

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2004-004

XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX

FINAL DECISION

ANDREWS, Deputy Chair:

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 BCMR docketed the case on October 27, 2003, upon receipt of the applicant's completed application and military records.

This final decision, dated June 10, 2004, is 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 received a general discharge under honorable conditions from the Coast Guard on June 1, 1986, after his urine tested positive for metabolites of marijuana, cocaine, and codeine, asked the Board to correct his record by upgrading his discharge to honorable.

The applicant alleged that the general discharge is "not reflective of [his] overall honorable service" during seven years on active duty. He alleged that he was suffering from depression, grief over the death of his father, and service-connected disabilities, which caused him to make the mistake that led to his general discharge. He alleged that he had been recommended for reenlistment and that his superiors were very impressed with his military bearing and professional knowledge.

The applicant alleged that if he had been properly informed of his options, he would have remained on active duty, received treatment for his depression, and made a career in the Coast Guard. However, he alleged, he "wasn't provided with a level play-

ing field and a number of choices made by [his] command and [him]self weren't well thought out."

The applicant stated that since his discharge, he had worked hard, raised a family, and actively advocated for the rights of veterans. He stated that he did not apply sooner for an upgrade of his discharge because he did not know there was a way to appeal it.

SUMMARY OF THE RECORD

On February 12, 1980, the applicant enlisted in the Coast Guard for four years. Emergency Data forms in his record indicate that his father passed away sometime after his enlistment but prior to April 26, 1982.

On February 4, 1982, the applicant was taken to mast in accordance with Article 15 of the Uniform Code of Military Justice (UCMJ) and convicted of wrongfully using marijuana on or about January 25, 1982, and of being derelict in his duties, in violation of Articles 92 and 134 of the UCMJ. He was fined \$200.00, awarded fourteen days' restriction to base with extra duties, and reduced from pay grade E-4 to E-3.

On July 29, 1982, the applicant's commanding officer (CO) recommended to the Commandant that the applicant's rank be restored because he was working hard and seemed "to have learned from his mistake and ha[d] shown no indications of repeating it." On August 11, 1982, the Commandant approved the restoration of the applicant's pay grade to E-4.

On November 1, 1983, the applicant underwent a physical examination. On his Report of Medical History, he reported never having any "depression or excessive worry" and stated that he was in good health. There is no evidence of any complaint about or treatment for any mental health condition in his Coast Guard medical record.

Beginning with his performance evaluation for the period ending September 30, 1984, the applicant received very low to mediocre marks on his evaluations up to the day of his discharge (marks of 2, 3, and 4 on a scale of 1 to 7, with 7 being best).

On February 5, 1985, the applicant received a Good Conduct Award for the three-year period from February 4, 1982, to February 4, 1985.

On May 1, 1985, the applicant's commanding officer made an administrative entry ("page 7") in his record to document counseling about "drastically" declining performance. He noted that during the previous six months, the applicant's grooming and appearance had become poor and he had become a burden to his colleagues as he had been unable to complete tasks. The commanding officer warned the applicant that

unless there were "a drastic improvement in [his] performance and appearance, disciplinary actions [would] be taken."

On October 15, 1985, the applicant attended training on the Coast Guard's policies regarding drug and alcohol abuse.

On March 10, 1986, the applicant underwent a random urinalysis. On March 19, 1986, the laboratory reported that his urine tested positive for metabolites of marijuana. On March 25, 1986, the laboratory reported that his urine had also tested positive for metabolites of cocaine.

On April 9, 1986, the applicant's Group Commander informed him in a letter that because his urine had tested positive for cocaine use, he was recommending that the applicant be administratively separated with a general discharge due to misconduct. The Group Commander also advised the applicant that he had a right to consult with an attorney and to submit a statement on his own behalf that would be forwarded with the Group Commander's recommendation.

On May 12, 1986, the applicant signed an acknowledgement indicating that he had received his Group Commander's notification and had an opportunity to consult with an attorney. The applicant waived his right to submit a statement in his own behalf and stated that he did not object to being discharged.

On May 14, 1986, the District Commander forwarded the recommendation for the applicant's general discharge to the Commandant. On June 5, 1986, the Commandant directed that the applicant receive a general discharge for misconduct due to drug abuse, in accordance with Article 12-B-18 of the Personnel Manual.

