DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2018-183

[redacted]
SNFS (former)

FINAL DECISION

This is a proceeding under the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the applicant's completed application on July 17, 2018, 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 May 31, 2019, 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 served in the Coast Guard from March 7, 1995, until his discharge for misconduct on December 13, 1996, asked the Board to upgrade his discharge from General (Under Honorable Conditions) to Honorable.[1] He stated that he had a difficult time being stationed aboard a cutter homeported in [redacted], Alaska, because he was born and raised in a warm climate ([redacted]) and that he only drank alcohol and smoked marijuana to cure the depression he experienced in Alaska. The applicant stated that he tried to tell his superiors that he was having a difficult time coping with the extreme weather and wanted to be transferred but that he never received any help in getting another assignment.

The applicant did not dispute that he had used marijuana but argued that his General discharge should be upgraded to Honorable because following his separation from the Coast Guard he completed a master's degree and for the past ten years has turned his efforts towards teaching [redacted] programs. He noted that he currently works as a professor in the [redacted] and that, in addition to his professional achievements, he has contributed to the community by providing

[1] The five authorized types of discharge are Honorable, General Under Honorable Conditions, Under Other than Honorable Conditions (OTH), Bad Conduct, and Dishonorable. Bad conduct and dishonorable discharges are only awarded by court-martial. Military Separations Manual, COMDTINST M1000.4.

leadership for a non-profit organization that helps families of kids with cancer. In addition, he stated that he has helped raise funds for the [redacted] and for the victims of Hurricane Irma in [redacted].

To support his request, the applicant submitted a copy of his DD 214; a certificate from the [redacted] indicating that he earned an Associate Degree in [redacted], on February 8, 2002; transcripts from the [redacted]; and a certificate from the [redacted] indicating that he was certified as an [redacted] on August 12, 2016.

The applicant alleged that he discovered the error or injustice in his record on June 5, 2018.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard at a recruiting station in [redacted] on March 7, 1995, and signed a Page 7 acknowledging that the "illegal use or possession of drugs constitutes a serious breach of discipline" and that if his urine tested positive for illegal drugs he would be "subject to a general discharge by reason of misconduct." He also acknowledged on a Page 7 dated April 19, 1995, during recruit training, that he had received a "full explanation of the drug and alcohol abuse program." The applicant completed recruit training and Subsistence Specialist "A" School and reported to the Coast Guard Cutter [redacted] Alaska on August 14, 1996. He advanced to Subsistence Specialist third class (SS3/E-4) on September 9, 1996.

On November 3, 1996, the applicant was arrested by [redacted] police for driving under the influence of alcohol. A breathalyzer showed that his Blood Alcohol Content was above the state limit at 0.1350%. Upon cuffing and searching the applicant, the police officer pulled a "green leafy substance" in a wrapper out of the applicant's pocket. The police officer reported that the applicant voluntarily stated that the substance was marijuana and did so again after being advised of his Miranda rights. A test later confirmed that the substance was marijuana.

On November 4, 1996, the applicant was notified on a Page 7 that because he had been arrested for driving under the influence and possession of a controlled substance, he had incurred his first alcohol incident. He was also advised that if an investigation found that he had used or possessed a controlled substance, he would be process for separation by reason of misconduct.

On November 5, 1996, the applicant signed a Coast Guard Miranda/Tempia Warning form regarding his right to remain silent, his right to consult an attorney and have one present during questioning, and his right to end the questioning at any time. He acknowledged that any statement he made could be used against him in an administrative or judicial proceeding and that he was suspected of having committed the following offenses under the Uniform Code of Military Justice (UCMJ): wrongfully using a controlled substance; drunken operation of a motor vehicle; failure to obey an order or regulation; and disorderly conduct/drunkenness. The applicant indicated that he wanted to answer questions and make a statement without consulting an attorney.

