

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2015-034



FINAL DECISION

This is a proceeding under the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. After receiving the applicant's completed application and military records on February 12, 2015, the Chair docketed the case and assigned it to staff member [REDACTED] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated November 20, 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 13, 1986, for illegal use of cocaine, asked the Board to upgrade his discharge classification from "general" to "honorable." The applicant stated that during the incidents leading to his discharge, he was "influenced by a senior officer" and that he has "not been in trouble since". The applicant submitted no evidence to support these claims. The applicant argued that it would be in the interest of justice for the Board to excuse his application's untimeliness because he "was young and easily influenced."

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard in December 1984. On December 10, 1984, the applicant signed a CG-3307 Administrative Remarks form (Page 7)¹ acknowledging that "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 possess or distribute illegal drugs or drug paraphernalia" (*sic*).

¹ Under Section 10.A. of the Coast Guard's Personnel and Pay Procedures Manual, HIRSICINST M1000.2A, an administrative remarks page (page 7) provides a means of recording miscellaneous entries, which are not recorded elsewhere in a Personnel Data Record (PDR). Administrative remarks entries are made to document counseling or to record any other information required by current directives, or considered to be of historical value.

On December 20, 1984, during recruit training at USCG Training Center Cape May, the applicant signed a Page 7 acknowledging that he was given a full explanation of the Coast Guard's Drug and Alcohol Abuse Program by the Command Drug and Alcohol Representative (CDAR), in compliance with the Personnel Manual, COMDINST M1000.6.

On February 1, 1985, upon completing recruit training, the applicant signed a Page 7 acknowledging that "During training the provisions of Article 8.B.1 (Art 137 UCMJ) COMDTINST CG PERSMAN were complied with and a course of instruction in the code of conduct for members of the U.S. Armed Forces was conducted in accordance with Article 2-C, COMDTINST M1500.10 Coast Guard Training & Education Manual."

After completing recruit training, the applicant was assigned to a cutter based in [REDACTED]. In April 1986, the applicant was transferred to another cutter based out of [REDACTED]. Prior to the incidents leading to his discharge, the applicant received fine marks for proficiency and conduct.

On July 1, 1986, while on liberty, the applicant was arrested by local police for possession of cocaine along with another enlisted member assigned to his cutter. The applicant was observed by the police officers cutting cocaine on a mirror in the front seat of his automobile. The applicant also tested positive for cocaine use during a subsequent urinalysis.

On August 4, 1986, the applicant's commanding officer (CO) recommended the applicant, by then an E-3, as well as the other enlisted member, an E-4, for a "general discharge under honorable conditions by reason of misconduct," due to their illegal possession and use of cocaine. The CO noted that both members "have worked hard during their short time" on the cutter and "have good attitudes and been of good character." The CO wrote, "Aside from this incident, I consider them good Coastguardsmen." However, the CO noted, both members had been "fully aware of the Commandant's policy on drug abuse, and I support that policy to the letter."

On August 14, 1986, the applicant was informed in writing that he was being recommended for a general discharge because of drug abuse. The applicant was also given an opportunity to make a statement on his own behalf in writing and to consult with counsel. For his statement, the applicant signed a page on which he wrote, "I have not statement to make."

On September 15, 1986, the applicant received a general discharge from the Coast Guard, under Article 12-B-18 of COMDINST M1000.6. The Character of Service (Block 24) entry on the applicant's DD 214 reads "General." The narrative reason given for the discharge is "Misconduct," the separation code is "HKK" (discharge for drug use with a board waiver), and the reentry code is RE-4 (not recommended for reenlistment).

At the time of his discharge, the applicant had served one year, nine months, and six days on active duty.

