

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2021-044


SNRD (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 April 7, 2021, and assigned the case to a staff attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated September 1, 2023, 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 Radarman (SNRD/E-3) who received a General – Under Honorable Conditions discharge for misconduct on December 7, 1984, asked the Board to correct his record by upgrading his characterization of service from General to Honorable and reinstating his rank of Radarman Third Class (RD3/E-4). The applicant explained that he was stripped of his Radarman Third Class rank following a Captain’s Mast for failing a random drug test. The applicant stated that he was accused of using marijuana and discharged immediately. The applicant alleged that at the time he requested the assistance of counsel and fought the decision, but was unsuccessful. According to the applicant, this was during a time when regulations for the use of marijuana were just being implemented, so he was made an example of. The applicant stated that his career in the Coast Guard was not perfect, but from the time he started to serve, he performed his duties and never allowed his extracurricular activities to interfere with his job. The applicant acknowledged that it was wrong for him to partake in the use of marijuana while on his personal time, and he has paid for his bad decisions for many years. The applicant claimed that had he been allowed to remain in the Coast Guard, his rank of RD3 would have been reinstated within six months, but because of his discharge he lost the opportunity to regain his rank.

The applicant stated that he worked very hard to achieve his RD3 rank and would like to have his achievements recognized on his headstone when he passes “the bar”. The applicant further

stated that he did not think it was fair to strip these achievements for an entire lifetime. The applicant requested that his General discharge be upgraded to Honorable to reflect the 90% of service, not the 10% of the irresponsible decisions made by a young sailor in his early twenties. The applicant explained that his reason for making this request now is that as he gets older and thinks about what the afterlife has in-store for him, the one thing that will remain forever here on Earth is his headstone. He stated that he wanted to be remembered for the achievements he while serving his country, rather than a stupid and immature decision he made over 30 years ago.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on February 27, 1979.

On June 25, 1980, the applicant was stationed aboard a cutter when his urine tested positive for marijuana. He was sent to Captain's Mast and found guilty of using marijuana while in a duty status and received NJP.

On January 12, 1982, the applicant was found guilty at Captain's Mast for having stolen his cutter's telescope in violation of Article 121¹ of the Uniform Code of Military Justice (UCMJ), and then selling the telescope in violation of Article 108² of the UCMJ. The applicant received NJP for these offenses, which included a reduction in rank that was suspended for six months.

On June 29, 1984, while onboard his cutter, the applicant was found guilty at Captain's Mast for having wrongfully used marijuana. The applicant received NJP including reduction in rank from RD3 to SNRD.

¹ Article 121 – Larceny and Wrongful Appropriation –

(a) Any person subject to this chapter who wrongfully takes, obtains, or withholds, by any means, from the possession of the owner or of any other person any money, personal property, or article of value of any kind –

(1) with intent permanently to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner, steals that property and is guilty of larceny; or

(2) with intent temporarily to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner, is guilty of wrongful appropriation.

(b) Any person found guilty of larceny or wrongful appropriation shall be punished as a court-martial may direct.

² Article 108 – Military Property of United States – Loss, Damage, Destruction, or Wrongful Disposition –

Any person subject to this chapter who, without proper authority –

(1) sells or otherwise disposes of;

(2) willfully or through neglect damages, destroys, or loses; or

(3) willfully or through neglect suffers to be lost, damaged, destroyed, sold, or wrongfully disposed of;

any military property of the United States, shall be punished as a court-martial may direct.

On July 5, 1984, the applicant's Commanding Officer (CO) issued a memorandum, "Notice of Intent to Discharge," wherein he notified the applicant that he was initiating separation proceedings against the applicant due to his two drug incidents that resulted in two separate NJPs.

On July 5, 1984, the applicant, via a First Endorsement, objected to his discharge and elected to make a personal statement.

On July 13, 1984, the applicant submitted his personal statement wherein he objected to his discharge and provided a defense of himself. The applicant admitted to using marijuana and stated that he did not think his discharge was unfair, but felt that a General Discharge was not based on his past performance. The applicant requested that he be awarded an Honorable discharge in lieu of a General – Under Honorable Conditions discharge.

On July 16, 1984, the applicant's CO issued a memorandum wherein he stated the following:

1. It is requested that SNRD [applicant] be discharged from the U.S. Coast Guard by reason of misconduct in accordance with reference (a). I recommend a General Discharge under the provisions of reference (b).
2. SNRD [applicant] has received two Commanding Officer's NJP involving the use of a controlled substance. The first was while serving aboard USCGC [redacted]. The second NJP was administered aboard this unit. The NJP aboard [redacted] was the result of random drug urinalysis. The test was conducted by [redacted], confirmed by Gas Chromatography/Mass Spectrometry (greater:: than 3000 ng/ml THC metabolite). Enclosures (1) and (2) are the non-judicial punishments awarded by [redacted] and [redacted] Commanding Officers on 25 Jun 80 and 29 Jun 84.
3. SNRD [applicant] was informed of these discharge proceedings on 5 Jul 84 by Enclosure (3) and chose to make a statement, attached in Enclosure (4). He received legal advice from [redacted] (dl) by telephone and objects to a General Discharge from the service.
4. My comments on his statement are as follows: I would recommend discharge after a first offense of this magnitude considering SNRD [applicant's] rate and his freely admitted drug usage. SNRD [applicant's] performance aboard [redacted] has in the whole been average. Occasional periods of disgruntlement and displays of a poor attitude were evident. He does not actually object to leaving the service but wishes to do so with an honorable discharge. Unfortunately he has not earned such a discharge. A general discharge is recommended due to a need for firm action in drug related offenses. SNRD [applicant] did willfully and wrongfully use marijuana although he clearly understood service policy and in spite of the mission of [redacted].

