


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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2005-094

XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX, SR (former)

FINAL DECISION


This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The application was docketed on April 15, 2005, upon the Board's receipt of the applicant's complete application for correction of his military record.

This final decision, dated February 8, 2006, 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 correct his record by upgrading his under honorable conditions discharge to an honorable discharge. The applicant was discharged from the Coast Guard with a general discharge under honorable conditions (known as a general discharge) by reason of misconduct (drug abuse). He was assigned an RE-4 (not eligible to enlist) reenlistment code and a HKK (involuntary discharge due to drug abuse) separation code.

The applicant stated that he has been out of the Service for twenty years and would like his discharge changed to an honorable discharge for the record. He stated that he discovered the alleged error or injustice on August 30, 1985, the date of his discharge from the Coast Guard.

SUMMARY OF RECORD

The applicant enlisted in the Coast Guard on May 7, 1984. At that time, he signed an administrative remarks page (page 7), which advised him of the following:

I have been advised that the illegal use or possession of drugs constitutes a serious breach of discipline which will not be tolerated. Also, illegal drug use or possession is counter to esprit de corps & mission performance and jeopardizes safety.

On May 28, 1984, an administrative remarks page (Page 7) was placed in the applicant's record counseling him that his urine sample had tested positive for THC (marijuana). The applicant acknowledged the following by his signature: "[the applicant] . . . understands that future confirmed positive urinalysis tests will be considered drug incidents and may result in [his] discharge from the service depending on his . . . overall performance and conduct IAW Article 20-B-3 and 12-B-18 CG PERSMAN."

In June 1985, the applicant participated in a urinalysis screening by providing a sample to be tested for the presence of illegal drugs. His urine specimen tested positive for THC.

On June 17, 1985, the applicant was punished at captain's mast for the wrongful use of a controlled substance, a violation of Article 112a of the Uniform Code of Military Justice (UCMJ).

On June 21, 1985, the applicant's commanding officer (CO) informed the applicant that he had initiated action to discharge the applicant from the Coast Guard with a general discharge under honorable conditions due to misconduct/drugs. The CO advised the applicant that he could submit a statement in his own behalf and consult with a lawyer.

On June 21, 1985, the applicant acknowledged notification of the proposed discharge, did not object to being discharged, waived his right to submit a statement in his own behalf, and acknowledged that he had been provided with the opportunity to consult with a lawyer and waived the right to do so.

On June 21, 1985, the applicant's CO recommended that the Commandant discharge the applicant due to his wrongful use of illegal drugs.

On August 14, 1985, the Commandant directed that the applicant be discharged due to misconduct/drug abuse.

On August 30, 1985, the applicant was discharged from the Coast Guard. He had served one year, three months, and twenty-four days on active duty.

VIEWS OF THE COAST GUARD

On August 26, 2005, the Board received an advisory opinion from the Judge Advocate General (TJAG), recommending that the Board deny the applicant's request for relief.

In recommending denial of relief, the JAG argued that the application was untimely. He stated that applications for correction of military records must be filed within three years of the date the alleged error or injustice was, or should have been, discovered. 33 CFR § 52.22. He said that the Board may waive the statute of limitations and consider the case if an applicant presents sufficient evidence that it is in the interest of justice to do so. The JAG stated that the length of the delay, the reasons for the delay, and the likelihood of the applicant's success on the merits of his claim are factors to be considered in deciding whether to waive the statute of limitations. The JAG stated that the applicant should reasonably have discovered the alleged error on his DD 214 when it was issued to him in 1985. The JAG argued that the applicant offered no explanation or justification for his delay in discovering the alleged error or injustice.

With respect to the merits of his claim, the JAG argued that the applicant has not presented any evidence to support his claim that the Coast Guard erred in characterizing his service upon his discharge. To the contrary, according to the JAG, the record shows that the applicant was properly separated from the Coast Guard after he failed a urinalysis and it was determined that he committed misconduct by using illegal drugs. The JAG stated that absent strong evidence to the contrary, government officials are presumed to have carried out their duties correctly, lawfully, and in good faith. Arens v. United States, 969 F.2d 1034, 1037 (1992). Moreover, he stated that the applicant bears the burden of proving error under 33 C.F.R. § 52.24, and that he has failed to meet his burden in this case.

The JAG also argued that the Coast Guard's policy on separating drug users is appropriate given the Coast Guard's prominent role in enforcing the nation's drug laws. The JAG stated that the applicant violated the Service's core values by using illegal drugs and did not complete his obligated service honorably.

Attached to the advisory opinion as Enclosure (1) were comments from Commander, Coast Guard Personnel Command (CGPC), who offered the following:

The applicant alleges no error in the proceeding that led to his separation, and I find no evidence of error or injustice in the record to recommend approval of the applicant's request. The record also indicates that the applicant received prior counseling on the Coast Guard's policies on the use of illicit substances and the consequences for violating them. These

policies are in keeping with the Coast Guard's law enforcement and drug interdiction missions and **must be maintained with strict adherence**.

As stated in his application, the applicant requests relief because it has been almost twenty years since the incident. However, the applicant's discharge was and is appropriate, and accurately reflects the character of the applicant's period of service with the Coast Guard. The applicant engaged in a serious infraction of the Coast Guard's core values of Honor, Respect, and Devotion to Duty that would result in a discharge with the same characterization today. The Coast Guard has no policy, nor is it contemplating a policy, to upgrade the discharge of members based solely on their subsequent good behavior in civilian life, especially discharges concerning the use of illegal drugs where neither error nor injustice has occurred.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 29, 2005, a copy of the Coast Guard views was sent to the applicant for any response that he desired to make. The BCMR did not receive a reply to the views of the Coast Guard.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction of this case pursuant to section 1552 of title 10 United States Code.

2. The application was not timely. The applicant had been discharged for approximately twenty years before he filed this application with the Board. 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 the 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 stated 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, 165. See also Dickson v. Secretary of Defense, 68 F.3d 1396 (D.C. Cir. 1995).

4. The applicant stated that he discovered the alleged error on the date of his discharge in 1985. However, he did not explain to the Board why he could not have filed an application to correct the alleged error within three years after he discovered it.

5. A cursory examination of the merits indicates that the applicant is not likely to prevail on his request for correction of his record. 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/drug abuse. In addition, the applicant's military record indicates that approximately one year prior to his discharge he was counseled after testing positive for marijuana use that any further infractions would probably result in his discharge from the Coast Guard. Notwithstanding this counseling, the applicant failed a second drug test and was awarded non-judicial punishment for use of marijuana. Moreover, the applicant did not object to the discharge after being advised of his right to do so.

6. The general discharge due to misconduct/drug use was assigned in accordance with the Personnel Manual. Article 12.B.18. of the Personnel Manual states that individuals discharged due to drug involvement will receive no higher than a general discharge.

7. Accordingly, due to the length of the delay, the reasons (or lack of reasons) for not filing his application sooner, and the probable lack of success on the merits of his claim, the Board finds that it is not in the interest of justice to waive the statute of limitations. The application should be denied because it is untimely.

[ORDER AND SIGNATURES ON NEXT PAGE]

ORDER

The application of former SR xxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is denied.

