


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

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2021-052**

  
TC3 (former)

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**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 15, 2021, 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 March 10, 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 Telecommunication Specialists third class (TC3/E-4) who received a general discharge under honorable conditions from the Coast Guard on February 6, 2002, asked the Board to upgrade his discharge to honorable.<sup>1</sup> He also asked the Board to correct his record by changing his separation code from JKK (misconduct) to FBK (completion of required active service) and by changing his reenlistment code from RE-4 (ineligible to reenlist) to either RE-1 (eligible for reenlistment) or RE-2 (ineligible for reenlistment because of status).

The applicant stated that while on active duty in 2001, he attended a party where possible drug use had occurred. A Coast Guard Investigative Services (CGIS) investigation was convened to investigate other members of the applicant’s unit and the alleged drug use. Since the applicant had attended the party, he was questioned by CGIS agents. Before he was questioned, he alleged, the Executive Officer (XO) of his ship warned members of the unit that he would “nail our balls to the wall” if they lied to the agents. The applicant stated that he fully cooperated with the investigation and truthfully answered all of the CGIS agent’s questions. According to the applicant,

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<sup>1</sup> 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.

he told investigators that he had not been aware of any drug use at the party. He also alleged that he told investigators that he had not used drugs at any point while stationed at his unit.

The applicant argued that at that point, he believed that the interview was over. He stated that he felt as though he had been cleared of any wrongdoing and that he was not the subject of any criminal investigation. Then, he alleged, CGIS agents asked him if he was familiar with ecstasy, which was the drug allegedly used at the party. The applicant responded that he had used ecstasy on one occasion while attending Radioman (RM) "A" School two years earlier in 1999. The applicant then asked the investigators if he would get in trouble for being forthcoming with this information. The CGIS agents informed the applicant that they had to notify his command of his statement and that any repercussion would be up to them.

In December 2001, the applicant received nonjudicial punishment (NJP) for his drug use. The applicant alleged that, as part of his punishment, he was discharged from the Coast Guard.

The applicant put forth several arguments to support his assertion that his discharge should be upgraded. First, he argued that his discharge should be upgraded because he should have been represented by counsel when he was questioned by CGIS agents.

The applicant also argued that his discharge should be upgraded because he was discharged for a mistake that he had made three years earlier. He argued that he had used ecstasy one time while he was attending RM "A" School in 1999. The applicant stated that he had used the drug with a few other students and that it was a youthful mistake.

Next, the applicant argued that his discharge should be upgraded because his Coast Guard record was stellar. At the time he was discharged, he was on the verge of becoming a first class petty officer. He argued that his record included a Good Conduct medal and very favorable performance evaluations. To support this assertion, the applicant provided his performance evaluation that his Supervisor completed on November 5, 2001. The performance evaluation shows that the applicant received standard, above-standard, and excellent marks. The applicant's conduct for the marking period was considered satisfactory and he was recommended for advancement. In addition to his favorable performance evaluations, he argued that he had no conduct-related issues while assigned to his unit.

Finally, the applicant argued that his discharge should be upgraded because he told the truth. He stated that when he was questioned by CGIS agents about his drug use, he could have lied and denied ever using drugs. However, the applicant chose to be honest and to tell the truth. He asked the Board to take his honesty into consideration in reviewing his application.

The applicant concluded by addressing the delay in his application. He argued that he was only recently made aware that he could apply to the BCMR to request an upgrade to his discharge.

### **SUMMARY OF THE RECORD**

The applicant enlisted in the Coast Guard on September 30, 1996.

On February 27, 1997, the applicant was granted a Secret clearance.

In 1999, the applicant attended RM “A” School. Shortly thereafter, on May 22, 1999, the applicant was assigned to a Coast Guard cutter.

On November 19, 2001, the applicant provided CGIS agents a signed affidavit. He acknowledged that the affidavit was being voluntarily furnished and that it was given in conjunction with an official investigation. The applicant stated that the previous summer, he and his wife had attended a party hosted by another Coast Guard member. The applicant stated that a third class petty officer had mentioned to him that three male Coast Guard members at the party had taken ecstasy for the first time. The applicant stated that he and his wife did not use drugs that night. However, he acknowledged that he had used ecstasy twice while in RM “A” School and once shortly after he was stationed to his current unit. However, he stated that he stopped using drugs once he got married. The applicant concluded his affidavit by apologizing to his command.

