

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2007-216

**XXXXXXXXXXXXXX
XXXXXXXXXXXXXX**

FINAL DECISION

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 Chair docketed the case on November September 26, 2007, upon receipt of the applicant's completed application and subsequently prepared the final decision for the Board as required by 33 CFR § 52.61(c).

This final decision, dated June 24, 2008, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant asked the Board to correct his record by upgrading his discharge under other than honorable conditions to an honorable discharge.

The applicant enlisted in the Coast Guard on April 20, 1987, and was discharged approximately four and one-half years later under other than honorable conditions by reason of the good of the Service in lieu of re-sentencing by court-martial. He was assigned an RE-4 (not eligible to reenlist) reenlistment code and a KFS (for the good of the service) separation code.

APPLICANT'S ALLEGATIONS

The applicant alleged that he has suffered an injustice with respect to the character of his discharge. He stated that the character of his discharge is based on having failed one urinalysis test for drugs while on active duty. He argued that he was promised an honorable discharge if he accepted an administrative discharge in lieu of a re-sentencing hearing on a court-martial conviction for illegal use of cocaine. In support of this contention, he submitted a July 29, 1991, unsigned letter purportedly from himself to the Commandant stating that he would accept an administrative discharge in lieu of a rehearing on his sentence, if the Commander, U.S. Coast Guard Group, recommended that he receive an honorable discharge. (There is no evidence in the record that the Commander, U.S. Coast Guard Group ever saw this letter or acted upon it.)

The applicant also argued that he was not given the option of receiving rehabilitation or counseling, and he noted that he was a good performer prior to the drug incident. He asserted that the Court in *Giles v. Secretary of the Army*, Civil Action No. 77-0904 (D.C.C. 1979) held that a member of the Army could be discharged for a negative urinalysis test for drugs, but the characterization of the member's service could not be based on the test results.

SUMMARY OF RECORD

Documents in the applicant's military record show that on December 13, 1989, he was convicted at a special court-martial of a single specification of wrongful use of cocaine. His sentence included a bad conduct discharge. (The military record does not currently contain the record of trial or court memorandum.)

On December 15, 1989, over the applicant's objection, his command requested the applicant's placement on appellate leave¹ after imposition of the BCD by a special court-martial.

On December 19, 1989, the Commandant approved the applicant's placement on appellate leave pending review of his court-martial conviction.

In 1991, the Court of Military Review affirmed the applicant's conviction for use of cocaine, but set aside the sentence adjudged by the court-martial and a rehearing was authorized.

On September 30, 1991, the applicant returned from appellate leave to his unit for the purpose of appearing at special court-martial for a rehearing on his sentence as ordered by the Court of Military Review.

On October 1, 1991, after consultation with a Coast Guard law specialist, the applicant requested a discharge under other than honorable conditions for the good of the Service pursuant to Article 12-B-21 of the Personnel Manual. In his signed letter requesting the administrative discharge, which was also signed by his counsel, the applicant stated the following:

I understand that if Commandant approves this request, I waive any right that I may have to a hearing before an administrative discharge board. Inherent in this waiver is the right to have my case heard by an administrative discharge board of not less than three officers, my right to personally appear before such a board, and my right to be represented by counsel before that board.

I understand that I may submit a sworn or unsworn statement in my behalf. I do not desire to submit a statement.

¹ Appellate leave is a leave of absence from the Coast Guard without pay or allowances for those members awaiting legal review of a court-martial sentence that includes a punitive discharge.

If Commandant approves this request, I agree to waive all rights and entitlements that I may have to back pay and allowances under 10 U.S.C. 707 and Article 12-D-2a of [the Personnel Manual].

I understand that if this request is approved I will receive a discharge under other than honorable conditions. I understand that such a discharge may deprive me of some or all veterans' benefits based upon my current period of active service and that I may expect to encounter substantial prejudice in civilian life in situations wherein the type of service rendered in any branch of the Armed Forces or the character of discharge received therefrom may have a bearing.

I understand that once this request is submitted it may only be withdrawn with the consent of the Commandant.

* * *

This request is voluntarily submitted free from any duress or promises of any kind. I have asked my counsel, who has fully explained to me the implications of my request, to witness my signature.

On October 17, 1991, the Commandant approved the applicant's discharge under other than honorable conditions for the good of the Service.

On November 15, 1991, the applicant was discharged from the Coast Guard under other than honorable conditions.

VIEWS OF THE COAST GUARD

On February 6, 2008, the Board received an advisory opinion from the Judge Advocate General (JAG), recommending that the Board deny the applicant's request for relief. The JAG adopted the facts and analysis provided by CGPC, which was attached as enclosure (1) to the advisory opinion. CGPC noted that the application was untimely and offered the following:

The applicant's record reveals that the applicant was tried by a special court-martial for illegal use of cocaine. The applicant was placed on involuntary appellate leave and was subsequently recalled for a re-hearing on sentencing. Prior to being recalled, the applicant allegedly submitted [a letter of acceptance for an administrative in lieu of a rehearing on his sentence if granted an honorable discharge]. This correspondence is not part of the applicant's official record and there is no record of endorsement or action on this request. The applicant alleges this request is the legitimate request for discharge over the request submitted on October 1, 1991 . . . There is nothing in the record to support this assertion and policy . . . [Article 12.B.21 of the Personnel Manual] does not support that such a request would be approved.

