

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2014-224



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 3, 2014, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated June 5, 2015, 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 February 25, 1992, for illegal use of marijuana, asked the Board to upgrade his discharge to an honorable discharge. He alleged that his discharge "was improper and correct procedure was not followed. I was not given an opportunity to proper legal advice or representation. In addition, there was no discharge board hearing." The applicant alleged that he discovered the error in his record on May 14, 2014, because that is the day he learned that proper procedures were not followed.

SUMMARY OF THE RECORD

On October 3, 1989, the applicant enlisted in the Coast Guard. Upon enlisting, he signed a form acknowledging the following:

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.

Following a random urinalysis at his unit on September 27, 1991, the applicant's urine tested positive for THC, a metabolite of marijuana. The laboratory reported the test results to the Coast Guard on October 15, 1991.

On November 19, 1991, the applicant's commanding officer (CO) notified the applicant in a memorandum of his determination that the applicant had been involved in a drug incident and that he was initiating the applicant's discharge for drug abuse and recommending that the applicant receive a general discharge. The CO advised the applicant that he had a right to submit a written statement and that, because a general discharge was contemplated, he had a right to consult a lawyer.

On December 13, 1991, the applicant signed a written acknowledgement of the CO's notification of the proposed discharge. He acknowledged having consulted with and been counseled by a particular lawyer about his discharge. He also objected to the proposed discharge, requested an honorable discharge, and submitted two statements on his own behalf:

- (1) In a statement dated November 29, 1991, the applicant denied being "a drug abuser or user of any kind." He stated, "My association at a party one weekend with people using these substances was very poor judgment on my part. For that I want to state that I am extremely sorry for these actions. ... I can only hope you can look upon my past record and find some redeeming value in it and be able to view this case with some compassion on my part. Just to know that I am very sorry about this indiscretion. ... I know the lapse of good judgment has probably ruined my chances to ever fulfill that dream of being a Coast Guard aviator." He requested a second chance "to be able to prove that I have the character to pick myself up and show that I can be a positive factor in the future."
- (2) In a statement dated December 12, 1991, the applicant strongly objected to the proposed discharge and stated that he had never abused drugs, although he did "not question the fact that THC was present in my urine." However, he claimed that "the ingestion of the drug was unknown to me and therefore accidental." The applicant summarized his past performance, asked to be retained on active duty, and asked for a hearing to present his case. He did not explain how he had accidentally ingested marijuana.

On January 14, 1992, the applicant's CO recommended that the applicant receive a general discharge for drug abuse. The CO noted that the Executive Officer had explained the urinalysis program to the applicant and his father extensively on November 26 and December 5, 1991. He also noted that the applicant "was given every opportunity to provide me with statements or other evidence to support his claims of passive ingestion. Unfortunately, he has not provided the requested information." The CO forwarded the applicant's statements and urinalysis results to the Personnel Command with his memorandum.

On January 27, 1991, the Personnel Command issued separation orders for the applicant to receive a general discharge under honorable conditions for misconduct within thirty days.

On February 25, 1992, the applicant received a general discharge “under honorable conditions” for misconduct in accordance with Article 12-B-18 of the Personnel Manual. His discharge form DD 214 reflects an HKK separation code, denoting an involuntary discharge for drug abuse following a waiver of the right to an Administrative Discharge Board, and an RE-4 reenlistment code (ineligible to reenlist). He had completed 2 years, 4 months, and 23 days of active duty.

VIEWS OF THE COAST GUARD

On April 10, 2015, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant’s request but grant alternative relief in this case. The JAG attached and adopted the findings and analysis provided in a memorandum on the case submitted by Commander, Personnel Service Center (PSC) on March 27, 2015.

PSC stated that the applicant was properly discharged for drug abuse after his urine tested positive for THC in accordance with Coast Guard regulations. PSC stated that the applicant’s claim that he was not allowed to consult a lawyer is rebutted by his signed acknowledgement of having consulted a lawyer, which is dated December 13, 1991. Regarding the applicant’s claim that he should have had a “discharge board hearing,” PSC stated that the applicant had no right to a hearing because he had less than eight years of military service.

PSC noted, however, that the applicant’s DD 214 bears the wrong separation code. Under the Separation Program Designator (SPD) Handbook, members who are involuntarily discharged for drug abuse with no legal entitlement to an Administrative Discharge Board hearing should be assigned the JKK separation code. The HKK separation code is for members who are involuntarily discharge for drug abuse and waive their right to a hearing. Therefore, PSC recommended that the Board grant the alternative relief of correcting the separation code on the applicant’s DD 214.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On April 14, 2015, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within thirty days. No response was received by the Board.

APPLICABLE LAW

Under Article 12-B-18.b.(4) of the Personnel Manual in effect in 1992, when the applicant was discharged, the Commandant was authorized to 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, a member with less than eight years of active service who was being recommended for a general discharge under honorable conditions 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.

Under Article 12-B-18, only members with at least eight years of service are entitled to a hearing before an Administrative Discharge Board.

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 or injustice in his record.¹ Although the applicant alleged that he discovered the error in his record in 2014 because someone told him about certain discharge procedures on that date, the applicant is asking the Board to correct the general discharge that he received and was clearly aware of in 1992. The Board finds that the preponderance of the evidence shows that he was aware that he had received a general discharge—the alleged error he wants corrected—in 1992, and so his application is untimely.

¹ 10 U.S.C. § 1552; 33 C.F.R. § 52.22.

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. The applicant did not explain his delay in seeking an upgrade of his discharge but stated that someone has recently led him to believe that the Coast Guard did not follow proper procedures. The Board finds that the applicant has not provided a compelling justification for his delay in challenging his general discharge.

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 THC, a metabolite of marijuana, in a random urinalysis. The record shows that the applicant received all due process provided under Article 12-B-18 of the Personnel Manual in that he was informed of the reason for the proposed discharge and afforded the opportunity to consult an attorney, to object to his discharge, and to submit statements on his own behalf.

6. The applicant was not entitled to a hearing before an Administrative Discharge Board, as he alleged, because he had less than eight years of military service. The record contains no evidence that substantiates the applicant’s allegations of error or injustice in his official military record, which is presumptively correct under the Board’s regulations at 33 C.F.R. § 52.24(b).⁴ Therefore, the Board finds that his claims cannot prevail.

7. The Coast Guard noted that the applicant’s separation code on his discharge form DD 214 should be JKK, rather than HKK. The JKK and HKK codes mean essentially the same thing except that JKK denotes no entitlement to a hearing, whereas HKK means that the member waived an entitlement to a hearing. The Coast Guard is correct that the applicant should have received a JKK, rather than an HKK, because he was not legally entitled to a hearing. However, the applicant did not request this correction, and the mistake is not prejudicial and does not affect the applicant’s rights or entitlements in any way. Therefore, the Board will not order the Coast Guard to make this correction.

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).

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.”).

8. Accordingly, the Board will not excuse the untimeliness of the applicant's request or waive the statute of limitations under 10 U.S.C. § 1552(b). The applicant's request should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

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

June 5, 2015

