

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2013-018

████████████████████
████████████████████

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 application upon receipt of the applicant's completed application on November 5, 2012, and subsequently prepared the final 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

The applicant asked the Board to correct his record by upgrading his general discharge under honorable conditions to an honorable discharge. The applicant was discharged with a general discharge under honorable conditions on October 17, 1985, by reason of misconduct because his urine tested positive for cocaine. He was assigned an RE-4 (not eligible to reenlist) reenlistment code and an HKK (drug abuse) separation code. The applicant alleged that he was on authorized leave when he was ordered back to duty to participate in a urinalysis. He argued that the Coast Guard committed an error by ordering him back to duty from his leave status for drug testing.

BACKGROUND

The applicant served a first enlistment in the Coast Guard from July 24, 1979 to July 23, 1983. He reenlisted on July 24, 1983 and he was serving in his second enlistment when his urine sample tested positive for cocaine.

The record indicates that on June 24, 1985, the applicant gave a urine sample as part of the Coast Guard's drug testing program. On July 2, 1985, the applicant's sample screened positive for cocaine and it was forwarded for confirmation testing. On July 18, 1985, the laboratory confirmed that the applicant's urine sample was positive for cocaine.

On August 28, 1985, the applicant was punished at captain's mast for violating Article 112a of the Uniform Code of Military Justice (wrongful use of drugs). As punishment, he was ordered to forfeit \$400.00 pay per month for one month, which was suspended for a period of ten days.

On August 28, 1985, the applicant's officer-in-charge (OIC) advised him that he had initiated action to discharge the applicant from the Coast Guard for misconduct due to drug abuse, and that he was recommending that the applicant received a general discharge. The applicant was advised that he had the right to make a statement in his behalf and that he could consult with a military lawyer.

On August 28, 1985, the applicant acknowledged the proposed discharge, acknowledged that he could consult with a lawyer, objected to the discharge, and stated that he understood that he could receive a general discharge. The applicant also submitted a statement in his behalf. In his statement, he admitted to one-time drug use, but denied that he had a drug problem. He stated that he had tried the drug out of curiosity. He asked to be retained in the Coast Guard because he had given the Coast Guard 100% and the Coast Guard had been good to him.

In a letter dated August 22, 1985, the applicant's OIC recommended to the Commander, Coast Guard San Francisco that the applicant be discharged from the Coast Guard by reason of misconduct due to the wrongful use of cocaine.

On August 28, 1985, the Commander, Coast Guard Group San Francisco recommended that the Commandant discharge the applicant from the Coast Guard by reason of misconduct due to drug abuse.

On September 17, 1985, the Commandant approved the applicant's discharge from the Coast Guard.

On October 17, 1985, the applicant was discharged from the Coast Guard due to misconduct (drug abuse).

VIEWS OF THE COAST GUARD

On March 21, 2013, the Judge Advocate General (JAG) submitted the views of the Coast Guard recommending that the Board deny relief. The JAG stated that the application is neither timely nor meritorious. The JAG stated an application should be submitted within three years after an applicant discovers or should have discovered the alleged error or injustice. The JAG argued that the Coast Guard discharged the applicant on October 17, 1985 and therefore, his application should have been submitted to the Board no later than October 17, 1988. The JAG acknowledged that the Board may excuse untimeliness, but argued that the applicant did not provide any reason why it is in the interest of justice to excuse his untimeliness.

The JAG argued that even if the Board considered the application to be timely, it is without merit and should be denied because the applicant failed to prove by a preponderance of the evidence that his general discharge from the Coast Guard by reason of misconduct is in error

or unjust. The JAG noted that under 33 C.F.R. § 52.24(b), the applicant has the burden of proof. The JAG stated that in this case, the applicant admitted to using cocaine and he was properly discharged under Article 12.B.18.b.4.a. of the Coast Guard Personnel Manual.

The JAG stated that although the applicant argued that he was unjustly ordered to return from leave to provide urine for testing, he did not submit any evidence, except for his own statement, to support his assertion. Nor did the applicant submit any evidence that such an order was even given. In light of the above, the JAG recommended that the application be denied.

APPLICANT'S REPOSENSE TO THE VIEWS OF THE COAST GUARD

On March 18, 2013, a copy of the views of the Coast Guard was mailed to the applicant for a reply. The Board did not receive a response from the applicant.

APPLICABLE REGULATIONS

Coast Guard Personnel Manual (1985)

Article 12-B-18.b.4 of the Personnel Manual stated the following in pertinent part:

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 processed for separation from the Coast Guard with no higher than a general discharge.

Article 20-A-3.e. defined drug abuse as the use of a drug or other substance to produce a physical or psychological effect other than the intended prescribed use.

Article 20-A-3.f. defined drug incident as “Any incident in which drugs are a factor. For the purposes of this titled instruction, voluntary self-referral, use or possession of drugs or drug paraphernalia, or drug trafficking constitute an incident.”

Article 20-A-3.g. defines drugs as marijuana, narcotics, and all other controlled substances as listed Schedules I-V established by section 202 of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 812 as updated and republished under the provisions of that Act.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's submissions and military record, the Coast Guard’s submission, 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. Under 33 C.F.R. § 52.22, an application to the Board must be filed within three years after the applicant discovers the alleged error or injustice. The applicant knew or should have known at the time of his discharge in 1985 that he had received a discharge under honorable conditions because it is documented on his DD 214, which the applicant acknowledged with his signature. The applicant did not file his application with the Board until October 22, 2012. Therefore, the BCMR application is untimely by approximately 24 years and the applicant did not provide a persuasive reason for not filing his application within the required time period.

3. 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 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.

4. Based upon a cursory review of his application, the applicant is not likely to prevail on his claim for an upgrade of his under honorable conditions discharge. The applicant admitted in his statement regarding his proposed discharge that he used cocaine. His admission plus the positive urine test is sufficient to establish that the applicant committed a drug incident. *See* Article 20-A-2.e.-g. of the Personnel Manual.

5. Pursuant to Article 12-B-18.b.4. of the Personnel Manual, a general discharge under honorable conditions is appropriate for a discharge due to a drug incident. Article 12-B-18.b.4. makes it clear that any member "involved in a drug incident or the illegal, wrongful, or improper sale, transfer, manufacture, or introduction onto military installation of any drug will be processed for separation from the Coast Guard with no higher than a general discharge." The applicant was afforded his due process rights prior to discharge and does not make any claim that he was denied any such rights.

6. Accordingly, the application should be denied because it is untimely and it is not in the interest of justice to excuse his untimeliness.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

