

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-172

**XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX**

FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the application upon receipt of the applicant's completed application on June 16, 2009, and subsequently prepared the final decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated March 11, 2010, 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 BACKGROUND

The applicant asked the Board to correct his record by upgrading his general discharge under honorable conditions (commonly referred to as a general discharge) to an honorable discharge and by upgrading his RE-4 (not eligible to reenlist) reenlistment code. The applicant enlisted in the Coast Guard on June 22, 1999, and was discharged under honorable conditions on February 8, 2002, by reason of misconduct due to drug abuse. He was assigned an RE-4 reenlistment code and a JKK¹ (drug abuse) separation code.

The applicant contended that he should receive the requested relief because he did not undergo a drug test or screening during the investigation into his drug use. He asserted that the investigating officer did not like or respect him and coerced him into saying that he had used Ecstasy. The applicant claimed that he was at the wrong place at the wrong time. He stated that he was a good sailor and further stated the following:

I have held a captains license [for] 4 years now and still support what the US Coast Guard does. I am not looking to get my GI Bill or any compensation from the Guard. I have been interested in [the United States] Customs and . . . Border Patrol for some time now and feel with my qualifications I would be perfect for

¹ The Separation Program Designator (SPD) Handbook states that a JKK separation code indicates a member has been involuntarily discharged due to a drug incident.

the job. I have been married for almost 4 years now and have a son and a daughter on the way. I also have my own construction business. I have made the best of my life after the horrible way of leaving the Coast Guard. I hope that something can be done . . .

The applicant stated that the Board's three-year statute of limitations should be waived in the interest of justice because "I feel the type of separation should be changed."

BACKGROUND

At the time of enlistment, the applicant was counseled on a page 7 about the Coast Guard's policy on illegal drugs. The page 7 stated the following, in pertinent part: "I have been advised that the illegal use or possession of drugs constitutes a serious breach of discipline which will not be tolerated . . . No member will use, possess, or distribute illegal drugs or drug paraphernalia."

A preliminary investigation was conducted into the applicant's alleged drug use and the Investigating officer issued his report on November 26, 2001. The investigating officer found that the applicant had consumed Ecstasy in June or July 2001 and had purchased and consumed Ecstasy on at least eleven more occasions since the June/July incident. The Investigating Officer's findings were based upon the applicant's written admissions to Coast Guard Investigative Service agents. The investigative report noted that the applicant was a qualified coxswain and had only one negative page 7 for reporting late to duty.

On December 1, 2001, the applicant was punished at non-judicial punishment (NJP) (also known as captain's mast) for the wrongful use of a controlled substance (Ecstasy) in violation of Article 112a of the Uniform Code of Military Justice.

On December 18, 2001, the applicant's commanding officer (CO) advised the applicant that the CO was recommending that the Commandant discharge the applicant from the Coast Guard with a general discharge under honorable conditions due to a drug incident. The basis for the discharge was the imposition of NJP for the wrongful use of a controlled substance, the findings of the preliminary investigating officer, and the applicant's incriminating statements to Coast Guard Investigative Service agents.

The applicant was advised in writing that he could submit a statement in his own behalf, that he could object to the discharge, and that he had the right to consult with a lawyer.

On December 18, 2001, the applicant signed a statement in which he acknowledged the proposed discharge, waived his right to submit a statement, waived his right to consult with a lawyer, and did not object to the discharge.

On January 1, 2002, the CO recommended that the Commandant discharge the applicant with a general discharge due to a drug incident. The CO stated that his recommendation was based on the applicant's admission to CGIS investigators that he used Ecstasy while serving on active duty and the imposition of NJP for the wrongful use of the controlled substance.

On January 22, 2002, the Commandant directed that the applicant be discharged with a general discharge under honorable conditions by reason of misconduct due to his involvement with drugs. The Commandant directed that the applicant receive a JKK separation code with the appropriate narrative reason as indicated in the Separation Program Designator (SPD) Handbook.

Discharge Review Board (DRB) Decision

Prior to filing his application with the BCMR, the applicant submitted an application to the DRB for an upgrade of his discharge. The DRB members voted unanimously to recommend denial of relief. On October 20, 2003, the Commandant of the Coast Guard approved the DRB's recommendation. The DRB members concluded that the applicant's discharge was well documented and carried out in accordance with Coast Guard policy.

