DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2010-188

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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 May 26, 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 March 10, 2011, 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 June 15, 1986, for illegal drug abuse and possession of marijuana, asked the Board to correct his record by upgrading his general discharge to honorable.[1] The applicant stated that in the Service, he was hoping to attend "A" School to become a marine science technician (MST), but the school was discontinued.[2] Therefore, he decided to leave the Service and go to college. When he asked to be discharged, however, the Service refused to release him even though his congressman submitted a letter supporting his request. Moreover, he alleged, his command failed to notify him that the Veterans Education Assistance Program (VEAP)[3] was being discontinued and that he needed to sign a Page 7 form in order not to lose the benefit.

[1] The 5 authorized types of discharge are Honorable, General "Under Honorable Conditions," Under Other than Honorable Conditions, Bad Conduct, and Dishonorable. Bad conduct and dishonorable discharges are only awarded by court-martial. Personnel Manual, Article 12.B.2.c.

[2] MST "A" School still exists, but it is possible sessions were canceled temporarily based on Service needs.

[3] Before July 1, 1985, servicemembers could enroll in VEAP at any time during their active duty service, and money deposited by members in a VEAP account was matched two to one by the government. 38 U.S.C. §§ 3201, 3221. Members were advised about VEAP during basic training, and there was no requirement that VEAP counseling be documented in their records. However, VEAP expired on June 1, 1985, and members first enlisting on or after July 1, 1985, were entitled to benefits under the Montgomery G.I. Bill (MGIB), instead of VEAP. 38 U.S.C. § 3001. Because members must opt out of MGIB during basic training to avoid automatic enrollment, each member's MGIB election is documented in his record.

The applicant stated that his shipmates told him that he could get a quick general discharge by failing a drug urinalysis or being in possession of marijuana. Therefore, because the Coast Guard would not release him to let him attend college, he "came into possession of some marijuana and turned it in." He stated that he did not actually smoke any of the marijuana because he thought it was harmful and would be dangerous to smoke while aboard the ship. The applicant alleged that after he turned in the marijuana, he underwent urinalysis and the result was negative.

The applicant stated that he now knows that his actions were foolish, and he has regretted them ever since. He should have sought counseling instead of seeking a general discharge for possession of marijuana.

The applicant argued that it is in the interest of justice for the Board to waive the statute of limitations in his case because he has "been an upstanding citizen with no criminal record since [his] discharge 23 years ago." He stated that he has received a college degree, worked for a large company, been married for 21 years, and raised two children. His service in the Coast Guard was a great experience, and he has encouraged young people to join.

SUMMARY OF THE RECORD

On April 2, 1984, at 19 years of age, the applicant enlisted in the Coast Guard for four years as a seaman recruit (SR). Before he enlisted, he was given an explanation of the Service's drug and alcohol abuse policies and advised that the illegal use or possession of drugs constituted a serious breach of military discipline. After completing basic training and advancing to seaman apprentice (SA), the applicant was assigned to a cutter based in Honolulu, Hawaii.

From July 16 to August 4, 1984, the applicant was absent without leave (AWOL) from his cutter and missed its sailing. He turned himself in at the port in Philadelphia, Pennsylvania. After being returned to the cutter, he received nonjudicial punishment (NJP) at a captain's mast on August 26, 1984. As a result of the NJP, he was reduced in rank from SA to SR, served 45 days of restriction to the cutter with extra duties, and received very low marks[4] on his first performance evaluation. The applicant also received more training on the Service's drug and alcohol abuse policies on August 20, 1984.

On a performance evaluation dated November 2, 1984, the applicant again received very low marks, including a mark of 1 (the lowest mark) in the category Motivation Towards Job and a mark of 3 in Conduct. However, he re-advanced to SA and received mostly average marks on his semi-annual evaluations dated April 30, 1985, and October 31, 1985. On October 25, 1985, the applicant was offered orders to attend Radioman "A" School to become a petty officer. However, he rejected them stating that he did not want to attend "A" School.

On March 20, 1986, the applicant was taken to mast and awarded NJP for having been AWOL from March 3 to 7, 1986. He was reduced in rank back to SR, served 30 days of restriction with extra duties, forfeited $297 in pay per month for two months, and received a performance evaluation with very low marks in several categories.