On December 7, 1984, the applicant was discharged from the Coast Guard with a "General – Under Honorable Conditions" characterization of service, an "HKK" Separation Code, and a Narrative Reason for Separation of "Misconduct."

VIEWS OF THE COAST GUARD

On August 4, 2021, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which he 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).

The JAG argued that the applicant failed to submit a timely application and failed to show why it was in the interest of justice to excuse the delay. The JAG stated that here, the applicant was discharged at the end of 1984 and was provided with a DD-214 reflecting his characterization of service and the reason for his discharge. The JAG argued that the applicant's DD-214 should have put the applicant on notice of the error and/or injustice in his record. The JAG cited to the applicant's application wherein the applicant stated that he "[h]ad no issues over the years with the type of discharge he received," to support his argument that the applicant was aware of the alleged error and/or injustice since his discharge in 1984. The JAG stated that the applicant provided no legitimate reason to account for his roughly 35-year delay in applying for relief. The JAG argued that the fact that the applicant is getting older and has begun contemplating the afterlife is insufficient to excuse such a delay. Finally, the JAG explained that turning to a cursory review of the merits, the applicant admitted to using marijuana, and only seeks a change in his discharge due to the passage of time and not wanting to be remembered for his mistakes, all of which are insufficient reasons to excuse the untimeliness of his application. Accordingly, the JAG argued that the applicant has failed to provide good cause for his failure to timely file his application for relief, and it is not in the interest of justice to waive the statutory three-year filing deadline.

The JAG further argued that even if the Board were to find good cause to waive the statute of limitations, the applicant still failed to overcome the presumption of regularity afforded to the Coast Guard. The JAG argued that the applicant bears the burden of proving error, and here, he has failed to offer any evidence that the Coast Guard committed an error or injustice. The JAG argued that on the contrary, the applicant admitted to the underlying misconduct that precipitated his discharge. The JAG claimed that the applicant's argument for correcting his record is not that the Coast Guard committed an error or injustice, but after the passage of all this time, the applicant would like to be remembered for the achievements he made while serving his country rather than for his mistakes. The JAG argued that unfortunately, this is not the standard for warranting a corrections to one's military record and the applicant provided no evidence to support the required standard. The JAG further argued that the applicant provided no evidence to support his claim that the Coast Guard was just making an example of the applicant. The JAG explained that at the time of the applicant's discharge, the applicant had been found guilty at Captain's Mast on three different occasions for misconduct, two of which were for marijuana. Accordingly, the JAG argued that the applicant's request for relief should be denied.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 16, 2021, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. As of the date of this decision, no response has been received.

APPLICABLE LAW AND POLICY

Under Article 12.B. of the Personnel Manual, in effect in 1984, provides the following guidance on separating a service member due to drug usage:

Article 12.B.2.f.(2) provided that a "general discharge will be issued ... [w]hen a member has been identified as either a user, possessor, or distributor of illegal drugs or paraphernalia" unless the discharge was not

administrative but punitive (by court-martial), in which case a bad conduct or dishonorable discharge could be assigned.

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 over this matter under 10 U.S.C. § 1552(a) because the applicant is requesting correction of an alleged error or injustice in his Coast Guard military record. The Board finds that the applicant has exhausted his administrative remedies, as required by 33 C.F.R. § 52.13(b), because there is no other currently available forum or procedure provided by the Coast Guard for correcting the alleged error or injustice that the applicant has not already pursued.

2. The application filed by the applicant was not timely. To be timely, an application for the correction of a military record must be submitted to the Board within three years after the alleged error or injustice was discovered or should have been discovered.³ The record shows that the applicant received his DD-214 on December 7, 1984. Therefore, the preponderance of the evidence shows that the applicant knew of the alleged error in his record in December 1984, and his application is untimely.

3. 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 "analyzing 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 his delay in filing his application, the applicant failed to explain what caused his delay in applying to the Board for relief. The Board finds that the applicant's request for consideration is not persuasive because he has 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. Not only has the applicant failed to submit evidence sufficient to overcome the presumption of regularity afforded to the Coast Guard's records and its officials, but the record shows that the applicant was punished at Captain's Mast three times, two of which were for the illegal use of a controlled substance in violation of Coast Guard policy. Furthermore, in the applicant's personal statement submitted in response to his CO's notice of intent to separate him, the applicant admitted to using marijuana in

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).

violation of Coast Guard policy. The applicant has also admitted to the drug use in his application for relief to this Board. Even with the passage of time, marijuana continues to be a controlled substance under federal law and Coast Guard policy and its usage continues to be prohibited. Article 12.B.18.b.4.a. of the Personnel Manual then in effect required that the applicant be discharged for misconduct upon a finding that the applicant was involved in a drug incident. Members then and now are subject to separation when testing positive for marijuana, and Coast Guard policy continues to mandate a characterization of service of no better General – Under Honorable Conditions for members discharged due to drug use. The applicant’s record is presumptively correct and the applicant has failed to show why it is in the interest of justice to waive the statute of limitations in his case to do a more thorough review of the record and evidence.

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

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

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

September 1, 2023

[REDACTED] [REDACTED] Digitally signed by [REDACTED]
[REDACTED] [REDACTED] Date: 2023.09.29 17:17:01 -04'00'

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[REDACTED] [REDACTED] Digitally signed by [REDACTED]
[REDACTED] [REDACTED] Date: 2023.10.02 13:38:46
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[REDACTED] [REDACTED] Date: 2023.09.29 17:45:26
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