On November 25, 2001, the applicant received and signed a Miranda/Tempia Rights form. The applicant was informed that he was suspected of committing the following offenses: Article 92 (Failure to Obey an Order or Regulation) and Article (112a) Wrongful Use of a Controlled Substance. The form stated that the applicant was being investigated for ecstasy use. The applicant was notified that he had the right to remain silent, that he could consult with a lawyer before deciding whether or not he wanted to make a statement, that the questioning would stop if he decided to consult with a lawyer, that anything he said could be used as evidence against him, that he could stop answering questions at any time, and that a lawyer could be present during any further questioning. The applicant indicated that he had carefully read and understood his rights and that any questions had been answered to his complete satisfaction. He further indicated that he did not want to consult with a lawyer and that he desired to make a statement.

On November 29, 2001, Ensign (ENS) S sent a memorandum to the applicant’s Commanding Officer (CO) regarding the investigation into the applicant’s misconduct. ENS S stated that CGIS agents had conducted an investigation into illegal drug use by several members of the applicant’s ship. On November 19, 2001, CGIS agents questioned the applicant. ENS S stated that the agents did not advise the applicant of his rights before questioning him because he was not suspected of committing a crime. However, the applicant made a voluntary, spontaneous, and incriminating statement to the agents.

Based on this statement by the applicant, ENS S conducted an investigation into alleged misconduct by the applicant during his time at RM “A” School. ENS S stated that he had questioned the applicant on November 25, 2001. Before questioning the applicant, ENS S had advised him of his rights. After being advised of his rights, the applicant elected to provide a statement. ENS S determined that the applicant had used ecstasy two times while attending RM “A” School in 1999. Then, the applicant had used ecstasy once more within the first month of arriving at his current unit in May 1999. ENS S determined that, in addition to using ecstasy, the applicant had lied on his security clearance application that he completed upon his arrival at his current unit. In the section addressing drug use, the applicant had indicated that he had only used marijuana and acid before he enlisted in the Coast Guard. The applicant had also indicated that he had never illegally used a controlled substance while possessing a security clearance.

ENS S opined that the applicant had violated Article 92 of the Uniform Code of Military Justice (UCMJ) in that the applicant had failed to obey the Commandant's policy on drug use by using ecstasy. ENS S also opined that the applicant had violated Article 107 of the UCMJ in that the applicant had falsified his security clearance application form to prevent his discharge and that he had used drugs while holding a Secret clearance. Finally, ENS S opined that the applicant had violated Article 112a of the UCMJ in that he had used ecstasy, a Schedule I controlled substance, without legal justification or authorization. ENS S recommended that the applicant receive NJP for violating Articles 92, 107, and 112a of the UCMJ. ENS S also recommended that the applicant's punishment include being reduced in rank to E-4, extra duty, and separation from the Coast Guard with a general discharge.

On November 30, 2001, the applicant reenlisted for a term of six years.

On December 1, 2001, the applicant received NJP for failure to obey an order or regulation<sup>2</sup> and wrongful use of a controlled substance.<sup>3</sup> Specifically, the applicant, on or about May 1999, failed to obey a lawful general order and wrongfully used a controlled substance by consuming ecstasy. The applicant's punishment included restraint to his ship for 45 days, forfeiture of ½ pay per month for 2 months, reduction to pay grade E-4, and extra duties for 45 days. His CO also initiated the revocation of the applicant's security clearance, qualification, and authorization to wear his insignia. Finally, the CO determined that the applicant should be processed for discharge due to misconduct for violating the Coast Guard's substance abuse policy.

On December 18, 2001, the applicant's CO notified him that he was being recommended for discharge for misconduct due to a drug incident. The CO cited the applicant's statements that he had made to CGIS agents regarding his ecstasy use while serving on active duty in violation of the Coast Guard's substance abuse policy. The applicant was notified that his CO was recommending that he receive a general discharge. The applicant was further notified that he could submit a statement that would be forwarded along with the CO's recommendation for discharge.

That same day, the applicant acknowledged receipt of the notification for discharge and did not object. He indicated that he waived his right to consult with a lawyer regarding the implications of a general discharge. The applicant also indicated that he waived his right to submit a statement. Finally, the applicant indicated that he did not desire to attend an alcohol or drug treatment or counseling program.