[4] Enlisted members are evaluated in a variety of performance categories on a scale of 1 (worst) to 7 (best).

On March 27, 1986, the applicant submitted a request to be discharged. He wrote that his enlistment had disrupted his desire to complete his college education and attend graduate school. He noted that he had recently tried to enroll in VEAP and learned that the program had been discontinued. Although he had petitioned the Personnel Records Review Board to correct his record to reflect enrollment in VEAP, he had not yet received the result of his petition. He also noted that he had requested discharge in early 1985 and that that request had been denied. The applicant stated that he knew of other members who had gained their discharges by abusing drugs or claiming unsuitability[5] but he did "not want to act in a manner which would discredit myself or the Coast Guard. I request discharge because I am confident that my career interests lie elsewhere."

On March 28, 1986, the applicant's commanding officer (CO) forwarded his request for discharge to the Commandant via the District Commander. The CO stated that he would prefer to have someone else in the billet given the applicant's lack of motivation.

On April 14, 1986, the applicant broke restriction and went AWOL from 10:50 p.m. until 5:00 a.m. the next morning. On April 16, 1986, he was found to be in possession of marijuana. The charge sheet shows that he gave marijuana to a petty officer in the head (bathroom) of the cutter and told different stories about how he had obtained the marijuana.

On April 17, 1986, the District Commander forwarded the applicant's request for discharge to the Commandant with a recommendation that it be denied because the applicant "now has disciplinary action pending under articles 86 and 92 UCMJ and may be a candidate for discharge under article 12-B-18 [misconduct] of the Personnel Manual."

On April 23, 1986, the applicant was taken to mast and awarded NJP a third time for violating restriction, being AWOL, and possessing marijuana aboard the cutter. He was restricted to the cutter for another 45 days with extra duties, forfeited $319 in pay per month for four months, and received another performance evaluation with very low marks in many categories.

On April 30, 1986, the Commandant disapproved the applicant's request for release from active duty.

On May 7, 1986, the CO notified the applicant that the CO was initiating his discharge for misconduct because of his involvement in a "drug incident" on April 16, 1986. The CO advised him that he was recommending the applicant for a general discharge and that the applicant had a right to consult a lawyer and to submit a written statement. The applicant acknowledged this notification the same day. He wrote that he had consulted a lawyer and did not wish to make a statement.

Also on May 7, 1986, the CO submitted to the Commandant via the District Commander his recommendation that the applicant be discharged for misconduct. He noted that on April 16, 1986, the applicant had "turned the marijuana over to the ship's MAA [Master at Arms], admit-

[5] The applicant was likely referring to the fact that members claiming, or being discharged for, homosexuality usually received discharges for "Unsuitability."

ting to possessing it onboard the ship and also to prior use of it. He consented to a drug urinalysis test and results are pending as of this date."[6] The CO also noted that the applicant's performance had deteriorated and that he had become "a burden on the unit and his shipmates."

On May 20, 1986, the District Commander forwarded the CO's recommendation to the Commandant and recommended that it be approved. On June 4, 1986, the Commandant approved it and issued orders for the applicant to be discharged within 30 days.

On June 11, 1986, the applicant was discharged. His DD 214 shows that he was discharged "Under Honorable Conditions" by reason of misconduct in accordance with Article 12-B-18 of the Personnel Manual. His DD 214 also shows that he did not enroll in VEAP.

VIEWS OF THE COAST GUARD

On October 15, 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 1986. The PSC argued that the Board should deny relief because the applicant did not deny being involved in a drug incident and, even under today's regulations, members involved in a drug incident may receive no higher than a general discharge Under Honorable Conditions. The PSC stated that the applicant's record "is presumptively correct, and the Applicant has failed to substantiate any error or injustice" in his record.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 19, 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 1986, 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 be 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 an 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.

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[6] The urinalysis results are not in the applicant's record.

Under Article 20.C. of the current Personnel Manual, any member involved in a "drug incident" must be discharged and may be administratively discharged with no better 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.[7] The applicant seeks an upgrade of his discharge, and he was discharged in 1986. Therefore, his application is untimely.

