

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2010-066

**XXXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX**

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 case after receiving the applicant's completed application on December 18, 2009, 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 October 8, 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 upgrade his November 25, 1987, general discharge under honorable conditions to an honorable discharge. He alleged that he received the general discharge for possessing drug paraphernalia. However, he states that he had purchased the item for his brother and never used it. He alleged that the item still had the price tag on it when it was discovered. In addition, he alleged that he was unaware at the time that having such paraphernalia was illegal. The applicant stated that he has never had a positive urinalysis and has subsequently worked as a federal civilian employee without any problem. The applicant stated that the purchase of the item as a gift for his brother was a youthful mistake and that his general discharge was not justified.

SUMMARY OF THE RECORD

On April 4, 1983, the applicant enlisted in the Coast Guard as a seaman recruit (SR/pay grade E-1). The applicant's first performance evaluation contained several above average marks, but thereafter his evaluations contained very low to mediocre marks.

On August 25, 1986, the applicant's commanding officer (CO) notified him that he was initiating his discharge for misconduct due to drug abuse. He advised the applicant of his right to consult an attorney and to submit a statement to rebut his recommendation for discharge. The applicant consulted counsel and submitted a statement in rebuttal in which he strenuously objected to the proposed discharge. He stated that the paraphernalia in question was a coke kit that he

had intended to send to his brother as a joke. He alleged that his actions were “without criminal intent,” though “in poor taste.” The applicant argued that “drug abuse” as defined in Article 20-A-3 of the Personnel Manual did not include the possession of drug paraphernalia. He noted that the definition of a “drug incident” did include possession of drug paraphernalia and that a single “drug incident” was grounds for separation. However, he argued that “the words drug abuse should not appear on any document associated with my discharge.” He noted that no traces of drugs had been found on the coke kit and that the results of three urinalyses conducted after the discovery of the coke kit had all been negative. The applicant argued that, if he had intended to use the coke kit, he “would not have been so stupid as to store it in my locker and to consent to a search of my room. I felt then and I feel now that I have nothing to hide. I do not believe that I should be discharged from the service because of a joke in possibly bad taste, and I definitely should not be discharged for ‘drug abuse.’ I do not use drugs and my performance within the past year has been more than satisfactory.”

On September 8, 1986, the CO recommended that the applicant receive a general discharge. He noted that the applicant had been punished at captain’s mast on January 24, 1984, for absenting himself from his place of duty; on February 22, 1984, for signing a false document about his date of birth; on September 11, 1984, for failing to obey an order to attend NASAPP classes; and on July 24, 1986, for possessing drug paraphernalia. He also noted that in three and one-half years of service, the applicant had never advanced beyond seaman apprentice (SA; E-2).

On September 17, 1986, the Commandant ordered the applicant’s command to award him a general discharge “by reason of misconduct due to drug abuse.” However, the command thereafter asked to retain the applicant on active duty while his disability was being evaluated by a medical board. The Commandant authorized the delay of the applicant’s discharge.

On September 16, 1987, a medical board convened and recommended that the applicant be discharged with a 10% disability rating due to “mechanical low back pain with mild nerve root irritation,” which was incurred on active duty and was not a result of misconduct. On September 28, 1987, the applicant accepted this recommendation and waived his right to a formal hearing.

On November 3, 1987, the Commandant ordered the applicant’s command to award him a general discharge based on a “physical disability incident to service” in accordance with the recommendation of the medical board.

On November 6, 1987, the applicant received a poor conduct mark on his final performance evaluation. On November 25, 1987, the applicant received a general discharge under honorable conditions from the Coast Guard. The narrative reason for separation shown at the bottom of his DD 214 is “physical disability incident to service.”

VIEWS OF THE COAST GUARD

On May 7, 2010, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case. In so doing,

the JAG adopted the findings and analysis of the case provided in a memorandum prepared by the Personnel Service Center (PSC).

The PSC stated that the application should be denied for untimeliness because the applicant did not explain his long delay in applying to the Board. The PSC also stated that the applicant received due process even under today's standards. The PSC noted that under Article 12.B.2.f.2.a. of the current Personnel Manual, a general discharge is warranted whenever the member "[h]as been identified as a user, possessor, or distributor of illegal drugs or paraphernalia."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 13, 2010, the Chair sent the applicant a copy of the views of the Coast Guard and invited her to respond. No response was received.

SUMMARY OF THE 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 submission, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552.
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 received his discharge papers in 1987 and so

knew or should have known of the alleged error in his record in 1987. Thus, 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.” *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 any reason for his delay in applying for an upgrade of his general discharge.

5. A cursory review of the merits of the case shows that the applicant submitted no evidence to support his allegation that his general discharge was erroneous or unjust. Absent evidence to the contrary, the Board presumes that Coast Guard officers and other Government officials have carried out their duties “correctly, lawfully, and in good faith.” *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)). The applicant must prove that his discharge was unjust by a preponderance of the evidence. 33 C.F.R. § 52.24(b).

6. The applicant alleged that he only possessed drug paraphernalia because he intended to play a joke on his brother. This argument apparently did not persuade his CO or others in his chain of command that he was not involved with illegal drugs, and they were well placed to assess the credibility of his claim. The applicant admitted in his rebuttal to the discharge recommendation that the Coast Guard’s definition of a “drug incident” at the time included the possession of drug paraphernalia and that a member could be discharged for a single drug incident. The applicant complained in his rebuttal to the discharge that he should not be discharged for drug abuse because he did not actually use drugs. Ultimately, the narrative reason for his discharge entered on his DD 214 was not misconduct or drug abuse but “physical disability incident to service.” Although the applicant complained that his general discharge was too harsh under the circumstances, the character of his discharge is strongly supported by his numerous low performance marks and several punishments at mast. The Board finds that the applicant has submitted insufficient evidence for his claim to prevail on the merits.

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

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

Patrick B. Kernan

Erin McMunigal

Kathryn Sinniger