VIEWS OF THE COAST GUARD

On September 30, 2009, the Board received an advisory opinion from the Judge Advocate General (JAG), of the Coast Guard recommending that the applicant's request be denied. The JAG also adopted the facts and analysis provided by Commander, Personnel Service Command (PSC) as the Coast Guard's advisory opinion. PSC asserted that the application was untimely and that the applicant had not provided an explanation for his failure to file timely.

PSC also stated that the discharge was in accordance with Coast Guard policy and noted that the applicant did not contest the findings of the DRB or allege that he had experienced any unjust prejudice. PSC concurred with the findings of the DRB and argued that the Coast Guard's actions are presumptively correct in the absence of evidence to the contrary.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 1, 2009, a copy of the Coast Guard views was sent to the applicant for any response that he wanted to make. The BCMR did not receive a response from the applicant.

APPLICABLE REGULATIONS

Article 12.B.18.b.4.a. of the Personnel Manual states the following:

Involvement with Drugs. Any member involved in a drug incident or the illegal, wrongful, or improper sale, transfer, manufacture, or introduction onto military installation of any drug . . . will be processed for separation from the Coast Guard with no higher than a general discharge.

Article 20.A.2.k. of the Personnel Manual then in effect defined a drug incident as follows:

Intentional drug abuse, wrongful possession of, or trafficking in drugs. If the use occurs without a member's knowledge, awareness, or reasonable suspicion or is medically authorized, it does not constitute a drug incident. A civil or military conviction for wrongful use, possession, etc., of controlled substances is prima facie evidence of a drug incident. The member need not be found guilty at court-martial, in a civilian court, or be awarded NJP for the behavior to be considered a drug incident.

Article 20.C.1.b. places responsibility on COs for ensuring their unit's compliance with the Coast Guard's Drug Abuse Program. "Commanding officers shall investigate all circumstances in which the use or possession of drugs appears to be a factor, and take appropriate administrative and disciplinary action.

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. Under 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22, 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 or within three years of the issuance of a DRB decision. See *Ortiz v. Secretary of Defense*, 41 F.3d 738, 743 (D.C. Cir. 1994). The DRB issued its decision on June 3, 2003, and the applicant did not file his application with the Board until February 25, 2008. The applicant discovered or should have discovered the alleged error upon his receipt of the DRB decision. All information was available to him at the time to pursue a correction of his record. Therefore, the BCMR application is untimely by approximately two years.

3. 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." 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's assertion that it is in the interest of justice to consider his application despite its untimeliness because of his belief that the type of separation should be changed is not a compelling reason to waive the statute of limitations.

5. With respect to the merits, the applicant is not likely to prevail on his application for an upgrade of his general discharge by reason of misconduct. In this regard, the applicant admitted in statements to CGIS investigators that he had used the controlled substance Ecstasy,

a violation of Article 112a of the UCMJ. The applicant's admission that he had used Ecstasy while in the Coast Guard and his punishment at captain's mast for wrongful use of the drug constituted a drug incident. Article 20.A.2.k. of the Personnel Manual defines a drug incident as the intentional use of drugs, the wrongful possession of drugs, or the trafficking in drugs. The applicant's admission that he had used Ecstasy, even in the absence of other evidence to the contrary was sufficient for the CO to conclude that he was involved in a drug incident. The applicant now suggests that he was coerced into admitting that he had used drugs, but offered nothing to corroborate his allegation. The Board notes that the applicant was provided with the required NJP and administrative due process and did not assert at the time that he was coerced into making any admissions.

6. Under the Personnel Manual, an under honorable conditions discharge is appropriate for a discharge due to a drug incident. Article 12.B.18.b.4.a. of the Personnel Manual makes it clear that any member "involved in a drug incident or the illegal, wrongful, or improper sale, transfer, manufacture, or introduction onto military installation of any drug . . . will be processed for separation from the Coast Guard with no higher than a general discharge." The applicant signed an administrative remarks page (page 7) on June 22, 1999, advising him of the Coast Guard's drug policy.

7. The Board is sympathetic to the applicant's plea for an honorable discharge so that he can work with the United States Customs and Border Patrol. However, the applicant's inability to work in this field does not prove that the Coast Guard committed an injustice by discharging him with an under honorable conditions discharge due to misconduct (drug abuse) in accordance with the applicable regulations.

8. Accordingly, the application should be denied because it is untimely and because the applicant is not likely to prevail on the merits of his claim.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

Lillian Cheng

George J. Jordan

Paul B. Oman