


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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2004-074

XXXXXXXXXXXXXXXXXXXXXXXXXXXX

FINAL DECISION


This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The application was docketed on February 19, 2004, upon receipt of the applicant's completed application and military records.

This final decision, dated October 28, 2004, is 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 asked the Board to upgrade his General Discharge Under Honorable Conditions by reason of misconduct to an Honorable Discharge. He stated that there was no error or injustice in his record. However, he stated that he suffered from chronic alcoholism and drug addiction while on active duty and that he continues to suffer from these conditions today. He asserted that the alcoholism and drug addiction had a negative impact on his performance and behavior while in the Coast Guard. He stated that he has completed several drug and alcohol treatment programs sponsored by Department of Veterans Affairs (DVA), and that he is currently participating in a DVA program for the homeless. He stated that having his discharge upgraded would greatly improve his self-esteem.

SUMMARY OF THE MILITARY RECORD

On January 14, 1980, the applicant enlisted in the Coast Guard.

On April 14, 1981, the applicant received non-judicial punishment (NJP) for wrongfully possessing a "bong pipe having marijuana residue." His punishment included forfeiture of \$250 pay per month for two months and a reduction in rate (suspended for 30 days).

On February 1, 1983, the commanding officer (CO) held a health, safety, and welfare inspection of unit personnel that required each person to give a urine specimen to be tested for the presence of illegal drugs. The applicant's urine tested positive for marijuana. On February 18, 1983, the applicant's urine specimen was retested for confirmation of the positive marijuana finding. The retesting confirmed that the applicant's urine contained THC, a marijuana metabolite.

On March 15, 1983, the applicant received NJP for the illegal use of drugs based on his positive urine specimen. His punishment included a reduction in rate by one pay grade and forfeiture of one-half month's pay for two months.

On March 16, 1983, the CO informed the applicant that he had initiated action to discharge the applicant from the Coast Guard because he had been involved in a second drug incident. The CO advised the applicant that he could submit a statement in his own behalf, he could disagree with the CO's recommendation for discharge, and he could consult a lawyer.

On March 18, 1983 the CO sent the Commandant a message recommending that the applicant be discharged because of his involvement in two drug incidents. In addition, the CO stated in the message that the applicant did not desire to make a statement, did not desire to consult with a lawyer, and did not object to the discharge. (There is no signed statement from the applicant in his military record waiving these rights.)

On April 1, 1983, the Commandant ordered the applicant to be discharged under Article 12-B-18 of the Personnel Manual with a General Discharge by reason of misconduct with a HKK (drug abuse) separation code.

On May 6, 1983, the applicant was discharged from the Coast Guard as directed by the Commandant. He was also given an RE-4 (not eligible for reenlistment) reenlistment code.

VIEWS OF THE COAST GUARD

On May 27, 2004, the Judge Advocate General (TJAG) of the Coast Guard submitted an advisory opinion and recommended that the Board deny the application because of untimeliness or lack of proof.

With respect to untimeliness, TJAG stated that an application for correction of a military record must be filed within three years after the alleged error or injustice was discovered or should have been discovered, unless the delay is excused in the interest of justice. He stated that the applicant filed his application more than 17 years after the statute of limitations had expired.

TJAG stated that it is not in the interest of justice to excuse the untimely filing. In this regard, TJAG stated that the BCMR's regulations require that an applicant filing an untimely request set forth reasons explaining why it is in the interest of justice for the BCMR to accept his application for correction. In making a determination whether to waive the statute of limitations, the Board must consider the reasons for the delay and make a cursory review of the potential merits of the claim. Dickson v. Secretary of Defense, 68 F.3d 1396 (D.C. Cir 1995). TJAG argued that the applicant offered no justification for not filing his application sooner and admitted that the Coast Guard did not commit any error or injustice by discharging him with a General Discharge based upon misconduct. "In sum, Applicant offers no substantive reason for his seventeen-year delay in taking action, and [he] lacks any reasonable chance of prevailing on the merits [of his application]. It is not in the interest of justice to waive the statutory three-year filing deadline in this case."

Applicant's Response to the Views of the Coast Guard

On June 1, 2004, a copy of the views of the Coast Guard was sent to the applicant for a reply, but none was received.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's and Coast Guard submissions, the military record of the applicant, and applicable law:

1. The BCMR has jurisdiction over this matter pursuant to section 1552 of title 10, United States Code. The application is untimely.

2. To be timely, an application for correction of a military record must be submitted within three years after the alleged error or injustice was discovered or should have been discovered. See 33 CFR 52.22.

3. However, the Board may still consider an untimely application on the merits, if it is in the interest of justice to do so. In deciding whether it is in the interest of justice to waive the statute of limitations, the Board should take into consideration the length and reason for the delay and the likelihood of the applicant's success on the merits. See Dickson v. Secretary of Defense, 68 F.3d 1396 (D.C. Cir 1995).

4. The applicant's application was submitted approximately 17 years beyond the statute of limitations. The applicant did not provide the date on which he discovered the alleged error, but he should have discovered it on the date of his discharge in 1983. He did not deny that he was aware of the General Discharge Under Honorable Conditions at the time of his discharge. Further, the applicant's explanation for why it is in the interest of justice to waive the statute is not persuasive. In this regard, the applicant asserted that it would be in the interest of justice for the Board to waive the statute and consider his untimely application on the merits because having his General Discharge Under Honorable Conditions upgraded to an Honorable Discharge would improve his self-esteem.

5. Although, the Board is not persuaded by the applicant's reason for not filing his application sooner, the Board must also consider the likelihood of the applicant's success on the merits of his claim in deciding whether the statute of limitations should be waived. Based on a cursory review of the evidence in this case, it is unlikely that the applicant will prevail on the merits of his claim. In this regard, the applicant did not allege any specific error or injustice on the part of the Coast Guard. Nor did he present any proof that the Coast Guard had committed an error or injustice by discharging him with a General Discharge under Honorable Conditions due to misconduct. Moreover, evidence in the applicant's military record supports his General Discharge Under Honorable Conditions by reason of misconduct. The applicant was punished on two occasions for involvement with drugs while on active duty: once for possession of drug paraphernalia and drug residue and once for drug use. Under Article 12-B-18b.(4) of the Personnel Manual the applicant could receive no higher than a General Discharge Under Honorable Condition for a discharge by reason of misconduct (drug abuse).

6. Although the military record does not contain a signed statement from the applicant waiving his right to make a statement, his right to object to the discharge, or his right to consult with a lawyer, the Board is satisfied that he was advised of these rights in a letter from the CO dated March 16, 1983. In addition, the applicant does not allege that he was denied any of his due process rights.

7. Accordingly, it is not in the interest of justice to waive the statute of limitations in this case. The application should be denied.

[ORDER AND SIGNATURES ON NEXT PAGE]

ORDER

The application of former XXXXXXXXXXXXX, XXXXXXXXX, USCG, for correction of his military record is denied.

