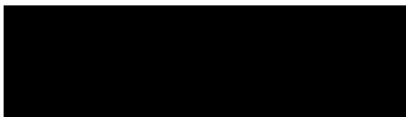


**DEPARTMENT OF HOMELAND SECURITY  
BOARD FOR CORRECTION OF MILITARY RECORDS**

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Application for the Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2015-029**



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**FINAL DECISION**

This is a proceeding under the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case after receiving the applicant's completed application on January 30, 2015, and assigned it to staff member [REDACTED] prepare the draft decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated October 9, 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, a former [REDACTED] (E-5), asked the Board to correct his military record by upgrading his August 9, 1999, general discharge under honorable conditions to an honorable discharge.

The applicant alleged that, since his time with the Coast Guard, he has "made positive changes in [his] life since [his] mistake and [that he would] like [his] military record to reflect the positive life [he has] tried to lead since before and after [his] mistake."

The applicant also alleged that he was not aware that he could request a change in his separation status as the reason for his untimely filing.

**SUMMARY OF THE RECORD**

On February 21, 1995, the applicant enlisted in the Coast Guard for four years. Upon enlisting, he signed a form CG-3307 ("Page 7"), acknowledging having been counseled about the Coast Guard's drug policy. Particularly, the Page 7 states that the applicant was "...advised that the illegal use or possession of drugs constitutes a serious breach of discipline...If my urine test detects the presence of illegal drugs, I will be subject to an immediate general discharge by reason of misconduct." The applicant reenlisted for six years on November 24, 1998. However,

on August 9, 1999, he received a general discharge under honorable conditions for “misconduct” with separation code JKK, which denotes illegal drug use, possession, or sale.

Upon inquiry, the Coast Guard Discharge Review Board stated that that board has not issued a decision in the applicant’s case within the last several years.

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

On June 23, 2015, the Judge Advocate General (JAG) submitted an advisory opinion in which he recommended that the Board deny the requested relief. In so doing, he adopted the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC).

PSC stated that the evidence of record shows the applicant was discharged due to a drug incident in accordance with policy and the applicant submitted the application in an untimely manner with insufficient evidence to overcome presumption of regularity accorded the drug incident and the general discharge for misconduct. PSC noted that the Personnel Manual requires that anyone discharged because of a drug incident receive “no higher than a general discharge.” Therefore, PSC recommended that the Board deny the request for relief.

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

On June 29, 2015, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond in writing within thirty days. No response was received.

### **APPLICABLE REGULATIONS**

Article 20 of the Personnel Manual in effect in 1999 (COMDTINST M1000.6A) contains most of the regulations regarding suspected illegal drug use by members of the Coast Guard. Article 20.A.1.a. states that “[d]rug [sic] abuse undermine[s] morale, mission performance, safety, and health. They will not be tolerated within the Coast Guard.” Furthermore, Article 20.C.1.a. states that “Coast Guard members are expected not only to comply with the law and not use illegal drugs, but also, as members of a law enforcement agency, to maintain a life-style which neither condones substance abuse by others nor exposes the service member to accidental intake of illegal drugs.”

Article 20.C.1.b. states that a unit CO should “investigate all circumstances in which the use or possession of drugs appears to be a factor, and take appropriate administrative and disciplinary action.” Article 20.C.3.a. states that “Commanding officers shall initiate an investigation into a possible drug incident, as defined in Article 20.A.2, following receipt of a positive confirmed urinalysis result or any other evidence of drug abuse.”

Article 20.A.2.k. defines a “drug incident” as the intentional use of drugs, the wrongful possession of drugs, or the trafficking of drugs. It further states that “[t]he member need not be found guilty at court-martial, in a civilian court, or be awarded NJP for the conduct to be consid-

ered a drug incident” and that “[i]f the conduct occurs without the member’s knowledge, awareness, or reasonable suspicion or is medically authorized, it does not constitute a drug incident.”

Article 20.C.3.d. states that in determining whether a drug incident has occurred, the CO shall use “the preponderance of the evidence standard” and that a positive confirmed urinalysis result may by itself be “sufficient to establish intentional use and thus suffice to meet this burden of proof.”

Article 20.C.4. states that if a CO determines that a drug incident did occur, the CO will do the following:

1. Administrative Action. Commands will process the member for separation by reason of misconduct under Articles 12.A.11., 12.A.15., 12.A.21., or 12.B.18., as appropriate. ...
2. Disciplinary Action. Members who commit drug offenses are subject to disciplinary action under the UCMJ in addition to any required administrative discharge action.
3. Eligibility for Medical Treatment. Members who have been identified as drug-dependent will be offered treatment prior to discharge. ...

Article 12.B.18.b.4. states that “[a]ny member involved in a drug incident ... will be processed for separation from the Coast Guard with no higher than a general discharge.” Article 12.B.2.f.2.a. states that a general discharge will be awarded when a member “has been identified as a user, possessor, or distributor of illegal drugs or paraphernalia.”

### 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. 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 the alleged error or injustice or, in discharge cases, within three years of the issuance of a decision by the DRB, which has a fifteen-year statute of limitations. 10 U.S.C. § 1553. *See Ortiz v. Secretary of Defense*, 41 F.3d 738, 743 (D.C. Cir. 1994). The DRB has not issued a decision in the past few years regarding the applicant’s discharge, and the applicant did not file his application with this Board until February 10, 2015. All relevant information was available to him at the time of his discharge to pursue a correction of his record. Therefore, his BCMR application is untimely.
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. The applicant’s assertion that it is in the interest of justice to consider his application despite its untimeliness because he was not aware he could request a change in his separation status is not compelling.

5. With respect to the merits, the applicant is not likely to prevail on his application for an upgrade of his general discharge by reason of misconduct because he has since “made positive changes in his life.” His desire for an honorable discharge and current conduct are not evidence that his general discharge is erroneous or unjust. His DD 214 shows that he was discharged due to a drug incident, and under Article 12.B.18.b.4.a. of the Personnel Manual then in effect, 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.” Therefore, his general discharge was awarded in accordance with Coast Guard policy, and the applicant was counseled about the Coast Guard’s drug policy when he enlisted.

6. Accordingly, the application should be denied because it is untimely and it is not in the interest of justice to excuse the applicant’s delay.

**(ORDER AND SIGNATURES ON NEXT PAGE)**

**ORDER**

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

October 9, 2015

