

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-176

**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 19, 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 ALLEGATIONS

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. The applicant enlisted in the Coast Guard on October 13, 1986, and was discharged under honorable conditions on September 4, 1992, by reason of misconduct due to drug abuse.

The applicant requested the upgrade of his discharge to honorable because he does not want a mistake he made as a foolish young person to hinder his hopes for a better future. He stated that since his discharge, he has become an aviation maintenance technician, a pilot, and a flight instructor with 4000 hours of instruction.

The applicant did not provide a reason why it is in the interest of justice to waive the three-year statute of limitations in his case.

BACKGROUND

On October 21, 1986, an administrative remarks page (Page 7) was entered into the applicant's record documenting that he had been given a full explanation of the Coast Guard's drug and alcohol abuse program as outline in Article 20-B-1 of the Coast Guard Personnel Manual.

On April 29, 1992, the applicant provided a urine specimen that tested positive for marijuana. The applicant's commanding officer (CO) was notified on May 21, 1992, that the applicant's specimen had tested positive for marijuana.

On July 13, 1992, the applicant's commanding officer (CO) advised the applicant that the CO was recommending that the Commandant discharge the applicant from the Coast Guard because his urine tested positive for marijuana. The CO advised the applicant that it was the Commandant's decision as to the type of discharge he would receive. 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 July 13, 1992, the applicant signed a statement in which he acknowledged the proposed discharge, acknowledged that he had spoken to a lawyer, objected to the discharge, attached a statement in his behalf, and acknowledged that a general discharge, if awarded, could be prejudicial to him in civilian life.

In his written statement objecting to the discharge, the applicant stated that he joined the Coast Guard to get training and to make a life for his family. However, soon after joining he and his wife separated. He stated that after adjusting to the separation from his wife, he encountered problems being accepted for training in various rates because of problems with his eyesight. He noted that he had been rejected for training in three rates. The applicant stated that although he had been a seaman (pay grade E-3) for too long, he was proud of the fact that he always performed beyond expectations. He stated that with all of his personal problems and career setbacks while in the Coast Guard, he did something really stupid, which he regretted and wished that he could have a second chance to make things right.

On July 17, 1992, the applicant was punished at non-judicial punishment (NJP) (also know as captain's mast) for the wrongful use of marijuana in violation of Article 112a of the Uniform Code of Military Justice.

On July 20, 1992, the CO recommended that the Commandant discharge the applicant from the Coast Guard due to a drug incident based upon the positive urine test for marijuana. The CO also stated that the applicant's positive test was confirmed by a second test of the applicant's urine sample. The CO stated that the applicant had been an excellent worker and seaman and that prior to the drug incident, he was trusted highly by his superiors and peers.

On August 12, 1992, the Commandant directed that the applicant be discharged with a general discharge under honorable conditions by reason of misconduct due to involvement with drugs.

On September 4, 1992, the applicant was discharged from the Coast Guard.

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 a part of the Coast Guard's advisory opinion. PSC noted that the application was untimely and that the applicant had not provided an explanation for his failure to file timely.

PSC stated that the applicant was given a full explanation of the Coast Guard's policy about drug abuse in 1986 and that the applicant had attended a mandatory training on drug and alcohol awareness and family advocacy on February 19, 1992.

PSC stated that the applicant's positive urine specimen for marijuana was the basis for his discharge from the Coast Guard due to a drug incident. PSC stated that under Article 12.B.18.b.4.a. of the Personnel Manual 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.

PSC also stated that the discharge was in accordance with Coast Guard policy and that the Coast Guard's actions are presumptively correct in the absence of evidence to the contrary.

APPLICANT'S REPOSENSE 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. The applicant knew or should have known at the time of his discharge in 1992 that he had received a discharge under honorable conditions because it is documented on his DD 214 that the applicant acknowledged by his signature. The applicant did not file his application with the Board until June 5, 2009. Therefore, the BCMR application is untimely by approximately fourteen 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 did not provide a reason for not filing his application within the required time period.

5. With respect to the merits based upon a cursory review, the applicant is not likely to prevail on his application for an upgrade of his under honorable conditions discharge. The applicant does not contest that his urine tested positive for marijuana or that the positive urinalysis test 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.

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 was afforded his due process rights prior to discharge and does not make any claim that he was denied any such rights.

7. The Board notes the applicant's statement that he encountered some personal problems and career disappointments that led him to do "something stupid." However, the Board notes that the applicant had been in the Service for approximately five years when he committed the drug incident and should have known better or should have been aware of available resources to assist him with resolving his challenges. Therefore, the applicant has not made a persuasive case that his discharge is an injustice.

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 XXXXXXXXXXXXXXXXXXXX, USCG, for correction of his military record is denied.

Lillian Cheng

George J. Jordan

Paul B. Oman