

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2006-136

XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX

FINAL DECISION

AUTHOR: Andrews, J.

This proceeding was conducted under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case on June 30, 2006, upon receipt of the applicant's completed application and military records.

This final decision, dated May 11, 2007, is approved 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 for misconduct on August 4, 1987, after his urine tested positive for cocaine use, asked the Board to "overturn" his discharge, which the Board interprets as a request for an honorable discharge. The applicant stated that his general discharge has "not allowed [him] financial or social advancements." He admitted that he "made a grave mistake" but alleged that he has worked to overcome it and feels that it is "time to make up with [his] Government."

In support of his request, the applicant submitted a letter from a psychiatrist, Dr. S, who wrote that he has known the applicant for several years both as a courtesy patient and as the son of his friends. Dr. S stated that the applicant has struggled with some learning disabilities but "is a man of high moral and ethical character, has worked very hard to overcome his problems, has no history of illegal behavior, and has not used illegal substances anymore." Dr. S stated that the applicant has worked for a number of mortgage companies and banks as a "trusted closer of mortgages" and "has held responsible retail jobs." Dr. S asked for the applicant's discharge to be upgraded because the applicant "has certainly paid a high price in anxiety and regret for any past indiscretions" and "fears applying for jobs which might require disclosure of his military discharge."

SUMMARY OF THE RECORD

On October 28, 1985, the applicant enlisted in the Coast Guard. Upon enlistment and again on November 7, 1985, the applicant acknowledged having been counseled about the Coast Guard's drug policy. Upon completing boot camp, he was assigned to a cutter and advanced from seaman recruit to seaman apprentice (SA).

On December 24, 1986, during a urinalysis of the crew, the applicant gave two samples of urine for testing and both tested positive for metabolites of cocaine. On January 21, 1987, the applicant's commanding officer (CO) informed him that she was initiating his general discharge for drug abuse. She informed him that he was entitled to object to his discharge, to consult an attorney, and to submit a statement on his own behalf.

On February 9, 1987, the applicant acknowledged that he had consulted an attorney and responded in writing to his CO's notification. He stated that the urinalysis result "is puzzling and personally unbelievable although the test results are undeniable ... I cannot deny the test results, but I do argue having knowingly been involved with drugs or anyone that does. I do not use drugs!" He asked to be retained on active duty.

The applicant submitted with his statement a letter from the officer in charge (OIC) of his cutter, dated February 9, 1987, who wrote that how the cocaine "got into [the applicant's] system is a matter of conjecture. His denial of knowledgeable substance abuse is good enough for me." The OIC noted that the applicant's first year on the cutter had been stressful and that the applicant had failed the course for advancement to seaman (E-3) three times. However, he argued, the applicant should be retained because he "deserves a chance to complete his obligation to the Coast Guard and himself. Releasing him will serve little purpose and I think we have an obligation to him as well. ... He has not given up, so why should we?"

On February 18, 1987, the District Commander forwarded the CO's recommendation and the applicant's rebuttal package to the Commandant with a recommendation that the discharge be approved. On March 2, 1987, the Commandant ordered the applicant's general discharge by reason of misconduct due to drug abuse within thirty days.

On March 12, 1987, the applicant underwent a physical examination in preparation for discharge. On March 20, 1987, the applicant's command informed the Commandant that the applicant could not be discharged within thirty days because he had disagreed with the finding of fitness on his discharge physical examination. The applicant was retained on active duty and underwent surgery for a congenital malformation of his left kidney on April 23, 1987, and again on May 13, 1987. Following a further physical examination, which showed that his kidney was functioning properly, on July 9, 1987, the applicant agreed that he was fit for discharge.

On August 4, 1987, the applicant received a general discharge "under honorable conditions" for "misconduct" pursuant to Article 12.B.18. of the Personnel Manual.

VIEWS OF THE COAST GUARD

On October 30, 2006, the Judge Advocate General of the Coast Guard submitted an advisory opinion in which he recommended denial of relief and adopted the facts and analysis provided in a memorandum on the case by the Coast Guard Personnel Command (CGPC).

CGPC stated that the application was not timely submitted and that the applicant did not justify his delay in seeking the requested correction.

CGPC further stated that the applicant was discharged because of a positive urinalysis showing cocaine use and that in his application to the BCMR he did “not disagree with the facts of the incident or contend that his discharge was improper.” CGPC stated that Coast Guard policy “prescribes that personnel processed for involvement with drugs be discharged with no better than a general discharge. ... While the applicant provides a statement regarding his current character and some potential learning disabilities, this does not substantiate any error or injustice at the time of discharge or regarding the applicant’s misconduct. The applicant has provided no basis for relief other than the passage of time since his discharge and that he has worked to overcome his mistakes.”

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 31, 2006, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 days. The applicant requested and was granted two 30-day extensions of the time to respond. However, no response was received by the Board.

APPLICABLE REGULATIONS

Under Article 12-B-18.b.(4) of the Personnel Manual in effect in 1987, 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 subject to an administrative discharge 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 section 1552 of title 10 of the United States Code.

2. An application to the Board must be filed within three years after the applicant discovers the alleged error in his record. 10 U.S.C. § 1552(b). The applicant received his general discharge for misconduct in 1987. Therefore, his application was untimely.

3. Pursuant to 10 U.S.C. § 1552(b), the Board may excuse the untimeliness of an application 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 to determine 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 failed to explain his delay in seeking the requested correction and to provide a compelling reason why the Board should waive the statute of limitations. The applicant's desire to "make up with [his] Government" is not a sufficient reason for the Board to waive the statute of limitations or to upgrade his discharge.

5. The applicant's military records show that he was advised of the Coast Guard's drug policies on the day he enlisted and during boot camp. The record further indicates that after a urinalysis conducted in accordance with regulation on December 24, 1986, the applicant's urine tested positive for cocaine metabolites. Therefore, under Article 12.B.18. of the Personnel Manual, he was subject to discharge and entitled to no better than a general discharge.

6. The applicant's military records show that he was informed of and afforded his due process rights under Article 12.B.18.e. The applicant has submitted no evidence of error or injustice in his discharge proceedings or in his character of discharge.

7. Accordingly, the application should be denied because of its untimeliness and lack of merit.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of former SA xxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is denied.

Toby Bishop

James E. McLeod

Adrian Sevier