On June 13, 1986, the applicant received a general discharge "under honorable conditions" with a narrative reason for separation of "Misconduct" and an RE-4 reenlistment code (ineligible).

VIEWS OF THE COAST GUARD

On March 11, 2004, the Judge Advocate General (TJAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request for relief because of its untimeliness or, if not, for lack of merit. He based his recommendation on a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC).

CGPC stated that the applicant's general discharge was "appropriate and carried out in accordance with the policy in effect at that time." He pointed out that, although the policy in the mid 1980s gave illegal drug users, such as the applicant, a "second

chance," no such leniency is afforded members today under the "zero tolerance" policy. CGPC stated that the record proves that the applicant was afforded his due process rights. CGPC stated that following his second drug incident, the applicant was not entitled to another chance to stay in the Coast Guard and had no "options" other than to be discharged.

CGPC further stated that the applicant never complained of or sought treatment for any depression or mental disorder while in the Coast Guard. CGPC argued that, even if the applicant was depressed, it would not have excused his misconduct. Finally, CGPC stated that the applicant's "general discharge under honorable conditions" appropriately reflects the fact that he performed some honorable military service but engaged in serious misconduct.

TJAG argued that the application should be denied for untimeliness because it was filed nearly sixteen years after the applicant's discharge and because the applicant "has not provided good cause for his failure to timely file."

TJAG argued that the applicant's "self-serving statement that he doesn't believe the characterization of his discharge adequately reflects his service and that he had personal problems during his service" does not overcome the presumption of regularity accorded the actions of his command in awarding him a general discharge after repeated drug abuse.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 11, 2004, 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 LAW

Under Article 12-B-18.b.(4) of the Personnel Manual in effect in 1986, 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 separated from the Coast Guard with no higher than a general discharge. However, in truly exceptional situations, commanding officers may recommend retention of members E-3 and below involved in only a single drug incident.

...

Under Article 12-B-18.e.(1), a member with less than eight years of active service who was being recommended for a general discharge for misconduct was entitled to

(a) be informed of the reasons for the recommended discharge, (b) consult an attorney, and (c) submit a statement in his own behalf.

Under Article 20.C. of the current Personnel Manual, any member involved in any “drug incident” is administratively discharged with no greater than a general discharge under honorable conditions.

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 submissions, 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 discovered or reasonably should have discovered the alleged error in his record.¹ The record indicates that the applicant signed and received his discharge documents in 1986. Therefore, he knew or should have known of the character of his discharge at that time. Although the applicant stated that he did not learn that he could appeal the character of his discharge until recently, his failure to investigate the possibility of appeal does not toll the Board's statute of limitations. Thus, his application was untimely.

3. The Board may waive the three-year statute of limitations if it is in the interest of justice to do so.² Factors for the Board to consider in determining whether it is in the interest of justice to waive the statute of limitations include any stated reasons for the delay and whether a cursory review of the record indicates that there is some merit in the case.³

4. The applicant stated that he delayed appealing the character of his discharge simply because he did not know that he could do so. The Board does not find this explanation to be compelling.

5. The record indicates that the applicant received a general discharge under honorable conditions after the second time he was found to have used illegal drugs, in accordance with Article 12-B-18.b.(4) of the Personnel Manual. The record further indi-

¹ 10 U.S.C. § 1552; 33 C.F.R. § 52.22.

² 10 U.S.C. § 1552(b).

³ See *Dickson v. Secretary of Defense*, 68 F.3d 1396, 1405 (D.C. Cir. 1995); *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

cates that he received all due process to which he was entitled under Article 12-B-18 of the Personnel Manual.

6. Although the applicant argued that the character of his discharge does not accurately reflect the character of his service, the Board finds that his history of misconduct and poor to mediocre evaluation marks fully supported the discharge he received. The Board notes that after his first drug incident, the applicant received a second chance to succeed but failed to do so and repeated his misconduct. Moreover, there is no evidence in the record to support his allegation that he was suffering from any stress or depression.

7. The Board finds no reason to waive the statute of limitations in this case as a review of the record has shown that there is no merit in it whatsoever.

8. Accordingly, the applicant's request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of xxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is denied.

William R. Kraus

Audrey Roh

Dorothy J. Ulmer