

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2013-078



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 March 5, 2013, and subsequently prepared the final decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated December 13, 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 BACKGROUND

The applicant asked the Board to correct his record by changing his general discharge under honorable conditions (referred to as a general discharge) by reason of misconduct to a discharge by reason of physical disability (medical). The applicant enlisted in the Coast Guard on January 5, 1987, and was discharged under honorable conditions on March 29, 1988, by reason of misconduct due to drug abuse. He was assigned an RE-4 reenlistment code and a HKK¹ (drug abuse) separation code.

The applicant contended that he was erroneously discharged due to a urinalysis that showed he had used opiates. He asserted that the opiates resulted from taking Tylenol with Codeine and other medications that had been prescribed by military doctors for a back condition. He alleged that the Coast Guard decided to discharge him after medical personnel indicated that he would need surgery. He stated that he went along with the discharge at the time so that he could get on with his life, but now it is time for the truth.

The applicant stated that the Board's three-year statute of limitations should be waived in the interest of justice because he is stating the truth.

¹ The Separation Program Designator (SPD) Handbook states that an HKK separation code indicates a member has been involuntarily discharged due to a drug incident.

BACKGROUND

On December 9, 1986, the applicant was counseled on an administrative remarks page (page 7) about the Coast Guard's policy on illegal drugs. The page 7 stated the following, in pertinent part: "I have been advised that the illegal use or possession of drugs constitutes a serious breach of discipline which will not be tolerated . . . No member will use, possess, or distribute illegal drugs or drug paraphernalia." He was counseled again on January 20, 1987, that he was given a full explanation of the Drug and Alcohol Abuse Program by the Command Drug and Alcohol Program Representative in compliance with Article 20 of the Coast Guard Personnel Manual.

On December 17, 1986, the applicant participated in a urinalysis screening for illegal drugs. On December 31, 1987, the laboratory reported the applicants' urine tested positive for cannabinoid (marijuana) at 75 ng/ml. On January 27, 1988, the laboratory confirmed that the applicant's urine contained cannabinoid. The laboratory report also showed Codeine and Morphine were present in the applicant's urine.

On February 18, 1988, the applicant's commanding officer (CO) advised the applicant that the CO was recommending that the Commandant discharge the applicant from the Coast Guard with a general discharge under honorable conditions due to a drug abuse. The CO told the applicant that his urine tested positive for cannabinoid.

The applicant was advised in writing that he could submit a statement in his own behalf, that he could object to the discharge, and that he had the right to consult with a lawyer.

On February 18, 1988, the applicant signed a statement in which he acknowledged the proposed discharge, indicated he would attach a statement, and acknowledged that he had been given the opportunity to consult with a lawyer. In his statement, the applicant wrote that he had spoken with a lawyer who explained all of his rights, even though he was being discharged for misconduct.

On February 18, 1988, the CO recommended that the Commandant discharge the applicant with a general discharge due to a positive drug test. The CO noted in his memorandum to the Commandant that there was a possibility of an initial medical board for the applicant to evaluate a back condition. The CO noted that the back condition could be treated by the Department of Veterans' Affairs (DVA).

On March 17, 1988, the Commandant directed that the applicant be discharged with a general discharge under honorable conditions by reason of misconduct due to drug abuse. The Commandant directed that the applicant receive a HKK (misconduct, drug abuse) separation code, with misconduct as the narrative reason for discharge.

On March 29, 1988, the applicant acknowledged by signature that he had been informed of the findings of a physical examination that occurred on the same date. The applicant agreed that he had been examined and found physically fit for separation from active duty. The applicant did not desire to make a statement.

On March 29, 1988, the applicant was discharged from the Coast Guard.

VIEWS OF THE COAST GUARD

On September 30, 2009, the Board received an advisory opinion from the Judge Advocate General (JAG), of the Coast Guard recommending that the applicant's request be denied. The JAG also adopted the facts and analysis provided by Commander, Personnel Service Command (PSC) as the Coast Guard's advisory opinion. PSC asserted that the application was untimely and that the applicant had not provided an explanation for his failure to file timely.

PSC also stated that Coast Guard policy clearly states that the intentional use of drugs will be defined as a drug incident and that any member involved in a drug incident will be processed for separation from the Coast Guard for misconduct with no higher than a general discharge (under honorable conditions). PSC stated that contrary to the applicant's contention that he was discharged because of a positive urinalysis for opiates that were prescribed to him by military doctors, he was in fact discharged due to a positive urinalysis for cannabinoid (THC), which is illegal and was not prescribed to him.

APPLICANT'S REPOSENSE TO THE VIEWS OF THE COAST GUARD

On August 20, 2013, the Board received the applicant's response to the views of the Coast Guard and disagreed with it. The applicant restated the allegations he made in his application.

APPLICABLE REGULATIONS

Article 12-B-18-b.(4) of the Personnel Manual in effect at the time states the following:

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 . . . Any member involved in a drug incident will be separated 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. Proper use of a drug by a patient is not drug abuse when the drug is prescribed by competent medical personnel for a valid medical purpose.

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

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

Article 20-A-3.j. defines marijuana as any intoxicating product of the hemp plant, cannabis, sativa (including hashish) or any synthesis thereof.

Article 20-F.1.a. of the Personnel Manual states that “any member involved in a drug incident will be processed for separation from the Coast Guard.”

Article 20-F-2.c.(2)(d) states that marijuana, phencyclidine, and cocaine do not normally have a valid medical use.

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. Under 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22, an application to the Board must be filed within three years after the applicant discovers, or reasonably should have discovered, the alleged error or injustice. The applicant discovered or should have discovered the alleged error at the time of his discharge, because all information was available to him at the time to pursue a correction of his record. The applicant offered no persuasive reason why he could not have filed a timely application. Therefore, the BCMR application is untimely by approximately twenty-two years.

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. See also *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

4. With respect to the merits, the applicant is not likely to prevail on his application to change his general discharge by reason of misconduct (drug abuse) to discharge by reason of physical disability. The applicant argued that his positive urinalysis was the result of taking opiates that were prescribed for him by Naval doctors. The military record and chain of custody documents for the urinalysis note that the applicant had been prescribed codeine #3 as well as another drug. The applicant's urine tested positive for Codeine and Morphine, as well as cannabinoid (marijuana). The applicant was not discharged for taking any prescribed drugs, but

rather he was discharged for using marijuana (cannabinoid) which was illegal. The applicant presented no evidence that he had a medical prescription for marijuana. He presented no evidence that the laboratory that analyzed his urine could not differentiate between the prescribed drugs and cannabinoid.

5. There is some evidence in the record that the applicant was being treated for a back condition prior to his discharge, but there is no evidence in the record that his back condition caused him to be unfit for active duty. Moreover, the applicant signed a medical entry on March 29, 1988, stating that he had been examined and found physically fit for separation from active duty, and that he did not desire to make a statement.

6. Under the Personnel Manual, a general discharge under honorable conditions discharge is appropriate for a discharge due to drug use. Article 12-B-18-b.(4) of the Personnel Manual makes clear that any member involved in a drug incident or “the illegal, wrongful, or improper use, possession, sale, transfer, or introduction onto military installation of any narcotic substance . . . marijuana . . . will be separated from the Coast Guard with no higher than a general discharge.”

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

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

December 13, 2013

Date