The applicant voluntarily requested discharge for the good of the service under other than honorable conditions in lieu of a re-hearing on sentencing . . . The applicant was afforded all due process, consulted with legal counsel and acknowledged the nature and impact of his request. The applicant's request was approved . . . and he was discharged on November 15, 1991 . . .

There is no basis for the applicant's assertion that he is entitled to an honorable discharge. Current policy expressly prohibits granting a discharge of any better status than a general discharge for involvement with drugs. Additionally, the applicant's assertion that the provision of *Giles v. Secretary of the Army* applies in his case is invalid. [Chapter 4-1, Army Regulation 15-185] specifies the application with regards to the Army for discharges processed prior to November 27, 1979 and related to urinalysis procedures that predate the applicant's case. The applicant states that he was not provided an option for rehabilitation or counseling for his drug abuse. [H]owever there is no provision that requires such as a determination of discharge.

APPLICANT'S REPOSENSE TO THE VIEWS OF THE COAST GUARD

On February 8, 2008, the Board sent the applicant a copy of the views of the Coast Guard and gave him 30 days to submit a rebuttal. On March 6, 2008, the applicant requested and was granted a 30-day extension to submit a rebuttal. The Board did not receive a rebuttal from the applicant.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's submissions and military record, the Coast Guard's submission, and applicable law:

1. The Board has jurisdiction of this case pursuant to section 1552 of title 10 United States Code.

2. The application was not timely. To be timely, an application for correction of a military record must be submitted within three years after the applicant discovered or should have discovered the alleged error or injustice. See 33 CFR 52.22. This application was submitted approximately thirteen years beyond the statute of limitations. The applicant did not state the date on which he discovered the error, but he should have discovered it at the time of his discharge because he signed a statement requesting an other than honorable discharge for the good of the service and he also signed his DD Form 214 that showed the character of his discharge. He did offer an explanation for why he could not have brought his application sooner, except to state that he was recently advised that he could request an upgrade. This explanation is not persuasive to the Board.

3. However, the Board may still consider the application on the merits, if it finds 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."

4. With respect to the merits, the Board finds that the applicant is not likely to prevail. The unsigned letter purportedly from the applicant to his Commander offering to accept an honorable administrative discharge in lieu of a re-sentencing hearing is not proof that the offer was ever communicated to or accepted and approved by the Coast Guard. This is particularly true when the applicant's military record contains a letter signed by the applicant and his military counsel, stating that the applicant would accept a discharge under other than honorable conditions in lieu of a re-sentencing hearing on his conviction for the wrongful use of illegal drugs. Documents in the military record show that the applicant's request for a discharge under other than honorable conditions was approved by military authorities and the applicant was discharged accordingly. There is no evidence in the record that the Coast Guard ever promised the applicant anything but a discharge under other than honorable conditions in lieu of re-sentencing hearing.

5. The applicant has presented no evidence establishing that he is entitled to have his discharge upgraded as the plaintiff did in *Giles v. Secretary of the Army*, 627 F.2d 554 (D.C. Cir. 1980). In that case, Giles was identified as a drug abuser through a compelled urinalysis and placed into involuntary treatment. Apparently while in treatment he was compelled to provide other urine samples, all of which were collected by the Army without providing the applicant with his Article 31(b) warnings (rights against self-incrimination). The Army eventually discharged Giles with a general discharge (less than an honorable discharge) on the ground that he was a drug rehabilitation failure. During the administrative discharge proceedings, the Army used evidence from the compelled urinalyses against Giles. In ordering Giles's general discharge upgraded to an honorable one, the *Giles* Court stated that the "Court of Military Appeals decision in *United States v. Ruiz*, 23 C.M.A. 181, 48 C.M.R. 797 (1974) . . . invalidated an order compelling urinalysis where the test results might be used in administrative discharge proceedings where the service member could be issued a less than fully honorable discharge. The military court held such an order violative of the Article 31 prohibition against compelled self-incrimination." *Giles* at 557. In this case, the applicant has presented no evidence that his right against self incrimination was violated with respect to the collection of his urine sample. Accordingly, the applicant has not shown *Giles* to be applicable in his case and nothing in the regulation prohibits awarding the applicant a discharge under other the honorable conditions under the circumstances of this case.

6. The Board would further note that the applicant with the assistance of counsel requested a discharge under other than honorable conditions for the good of the Service rather than face a rehearing on sentencing for his special court-martial conviction for illegal use of cocaine. The applicant also waived his right to an administrative hearing and elected not to submit a statement in his own behalf.

7. There was no requirement for the Coast Guard to provide the applicant with rehabilitative treatment or drug counseling for use of illegal drugs before referring charges against him to a court-martial or before administratively separating the applicant from the Coast Guard.

8. The applicant has failed to put forth evidence of probable error or injustice in this case. Accordingly, the application should be denied because it is untimely and because it lacks merit.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

Jeff M. Neurauter

Lynda K. Pilgrim

Eric J. Young