

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-053

XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX

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 after receiving the completed application on December 9, 2008, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated September 10, 2009, 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, who received a General discharge under honorable conditions from the Coast Guard on May 19, 1988, for illegal drug use, asked the Board to upgrade his General discharge to Honorable and to issue him an Honorable discharge certificate. He also asked the Board for a corresponding upgrade of his RE-4 reenlistment code (ineligible for reenlistment).

The applicant argued that his General discharge should be upgraded because he has suffered the burden of it for more than twenty years. Moreover, while in the Service, he received several ribbons and awards and qualified as an underway watchstander. He alleged that he served both the Coast Guard and his country well and that his discharge should reflect this.

Regarding the timing of his request, the applicant alleged that he discovered the error in his record on August 8, 2008. He stated that the Board should find it in the interest of justice to waive the three-year statute of limitations and consider his application because he has suffered the burden of his General discharge for more than twenty years. In addition, the applicant alleged that an administrative officer told him on the day of his discharge that he could get his General discharge upgraded within a seven-year period.

In support of his request, the applicant submitted copies of his DD 214 from the Coast Guard, which shows his General discharge for misconduct, and of his DD 214 covering more

than seven months of training in the Army National Guard in 1983, as well as a photocopy of his military identification cards.

SUMMARY OF THE RECORD

On May 21, 1984, the applicant enlisted in the Coast Guard as a seaman apprentice (SA) for four years. He had prior service in the Army National Guard. Upon enlistment, the applicant was advised that he would be subject to the Uniform Code of Military Justice (UCMJ) and that the illegal use or possession of drugs constituted a serious breach of discipline.

On May 23, 1984, during his initial training, the applicant's urine tested positive for THC, a metabolite of marijuana. He was counseled about Article 20 of the Personnel Manual and advised that any future positive urinalysis would be considered a "drug incident" and result in his discharge from the Service under Article 12-B-18. On June 15, 1987, the applicant received more instruction in the UCMJ, the code of conduct for the Armed Forces, and the Coast Guard's drug and alcohol abuse program under Article 20 of the Personnel Manual.

Following his initial training, the applicant was assigned to a cutter based in Kodiak, Alaska. On August 17, 1984, he signed a Page 7 (form CG-3307) acknowledging having been counseled about the fact that the Personnel Manual had been amended so that members involved in a single "drug incident" would normally be discharged for misconduct under Article 12-B-18 with a less than Honorable discharge.¹

On September 19, 1984, the applicant was counseled about his poor performance and attitude by the Executive Officer of the cutter. On December 20, 1984, he was punished at mast and awarded 2 hours of extra duties for 20 days for being derelict in his duties by failing to report for work as ordered and going to his rack (bed) instead.

In 1985, the applicant sought and received a mutual exchange transfer to New York. On June 19, 1985, he was punished at mast and awarded 10 days of extra duties and a reduction in paygrade to SR for having used disrespectful language toward a petty officer. The reduction in paygrade was suspended for three months upon condition of good behavior and the suspension was never vacated. On June 20, 1985, the applicant's command counseled him about a poor attitude and undesirable work habits.

On October 25, 1985, the applicant was punished at mast and awarded 15 days of extra duties and a reduction in pay grade to SR for having been absent without leave (AWOL) for 1.5 hours and telling his supervisor that he was at a medical appointment, which was not true. The reduction in paygrade was suspended for six months upon condition of good behavior and the suspension was never vacated.

¹ ALCOAST 016/84 amended Article 20-B-3(c) of the Personnel Manual in effect in 1984 to require discharge for misconduct under Article 12-B-18 after a single "drug incident," whereas the previous rule required discharge only after a member's second drug incident. In addition, the regulation was amended to make a positive urinalysis result, by itself and without corroborative evidence, a sufficient basis for a commanding officer to decide that a "drug incident" had occurred.

On April 1, 1986, the applicant's command counseled him about having been arrested by the New York City police for assaulting his wife. The applicant was issued a restraining order for two weeks and referred for counseling.

On July 21, 1986, the applicant advanced to seaman (SN).

On May 29, 1987, the applicant was counseled about his poor behavior, performance, attitude, and lack of respect for authority. He was advised that if he did not improve, he would not be recommended for advancement or reenlistment.

On October 6, 1987, the applicant was counseled about his poor behavior, performance, and attitude. It was noted that he had, on several occasions while on watch, answered the telephone, set down the receiver, and walked away without notifying anyone. In addition, he had several times failed to file documents properly. He had put all of the documents he had been asked to file in a single, erroneous place in a filing cabinet.

