


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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2019-059

 GM3 (former)

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 January 29, 2019, and assigned the case to the Deputy Chair to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated February 14, 2020, 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 Gunner's Mate (GM3; pay grade E-4), received a general discharge from the Coast Guard on June 13, 2002, after testing positive for ecstasy. He asked the Board to correct his record by upgrading his discharge from general, under honorable conditions, to honorable.

The applicant put forth two arguments in support of upgrading his discharge to honorable. First, he stated that he served his country with respect and integrity. Second, he stated that he did not receive the assistance that he needed from the Coast Guard for his anxiety disorder.

The applicant stated that he excelled early on in his career in the Coast Guard. He completed basic training, attended "A" School to become a Gunner's Mate, and then trained new recruits at an Instructor Development School with officers and senior enlisted members.

The applicant was a member of the Coast Guard on September 11, 2001. He stated that when he and other members from his base learned about the terror attacks, they drove to New York to assist in the aftermath. He alleged that in the weeks following the terror attacks, he became stressed and anxious. One evening when he was working his security detail, he pulled his service weapon on a fellow Gunner's Mate who was looking for scrap metal in the ammunitions bunker. The applicant recalled that he was very close to shooting him.

Shortly after the incident in the ammunitions bunker, the applicant stated, he was asked to go to Guantanamo Bay, Cuba. At the time, the applicant was married with one young daughter. He stated that he was having a very difficult time with his wife and that his marriage was failing. The applicant alleged that he was not receiving the assistance he needed to address his issues both at work and at home. The applicant stated that he tried to reach out but felt defeated when people laughed at him.

In addressing the drug incident that caused his discharge, the applicant stated: “I went out one night and got drunk with my military buddies and ended up in the hospital.”

The applicant addressed the delay in submitting his application by acknowledging that he was aware of his character of service at the time of his discharge. However, he stated, he only recently learned from Volunteers of America that he could apply to the Board for an upgrade.

The applicant did not provide any evidence to support his application.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on January 30, 2001. Following recruit training, he was enrolled in “A” School to become a Gunner’s Mate. In July 2001, he graduated from GM “A” School and was assigned to the training center in Cape May, New Jersey.

On January 23, 2001, the applicant acknowledged the following on a CG-3307 Administrative Remarks form (“Page 7”):

I have been advised that the illegal use or possession of drugs constitutes a serious breach of discipline which will not be tolerated in the United States Coast Guard. Also, illegal drug use or possession is counter to esprit de corps & mission performance and jeopardizes safety. I understand that I am not to use, possess, or distribute illegal drug, drug paraphernalia or hemp oil products. I also understand that upon reporting to recruit training, I will be tested by urinalysis for the presence of illegal drugs. If my urine test detects the presence of illegal drugs, I may be subject to discharge and receive a general discharge. I hereby affirm that I am drug free and ready for recruit training.

On March 3, 2002, the applicant was taken to a hospital under police escort for treatment of a possible drug overdose. The applicant tested positive for ecstasy.

On a Page 7 dated April 15, 2002, the applicant was notified that he had received a “drug incident” for testing positive for ecstasy on March 3, 2002. The applicant’s Executive Officer stated that the incident was thoroughly investigated, and the evidence concluded that the applicant had knowingly taken ecstasy. The applicant was further notified that he would be processed for separation from the Coast Guard.

On April 22, 2002, the applicant received a memorandum from his Commanding Officer (CO) stating that he had initiated action for the applicant’s discharge for misconduct. The CO stated that although the applicant’s performance marks support an honorable discharge, he

recommended a general discharge in accordance with the Coast Guard Personnel Manual.¹ In support of his recommendation, the CO cited the applicant's drug incident. The CO notified the applicant that he could submit a statement on his behalf and that any rebuttal would be forwarded to Headquarters along with the CO's recommendation.

On April 22, 2002, the applicant acknowledged receipt of the notification for discharge and indicated that he had attached a statement on his behalf, understood that he might encounter prejudice in civilian life if awarded a general discharge, had been provided the opportunity to consult with a lawyer, and did object to discharge from the Coast Guard. In his statement, dated April 23, 2002, the applicant wrote that since joining the Coast Guard, he had found a new meaning for self and country. The applicant stated that after graduating from "A" School, he became a qualified instructor and Duty Gunner's Mate at an Instructor Development School where he assisted in the training of 4,089 recruits. The applicant referenced two instances in which he was praised for his noteworthy performance as an instructor in Marksmanship. The first instance was on October 25, 2001, when he received a Bravo Zulu Award.² The second instance was on a Page 7 dated December 21, 2001, which notified the applicant that he received a mark of 7 in Setting an Example. The applicant concluded by stating that if he were allowed a second chance, he would serve to the best of his ability. However, he requested that if he were to be separated, that he receive an honorable discharge.