The investigating officer (IO) appointed by the Commanding Officer (CO) of the cutter submitted the results of his investigation into the applicant's conduct on November 7, 1996, and

noted that the applicant had been arrested by the [redacted] police on November 3, 1996, after he was pulled over for a moving violation and failed a field sobriety test when his breath test indicated a 0.135% blood alcohol content. The IO noted that after the applicant was taken into custody, the police officer found a small amount of marijuana in his pocket and that the applicant had admitted in writing that he had obtained the marijuana from a woman in a parking lot and smoked it on the evening of November 2, 1996. The applicant told the IO that he found living in Alaska difficult because his girlfriend refused to visit him there.

On November 14, 1996, the applicant's CO sent the Personnel Command a memorandum recommending that the applicant receive a General discharge due to his involvement with drugs. He stated that a urinalysis conducted on November 4, 1996, had revealed THC in the applicant's urine; that the applicant had been taken to mast and reduced in rate from E-4 to E-3 as non-judicial punishment[2] (NJP); and that the state had dropped the possession charge but was prosecuting a DWI charge.

The CO attached to this memorandum to the Personnel Command a notification of discharge addressed to the applicant, dated November 15, 1996, in which the CO advised him in writing that he was recommending that the applicant receive a General discharge for misconduct due to his involvement with drugs. He advised the applicant that he had a right to object to the discharge and to submit a written statement. The applicant acknowledged this notification the same day and indicated that he did not object to being discharged and did not desire to make a statement on his behalf.

On December 6, 1996, the Personnel Command issued orders for the applicant to receive a General discharge for misconduct no later than January 6, 1997, due to his involvement with drugs in accordance with Article 12.B.18. of the Personnel Manual.

On December 13, 1996, the applicant was discharged from the Coast Guard. His DD 214, which he signed, shows that he received a General discharge because of "misconduct" in accordance with Article 12.B.18. of the Personnel Manual, with a JKK separation code and an RE-4 (ineligible for reenlistment) reentry code. He had served 1 year, 9 months, and 7 days on active duty in the Coast Guard. Block 24 of the DD 214 shows that his Character of Service was "GENERAL."

APPLICABLE LAW AND POLICY

Article 12.B.18.b.(4) of the Personnel Manual in effect in 1996 states that "[a]ny member involved in a drug incident or the illegal, wrongful, or improper sale, transfer, manufacture, or introduction onto a military installation 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." Article 12.B.18.e. states that a member being processed for a General discharge who has fewer than eight years of service will be informed of the reasons for the discharge; afforded an opportunity to submit a written statement; and afforded an opportunity to consult an attorney regarding his response to the notification.

[2] Article 15 of the Uniform Code of Military Justice (UCMJ) authorizes NJP as a disciplinary measure for minor offenses under the UCMJ.

Article 20.A.2.k. of the Personnel Manual defines "drug incident" as "[i]ntentional drug abuse, wrongful possession of, or trafficking in drugs. … The member need not be found guilty at court-martial, in a civilian court, or be awarded NJP for the behavior to be considered a drug incident." Article 20.C.3.d. states that a CO determines whether a member has incurred a "drug incident" based on the preponderance of the evidence.

Article 20.C.4. states that any member who incurs a drug incident will be processed for separation for misconduct.

Article 1.B.17.b.(4) of the current Military Separations Manual 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 (under honorable conditions)."

Article 1.e of COMDTINST M1900.4D, the Commandant's instructions for preparing the DD 214 in effect in 1996, states that Block 24 (Character of Service) should only indicate "HONORABLE"; "UNDER HONORABLE CONDITIONS"; "UNDER OTHER THAN HONORABLE CONDITIONS"; or "DISHONORABLE."

VIEWS OF THE COAST GUARD

On January 28, 2019, a Judge Advocate (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief in accordance with a memorandum submitted by the Commander, Personnel Service Center (PSC).

The JAG noted that the application was not timely filed and the applicant did not allege any error or injustice committed by the Coast Guard. The JAG stated that the applicant's sole basis for relief is that he has turned his life around since he was discharged from the Coast Guard and that he looks upon his service with great pride.

The JAG noted that the applicant stated that he was sad or depressed in Alaska because the climate was so different from [redacted] but there is nothing in his medical records which state that he smoked marijuana to manage his depressive symptoms, although the applicant alleged that he did so to alleviate his feelings of sadness and depression caused by trying to deal with the cold climes of Alaska. Furthermore, the JAG stated, the applicant has made a successful life after the Coast Guard and no longer alleges that he is depressed.