On December 29, 2001, the applicant's CO sent a memorandum to the Commander of the Personnel Service Center requesting that the applicant be discharged for misconduct due to a drug incident. To support his request, the CO cited to the memorandum from ENS S dated November 29, 2001. Specifically, the CO cited the applicant's confession that he had used ecstasy while serving on active duty with the Coast Guard. The CO recommended that the applicant receive a general discharge.

On February 6, 2002, the applicant was discharged for misconduct in accordance with Article 12.B.18. of the Coast Guard Personnel Manual. His DD-214 shows "under honorable

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<sup>2</sup> Art. 92, UCMJ.

<sup>3</sup> Art. 112A, UCMJ.

conditions” as the character of discharge; “misconduct” as the narrative reason for separation; JKK (misconduct) as his separation code; and RE-4 (ineligible for reenlistment) as his reenlistment code.

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

On September 23, 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).

PSC argued that the applicant’s application was untimely. Regarding the merits of the case, PSC argued that the applicant failed to prove that the Coast Guard committed an error or injustice regarding his discharge. To support its assertion, PSC cited Article 12.B.18. of the Coast Guard Personnel Manual that states, “any 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.”

The JAG reiterated that the applicant failed to prove that the Coast Guard committed an error or injustice. The JAG first addressed the applicant’s assertion that he should have been represented by counsel during his interview with CGIS agents. The JAG stated that during the applicant’s initial interview with the agents, he was not suspected of having done anything wrong. Accordingly, the agents had no reason to provide the applicant with an opportunity to consult with counsel. The JAG argued that the question posed by the agents about whether the applicant was knowledgeable about ecstasy was not a question that would necessarily illicit an incriminating answer. However, during the interview, the applicant spontaneously confessed to previous ecstasy use while on active duty. Consequently, a separate CGIS investigation was convened to investigate the applicant’s drug use. The JAG stated that at this point, the applicant was properly provided the opportunity to consult with counsel. However, the applicant waived the right to consult with counsel and made another voluntary statement admitting to the use of ecstasy while on active duty.

The JAG also addressed the applicant’s assertion that he should not have been discharged for a mistake he made three years earlier. The JAG acknowledged that the initial CGIS investigation was unrelated to the applicant’s misconduct. However, the JAG stated that due to the applicant’s spontaneous confession, a subsequent investigation was convened to investigate his drug use. The JAG stated that during the second investigation, the applicant again admitted to using drugs. The JAG stated that it was the applicant’s second confession that led to his discharge.

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

On October 4, 2021, 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

Annex A of the Military Justice Manual in effect in 2001, COMDTINST M5810.1D, discusses a suspect's rights in relevant part:

### Self-Incrimination Protections.

The military justice system provides an accused rights and due process that in many ways are superior to those provided a defendant in civilian criminal courts. Pursuant to Article 31, Uniform Code of Military Justice (Section 831 of Title 10, United States Code), servicemembers have a right against self-incrimination and an entitlement to be informed of the suspected offense(s) before questioning begins. In addition to protections against self-incrimination, servicemembers have a right to free military counsel when questioned as a suspect of committing an offense, upon preferral of court-martial charges, or initiation of arrest or apprehension.

Rule 305 of the Manual for Courts-Martial in effect in 2001 discusses warnings about rights in relevant part:

### (d) *Counsel rights and warnings.*

(1) *General rule.* When evidence of a testimonial or communicative nature within the meaning of the Fifth Amendment to the Constitution of the United States either is sought or is a reasonable consequence of an interrogation, an accused or a person suspected of an offense is entitled to consult with counsel as provided by paragraph (2) of this subdivision to have such counsel present at the interrogation, and to be warned of these rights prior to the interrogation if—

(A) The interrogation is conducted by a person subject to the code who is required to give warnings under Article 31 and the accused or suspect is in custody, could reasonably believe himself or herself to be in custody, or is otherwise deprived of his or her freedom of action in any significant way; or

(B) The interrogation is conducted by a person subject to the code acting in a law enforcement capacity, or the agent of such a person, the interrogation is conducted subsequent to the preferral of charges, and the interrogation concerns the offenses or matters that were the subject of the preferral of the charges.

