

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

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Application for the Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2014-223**



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**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 22, 2014, and assigned it to staff member [REDACTED] to prepare the draft decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated June 11, 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 from the Coast Guard on September 16, 1994, for illegal use of marijuana, asked the Board to upgrade his discharge to an honorable discharge. He alleged that he has been clean and sober for many years. Additionally, he alleged that he was under the impression at the time of his discharge that his general discharge would be automatically upgraded to honorable if he remained sober.

**SUMMARY OF THE RECORD**

On November 10, 1992, 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.

The applicant was assigned to temporary additional duty at the Naval Alcohol Rehabilitation, [REDACTED] for Level III treatment for alcohol dependence on June 23, 1994. Following a urinalysis on June 23, 1994, the applicant's urine tested positive for THC, a metabolite of marijuana. The laboratory reported the test results to the Coast Guard. On July 22, 1994, the applicant was transferred back to his assigned station, the [REDACTED].

On July 29, 1994, 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 object and submit a written statement. The applicant signed a written acknowledgement of the CO's notification. He did not object to the proposed discharge and did not submit a statement.

On August 17, 1994, the Commandant issued separation orders for the applicant to receive a general discharge for misconduct within thirty days, with SPD Code JKK, denoting an involuntary discharge due to drug abuse.

On September 16, 1994, the applicant received a general discharge for misconduct in accordance with Article 12-B-18 of the Personnel Manual. His DD 214 reflects a JKK separation code and an RE-4 reenlistment code (ineligible to reenlist).

### **VIEWS OF THE COAST GUARD**

On March 27, 2015, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request. He adopted the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC).

PSC argued that the application is not timely and should therefore not proceed beyond a cursory review. It argued that the applicant was discharged from the Coast Guard in 1994 and did not provide proper justification for his delay in challenging his discharge. PSC stated that the applicant was properly discharged for drug abuse after his urine tested positive for THC in violation of Coast Guard regulations. Further, PSC stated that the "[c]ontention from the Applicant that [his] current behavior of sobriety should impact previous discharge procedures is insufficient for relief."

### **APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD**

On March 30, 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.

### **APPLICABLE LAW**

Under Article 12-B-18.b.(4) of the Personnel Manual in effect in 1994, 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-2k., will be processed for separation from the Coast Guard with no higher than a General Discharge.

Under Article 12-B-18.e, a CO was required to perform several steps to process a member with less than eight years of active service recommended for general discharge for misconduct:

1. Inform the member in writing of the reason(s) for being considered for discharge . . .
2. Afford the member an opportunity to make a written statement. . . .
3. Afford the member an opportunity to consult with a lawyer as defined by Article 27(b)(1), UCMJ, if contemplating a general discharge. If the member requests counsel and one is not available, the commanding officer must delay discharge proceedings until such time as counsel is available.
4. Send the case containing a recommendation and these documents to Commander . . . for action:
  - . . . d. These enclosures:
    - . . . (2) The member's signed statement of awareness of rights and privileges and request to exercise or waiver of these rights.

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

On July 7, 1976, the General Counsel for the Department of Transportation issued a memorandum setting the policy of the Board regarding the effect of post-service conduct on records corrections. The memorandum states, *inter alia*, "that the Board should not upgrade discharges solely on the basis of post-service conduct."

The memorandum also states that this "does not mean that the justness of the discharge should be judged by the criteria prevalent at the time it was rendered." Post-service conduct may be relevant for the treatment received at discharge. "[T]he Board should not upgrade discharge unless it is convinced . . . that in light of today's standards the discharge was disproportionately severe vis-à-vis the conduct in response to which it was imposed." This policy has not been reversed and remains binding on the Board.

### 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, or reasonably should have discovered, the alleged error in his record.<sup>1</sup> The applicant received his general discharge in 1994. Therefore, his application is untimely.
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."<sup>2</sup> The court further instructed that "the longer the

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<sup>1</sup> 10 U.S.C. § 1552(b); 33 C.F.R. § 52.22.

<sup>2</sup> *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

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.”<sup>3</sup>

4. The applicant did not explain his delay in seeking an upgrade of his discharge but stated that he believed at the time of his discharge that were he to remain sober he would be able to upgrade his discharge and that he had been sober for several years at the time of his application. The Board finds that the applicant has not provided a compelling justification for his long 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.b.(4) of the Personnel Manual then in effect, after his urine tested positive for marijuana use during a urinalysis. The Board notes that the applicant submitted no evidence to support his request, and the Board knows of no policy that has ever afforded automatic discharge upgrades to veterans after discharge, whether sober or not. The Board does not upgrade veterans’ discharges based on post-discharge conduct, and current policy continues to assign general discharges for members discharged due to drug abuse. Therefore, the applicant’s claims cannot prevail.

6. 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 ON NEXT PAGE)**

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

**ORDER**

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

June 11, 2015