The JAG argued that the applicant's general discharge is proper because under Coast Guard Policy, a member found to be in possession of marijuana will be discharged with no higher than a General discharge. The JAG noted that the applicant's record is replete with numerous signed documents establishing that he was advised that possession of marijuana while serving in the Coast Guard was antithetical to service. Moreover, the JAG stated that at the time of the applicant's Article 15 UCMJ hearing, he admitted that he was in a ready-recall position and was hoping that if he was recalled, he would no longer be under the influence of marijuana. The JAG stated that this response showed a callous attitude that put his shipmates in potential danger.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On February 4, 2019, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within 30 days. No response was received.

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.

2. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice.[3] The applicant was discharged in 1996 and received and signed his DD 214 showing a General discharge at the time. Therefore, the preponderance of the evidence shows that the applicant knew of the alleged error in his record in 1996, and his application is untimely. However, the Board may excuse the untimeliness of an application if it is in the interest of justice to do so,[4] and the Board will excuse the untimeliness in this case because the applicant's request falls under the Board's "liberal consideration" guidance since the applicant is challenging his character of discharge based in part on an alleged mental health problem.[5] Therefore, the Board waives the statute of limitations in this case.

3. The applicant alleged that his General discharge for misconduct due to drug abuse is erroneous and unjust because he was depressed about being in Alaska and, since his discharge, he has achieved several professional accomplishments and contributed to his community through volunteer work. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.[6] Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."[7] And under the "liberal consideration" guidance, when deciding whether to upgrade the discharge of a veteran based on an alleged mental health condition, the Board must liberally consider the evidence, including the applicant's claims, and decide whether the preponderance of the evidence shows that the veteran had mental health condition(s) while in the Service that could excuse the veteran's misconduct; whether the mental health condition(s) actually excused the misconduct that adversely affected the discharge; and, if not, whether

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[3] 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.
[4] 10 U.S.C. § 1552(b).
[5] DHS Office of the General Counsel, "Guidance to the Board for Correction of Military Records of the Coast Guard Regarding Requests by Veterans for Modification of their Discharges Based on Claims of Post-Traumatic Stress Disorder, Traumatic Brain Injury, Other Mental Health Conditions, Sexual Assault, or Sexual Harassment" (signed by the Principal Deputy General Counsel as the delegate of the Secretary, June 20, 2018).
[6] 33 C.F.R. § 52.24(b).
[7] *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

the mental health conditions outweigh the misconduct or otherwise warrant upgrading the veteran's discharge.[8]

4. The applicant has not proven by a preponderance of the evidence that his General discharge for drug abuse was erroneous or unjust because of a mental health condition. The record shows that following an arrest by local police for DUI and the discovery of marijuana in his pocket on November 3, 1996, the applicant was advised of his Miranda/Tempia rights by the Coast Guard, waived his right to an attorney, and voluntarily and repeatedly admitted to marijuana possession and use, which was confirmed by testing. The applicant told the IO that he found Alaska difficult because his girlfriend did not visit him and he stated in his application that he did not like the weather. While the Board is not unsympathetic to the applicant's situation, he has not submitted evidence showing that he had a mental health condition while in the service that could excuse his decisions to obtain marijuana, use marijuana, and then drive while under the influence of alcohol.

