DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2012-179

[redacted]
xxxxxxxxxxxxxxxxx

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 after receiving the applicant's completed application on July 2, 2012, and assigned it to staff member [redacted] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c), with the assistance of staff member [redacted]

This final decision, dated April 11, 2013, 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 December 4, 1989, for illegal use of marijuana, asked the Board to upgrade his discharge to honorable. He argued that his discharge was inequitable because it was based on one isolated incident of misconduct and that his conduct prior to his drug incident was unblemished. The applicant also pointed out that his criminal record has been spotless in the 22 years following his discharge.

Regarding the delay in submitting his application, the applicant stated that he discovered the alleged errors in his record on June 7, 2012, and argued that it is in the interest of justice to waive the untimeliness because he feels that it is unjust that my "singular indiscretion 22 years ago should affect my pursuit of a new career considering my spotless criminal record before and after my enlistment."

SUMMARY OF THE RECORD

On March 13, 1988, at age 23, the applicant enlisted in the Coast Guard as a seaman recruit (SR). On his enlistment application, he admitted to using marijuana in the past but stated that he had discontinued its use in 1987. On March 13, 1988, the applicant signed the following statement for 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.

On March 22, 1988, an Administrative Remarks form (Page 7) was placed in the applicant's record to document that he had been given a full explanation of the Coast Guard's drug and alcohol abuse program.

Following a random urinalysis conducted on September 7, 1989, the applicant's urine tested positive for THC, a metabolite of marijuana.

On November 3, 1989, the applicant's commanding officer advised him that he had initiated the applicant's general discharge due to drug abuse. The commanding officer advised the applicant that he had a right to consult a lawyer, to object to the proposed discharge, and to submit a statement on his own behalf. On November 6, 1989, the applicant acknowledged the notification and stated that he did not desire to submit a statement. He also stated that he did not desire to consult a lawyer.

On November 14, 1989, the applicant's commanding officer requested permission from the Commandant to discharge the applicant for misconduct due to drug abuse.

On November 20, 1989, the Commandant issued orders for the applicant to receive a general discharge for misconduct with an HKK separation code denoting drug abuse, in accordance with Article 12-B-18 of the Personnel Manual.

On December 4, 1989, the applicant was awarded a general discharge "under honorable conditions" for misconduct in accordance with Article 12-B-18 of the Personnel Manual with an HKK separation code and an RE-4 reentry code (ineligible to reenlist). He signed his discharge certificate, DD 214, with this information.

VIEWS OF THE COAST GUARD

On December 19, 2012, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief in this case. The JAG argued that the application is untimely and the applicant failed to establish that an error or injustice exists in his record.

The JAG adopted the facts and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC). The PSC pointed out that the application is untimely because the applicant was discharged in 1989, and stated that the applicant was properly discharged in accordance with Coast Guard policy.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On December 24, 2012, 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 REGULATIONS

Under Article 12-B-18.b.(4) of the Personnel Manual in effect in 1989, the Commandant could separate a member for misconduct due to drug abuse as follows:

> Involvement with drugs. Any member involved in a drug incident as defined in article 20-A-2h., … will be processed for separation from the Coast Guard with no higher than a General Discharge.

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, (c) object to the discharge, and (d) submit a statement in his own behalf.

These regulations remain essentially the same under Article 1.B.17. of the current Coast Guard Separations Manual.

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.

2. An application to the Board must be filed within three years after the applicant discovers the alleged error in his record.[1] Although the applicant stated that he discovered the alleged error in 2012, he was informed of the reasons for his pending discharge and signed his DD 214 showing his general discharge for misconduct in 1989. Therefore, the preponderance of the evidence shows that he knew of the alleged error in 1989, and 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."[2] 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."[3]

4. Regarding the delay of his application, the applicant argued that his application should be considered, even if untimely, because of his otherwise clean record and intent to pursue a new career. This argument is not persuasive because he has not shown that anything prevented him from applying to the Board in a timely manner.

---

[1] 10 U.S.C. § 1552(b).

[2] *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

[3] *Id*. at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

5. The Board's cursory review of the merits of this case indicates that the applicant was properly awarded a general discharge for misconduct, in accordance with Article 12-B-18 of the Personnel Manual then in effect after his urine tested positive for THC, a metabolite of marijuana, during a random urinalysis. His record shows that he received due process as provided in Article 12-B-18.e.(1) of the Personnel Manual. These records are presumptively correct under 33 C.F.R. § 52.24(b),[4] and the applicant has submitted no evidence showing that they are erroneous or unjust. Because the record contains no evidence of error or injustice, the applicant's request cannot prevail on the merits.

6. The applicant argued that his discharge should be upgraded in the interest of justice because it was based on one isolated incident of misconduct in nearly 21 months of service in the Coast Guard, and a single indiscretion 22 years ago should not adversely affect his pursuit of a new career. The Board notes that the applicant has borne the consequences of his drug use for a long time. However, the delegate of the Secretary informed the Board on July 7, 1976, by memorandum that it "should not upgrade a discharge unless it is convinced, after having considered all the evidence … that in light of today's standards the discharge was disproportionately severe vis-à-vis the conduct in response to which it was imposed."[5] Under Article 1.B.17. of the Military Separations Manual in effect today, members whose urine tests positive for THC are discharged for misconduct with no better than a general discharge. Therefore, the Board is not persuaded that the applicant's general discharge for misconduct is disproportionately severe in light of current standards.

7. Based on the record before it, the Board finds that the applicant's request for correction of his general discharge for misconduct cannot prevail on the merits. 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]

---

[4] *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").

[5] Memorandum of the General Counsel to J. Warner Mills, et al., Board for Correction of Military Records (July 7, 1976).

ORDER

The application of former x[redacted] for correction of his military record is denied.

[redacted]