On April 23, 2002, the applicant's CO sent a memorandum to the Personnel Command recommending that the applicant be discharged for misconduct due to drug use based on his use of ecstasy. The applicant's statement was forwarded with this recommendation for consideration.

On May 16, 2002, the Personnel Command issued orders for the applicant to receive a general discharge for misconduct due to involvement with drugs with a JKK separation code pursuant to Article 12.B.18. of the Personnel Manual.

On June 13, 2002, the applicant was discharged by reason of misconduct in accordance with Article 12.B.18. of the Coast Guard Personnel Manual. His record shows "general" as the character of discharge; RE-4 (ineligible for reenlistment) as his reenlistment code; and JKK (misconduct) as his separation code.

VIEWS OF THE COAST GUARD

On July 23, 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 alleged that the application is not timely. PSC also alleged that no error or injustice occurred in separating the applicant under a general discharge. The applicant received a drug

¹ The applicant's CO referenced three articles in the Coast Guard Personnel Manual: 12.B.18.b.; 12.B.2.f.2.; and 20.A.2.k.

² In the international code of signals, the flag hoist "Bravo Zulu" has long been used to indicate congratulations on a job well done.

incident for the illegal use of ecstasy. According to Article 12.B.2.f.2. of the Coast Guard Personnel Manual, a drug incident qualified the applicant for a general discharge.

The JAG reiterated PSC's allegation that the application is not timely. The applicant acknowledged that he was aware of his character of service when he was discharged in 2002. Further, the JAG alleged that the application is barred by the equitable doctrine of laches.

The JAG alleged that there is no evidence that the applicant requested assistance related to his job or marriage from his command. The JAG also alleged that there is no evidence that the applicant suffered from an anxiety disorder. The JAG recognized that tensions were high in the military following the terror attacks on September 11, 2001. Further, the JAG acknowledged that the applicant may have been nervous after almost shooting a fellow Coast Guard member. However, there is no evidence that the applicant sought medical care for anxiety while he was in the Coast Guard or after he was discharged.

The JAG expanded on PSC's allegation that there is no evidence of error or injustice on the part of the Coast Guard that warrants an upgrade in the applicant's character of service. According to Article 12.B.18.b.4. of the Coast Guard Personnel Manual, the applicant's drug incident prohibited the Coast Guard from issuing him an honorable discharge. The JAG noted that the Coast Guard is a law enforcement agency that does not condone the use of illegal drugs. The applicant's personal problems did not justify the use of illegal drugs.

The JAG concluded by stating that the Coast Guard does not have a policy that permits the upgrade in character of service due to post-service conduct. While the applicant has not demonstrated that his post-service conduct is noteworthy, even if he had, the applicant must be held accountable for his actions.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On July 26, 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

Article 12.B.2.f.2. of the Coast Guard Personnel Manual in effect at the time of the applicant's discharge discusses the standards for discharge in relevant part:

General Discharge. The member's commanding officer or higher authority may effect a separation with a general discharge if the member is subject to discharge and a general discharge is warranted under the standards prescribed in this paragraph. When a general discharge is issued for one of the reasons listed in Article 12.B.2.f.1a., the specific reasons shall be stated in an entry on an Administrative Remarks, CG-3307, in the member's Personnel Data Record. A general discharge applies in these situations:

- a. The member either:
 - (1) Has been identified as a user, possessor, or distributor of illegal drugs or paraphernalia; or

- (2) Has tampered with drug urinalysis samples, supplies, or documentation

Article 12.B.18. of the Coast Guard Personnel Manual in effect at the time of the applicant's discharge discusses a discharge for misconduct as follows:

- a. Policy: Except as specifically provided here, only Commander, (CGPC) may direct a discharge for misconduct and the type of discharge (under other than honorable, general, or honorable) as warranted by the particular circumstances of a given case.
- b. Reasons to Discharge for Misconduct: Commander, (CGPC) may direct discharging a member for misconduct in any of these cases:

...

4. Drugs.

- a. Involvement with Drugs. Any member involved in a drug incident or the illegal, wrongful, or improper sale, transfer, manufacture, or introduction onto a military installation of any drugs, as defined in Article 20.A.2.k., will be processed for separation from the Coast Guard with no higher than a general discharge.

...

- e. Discharging Members with Fewer than 8 Years' Service for Misconduct: Commanding officers shall process members with fewer than eight years of total active and inactive military service recommended for honorable or general discharge for misconduct as follows:

- 1. Inform the member in writing of the reason(s) for being considered for discharge (specifically state one or more of the reasons listed in Article 12.B.18.b. supported by known facts).
- 2. Afford the member an opportunity to make a written statement. If the member does not desire to do so, the commanding officer sets forth that fact in writing over the member's signature. If the member refuses to sign a statement his or her commanding officer will so state in writing.
- 3. Afford the member an opportunity to consult with a lawyer as defined by Article 27(b)(1), UCMJ, if contemplating a general discharge. If the members requests counsel and one is not available, the commanding officer must delay discharge proceedings until such a time as counsel is available.
- 4. Send the case containing a recommendation and these documents to Commander, (CGPC-epm-1) for action:

- a. The reason(s) for processing (include reason such as repeated military offenses, drug abuse, indebtedness, etc.)

