

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

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Application for the Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2010-125**

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XXXXXXXXXXXXXX**

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**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 March 4, 2010, 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 November 5, 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, who received a general discharge under honorable conditions from the Coast Guard on May 16, 1988, for illegal drug abuse, asked the Board to correct his record by upgrading his discharge to honorable. The applicant stated that he "made a foolish mistake by being with the wrong people at the wrong place and time" and by using drugs. He stated that his mistake has been "a source of great pain and regret" because he was unable to continue in his planned career of service in the Coast Guard. He apologized and asked for forgiveness. He did not explain his delay in applying to the Board.

The applicant stated that upon leaving the Service, he entered a six-month spiritual drug treatment program run by the Salvation Army and became a role model for others in the program. He has "spent the last nineteen years as a mentor to recovering addicts, carrying the spiritual message of hope and redemption." He alleged that he has led an exemplary life and now works as the Purchasing Manager for a digital equipment company. The applicant asked the Board to consider not only his post-discharge conduct but also his marks, awards, and nine years of military service. In support of his allegations, he submitted the following:

- Several documents from the Salvation Army showing that he entered their Adult Rehabilitation Center Command on September 3, 1991, "made an outstanding amount of progress since entering" and attended all required activities, and graduated on February 26, 1992.

- A letter from a controller at the digital equipment company stating that the applicant was an employee in 1991 and was “a very conscientious and extremely efficient worker.”
- In a letter dated September 4, 2009, the office manager of the applicant’s company stated that the applicant had worked for the company for 19 years and been promoted several times. He has shown outstanding judgment and great organizational skills. The applicant told him that he “made a life-changing decision in 1991 and turned his life around, went into a substance abuse treatment facility and graduated, and [has] been clean and sober ever since.” He noted that his company hired the applicant in 1991 because although they understand the military policy on drug use, they “believe in second chances.” He stated that the company is grateful to have the applicant on staff.

### **SUMMARY OF THE RECORD**

On November 20, 1978, at age 19, the applicant enlisted in the Coast Guard as a seaman recruit (SR). On his performance evaluations, he regularly received average to good marks. On May 3, 1982, he signed the following statement for his record:

I have read and understand ALCOAST 007/82. Specifically, I am aware that the Coast Guard has taken a hard line on the use of illegal drugs, that the drug exemption program has been cancelled, that detection methods such as urinalysis and dogs may be utilized and that use or possession of illegal drugs can result in disciplinary action and discharge.

On May 27, 1986, the applicant received a Letter of Appreciation from the CO of the POLAR STAR regarding his performance of duty during Operation Deep Freeze, when the cutter delivered supplies to two Antarctic stations during severe ice conditions.

On February 11, 1988, the applicant’s Group Commander notified him that he was initiating his discharge because following a urinalysis at the command on January 21, 1988, his urine had tested positive for metabolites of cocaine. He advised the applicant that he had a right to consult an attorney, to submit a statement on his own behalf, and to appear before and be heard by an Administrative Discharge Board (ADB). He also stated that he intended to recommend that the applicant receive a general discharge by reason of misconduct due to drug abuse but that the final decisions about his discharge would be made by Commandant. The applicant acknowledged receiving this notice and noted his desire to consult an attorney and to submit a statement on his own behalf.

On March 22, 1988, after consulting the attorney, the applicant signed a memorandum on which he agreed to waive his right to an ADB if he would receive an honorable discharge. On March 28, 1988, he submitted a statement requesting an honorable discharge. He noted that he had nine years and five months of service and that he loved the Coast Guard and would be “willing to do anything the Coast Guard asks of me if I could be retained on active duty.”

On March 28, 1988, the Group Commander recommended to the Commandant that the applicant be discharged for drug abuse. The Group Commander noted that the applicant had no record of other military offenses and had received a Coast Guard Unit Commendation Medal

with “O” Device, Sea Service Ribbon, Arctic Service Medal, Antarctic Service Medal, and three Coast Guard Good Conduct awards. He recommended that the applicant receive an honorable discharge in accordance with his conditional waiver of the ADB. However, the District Commander recommended that the applicant receive a general discharge.

On April 8, 1988, the Commandant sent the Group Commander a message stating that the conditional waiver signed by the applicant was “unacceptable” and that the Group should convene an ADB unless the applicant executed an unconditional waiver for a general discharge.

