DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2016-115

[redacted]

FINAL DECISION

This proceeding was conducted according to 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 completed application on May 6, 2016, and assigned it to staff attorney [redacted] to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated February 17, 2017, 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 asked the Board to upgrade his 1984 general discharge under honorable conditions for drug abuse to an honorable discharge.[1] He stated that he was discharged for drug abuse after 11 years of honorable service, despite the fact that he volunteered to attend rehabilitation. The applicant claimed that he did have a drug dependency problem but that he has been clean for nearly 7 years. He further stated that he "would like to be honest on [his] Veteran's Preference Card," for which he used his DD 214 from 1977,[2] which had a reentry code of RE-1, eligible to reenlist.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on May 24, 1977. He completed a drug abuse rehabilitation program at the Naval Regional Drug Rehabilitation Center in November 1982. His military records show that on July 7, 1983, the applicant participated in a random urinalysis which detected marijuana in his urine. His non-judicial punishment (NJP) consisted of forfeiture of $400 for one month, reduction from pay grade E-6 to E-5, and restriction to base for 10 days.

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[1] The five authorized types of discharge are Honorable, General Under Honorable Conditions, Under Other than Honorable Conditions, Bad Conduct, and Dishonorable. Bad conduct and dishonorable discharges are only awarded by court-martial. Personnel Manual, Article 12.B.2.c.

[2] The applicant has a DD 214 from 1977 in addition to his DD 214 in question here, from 1984. He was discharged in 1977 and immediately reenlisted into the Coast Guard.

On September 28, 1983, the applicant signed a Page 7,[3] which acknowledged his positive urinalysis test from July 7, 1983. The applicant was advised that this conduct could not be tolerated and that a second drug-related incident could result in his separation from the Coast Guard. The Page 7 required that the applicant be placed on a mandatory urinalysis program for 6 months. The applicant acknowledged and signed this entry.

On January 16, 1984, the applicant participated in urinalysis which detected marijuana in his urine. On February 15, 1984, the applicant participated in urinalysis which also detected marijuana in his urine. This reading was found to be below the minimum level required at the time for punitive action, therefore no action was taken regarding the February test. On March 19, 1984, the applicant again participated in urinalysis which detected marijuana and cocaine in his urine. On April 16, 1984, the applicant received an NJP which consisted of forfeiture of $400 for 2 months, a reduction from pay grade E-5 to E-4, and restriction to base for 20 days.

On May 1, 1984, the applicant appealed the NJP awarded to him on April 16, 1984. The applicant argued that the NJP given to him was, under the circumstances, disproportionate to his acts of misconduct. He stated that he was facing an administrative discharge and that one of the elements to consider when awarding punishment is the effect of the punishment on the member. The applicant argued that the NJP was adversely affecting his attempts to reenter civilian life. He stated that he was recently married, had bills to pay, and was attempting to find employment. While on restriction, he stated, he was unable to submit applications. He stated the punishment, including the pay decrease, was putting an undue hardship on him and his family.

On May 4, 1984, the applicant's commanding officer (CO) forwarded the applicant's appeal to the Commander with a written statement. The CO recited the facts surrounding the applicant's urinalysis screenings and NJPs. The CO further stated that the second offense[4] was of the exact same nature as his first offense in less than one year and that the applicant committed the second offense while on probation from his first offense. The CO pointed out that the NJP and administrative discharge proceedings are two separate matters. Reference to the applicant's discharge was not relevant to the NJP proceeding or punishment. The CO therefore recommended that the applicant's appeal be denied.

On May 25, 1984, the Commander denied the applicant's appeal of the April 16, 1984 NJP. In his decision, the Commander stated that the applicant "knowingly, deliberately, and repeatedly violated the law even though [the applicant] knew from [his] participation in the drug rehabilitation program that the Coast Guard is trying to eliminate the use of drugs." The Commander noted that the punishment was tailored to the applicant specifically, and it was much less than the maximum punishment the applicant could have received.

On June 4, 1984, the applicant was given notice that his discharge had been initiated by his CO. The notice stated that the applicant's "repeated violation[s] of the Uniform Code of Military Justice, and the Coast Guard's policy on drug abuse is unacceptable and has created an

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[3] A Page 7 (CG-3307 or Administrative Remarks) documents any counseling that is provided to a service member as well as any other noteworthy events that occur in a member's military career.

[4] Both of the applicant's 1984 urinalysis results are, together, treated as his second offense in the record.

administrative burden for this command." The applicant was given notice of his rights, including his right to present his case in person before an administrative discharge board.

On June 19, 1984, the applicant submitted a conditional waiver of a hearing before an administrative discharge board, provided that he be discharged under honorable conditions. He stated that he understood that the type of discharge was up to the Commandant, and that his conditional waiver could be disapproved.