Article 12.B.2.f.2. of the Coast Guard Personnel Manual in effect in 2001 discusses standards for a general discharge in relevant part:

2. General Discharge. The member's commanding officer or higher authority may effect a separation with a general discharge if the member is subject to discharge and a general discharge is warranted under the standards prescribed in this paragraph. When a general discharge is issued for one of the reasons listed in Article 12.B.2.f.1.a., the specific reason shall be stated in an entry on an Administrative Remarks, CG-3307, in the member's Personnel Data Record. A general discharge applies in these situations:

### a. The member either:

(1) Has been identified as a user, possessor, or distributor of illegal drugs or paraphernalia; or

(2) Has tampered with drug urinalysis samples, supplies, or documentation; However, the commanding officer may recommend a discharge under other than honorable conditions in severe circumstances, including among others, tampering with evidence in drug seizure cases or distributing drugs for profit, to other Coast Guard members or to minors.

Article 12.B.18.b. of the manual discusses reasons to discharge members for misconduct in relevant part:

Commander, (CGPC) may direct discharging a member for misconduct in any of these cases:

4. Drugs.

a. Involvement with Drugs. Any 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 20.A.2.k. of the manual defines a drug incident as follows:

Intentional drug abuse, wrongful possession of, or trafficking in drugs. If the use occurs without the member's knowledge, awareness, or reasonable suspicion or is medically authorized, it does not constitute a drug incident. A civil or military conviction for wrongful use, possession, etc., of controlled substances is prima facie evidence of a drug incident. 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 1.B.17.b.4. of the Military Separations Manual in effect today, COMDTINST M1000.4, states that any 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 1.A.2.k. of reference (h), Coast Guard Drug and Alcohol Abuse Program, COMDTINST M1000.10 (series), will be processed for separation from the Coast Guard with no higher than a general discharge (under honorable conditions.)

### 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.<sup>4</sup>
3. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice.<sup>5</sup> The record shows that the applicant signed and received his DD-214 upon his discharge on February 6, 2002. Therefore, the preponderance of the evidence shows that the applicant knew of the alleged error in his record in 2002, and his application is untimely.

<sup>4</sup> *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are nonadversarial and 10 U.S.C. § 1552 does not require them).

<sup>5</sup> 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.

4. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.<sup>6</sup> 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”<sup>7</sup> 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.”<sup>8</sup> Pursuant to these requirements, the Board finds the following:

a. The applicant waited more than eighteen years to submit an application to the Board. Regarding the delay in applying to the Board, the applicant stated that he had only recently been made aware that he could request an upgrade to his discharge. 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 first argued that his discharge should be upgraded because he was not represented by counsel when he was questioned by CGIS agents. According to Annex A of the Military Justice Manual, servicemembers have a right to free military counsel when questioned as a suspect. When the applicant was initially questioned by CGIS agents on November 19, 2001, he was not suspected of committing a crime. Instead, he was questioned regarding the drug use of other members of his ship. Accordingly, the applicant was not entitled to counsel at the time he initially confessed to drug use. Further, once the applicant was suspected of committing violations of the UCMJ on November 25, 2001, he was notified that he could consult with a lawyer before deciding whether or not he wanted to make a statement and that a lawyer could be present during any further questioning. However, the applicant elected to make a statement without consulting with a lawyer. The applicant also argued that his discharge should be upgraded because it was based on a youthful mistake that he had made years earlier, he had a stellar Coast Guard career, and he was honest with the CGIS agents about his drug use. However, the applicant’s illegal drug use mandated his discharge for misconduct with no higher than a general character of service in accordance with Article 12.B.18. of the Coast Guard Personnel Manual. In fact, members who use illegal drugs today continue to receive general discharges for misconduct. Therefore, the disputed record is presumptively correct,<sup>9</sup> and the record contains no persuasive evidence that substantiates his allegations of error or injustice in his official military record.

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)**

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<sup>6</sup> 10 U.S.C. § 1552(b).

<sup>7</sup> *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

<sup>8</sup> *Id.* at 164, 165; see also *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

<sup>9</sup> 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 TC3 [REDACTED] [REDACTED] USCG, for correction of his military record is denied.

March 10, 2023

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