VIEWS OF THE COAST GUARD

On July 22, 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 alternate relief in this case. 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 application is untimely, as the applicant was discharged in 1986, and that the Board should not consider it beyond a cursory review. PSC stated that the applicant was properly given a general discharge in accordance with Article 12.B.4.a of the Personnel Manual in effect in at the time of the applicant's discharge in 1986. PSC alleged that the applicant's service record clearly demonstrates that he was given a general discharge following his arrest for cocaine possession by civilian authorities and later tested positive for cocaine use after [REDACTED] urinalysis test. In this regard, PSC noted that Article 12.B.4.a. of the Personnel Manual [REDACTED] 1986 states, "Any member involved in a drug incident or the illegal, wrongful, or improper sale, transfer, manufacture, or introduction onto a military institute of any drug, as defined in Article 20.A.2.k., will be processed for separation from the Coast Guard with no higher than a general discharge."

PSC also argued that under Article 20.C.4. of the Personnel Manual in effect in 1986, if after completing an investigation, a commanding officer determines that a member was involved in a drug incident, the member will be processed for separation by reason of misconduct. PSC noted that the applicant submitted no evidence demonstrating that his general discharge was unjust or erroneous. Therefore, PSC recommended denying the applicant's request to upgrade his discharge.

PSC also noted, however, that with only one year, nine months, and six days on active duty, the applicant was not legally entitled to a hearing before an administrative separation board (ASB) prior to his discharge and did not waive an ASB. Only members with at least eight years of service are entitled to an ASB. Therefore, PSC stated, the HKK separation code in Block 26 on the applicant's DD 214 is incorrect because it indicates that the applicant had a right to an ASB and waived it. PSC stated that the applicant should have received a JKK separation code, which denotes an involuntary discharge for illegal drug use with no ASB entitlement.

Similarly, PSC recommended correcting Block 24, "Character of Service," on the applicant's DD 214 from "General" to "Under Honorable Conditions" in accordance with the manual for preparing DD 214s, COMDTINST M1900.4D. PSC explained that a general discharge is a discharge "Under Honorable Conditions" and that the latter phrase is supposed to be entered in the Character of Service block on the discharge certificate of a member who receives a general discharge.

Therefore, PSC recommended denying the applicant's request but granting alternative relief by correcting his separation in Block 26 on his DD 214 from "HKK" to "JKK" and by correcting his Character of Service in Block 24 to "Under Honorable Conditions."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 12, 2015, the applicant responded to the views of the Coast Guard, stating that he had "no objection to the Coast Guard's recommendation."

APPLICABLE LAW AND REGULATIONS

Under Article 12-B-18.b.(4) of the Personnel Manual in effect in 1986, the Commandant could separate a member for misconduct due to "drug abuse" as follows:

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 separated from the Coast Guard with no higher than a general discharge. However, in truly exceptional situations, commanding officers may recommend retention of members E-3 and below in only a single drug incident.

Under Article 12-B-18.e.(1), a member with less than eight years of active service who was being recommended for a general discharge for misconduct was entitled to (a) be informed of the reasons for the recommended discharge, (b) consult an attorney, and (c) submit a statement in his own behalf.

These regulations remain essentially the same under Article 1.B.17. of the current Coast Guard Military Separations Manual, COMDTINST M1000.4, except there is no provision regarding recommending retention of members E-3 and below in exceptional situations.

COMDTINST M1900.4D, the manual for preparing DD 214s, provides that when a member receives a general discharge, Block 24 shall state "Under Honorable Conditions" for the member's character of service.

With regard to the correct separation codes to be entered in Block 26 (Separation Code) of members' DD 214s, the Coast Guard Separation Program Designator (SPD) Handbook states that the separation code "JKK" is assigned to members who are involuntarily discharged who have been determined to have committed drug abuse. The SPD Handbook further provides that the separation code "HKK" is assigned to those who are discharged in lieu of further processing by an ASB (board waiver) when the member commits drug abuse.

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 in his record or within three years of a decision of the Discharge

Review Board (DRB), which has a 15-year statute of limitations.² The applicant was discharged in 1986, and so the DRB's jurisdiction expired in 2001. The record shows that he was informed of the reason for his discharge and the character of his discharge in 1986. Therefore, his application is untimely.