3. Under 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."[8]

4. The applicant did not explain his delay in seeking an upgrade of his discharge. However, his request is based in part on alleged long-term post-service good conduct, as well as on alleged injustice.

5. The applicant's March 27, 1986, request for discharge shows that he wanted to leave the Service and knew that he could get out by incurring a drug incident or claiming homosexuality but wanted to get out without doing so. His CO endorsed his request for discharge because he was a poor performer with no motivation to serve and forwarded it to the District Commander to, in turn, forward it to the Commandant. However, on April 16, 1986, before the District Commander took action on the applicant's request for discharge, the applicant surrendered marijuana to the Master at Arms aboard the cutter and admitted to having possessed and used marijuana. As a result of the applicant's misconduct, the District Commander forwarded the applicant's request for an honorable discharge with a recommendation that it be disapproved, which it was, and the CO initiated the applicant's general discharge for misconduct. The record also shows that the applicant received due process under Article 12-B-18.e.(1) of the Personnel

[7] 10 U.S.C. § 1552(b); 33 C.F.R. § 52.22.
[8] *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).

Manual in that he was informed of the reason for his proposed general discharge; afforded an opportunity to consult an attorney, which he did; and afforded the right to submit a statement on his own behalf, which he did not.

6. The applicant now regrets having obtained and surrendered the marijuana to gain a quick discharge and asks the Board to upgrade his general discharge to honorable. However, the Board does not believe that the applicant's reason for revealing his possession of marijuana—gaining a quick discharge—excuses his misconduct or warrants a fully honorable discharge. In this regard, the Board notes that interdiction of marijuana and other illegal drugs is one of the Coast Guard's major missions. Nor does the applicant's record of poor conduct and work performance while on active duty warrant upgrading his discharge.

7. The applicant argued that his discharge should be upgraded in the interest of justice because he has been "an upstanding citizen with no criminal record" since his discharge. He did not submit evidence to prove his allegations. However, even if he had done so, it would not be grounds for upgrading his discharge because on July 7, 1976, the delegate of the Secretary informed the Board by memorandum that it "should not upgrade discharges solely on the basis of post-discharge conduct" and "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."[9] This instruction has never been reversed. Under Article 20.C. of the current Personnel Manual, members discharged for drug abuse or possession may receive no higher than a general discharge. Therefore, the applicant's general discharge is not disproportionately severe in light of current standards.

8. Under the Uniform Code of Military Justice, the maximum punishment at court-martial for illegal possession of less than 30 grams of marijuana aboard a Coast Guard cutter is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for seven years.[10] If the applicant had received such a sentence, the Board would consider the issue of clemency because the delegate's guidance does not prohibit 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."[11] Under 10 U.S.C. § 1552(f), the Board is expressly authorized to grant clemency. However, the applicant did not receive anything close to the maximum punishment he could have received for his misconduct. Instead, he received a general discharge "Under Honorable Conditions." Therefore, clemency is not warranted.

9. The applicant complained that he was never informed that VEAP was expiring before it expired and so he was not afforded an opportunity to sign a Page 7 to retain the benefit. However, the record indicates that the applicant never enrolled in VEAP, and he did not prove that his command was required to have him sign a Page 7 upon the expiration of VEAP. Under

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[9] Memorandum of the General Counsel to J. Warner Mills, et al., Board for Correction of Military Records (July 8, 1976).

[10] MANUAL FOR COURTS-MARTIAL UNITED STATES, IV-57 (2008 ed.) (The regular maximum period of confinement for the offense is 2 years, but the period is increased by five years when the offense is committed aboard a vessel.).

[11] BLACK'S LAW DICTIONARY, 288 (9th ed., 2009).

the presumption of regularity[12] and absent evidence to the contrary, the Board presumes that the applicant was informed of his right to enroll in VEAP when he enlisted and that his command carried out its responsibilities regarding VEAP in accordance with the Commandant's instructions. The applicant has submitted no evidence to overcome the presumption of regularity.

10. 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]

[12] 33 C.F.R. § 52.24(b).

ORDER

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

Lillian Cheng

Megan Gemunder

Donna A. Lewis