

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2013-012



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 October 31, 2012, and assigned it to staff members [REDACTED] and [REDACTED] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated July 25, 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 asked the Board to upgrade his 1990 general discharge under honorable conditions for drug abuse to an honorable discharge.¹ He stated that it was unjust for the Coast Guard to discharge him for failing a drug test and that he should have received counseling or been offered rehabilitation instead.

The applicant indicated that he discovered the alleged error or injustice in his record on October 27, 1989, and argued that it is in the interest of justice to consider his application because he used drugs only one time due to personal problems and was not a drug addict.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on October 20, 1986. On September 18, 1989, a random urinalysis was conducted at the applicant's unit and his urine tested positive for THC, a metabolite of marijuana. His Coast Guard record contains a handwritten letter dated October 26, 1989, in which he explained that he smoked marijuana because he had a lot of personal problems and that although "the stuff was illegal I thought I could get away with it." On November 17,

¹ The five authorized types of discharge are Honorable, General Under Honorable Conditions, Under Other than Honorable Conditions, Bad Conduct, and Dishonorable. Bad conduct and dishonorable discharges are only awarded by court-martial. Personnel Manual, Article 12.B.2.c.

1989, the Officer in Charge (OIC) of the applicant's unit advised him in writing that he had initiated his discharge for drug abuse because of the urinalysis result. The OIC advised the applicant that he had a right to object to the discharge, and that the Commandant would make the final decision on his discharge. The applicant acknowledged the notification. He indicated that he had been provided the opportunity to consult with a lawyer and that he did not wish to submit a statement on his behalf.

On January 10, 1990, the Commandant ordered the applicant's command to discharge him with a general discharge for misconduct due to involvement with drugs in accordance with Article 12-B-18 of the Personnel Manual. The applicant was discharged on February 1, 1990.

Prior to filing an application with the BCMR, the applicant applied to the Coast Guard's Discharge Review Board (DRB) and requested to have his general discharge under honorable conditions upgraded to honorable. On June 2, 1992, the DRB denied the applicant's request. The DRB stated that the applicant's general discharge by reason of misconduct was appropriate and that there were no errors of fact, law, or procedure at the time the discharge was issued.

VIEWS OF THE COAST GUARD

On March 15, 2013, the Judge Advocate General (JAG) of the Coast Guard adopted the findings and analysis in a memorandum prepared by the Personnel Service Center (PSC) and recommended that the Board deny relief in this case. The JAG argued that the application is untimely and that the applicant was properly discharged after his urine tested positive for marijuana use. The JAG noted that the applicant submitted no evidence to support his assertion that the Coast Guard committed an error or injustice during the discharge process.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On April 4, 2013, 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 1990, 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.² The applicant received his general discharge in 1990 and the DRB issued its response to the applicant's request to upgrade his discharge on July 2, 1992. Therefore, his application is untimely.³
3. Under 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."⁴
4. Regarding the delay in submitting his application, the applicant argued that the Board should consider his application because his one-time drug use was attributable to his mounting personal problems and he was not a drug addict. The Board finds that his explanation for the delay is not compelling because he failed to show why he could not have applied sooner.
5. A 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 marijuana use 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 then in effect. These records are presumptively correct under 33 C.F.R. § 52.24(b). The Board notes that the applicant submitted no evidence to support his request, and the record contains no grounds for upgrading his discharge.
6. The Board notes that the applicant was 24 years old when he committed the offense for which he was discharged and he 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." Under Article 1.B.17. of the 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

² 10 U.S.C. § 1552(b); 33 C.F.R. § 52.22.

³ See *Ortiz v. Secretary of Defense*, 41 F.3d 738, 743 (D.C. Cir. 1994).

⁴ *Allen v. Card*, 799 F. Supp. 158, 164-65 (D.D.C. 1992); see also *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

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]

ORDER

The application of forme  USCG, for correction of his military record is denied.