On October 19, 1987, the applicant was counseled about his continuing poor performance and about the fact that he would not be recommended for reenlistment. On October 29, 1987, the Executive Officer noted that the applicant's attitude and work had improved to an acceptable level during the prior 10 days.

On December 14, 1987, the applicant participated in a random urinalysis at his unit. He signed a Page 7 noting his two sample numbers and affirming that his samples had been properly sealed and were not tampered with or switched. A pharmaceutical laboratory report dated December 21, 1987, shows that the applicant's urine sample tested positive for a metabolite of marijuana, at a level of 50 micrograms per milliliter. A second pharmaceutical laboratory report dated January 14, 1988, shows that the applicant's other urine sample also tested positive for a metabolite of marijuana, at a level of 56 micrograms per milliliter.²

On February 4, 1988, the Group Commander notified the applicant that he intended to initiate his discharge and was recommending that the applicant receive a General discharge for misconduct due to drug abuse. He advised the applicant that he had a right to submit a rebuttal statement regarding the proposed discharge within three days.

Also on February 4, 1988, the applicant signed a form acknowledging that he had been notified that his command was initiating a General discharge for misconduct. He indicated that he did not object to being discharged but would submit a statement on his behalf.

On February 8, 1988, the applicant submitted a statement asking to receive an Honorable discharge for the convenience of the Government instead of a General discharge for misconduct. He stated that he had experimented with only a minute amount of marijuana because he was feeling stressed and depressed.

² In 1988, the Coast Guard's minimum cut-off level of THC for a "positive" urinalysis result was 50 micrograms per milliliter because it was not then known what level could be caused by secondary inhalation of others' marijuana smoke. The cut-off is now set at 15 micrograms per milliliter.

On February 17, 1988, the Group Commander recommended to the Commandant that the applicant receive a General discharge for misconduct because of the positive urinalysis results. In response, the Personnel Command advised the applicant's command to ensure that he was given an opportunity to consult legal counsel because of the proposed General discharge.

On March 18, 1988, the applicant appealed the recommended discharge. He noted that he had consulted a Coast Guard attorney and requested a General discharge for unsuitability due to psychological problems. He also asked for a hearing by an Administrative Discharge Board. He asked the Coast Guard to remove his February 8, 1988, statement from his record since he had not yet consulted counsel when he wrote it.

On March 31, 1988, the applicant's Group Commander forwarded the discharge package to the Commandant and recommended that the applicant be discharged for drug abuse rather than for any psychological reason. He noted that the applicant was not entitled to an Administrative Discharge Board because he had less than eight years of service.

On April 20, 1988, the Commandant ordered that the applicant receive a General discharge for misconduct due to drug abuse under Article 12-B-18 of the Personnel Manual within 30 days.

On May 19, 1988, the applicant received his discharge form, DD 214, with a General discharge "under honorable conditions" by reason of misconduct in accordance with Article 12-B-18 of the Personnel Manual. The DD 214 bears his signature. The DD 214 also shows that his separation code is HKK, which denotes a discharge due to illegal drug abuse, and his reenlistment code is RE-4. The decorations and awards listed on his DD 214 are the following: Coast Guard Pistol Shot Marksmanship Ribbon (Marksman), Coast Guard Rifleman Marksmanship Ribbon (Marksman), Coast Guard Unit Commendation Ribbon with "O" Device, and Commandant's Letter of Commendation Ribbon Bar. Because of his misconduct, the applicant never received a Good Conduct Medal.

VIEWS OF THE COAST GUARD

On April 30, 2009, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief in this case.

The JAG stated that the application was not timely and should be denied for untimeliness because the applicant provided "no rationale for his approximately 21 year delay." The JAG also adopted the findings and analysis provided in a memorandum on the case prepared by the Coast Guard Personnel Service Center (PSC), which also recommended that the Board deny relief.

The PSC noted that the applicant's urine had tested positive for marijuana use in 1984 and that he had been advised in 1984 that a subsequent positive urinalysis could be grounds for discharge.

The PSC noted that the applicant had asked, after consulting an attorney, that his February 8, 1988, rebuttal statement, in which he admitted having used marijuana, be removed from

his record. The PSC argued that even without that admission, the confirmed positive urinalysis constituted “sufficient grounds to substantiate drug use.”

