

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

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Application for the Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2005-128**

**XXXXXXXXXX.**

Xxx xx xxxx, SN/E-3 (former)

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**FINAL DECISION**

**AUTHOR:** Hale, D.

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was docketed on June 24, 2005, upon the BCMR's receipt of the applicant's completed application for correction.

This final decision, dated April 5, 2006, 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, a former seaman (SN; pay grade E-3) who served a little more than one year in the Coast Guard, asked the Board to correct his record by upgrading his 1988 discharge (general, under honorable conditions) to honorable. The applicant did not provide any reasons why his discharge should be upgraded, nor did he explain why he delayed filing his application.

**SUMMARY OF THE RECORD**

The applicant enlisted in the Coast Guard on August 11, 1986. On August 19, 1986, he signed a page 7<sup>1</sup> entry acknowledging that he had been provided a full explanation of the Coast Guard's drug and alcohol abuse program. After completing recruit training he was assigned to the Coast Guard Cutter *Venturous*. During his abbreviated enlistment, the applicant received numerous negative page 7s and was disciplined on several occasions for a variety of offenses.

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<sup>1</sup> A CG-3307 (Administrative Remarks, or Page 7) entry documents any counseling that is provided to a service member as well as any other noteworthy events that occur during that member's military career.

On May 10, 1987, a page 7 entry was made in the applicant's record noting his continued pattern of lateness.

On June 10, 1987, the applicant received non-judicial punishment (NJP) for an unauthorized absence.

On December 23, 1987, Coast Guard Training Center (TRACEN) Petaluma sent a message to the Commandant of the Coast Guard requesting that the applicant be transferred to a permanent duty station. The message noted that the applicant was counseled in May 1987 about his continued tardiness and the effect an NJP would have on his eligibility for "A" school.

On January 7, 1988, a page 7 was placed in the applicant's record documenting counseling about his failure to report to work on time.

On January 14, 1988, the applicant was notified that he had written several bad checks and that the Coast Guard Pay and Personnel Center would collect that money from his pay.

On January 20, 1988, the applicant underwent a psychiatric evaluation following a failed suicide attempt by drug overdose. The examining psychiatrist noted in the evaluation that the applicant had a personality disorder but that he still met the retention standards and that there was no psychiatric disease or defect which warranted further examination.

On January 21, 1988, TRACEN Petaluma sent a message to the Commandant indicating that the applicant had admitted to drug use and had also committed several other UCMJ (Uniform Code of Military Justice) violations, which were under investigation. The message noted that the applicant would likely be processed for discharge.

On January 22, 1988, the applicant was disenrolled from the Subsistence Specialist "A" school for having made sexually derogative comments to the women in his class and for writing more than \$5,000 in bad checks within three months.

On January 28, 1988, the Commandant directed that the applicant be discharged due to misconduct (drug use) in accordance with Article 12.B.18. of the Coast Guard Personnel Manual. The Commandant directed that the applicant receive a general

discharge, SPD Code HKK,<sup>2</sup> and that the narrative reason for discharge be listed as "misconduct."

On February 2, 1988, a page 7 was placed in the applicant's record documenting counseling about his failure to pay a \$2,030 phone bill he incurred while staying at a friend's home.

On February 4, 1988, the applicant was discharged from the Coast Guard pursuant to Article 12.B.18. of the Coast Guard Personnel Manual. He received a discharge "under honorable conditions," a separation code of HKK, and "misconduct" as his narrative reason for separation. The record indicates that the applicant received an RE-4 reenlistment code (ineligible to reenlist). He had served in the Coast Guard for one year, five months, and twenty-four days.

On June 18, 1991, the applicant requested a copy of his DD 214 and medical records from the National Personnel Records Center (NPRC). On July 19, 1991, the applicant submitted a letter to the Commandant of the Coast Guard, wherein he requested an upgrade of his reenlistment code so he could enlist in the Army or Marine Corps. The record also contains a letter from the NPRC to the applicant dated October 8, 1991, indicating that it sent the applicant a copy of his DD 214 and his medical records.