On June 20, 1984, the applicant's CO asked the Commandant to discharge the applicant for misconduct. The CO noted the applicant's repeated drug use and what actions had been taken, including informing the applicant of his rights regarding his discharge. The CO stated that the applicant conditionally waived his right to an administrative discharge board and that the applicant did not submit a statement of rebuttal.

On June 27, 1984, the Commandant ordered the applicant's command to discharge him with a general discharge under honorable conditions for misconduct due to drug abuse in accordance with Article 12-B-18 of the Personnel Manual. The Commandant instructed that the applicant be given an HKK[5] separation code and that his narrative reason for separation be "misconduct."

On September 7, 1984, the applicant was discharged pursuant to this order. His DD 214, which he signed, shows that he was discharged "under honorable conditions" (a general discharge) because of "misconduct – ~~drug abuse~~"[6] with a GKK[7] separation code, and an RE-4 (ineligible for reenlistment) reentry code.

VIEWS OF THE COAST GUARD

On October 19, 2016, the Judge Advocate General (JAG) of the Coast Guard recommended that the Board deny relief in this case. In so doing, he adopted the findings and analysis provided in a memorandum, dated August 12, 2016, prepared by the Personnel Service Center (PSC).

PSC stated that the application is untimely and should not be considered by the Board because the applicant was discharged in 1984 but did not submit his application to the BCMR until 2016. PSC argued that the applicant was properly discharged for misconduct in accordance with Article 12-B-18(b) of the Coast Guard Personnel Manual after he tested positive for drug use and that his alleged sobriety in the past 7 years has no bearing on his violation of Coast Guard policy during his service. PSC argued that notwithstanding the untimeliness, relief should be denied because the applicant's discharge was proper and aligns with current Coast Guard standards for illegal drug use.

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[5] The Separation Program Designator (SPD) handbook states than an HKK separation code denotes "involuntary discharge directed in lieu of further processing or convening of a board (board waiver)."
[6] The words "drug abuse" are clearly legible on the applicant's DD 214, although they are crossed through.
[7] The SPD handbook states that a GKK separation code denotes "involuntary discharge approved recommendation of a board when member…commits drug abuse."

PSC did note that the applicant's separation code on his DD 214 was instructed to be HKK, but instead the applicant was given a GKK code. The HKK code is assigned to members for being discharged for drug abuse who have waived their right to an administrative discharge board. The GKK code is assigned to members who have been discharged for drug abuse as a result of a board's action. PSC stated that this appeared to be an administrative error that the BCMR may consider correcting.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 25, 2016, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 days. No response was received.

APPLICABLE REGULATIONS

Article 20.A.2.k.1. of the Personnel Manual in effect in 2009 states that the intentional use of drugs constitutes a "drug incident as determined by the commanding officer." Article 20.A.2.k.2. states that a "member need not be found guilty at court-martial, in a civilian court, or be awarded NJP for the conduct to be considered a drug incident."

Article 20.C.3.a. provides that "[c]ommanding 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. The absence of a positive confirmed urinalysis result does not preclude taking action based on other evidence." Article 20.C.3.d. states that "[i]n determining whether a drug incident occurred, a commanding officer should consider all the available evidence, including positive confirmed urinalysis test results, … Evidence relating to the member's performance of duty, conduct, and attitude should be considered only in measuring the credibility of a member's statement(s)." Article 20.C.3.e. states that "[t]he findings of a drug incident shall be determined by the commanding officer … using the preponderance of evidence standard. … A member's admission of drug use or a positive confirmed test result, standing alone, may be sufficient to establish intentional use and thus suffice to meet this burden of proof." Article 20.C.4. states that after the investigation is complete, the CO must determine whether a drug incident occurred and, if it did, will process the member for separation and may take disciplinary action. The same rules currently appear in the Drug and Alcohol Abuse Program Manual, COMDTINST M1000.10.

ALCOAST 016/84, issued by the Commandant on July 30, 1984, stated that "[e]ffective upon receipt, any member involved in a drug incident as defined by [the Personnel Manual]…will be processed for separation." It noted that the then-current drug policy had been in effect for more than two years and had been widely publicized through recruit training and required unit indoctrination. It stated that in the Service's attempt to rid itself of anyone who abused drugs, more than 700 members had received general discharges due to drug abuse since April 1982.

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 submission and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. An application to the Board must be filed within three years after the applicant discovers the alleged error in his record.[8] The applicant received the general discharge on September 7, 1984, but did not submit his application until 2016. The preponderance of the evidence shows that he knew of the alleged error in his record in 1984, particularly in light of the fact that he made his waiver of an administrative discharge board conditional upon receiving a discharge "under honorable conditions," and his application is therefore untimely.

2. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.[9] In *Allen v. Card*, 799 F. Supp. 158 (D.D.C. 1992), the court stated that the Board should not deny an application for untimeliness without "analyz[ing] both the reasons for the delay and the potential merits of the claim based on a cursory review"[10] to determine whether the interest of justice supports a waiver of the statute of limitations. The court noted 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."[11]

3. The applicant did not provide a justification for his lengthy delay in submitting his application. He did state that he has not used drugs in nearly 7 years. The Board notes that his request does not depend upon an allegation of error, but on a claim that his general discharge is now unjust based upon the passage of time and his post-service conduct.

4. A cursory review of the merits of this case shows that it lacks potential merit. The record shows that the applicant received a general discharge after urinalyses revealed that he used illegal drugs at least three times while on active duty despite counseling and discipline. There has been no change in this policy to date, and the District Commander's determination that the applicant had abused drugs and the resulting general discharge are presumptively correct under the Board's rules at 33 C.F.R. § 52.24(b).[12] The applicant was afforded the same due process that members with less than eight years of service who are involved in a "drug incident" receive today (notification of the proposed discharge and the opportunity to consult a lawyer, to object to the discharge, and to submit a written statement),[13] and he did not object to the proposed general discharge. Moreover, although the applicant argued that his discharge should be upgraded because he has been clean for almost 7 years, his post-discharge conduct alone is not a proper basis for upgrading the character of his discharge, which is properly based on the

[8] 10 U.S.C. § 1552(b); 33 C.F.R. § 52.22.
[9] 10 U.S.C. § 1552(b).
[10] *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).
[11] *Id*. at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).
[12] *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.").
[13] Personnel Manual, Article 12.B.18.

character of his service and reason for discharge.[14] Therefore, the Board finds that the applicant's claim cannot prevail on the merits.

5. The Board has also considered the applicant's argument in light of prior decisions such as BCMR Docket No. 2005-107, which consider whether, under the totality of the circumstances, clemency should be exercised to remove injustice with respect to a past discharge, even if (as here) it is neither disproportionately severe compared to the misconduct nor clearly inconsistent with today's standards. While the applicant's representation that he has been clean and sober for almost 7 years is commendable, it is not a circumstance that justifies an exercise of clemency to upgrade the applicant's 1984 discharge for drug abuse.

6. However, the Board finds that the applicant's DD 214 does contain two errors. First, the applicant's separation code on his DD 214 is currently GKK, which denotes "involuntary discharge approved recommendation of a board when member…commits drug abuse." The applicant conditionally waived his right to an administrative discharge so that he could receive a discharge "under honorable conditions." The record does not indicate that the applicant rescinded this conditional waiver, nor does it indicate that the applicant appeared before an administrative discharge board. Therefore, the GKK code is incorrect. As the Commandant instructed on June 27, 1984, the separation code should be HKK, which denotes "involuntary discharge directed in lieu of further processing or convening of a board (board waiver)." The HKK code is the proper code for this applicant, and the Board finds that his DD 214 should be changed accordingly.

7. In addition, according to the Separation Program Designator (SPD) handbook, an HKK code should receive a narrative reason for separation of "misconduct." The applicant's DD 214 states "Misconduct – ~~Drug Abuse~~." Perhaps at some point someone noticed the error of including "drug abuse" on the DD 214 and crossed it out. However, the words are still clearly legible and are prejudicial. The GKK separation code already identifies for the reason for the applicant's discharge for military purposes. The Board finds that the applicant's DD 214 should be changed to state only "misconduct" in the narrative reason for separation.

8. Accordingly, the Board will not excuse the application's untimeliness or waive the statute of limitations. The applicant's request should be denied. However, alternative relief is granted by correcting the applicant's DD 214 to state "HKK" for the separation code and "misconduct" for the narrative reason for separation.

(ORDER AND SIGNATURES ON NEXT PAGE)

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[14] *See* Memorandum of the General Counsel to J. Warner Mills, *et al.,* Board for Correction of Military Records (July 8, 1976) (instructing the Board with respect to upgrading discharges that it should not upgrade them based on the veterans' post-discharge conduct alone and "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."

ORDER

The application of former [redacted] USCG, for correction of his military record is denied, although alternative relief is granted. His DD 214 shall be corrected to show the following:

- Block 26, Separation Code, shall be corrected to show HKK.
- Block 28, Narrative Reason for Separation, shall be corrected to show only "Misconduct."

The Coast Guard shall issue him a new DD 214 reflecting these corrections.

February 17, 2017

[redacted]