On April 13, 1988, the Group command informed the Commandant that the applicant had elected to have his case heard by an ADB and that “board action [was] to follow.” However, on April 18, 1988, the applicant signed an “Unconditional Waiver of a Hearing Before an Administrative Discharge Board.” On the waiver, he acknowledged having been advised of his right to appear before and be heard by an ADB and to be represented by counsel. He noted that he understood that he would receive a general discharge.

On April 19, 1988, the Group notified the Commandant that the applicant had “reconsidered his decision to have his case heard by an [ADB] and has elected to execute an unconditional waiver for general disch[arge].”

On April 28, 1988, a doctor noted that the applicant was addicted to cocaine.

On May 6, 1988, the Commandant directed the applicant’s command to separate him with a General discharge by reason of misconduct due to drug abuse within 30 days.

On May 16, 1988, the applicant received a General discharge “under honorable conditions” by reason of misconduct in accordance with Article 12-B-18 of the Personnel Manual.

### **VIEWS OF THE COAST GUARD**

On June 16, 2010, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief in this case. In so doing, he adopted the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC). The PSC pointed out that the application is untimely since the applicant was discharged in 1988. The PSC argued that his record “is presumptively correct, and the applicant has failed to substantiate any error or injustice” in his record. Therefore, the PSC recommended that the application be denied for untimeliness.

### **APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD**

On June 25, 2010, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 days. No response was received.

## **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, a member with more 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, (c) submit a statement in his own behalf, and (d) be heard by an ADB represented by counsel.

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 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.

2. An application to the Board must be filed within three years after the applicant discovers, or reasonably should have discovered, the alleged error in his record. 10 U.S.C. § 1552; 33 C.F.R. § 52.22. The applicant was discharged 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." *Id.* at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

4. The applicant did not explain his delay in seeking an upgrade of his discharge. However, his request is based on alleged long-term post-service good conduct, not on any alleged error or injustice committed during his years of service.

5. The applicant argued that his discharge should be upgraded in the interest of justice because he has been drug-free and a good, hard-working citizen since 1991. However, the delegate of the Secretary informed the Board on July 7, 1976, by memorandum that it “should not upgrade a discharge unless it is convinced, after having considered all the evidence ... that in light of today’s standards the discharge was disproportionately severe vis-à-vis the conduct in response to which it was imposed.”<sup>1</sup> Under Article 20.C. of the current Personnel Manual, members discharged for drug abuse may receive no higher than a general discharge. Therefore, the Board is not persuaded that the applicant’s general discharge is disproportionately severe in light of current standards.

6. The Board does not, however, construe the delegate’s guidance as prohibiting it from exercising clemency even if the discharge was neither disproportionately severe compared to the misconduct, nor clearly inconsistent with today’s Coast Guard standards. Such a construction would be inconsistent with the very nature of clemency, which means “mercy or leniency.”<sup>2</sup> Clemency does not require that a punishment have been unjust or overly harsh; on the contrary, it can be (and often is) forgiveness of punishment that was otherwise appropriate. An analysis under the 1976 guidance<sup>3</sup> primarily considers whether the past discharge was unjust at the time or would be unjust if applied to a similarly situated member today; a clemency analysis considers whether it is appropriate today to forgive the past offense that led to the punishment and to mitigate the punishment accordingly.

7. The factors in the record weighing in favor of clemency are the applicant’s good performance marks, his duty aboard the ice cutter during Operation Deep Freeze, his long-term, successful employment, and the 22 years he has borne the burden of the general discharge. Although he alleged that he has worked as a mentor for recovering addicts and been a role model for others since 1991, he did not submit evidence supporting these allegations. Moreover, the record shows that the applicant was 28 years old when his urine tested positive for metabolites of cocaine, and drug interdiction was and is one of the Coast Guard’s major missions. In addition, contrary to his allegation that he was discharged because of one foolish mistake by being “with the wrong people at the wrong place and time,” the record shows that he was already an addict while serving on active duty in 1988, not a one-time user. Therefore, the Board finds that clemency is unwarranted, and the applicant’s claim cannot prevail on the merits.

8. 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]**

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<sup>1</sup> Memorandum of the General Counsel to J. Warner Mills, et al., Board for Correction of Military Records (July 8, 1976).

<sup>2</sup> BLACK’S LAW DICTIONARY 288 (9<sup>th</sup> ed., 2009)

<sup>3</sup> Memorandum of the General Counsel to J. Warner Mills, et al., Board for Correction of Military Records (July 8, 1976).

**ORDER**

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

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Donna M. Bivona

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Evan R. Franke

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Darren S. Wall