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

On November 7, 2005, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he adopted the findings of the Coast Guard Personnel Command (CGPC) and recommended that the Board deny the applicant's request. The JAG argued that the applicant failed to submit a timely application, failed to show why it was in the best interest of justice to excuse the delay, and failed to meet his burdens of production and persuasion. CGPC recommended denial because the character of service (general, under honorable conditions) listed on the applicant's DD 214 is consistent with Coast Guard policy and the applicant was discharged after he admitted to drug use.

The JAG also noted that the applicant offered no explanation or justification for his alleged delay in discovering the alleged "error" or in filing his application with the Board. The JAG noted that in determining whether it is in the interest of justice to

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<sup>2</sup> HKK is used to denote an involuntary discharge directed in lieu of further processing or convening of a board when a member commits drug abuse, which is illegal, wrongful, or an improper use, possession, sale, transfer or introduction on a military installation of any narcotic substance, marijuana or controlled substance, as established by 21 U.S.C. 812, when supported by evidence not attributed to urinalysis administered for identification of drug abusers or to a member's volunteering for treatment under the drug identification and treatment program. SPD Code Handbook, page 2-56.

waive the time limitations on applications, this Board must “consider the reasons for delay and the plaintiff’s potential for success on the merits, based on a cursory review. . . .” *Allen v. Card*, 799 F. Supp. 158, 166 (D.D.C. 1992). The JAG further stated that absent strong evidence to the contrary, government officials are presumed to have carried out their duties “correctly, lawfully, and in good faith.” *Arens v. United States*, 969 F.2d 1034, 1037 (1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

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

On November 9, 2005, the BCMR sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 days. The letter was returned to the BCMR on January 23, 2006, marked by the U.S. Postal Service as “return to sender – attempted not known.”

## **APPLICABLE REGULATIONS**

Under Article 12.B.18.b.4. of the Personnel Manual in effect in 1988, 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.  
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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. Admission of drug use is sufficient to find that a “drug incident” has occurred.

## **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 section 1552 of title 10 of the United States Code. The application was untimely.
2. An application to the Board must be filed within three years of the day the applicant discovers the alleged error in his record. 10 U.S.C. § 1552(b). The applicant was issued a DD Form 214 on February 4, 1988, with a discharge under

honorable conditions and an RE-4 reenlistment code. This information is clearly marked on the DD 214 and thus he knew or should have known that he had received a discharge under honorable conditions and an RE-4 reenlistment code. Therefore, the Board finds that the application was filed more than 14 years after the statute of limitations expired and is untimely.

3. Under 10 U.S.C. § 1552(b), the Board may waive the three-year statute of limitations if it is in the interest of justice to do so. In *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992), the court stated that in assessing whether the interest of justice supports a waiver of the statute of limitations, the Board “should analyze both the reasons for the delay and the potential merits of the claim based on a cursory review.” The court further instructed 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.” *Id.* at 164, 165. See also *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

4. The applicant provided no explanation for his failure to request an upgrade of his discharge at an earlier date, nor did he provide *any* reasons why his discharge should be upgraded. A cursory review of the record indicates that the applicant has not proved that the Coast Guard committed an error or injustice in awarding him a general discharge. The record indicates that the applicant’s commanding officer recommended his discharge after he admitted to using drugs and the Commandant directed that the applicant be discharged for misconduct on February 4, 1988, with a general discharge under honorable conditions, in accordance with Article 12.B.18. of the Personnel Manual. Absent evidence to the contrary, the Board presumes that Coast Guard officials have acted correctly, lawfully, and in good faith. *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979). Therefore, the Board finds that it is not in the interest of justice to waive the three-year statute of limitations.

5. Accordingly, due to the probable lack of success on the merits of his claim, the Board finds that it is not in the interest of justice to waive the statute of limitations in this case and it should be denied because it is untimely.

**[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]**

**ORDER**

The application of former SN XXXXXXXXXXXXXXX, xxx xx xxxx, USCG, for correction of his military record is denied.

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Frank H. Esposito

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Jordan S. Fried

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William R. Kraus