

**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. 2015-185**

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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 August 13, 2015, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated July 1, 2016, 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 November 18, 1994, for illegal use of cocaine, asked the Board to upgrade his discharge to an honorable discharge and to upgrade his reentry code from RE-4 (ineligible to reenlist) to RE-1 (eligible). He stated that he needs the correction to seek federal employment.

The applicant stated that he is "a law-abiding citizen and never had problems with the law but sometimes life throws us a curve that as youngster don't know how to handle the situation correctly." The applicant stated that he made a mistake because he was having marital problems. When his military career and his marriage ended, it was a very difficult time and he was embarrassed. Now, however, he has learned a lot from his mistakes and he respectfully requests an upgraded discharge and reentry code. In support of these allegations, the applicant submitted his DD 214 discharge form and a copy of his final divorce decree, dated September 1997, including a page of stipulations regarding marital property and custody of a child.

**SUMMARY OF THE RECORD**

On March 27, 1990, 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 use or possession of drugs is counter to the esprit de corps, mission performance, and jeopardizes safety. No member shall use, possess or distribute illegal drugs or drug paraphernalia.

During recruit training on April 3, 1990, the applicant signed another form acknowledging that he had been “give a full explanation of the drug and alcohol abuse program by the Command Drug and Alcohol Program Representative (D&A Rep) this date in compliance with Article 20-A-3A, CG PERSMAN COMDTINST M1000.6A.”

After completing recruit training, the applicant was assigned to a patrol boat as a seaman apprentice for two years. In 1992, he was assigned to a shore unit. On July 5, 1993, the applicant signed another form acknowledging having received more drug and alcohol awareness training.

Following a random administrative urinalysis on September 6, 1994, the applicant’s urine tested positive for cocaine. A retest confirmed the results. On September 26, 1994, his commanding officer (CO) notified the applicant in a memorandum that he was initiating the applicant’s general discharge for misconduct because his urine had tested positive for cocaine. The CO advised him that he had a right to consult counsel, a right to object to the discharge, and a right to submit a statement. The applicant signed a form acknowledging this notification and waiving his rights.

On September 25, 1994, the applicant’s CO asked permission from the Military Personnel Command to discharge the applicant for misconduct based on the urinalysis results. He recommended a general discharge. In response, the Military Personnel Command issued separation orders on October 19, 1994, which authorized the applicant’s general discharge for misconduct with a JKK separation code in accordance with Article 12-B-18 of the Personnel Manual.

The applicant’s DD 214 shows that he received a general discharge “under honorable conditions” on November 18, 1994, with separation code JKK, reentry code RE-4, and “misconduct” as his narrative reason for separation, pursuant to Article 12-B-18 of the Personnel Manual. He had served 4 years, 7 months, and 22 days on active duty.

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

On December 16, 2015, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant’s request and adopting the findings and analysis provided in a memorandum on the case submitted by Commander, Personnel Service Center (PSC).

PSC stated that the application should be denied because it is untimely and because the applicant “has not shown that his discharge was erroneous or unjust.” PSC stated that pursuant to policy, the positive urinalysis result was sufficient for the applicant’s CO to determine, by a

preponderance of the evidence standard, that a drug incident had occurred. PSC concluded that the applicant was therefore correctly processed for separation with a general discharge and an RE-4 reentry code.

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

On December 29, 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 1994, 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.

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.<sup>1</sup> The record shows that the applicant knew his type of discharge and reentry code no later than the date of his discharge, November 18, 1994, when he received his DD 214. Therefore, his application is untimely.

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<sup>1</sup> 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.”<sup>2</sup> 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.”<sup>3</sup>

4. The applicant asked the Board to consider his request despite the delay because he is seeking federal employment. 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, with separation code JKK, in accordance with Article 12-B-18 of the Personnel Manual then in effect, after his urine tested positive for metabolites of cocaine in a random urinalysis. The record also 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. These records are presumptively correct under the Board’s regulations at 33 C.F.R. § 52.24(b),<sup>4</sup> and the applicant has submitted nothing to rebut them except evidence that his marriage was heading toward divorce. Although he wants an RE-1 reentry code, under the SPD Manual, an RE-4 is the only reentry code authorized for members discharged due to illegal drug use.

6. The applicant asked the Board to upgrade his discharge because, he alleged, since his discharge from the Coast Guard, he has learned from his mistakes, become a law-abiding citizen, and is seeking a federal job. However, on July 7, 1976, the delegate of the Secretary informed the BCMR of the following determination, which has never been countermanded:

[T]he Board should not upgrade discharges solely on the basis of post-service conduct. ... [T]he Board should not upgrade [a] discharge unless it is convinced, after having considered all the evidence [in the record], that in light of today’s standards the discharge was disproportionately severe vis-à-vis the conduct in response to which it was imposed.

Coast Guard members involved in drug incidents have long been and still are awarded general discharges and RE-4 reenlistment codes. Therefore, the applicant’s discharge and reentry code cannot be considered disproportionately severe in light of today’s standards.

7. Therefore, the Board finds that the applicant’s claims cannot prevail, and there is no reason to excuse the application’s untimeliness. His request should be denied.

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

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

<sup>4</sup> *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.”).

**ORDER**

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

July 1, 2016