5. The record shows that on November 15, 1996, the CO formally notified the applicant that he was being discharged due to a "drug incident" and that he had a right to object and to submit a statement. The applicant acknowledged the notification, indicated that he did not object to being discharged, and waived his right to submit a statement. Pursuant to Article 12.B.18.e. of the Personnel Manual then in effect, the applicant also had a right to consult an attorney about how to respond to the CO's notification of discharge. He had been informed of and waived the right to counsel before he admitted to having used marijuana to the police officer, the IO, and his CO at mast, but it is not clear whether he was later told, during the discharge proceedings, that he could consult counsel about whether to submit a statement on his own behalf and, if so, what to say in that statement. Nonetheless, because the applicant had voluntarily admitted that he had used marijuana while on active duty and his admissions were confirmed by tests, the Board finds that any failure to notify him of his right to consult counsel about submitting a statement in response to the discharge notification was harmless error[9] at least with respect to the characterization of his discharge. The error, if any, was harmless because the applicant's wrongful possession and use of marijuana—a "drug incident"[10]—was clearly proven by overwhelming evidence, and Article 12.B.18.b.(4) of the Personnel Manual states that any member involved in a drug incident "will be processed for separation from the Coast Guard with no higher than a general discharge." The applicant has not submitted evidence of anything that he might have put in a written statement to the discharge authority that could have negated or mitigated the findings against him. And since the applicant admitted that he had possessed and used marijuana while on active duty, his General

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[8] *Id.*

[9] *See* FED. R. CIV. P. 61 ("Harmless Error: … At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."); *Texas v. Lesage*, 528 U.S. 18, 21 (1999) ("[W]here a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting relief"); *Quinton v. United States*, 64 Fed. Cl. 118, 125 (2005) (finding that harmlessness requires that there be "no substantial nexus or connection" between the proven error and the prejudicial record that the applicant wants the Board to remove or correct); *Engels v. United States*, 678 F.2d 173, 175 (Ct. Cl. 1982) (finding that an error in an officer's military record is harmless unless the error is "causally linked with" the record the officer wants corrected); *Hary v. United States*, 618 F.2d 704, 707-09 (Ct. Cl. 1980) (finding that the plaintiff had to show that the proven error "substantially affected the decision to separate him" because "harmless error … will not warrant judicial relief.").

[10] Coast Guard Personnel Manual, Article 20.A.2 k.

discharge "Under Honorable Conditions" (or a worse characterization) was required by policy—a policy that remains unchanged in Article 1.B.17. of the current Military Separations Manual.

6. The applicant submitted certificates and transcripts showing that he has pursued an education in the culinary arts, and he stated that he is now a [redacted] at a State University. He argued that the character of his discharge from the Coast Guard should be upgraded in the interest of justice because he has corrected his shortcomings and has turned his life around. However, a veteran's type of discharge is based on his military service, not on anything that the veteran does later in civilian life. The delegate of the Secretary advised the Board in 1976 that when exercising it's the equitable authority, the Board "should not upgrade discharges solely on the basis of post-service conduct … [but may] upgrade a discharge if it is judged to be unduly severe in light of contemporary standards."[11] This direction to the Board is still in effect, and the Coast Guard's policies regarding separating illegal drug users with no higher than a General discharge have not changed since 1996.[12] Therefore, the Board finds that the applicant's post-discharge achievements, while laudatory, are not evidence that his General discharge for misconduct from the Coast Guard is erroneous or unjust.

7. The applicant's final DD 214 indicates in block 24 that he received a "GENERAL" discharge. However, Article 1.e of the Commandant's instructions for preparing the DD 214 in 1996 states that block 24 should indicate not the type of discharge but the corresponding "character of service." A General discharge denotes service "under honorable conditions." Therefore, because the applicant received a General discharge for misconduct pursuant to Article 12.B.18., block 24 of his DD 214 should indicate that his character of service was "UNDER HONORABLE CONDITIONS," not "GENERAL."

8. Although the applicant's request for an Honorable discharge should be denied, the entry in block 24 is clearly erroneous and requires correction. The Coast Guard should prepare a new DD 214 for the applicant and indicate in block 24 that his character of service was "UNDER HONORABLE CONDITIONS," instead of "GENERAL."

(ORDER AND SIGNATURES ON NEXT PAGE)

[11] *See* Memorandum of the General Counsel to J. Warner Mills, *et al.*, Board for Correction of Military Records (July 8, 1976).
[12] Military Separations Manual, COMDTINST M1000.4, Article 1.B.17.

ORDER

The application of former SNFS [redacted], USCG, for correction of his military record is denied, but the Coast Guard shall prepare a new DD 214 for him, which shall show in block 24 that his character of service is "UNDER HONORABLE CONDITIONS," instead of "GENERAL"

May 31, 2019

[redacted]