

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2008-160

XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX

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 Chair docketed the case on July 14, 2008, upon receipt of the applicant's completed application, and assigned it to staff member [REDACTED] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated April 16, 2009, 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 received a general discharge under honorable conditions from the Coast Guard on August 12, 1988, for illegal drug abuse, asked the Board to correct his record by upgrading his discharge to honorable. The applicant explained his request as follows:

As a young man of 21 in the U.S. Coast Guard, I used what I thought was only a very small amount of marijuana at a party to impress a young lady. Not long after, I was called in for a random urinalysis and tested positive, as would be expected, it registered far below what was considered acceptable levels before disciplinary action was to be taken. Unfortunately for me, a very small amount of another substance, cocaine, was discovered as well. When confronted with this by my superior officer, he informed me of what he said they had found and strongly suggested that I sign a form admitting my guilt or face a far worse outcome. I did not knowingly participate in the use of any other substance, other than the one of my aforementioned admission. At the time, I had already been accepted into the voluntary reduction in force program (R.I.F.) and was being processed out of the service. By my own admission, I was wrong. Until that costly transgression, I had served with distinction, and am continuing to try to make up for my shortcomings, past and present, by being the most productive person I can be. Thus, I am requesting an upgrade in my discharge.

The applicant did not provide the date of his discovery of the alleged error but wrote that the Board should consider his application in the interest of justice because his "home address on [his] DD 214 was incorrect, and [he] had to call for a copy, still not realizing the problem until later." The applicant indicated that, whereas he lived in Apartment B at a particular street address, the mailing address on his DD 214 shows that he lived in Apartment 13.

In support of his request, the applicant submitted copies of his DD 214; certificates showing that he is a licensed electrical contractor specializing in low voltage systems in the State of North Carolina; and a certificate showing that in 2004 he earned an Associate's Degree in Applied Science, Advertising and Graphic Design.

SUMMARY OF THE RECORD

On May 27, 1985, the applicant enlisted in the Coast Guard as a seaman recruit (SR) for four years. On the same day, the applicant was advised that he would be subject to urinalysis and the Uniform Code of Military Justice (UCMJ) while on active duty, and he signed the following acknowledgment, which is in his record:

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. No member will use, possess or distribute illegal drugs or drug paraphernalia.

Another acknowledgment in the applicant's record shows that the UCMJ and the code of conduct for members of the Armed Forces were explained to him during boot camp. On August 2, 1985, upon completing boot camp, the applicant was advanced to seaman apprentice (SA), and in September 1985, he reported for duty aboard cutter homeported in Sitka, Alaska.

On March 15, 1987, the applicant advanced to seaman (SN). On April 3, 1987, he applied to attend Radioman "A" School. On May 7, 1987, the applicant was advised that he was in receipt of transfer orders to the air station in Clearwater, Florida, and was also on the list to attend Radioman "A" School. He was advised that if he chose to accept the transfer orders, he would have to serve at his new unit for six months before attending "A" School. The applicant chose to accept the transfer orders.

On February 19, 1988, the applicant submitted to the Commandant a "Request for Early Release from Active Duty," pursuant to a Service-wide reduction in force (RIF). He asked to be released as of July 1, 1988. On April 1, 1988, the Commandant authorized his early release. On April 21, 1988, the applicant's command prepared an Endorsement on Orders to release the applicant for the "convenience of the Government" on June 22, 1988.

On April 25, 1988, the applicant's command conducted a random urinalysis on several member, including the applicant. The applicant's urine tested positive for cocaine and for THC, a metabolite of marijuana, at the level of 45 micrograms per milliliter (ng/mL). A test on a second sample taken from the applicant the same day confirmed these positive results.

On June 14, 1988, the applicant's command notified him that, based on the results of the urinalysis, he was "being recommended for discharge ... by reason of Misconduct for drug abuse in accordance with [Article 12-B-18 of the Personnel Manual]." The applicant was advised that he would receive no higher than a General discharge; that he had a right to submit a statement in his own behalf; and that he would be afforded an opportunity to consult a lawyer. Also on June 14, 1988, the applicant signed an acknowledgment of this notification and indicated that he did

not desire to submit a statement in his own behalf. There is no written confession of drug abuse in the applicant's military record.

On June 14, 1988, the applicant's command informed the Commandant that his urine had tested positive for cocaine and recommended that he be processed for a discharge due to misconduct in lieu of the authorized early release. On June 21, 1988, the Commandant authorized the applicant's command to hold his release in abeyance.

On June 30, 1988, the Commandant asked the applicant's command if the applicant had consulted legal counsel since he was being recommended for a General discharge. On July 6, 1988, the applicant signed another memorandum acknowledging the proposed discharge for drug abuse and the fact that he had been "afforded the opportunity to consult with legal counsel."

