applicant was taken to mast and reduced in rate from E-2 to E-1 as non-judicial punishment (NJP).

On March 23, 1995, the Personnel Command issued orders for the applicant to receive a general discharge for misconduct within thirty days due to his involvement with drugs in accordance with Article 12-B-18 of the Personnel Manual. Also on March 23, 1995, the applicant’s counselor reported that he was distressed and “afraid of ‘snapping.’”

On March 27, 1995, the counselor reported that the applicant was feeling uplifted and was planning to spend a week in North Carolina with a friend after his discharge. His father was coming to help him pack.

On March 31, 1995, the applicant received a general discharge “Under Honorable Conditions” for misconduct. He had served 1 year, 4 months, and 22 days on active duty.

VIEWS OF THE COAST GUARD

On November 16, 2018, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which she recommended that the Board deny relief in this case.

The JAG noted that the application was not timely filed and that they applicant had “failed to show why it is in the interest of justice to excuse the delay.” The JAG also stated that the applicant has submitted no evidence that he smoked marijuana to manage his depressive symptoms. The JAG noted that the Page 7 dated March 25, 1994—less than five months after he enlisted—is evidence that his illegal drug use had begun long before he sought help for anxiety. The JAG noted that the applicant had been allowed to consult counsel and did not object to the proposed discharge. Regarding the Coast Guard’s drug program, the JAG stated the following:

The Coast Guard has a significant interest in protecting the public and its members from injury or death at the hands of an individual who abuses drugs. Additionally, given the Coast Guard’s prominent role in enforcing the nation’s drugs laws, it is only appropriate that those members who violate Coast Guard policy concerning illegal drug use be discharged from the service. Applicant was repeatedly informed of the Coast Guard’s illegal drug use policy, acknowledged its provisions repeatedly in writing, and was personally counseled on options to seek treatment for substance abuse. Regardless of the reason Applicant chose to engage in illegal drug use, he did not complete his service honorably, and was appropriately separated from the Coast Guard with a general discharge. Applicant is entitled to no relief.

The JAG included with the advisory opinion the opinion of a psychiatrist, as required by 10 U.S.C. § 1552(g). The psychiatrist stated that he—

did not find any evidence of a depressive disorder during [the applicant’s] enlistment. While he was seen by mental health, his frequently documented symptoms were ‘impulsive anger’. While there was documentation of a depressed mood, he was seen after a break up with his girlfriend and was given the diagnosis of Adjustment Disorder with Depression and Anxiety (which is different from

a depressive disorder. ... I do not find any evidence at all suggesting that his marijuana use was caused by a depressive disorder.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 30, 2018, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within 30 days. No response was received.

APPLICABLE REGULATIONS

Article 12-B-18.b.(4) of the Personnel Manual in effect in 1995 states that any enlisted member "involved in a drug incident" could be discharged for misconduct with "no higher than a general discharge."

Article 1.B.17.b.(4) of the current Military Separations Manual currently in effect 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."

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 was discharged in 1995 and received and signed his DD 214 at the time. Therefore, the preponderance of the evidence shows that the applicant knew of the alleged error in his record in 1995, and his application is untimely. However, the Board finds that the applicant's request falls under its "liberal consideration" guidance and so will waive the statute of limitations.²
3. According to the "liberal consideration" guidance, when deciding whether to upgrade the discharge of a veteran who was diagnosed with a mental health condition, the Board must liberally consider the evidence, including the applicant's claims, and decide whether the preponderance of the evidence shows that the veteran had mental health condition(s) while in the Service that could excuse the veteran's misconduct; whether the mental health condition(s) excused the misconduct that adversely affected the discharge; and, if not, whether they outweigh the misconduct or otherwise warrant upgrading the veteran's discharge.³ In this case, the record shows that the applicant was diagnosed with an adjustment disorder with symptoms of depression and anxiety because his girlfriend had just broken up with him. As the Coast Guard's psychiatrist

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

² DHS Office of the General Counsel, "Guidance to the Board for Correction of Military Records of the Coast Guard Regarding Requests by Veterans for Modification of their Discharges Based on Claims of Post-Traumatic Stress Disorder, Traumatic Brain Injury, Other Mental Health Conditions, Sexual Assault, or Sexual Harassment" (signed by the Principal Deputy General Counsel as the delegate of the Secretary, June 20, 2018).

³ *Id.*

noted, there is no evidence that the applicant suffered from a depressive disorder while in the Service. The Board finds that feeling depressed and anxious because your girlfriend has left you does not excuse or outweigh drug abuse. The Board finds no grounds for upgrading the applicant's discharge.

4. Accordingly, the applicant's request to upgrade his discharge from general Under Honorable Conditions to Honorable should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

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

March 22, 2019