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."³ 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."⁴

4. The applicant did not explain or justify his long delay in seeking an upgrade of discharge. The fact that he was 20 years old at the time of his discharge is not a compelling reason to excuse his long delay.

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 arrest for cocaine possession by civil authorities and after his urine tested positive for cocaine use. His record shows that he received due process as provided in Article 12-B-18.e.(1) of the Personnel Manual then in effect. These records are presumptively correct under 33 C.F.R. § 52.24(b).⁵ The Board notes that the applicant submitted no evidence to support his request, and the record contains no grounds for upgrading his discharge. The applicant's request cannot prevail on the merits.

6. The Board notes that the applicant was young when he committed the offense for which he was discharged, and the applicant alleges that he has not been "in trouble" since his drug incident in 1986. However, the delegate of the Secretary informed the Board on July 7, 1976, by memorandum that it "should not upgrade a discharge unless it is convinced, after having considered all the evidence ... that in light of today's standards the discharge was disproportionately severe vis-à-vis the conduct in response to which it was imposed."⁶ Under Article 1.B.17. of the Military Separations Manual in effect today, COMDTINST M1000.4, members whose urine tests positive for cocaine are discharged for misconduct with no better than a general discharge. Therefore, the Board is not persuaded that the applicant's general discharge for misconduct is disproportionately severe in light of current standards.

7. Based on the record before it, the Board finds that the applicant's request for correction of his general discharge for misconduct cannot prevail on the merits. His request to

² 10 U.S.C. § 1552; 33 C.F.R. § 52.22; *Ortiz v. Secretary of Defense*, 41 F.3d 738, 743 (D.C. Cir. 1994).

³ *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

⁴ *Id.* at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

⁵ *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.").

⁶ Memorandum of the General Counsel to J. Warner Mills, et al., Board for Correction of Military Records (July 7, 1976).

upgrade his discharge is untimely and should be denied. However, the Coast Guard recommended correcting Block 24 (Character of Service) of the applicant's DD 214 to read "Under Honorable Conditions" rather than "General." Pursuant to COMDTINST M1900.4D, members receiving a general discharge are supposed to receive the character of service "Under Honorable Conditions" in Block 24 of their DD 214. "Under Honorable Conditions" is the correct entry and appears more favorable than "General." Therefore, the Board agrees with the Coast Guard that the applicant should be granted alternative relief by correcting the entry in Block 24 of his DD 214 from "General" to "Under Honorable Conditions."

8. The Coast Guard also recommended correcting the separation code in Block 26 of the applicant's DD 214 to reflect separation code "JKK" rather than "HKK." Under the SPD Handbook, the Separation Code "HKK" is to be given to members discharged for drug abuse who have more than eight years of service, are entitled to a hearing before an ASB, and are entitled to an ASB. The separation code "JKK" is for members who are, like the applicant, discharged for drug abuse with no entitlement to an ASB. The Board finds that because the applicant served less than two years on active duty, he was not entitled to a hearing before an ASB. Therefore, the Board agrees with the Coast Guard that the applicant's separation code in Block 26 of his DD 214 should be corrected from "HKK" to "JKK."

9. Accordingly, although the applicant's request for an honorable discharge is untimely and unsupported and should be denied on that basis, the Board will direct the Coast Guard to issue him a new DD 214 with corrections in Blocks 24 and 26, as explained above.

(ORDER AND SIGNATURES NEXT PAGE)

ORDER

The application of former [REDACTED], USCG, for correction of his military record is denied, but alternative relief is granted. The Coast Guard shall issue him a new DD 214 for him with the following corrections:

- a. His character of service in Block 24 shall be "Under Honorable Conditions."
- b. His separation code in Block 26 shall be JKK.
- c. Block 18 may contain the phrase, "Action taken pursuant to order of BCMR."

November 20, 2015