On July 14, 1988, the Commandant directed the applicant's command to separate him with a General discharge by reason of misconduct due to drug abuse within 30 days.

On August 12, 1988, the applicant received a General discharge "under honorable conditions" by reason of misconduct in accordance with Article 12-B-18 of the Personnel Manual. His DD 214, which bears all of this information and his mailing address, also bears the applicant's signature.

VIEWS OF THE COAST GUARD

On November 18, 2008, the Judge Advocate General of the Coast Guard submitted an advisory opinion recommending that the Board deny relief in this case. In so doing, he adopted the findings and analysis provided in a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC).

CGPC pointed out that the application is untimely since the applicant was discharged in 1988. CGPC also stated that the Discharge Review Board has no record of an application from the applicant.

CGPC noted that in 1988 the minimum level of THC that constituted grounds for disciplinary action for illegal drug use was 50 ng/mL, whereas today the minimum level for disciplinary action is 15 ng/mL. CGPC stated that "while the threshold for THC may not have been met, any reported level of cocaine clearly constitutes a drug incident. ... Regardless of the applicant's intention to use cocaine, the urinalysis results confirm his cocaine use. The applicant has not provided any evidence to support that the results of his drug test are in dispute."

CGPC stated that under Article 12.B.18.b.4.a., members found to have used illegal drugs in a "drug incident ... will be processed for separation from the Coast Guard with no higher than a General discharge." CGPC noted that in his application, the applicant admitted to having "voluntarily engaged in illegal use of marijuana," but claims that "he did not knowingly engage in illegal use of cocaine." CGPC stated that there are no awards or other grounds for special consideration in the applicant's record. CGPC stated that discharging members who have abused

illegal drugs is especially given the Service's "maritime law enforcement mission whereby the organization conducts counter-drug operations each and every day of the year."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 19, 2008, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 days. No response was received.

APPLICABLE LAW

Under Article 12-B-18.b.(4) of the Personnel Manual in effect in 1988, the Commandant could separate a member for misconduct due to drug abuse as follows:

Drug abuse. The illegal, wrongful, or improper use, possession, sale transfer, or introduction on a military installation of any narcotic substance, intoxicating inhaled substance, marijuana, or controlled substance, as established by 21 U.S.C. 812. Any member involved in a drug incident will be separated from the Coast Guard with no higher than a general discharge. However, in truly exceptional situations, commanding officers may recommend retention of members E-3 and below involved in only a single drug incident. ...

Under Article 12-B-18.e.(1), a member with less than eight years of active service who was being recommended for a General discharge for misconduct was entitled to (a) be informed of the reason for the recommended discharge, (b) consult an attorney, and (c) submit a statement in his own behalf.

Under Article 20.C. of the current Personnel Manual, any member involved in any "drug incident" is subject to an administrative discharge with no greater than a General discharge "under honorable conditions."

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 submissions, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The Board finds that the applicant has exhausted his administrative remedies, as required by 33 C.F.R. § 52.13(b), because there is no other currently available forum or procedure provided by the Coast Guard for correcting the alleged error or injustice.

2. An application to the Board must be filed within three years after the applicant discovers, or reasonably should have discovered, the alleged error in his record. 10 U.S.C. § 1552; 33 C.F.R. § 52.22. The applicant was discharged on August 12, 1988. Prior to that date, he was notified of the pending General discharge and afforded counsel about it. In addition, he signed his DD 214, which shows that he was discharged "under honorable conditions." Therefore, he knew or should have known of the alleged error in his record in 1988. His application is untimely.

3. Pursuant to 10 U.S.C. § 1552(b), the Board may excuse the untimeliness of an application if 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 to determine 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 instructed 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. Regarding the delay of his application, the applicant argued that it would be in the interest of justice to excuse the untimeliness of his application because the home address on his DD 214 was incorrect, so he did not receive it when it was first mailed to him and had to call later for a copy. The Board finds that the applicant’s explanation for his delay is not compelling because he clearly knew the character of his discharge in 1988 and he has 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 shows that it lacks potential merit. The applicant’s command determined on the basis of his urinalysis results that the applicant was involved in a “drug incident” because he had knowingly used an illegal drug. He was afforded all due process under Article 12-B-18.e.(1) of the Personnel Manual then in effect. His commanding officer’s determination that he was involved in a drug incident and the resultant General discharge are presumptively correct under 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.”). Although the applicant now claims he did not know that he was ingesting cocaine when he knowingly smoked marijuana, his claims are insufficient to overcome his commanding officer’s determination that he was involved in a drug incident in that he knowingly used an illegal drug, which is all that is required to trigger a General discharge under Article 12-B-18.b.(4). The Board finds that the applicant’s claim 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 APPEAR ON NEXT PAGE]

ORDER

The application of former SN xxxxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is denied.