...

- c. Summary of Military Offenses. List in chronological order all disciplinary action during current enlistment.

...

- d. These enclosure:

1. The copy of the letter notifying the member of the reason(s) for the processing and information on the member's rights and privileges.
2. The member's signed statement of awareness of rights and privileges and request to exercise or waiver of these rights.
3. The member's signed statement, or member's written, signed statement declining to make a statement.
4. A copy of the closed-out form CG-3306 dated 30 June 1983 showing average Proficiency, Leadership, and Conduct marks and a copy of the current form CG-3306 showing factor marks.
5. Other pertinent documents such as psychiatric or medical evaluations (especially in aberrant sexual behavior cases), statements of any witnesses...police reports, etc.
6. A copy of the chain of custody test results form and the appropriate page from unit's drug urinalysis ledger (applicable in cases of recommendations for discharge resulting from a urinalysis indicating drug abuse).

Article 20.A.2.k. of the Coast Guard Personnel Manual in effect at the time of the applicant's discharge 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. A civil or military conviction for wrongful use, possession, etc., of controlled substance is prima facie evidence of a drug incident. The member need not be found guilty at court-martial, in a civilian court, or be awarded NDP for the behavior to be considered a drug incident.

Article 20.C. of the Coast Guard Personnel Manual in effect at the time of the applicant's discharge discusses the Coast Guard's Drug Abuse Program in relevant part:

20.C.1.a. General: Intentional use of illegal drugs is misconduct which will not be tolerated in the Coast Guard. 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 life-style which neither condones drug abuse by others nor exposes the service member to accidental intake of illegal drugs.

...

20.C.4. Findings of a Drug Incident: If, after completing the investigation described in Article 20.C.3, the commanding officer determines that a drug incident did occur, he or she will take these actions:

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. Cases requiring Administrative Discharge Boards because of the character of discharge contemplated or because the member has served a total of eight or more years, will also be processed under Articles 12.B.31. and 12.B.32, as appropriate.

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.³ The applicant was discharged in 2002 and his DD-214 indicates that he received a general discharge. Therefore, the preponderance of the evidence shows that the applicant knew of the alleged error in his record in 2002, and his application is untimely. However, the Board will waive the statute of limitations because the applicant's request falls under its "liberal consideration" guidance as the applicant is claiming that a mental health condition led to his general discharge.⁴
3. According to the "liberal consideration" guidance, when deciding whether to modify the discharge of an applicant based on a mental health condition, the Board must liberally consider the available evidence to determine whether the preponderance of the evidence shows that while in the Service, the applicant suffered a mental health condition that could excuse the misconduct that led to his discharge or that otherwise warrants upgrading his character of discharge.⁵ In this case, however, the disputed record is presumptively correct,⁶ and the record contains no evidence that substantiates his allegation that he was sent on temporary duty to New York City or that he was suffering from a mental health condition while in the Service. In his application to the Board, the applicant alleged that he suffered from anxiety due to his marital problems, the terror attacks on September 11, 2001, and an incident in which he almost shot a fellow member while on security detail. The Board agrees with the Coast Guard that these events would have been stressful, but there is no evidence that the applicant sought medical treatment for an anxiety disorder while he was in the Coast Guard or soon after his discharge. The applicant has not proven by a preponderance of the evidence that he suffered a mental health condition while in the Coast Guard that could justify his illegal drug use.

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

⁴ 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).

⁵ *Id.*

⁶ 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.").

4. The applicant also alleged that his discharge should be upgraded because he served his country with respect and integrity. In a memorandum informing the applicant of his discharge, his CO recognized that the applicant's performance marks supported an honorable discharge. However, Article 12.B.18.b.4. of the Personnel Manual states: "Any member involved in a drug incident...will be processed for separation from the Coast Guard with no higher than a general discharge." While the applicant's record clearly demonstrates that he was a skillful Gunner's Mate, his drug incident prohibited him from receiving an honorable discharge. The Coast Guard is a law enforcement agency, and Coast Guard members regularly risk their lives to stop the flow of illegal drugs. The applicant has not rebutted the fact that his urine tested positive for ecstasy, and he has not proven by a preponderance of the evidence that his general discharge for misconduct due to drug abuse is erroneous or unjust. Accordingly, his request should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of former GM3 [REDACTED], USCG, for correction of his military record is denied.

February 14, 2020