The PSC stated that under current policy, members involved in a drug incident may receive no higher than a General discharge. The PSC stated that the applicant’s record does not contain any special awards that would merit special consideration and does include many negative entries documenting other misconduct by the applicant. Moreover, the PSC argued, allowing members to abuse drugs is completely inconsistent with the Coast Guard’s major role in drug interdiction.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 4, 2009, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within thirty days. The applicant’s response was received on May 28, 2009. He stated that he disagreed with the views of the Coast Guard. He repeated his allegation that on his day of discharge, an administrative officer told him that he would “have the opportunity to apply for a discharge upgrade (via) four years and up.” However, he waited twenty years before receiving information or guidance about upgrading his discharge.

The applicant stated that he feels strongly that his past mistake in having used marijuana “should not currently be able to constitutional[ly] deny [him] success in upgrading [his] discharge.” He noted that his discharge was General “under honorable conditions,” not Dishonorable. The applicant noted his receipt of medals and awards from the Army National Guard and the Coast Guard and his completion of his four-year enlistment. He stated that he wants his discharge upgraded so that he can hang the certificate over his mantel with his other achievements.

APPLICABLE LAW

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. ...

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

The Separation Program Designator (SPD) Handbook shows that the only reenlistment code authorized for members discharged due to illegal drug use is the RE-4.

Under Articles 20.C.4.1. and 12.B.18.b.4.a. of the current Personnel Manual, any member involved in a “drug incident” is subject to an administrative discharge for misconduct and “will be processed for separation from the Coast Guard with no higher than a General discharge.”

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. The Board finds that the applicant has exhausted his administrative remedies, as required by 33 C.F.R. § 52.13(b), because there is no other currently available forum or procedure provided by the Coast Guard for correcting the alleged error or injustice.³

2. An application to the Board must be filed within three years after the applicant discovers, or reasonably should have discovered, the alleged error or injustice in his record.⁴ The applicant has alleged that his General discharge and RE-4 are erroneous or unjust. He received and signed his DD 214 with the General discharge and RE-4 on May 19, 1988. Therefore, although he claimed on his application form that he discovered the alleged error or injustice in his record in 2008, the Board finds that he clearly knew about his General discharge and the RE-4 in 1988. Therefore, his application is 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.”⁵

4. Regarding the delay of his application, the applicant argued that it would be in the interest of justice for the Board to excuse the untimeliness of his application because he waited and has suffered the burden of the General discharge for more than twenty years. The Board finds that the applicant’s explanation for his delay is not compelling because he has admitted that he was told on the day he was discharged that he could apply to have his discharge upgraded and yet he did not pursue the upgrade for more than twenty years. He has not shown that anything prevented him from seeking correction of the alleged error or injustice in his record more promptly.

³ Under 10 U.S.C. § 1553(a), the Discharge Review Board has authority to upgrade veterans’ discharges only within the first 15 years from the date of discharge.

⁴ 10 U.S.C. § 1552(b); 33 C.F.R. § 52.22.

⁵ *Allen v. Card*, 799 F. Supp. 158, 164-65 (D.D.C. 1992); see also *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

5. A cursory review of the merits of this case shows that it lacks potential merit. The record shows that the Group Commander determined on the basis of confirmed urinalysis results that the applicant was involved in a “drug incident.” The Group Commander’s determination that the applicant had used an illegal drug and the resultant General discharge are presumptively correct under 33 C.F.R. § 52.24(b).⁶ As a result of the “drug incident,” the applicant was processed for a General discharge in accordance with Article 12-B-18.b.(4) of the Personnel Manual in effect in 1988, which stated that “[a]ny member involved in a drug incident will be separated from the Coast Guard with no higher than a general discharge.” The record shows that he was not initially offered legal counsel but that this mistake was rectified and his appeal was forwarded to the Commandant. Although the applicant admitted smoking marijuana in his first statement, dated February 8, 1988, and may not have done so had he received counsel earlier, his General discharge was not based on this admission but on the urinalysis results and on Article 12-B-18.b.(4), under which he was not eligible for an Honorable discharge.

6. The applicant argued that his discharge and RE-4 code should be upgraded because he served his country and the Coast Guard well and has suffered the burden of his General discharge for more than twenty years. The Board is not persuaded that the burden of a General discharge under honorable conditions is overly onerous in light of the applicant’s drug abuse while serving on active duty. As the PSC indicated, drug abuse by members is particularly offensive to the Coast Guard because of the Service’s major role in drug interdiction. Moreover, the applicant’s military record reveals repeated instances of other types of misconduct, disrespect, and poor performance. Therefore, the Board finds that the applicant’s claim cannot prevail on the merits.

7. Accordingly, the Board will not excuse the application’s untimeliness or waive the statute of limitations. The applicant’s request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

⁶ 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 SN xxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is denied.

Bruce D. Burkley

Robert S. Johnson, Jr.

Randall J. Kaplan