

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2019-186

██████████
SN (former)

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on August 9, 2019, and assigned the case to the Deputy Chair to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated October 15, 2020, 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 Seaman (SN/E-3) who received a general discharge under honorable conditions from the Coast Guard on October 28, 1988, for illegal use of cocaine, asked the Board to correct his record by upgrading his character of discharge to honorable.¹

The applicant stated that he is not asking for an error or injustice to be corrected. In fact, he stated that he deserved a general discharge at the time. Instead, he stated that his request to upgrade his characterization of service is based on his post-service conduct. He argued that in the thirty-one years since his discharge, he has not had "any legal issues." Further, for the last twenty-eight years, he has worked at ██████████. He stated that his two sons also served in the military and their discharge certificates proudly hang on the wall. He stated that due to his general discharge, he is too ashamed to display his discharge certificate.

To address the delay in submitting his request, the applicant stated that his discharge was based on actions that he committed when he was twenty-four years old. More than thirty years later, the "cloud" surrounding his discharge has never left him.

¹ There are five types of discharge: three administrative and two punitive. The three administrative discharges are honorable, general under honorable conditions, and under other than honorable (OTH) conditions. The two punitive discharges may be awarded only as part of the sentence of a conviction by a special or general court-martial. A special court-martial may award a bad conduct discharge (BCD), and a general court-martial may award a BCD or a dishonorable discharge.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on March 21, 1988. Following recruit training, he was granted a Humanitarian Assignment for a sixty-day period to be home with his wife while she underwent surgery for the delivery of their first child. After his Humanitarian Assignment ended, he was assigned to a cutter.

On August 12, 1988, the applicant was subject to a urinalysis, and his urine tested positive for cocaine. On August 29, 1988, the applicant's command was notified by a laboratory of these results.

On September 15, 1988, the applicant was notified that his Commanding Officer (CO) had initiated action for his discharge. The CO cited the applicant's positive urinalysis for a controlled substance as the reason. The CO stated that he would request that the applicant receive a general discharge but that the final decision regarding his discharge rested with the Commandant. The applicant was advised that if he did receive a general discharge, he might encounter extreme prejudice in civilian life. The applicant was notified that he had the right to submit a statement on his own behalf, that he could disagree with the CO's recommendation, and that any such rebuttal would be forwarded to the Commandant.

On September 20, 1988, the applicant's CO sent a memorandum to the Commandant requesting that the applicant be discharged by reason of misconduct. The CO stated that on August 12, 1988, the applicant had admitted using cocaine to the Support Center Human Rights Officer. Consequently, the applicant was ordered to submit to a urinalysis which tested positive for cocaine. The CO requested that the applicant receive a general discharge in accordance with Article 12.B.18. of the Coast Guard Personnel Manual.

On October 21, 1988, the applicant acknowledged receipt of the notification for discharge and did not object. He indicated that he waived his right to submit a statement on his own behalf, acknowledged that he had been provided the opportunity to consult with a lawyer and did not wish to exercise this right, and did not desire to have a second urine sample submitted for a confirmation test.

On October 28, 1988, the applicant was discharged from active duty in accordance with Article 12.B.18. of the Coast Guard Personnel Manual. His DD-214 shows "general" as the characterization of discharge; "misconduct" as the narrative reason for separation; HKK (drug abuse) as his reenlistment code; and RE-4 (not eligible to reenlist) as his separation code. The applicant signed his DD-214.

VIEWS OF THE COAST GUARD

On January 29, 2020, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which she recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC argued that the application was not timely filed. Regarding the merits of the case, PSC stated that the applicant was properly discharged in accordance with Article 12.B.18. of the Coast Guard Personnel Manual.

The JAG stated that the applicant received a general discharge following a urinalysis which tested positive for cocaine. The JAG argued that while social mores are beginning to change with respect to some drugs, namely marijuana, the use of cocaine remains illegal and is not socially acceptable. Specifically, cocaine is illegal under both the Uniform Code of Military Justice and federal law.

The JAG argued that while the BCMR may grant clemency based on an injustice, it may not do so if post-service conduct is the sole factor for consideration. Since the applicant's request for upgrading his discharge was solely based on his post-service employment history and recognition of his children's military service, the JAG argued, the applicant has failed to establish that his discharge warrants clemency.

The JAG noted that the use of cocaine is contrary to the Coast Guard's core values as the primary maritime law enforcement agency in the country. Interdiction of illicit drugs being trafficked in the maritime domain remains a large part of the Coast Guard's mission.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 6, 2020, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. No response was received.

APPLICABLE LAW AND POLICY

Article 12.B.18.b.4. of the Personnel Manual in effect in 1988, COMDTINST M1000.6, states that 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 processed for separation from the Coast Guard with no higher than a general discharge.

Article 20.A.3.g. defines drugs as marijuana, narcotics, and all other controlled substances as listed Schedules I-V established by section 202 of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 812 as updated and republished under the provisions of that Act.

Article 1.B.17.b.4. of the Military Separations Manual in effect today, COMDTINST M1000.4, states that a Commander may discharge a member for misconduct due to involvement with drugs.

On July 7, 1976, the General Counsel for the Department of Transportation issued a memorandum setting the policy of the Board regarding the effect of post-service conduct on records corrections. The memorandum states that "the Board should not upgrade discharges solely

on the basis of post-service conduct.” This policy has not been reversed and remains binding on the Board.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions based on 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. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.²
3. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice.³ The record shows that the applicant signed and received his DD-214 upon his discharge on October 28, 1988. Therefore, the preponderance of the evidence shows that the applicant knew of the alleged error in his record in 1988, and his applicant is untimely.
4. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.⁴ 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”⁵ 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.”⁶ Pursuant to these requirements, the Board finds the following:
 - a. Regarding the long delay in applying to the Board, the applicant explained that although he received a general discharge more than 30 years ago, the “cloud” has never left him. The Board finds that the applicant’s explanation for the delay is not compelling because he failed to show that anything prevented him from seeking correction of the alleged error or injustice more promptly.
 - b. A cursory review of the merits of this case shows that the applicant’s claim lacks potential merit. The applicant was properly awarded a general discharge for misconduct, in accordance with Article 12.B.18.b.4. of the Coast Guard Personnel Manual then in effect, after his urine tested positive for cocaine less than five months after he enlisted. In his application, the applicant acknowledged that his request to upgrade his characterization of service is not a request to correct an error or injustice. Instead, he stated that his request is based on his post-service conduct. The Board notes that the evidence indicates that the applicant has been a law-abiding

² *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

³ 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.

⁴ 10 U.S.C. § 1552(b).

⁵ *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

⁶ *Id.* at 164, 165; see also *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

citizen who has had a lengthy career since his discharge. However, the delegate of the Secretary informed the Board on July 7, 1976, by memorandum that “the Board should not upgrade discharges solely on the basis of post-service conduct.”⁷ The disputed record is presumptively correct,⁸ and the record contains no evidence that supports upgrading his characterization of service.

5. Accordingly, the Board will not excuse the application’s untimeliness or waive the statute of limitations to conduct a thorough review of the merits. The applicant’s request should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

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

⁸ 33 C.F.R. § 52.24(b); *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 SN [REDACTED] USCG, for correction of his military record is denied.

October 15, 2020

