

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2010-234

**XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX**

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 August 24, 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 June 3, 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 asked the Board to upgrade his 1984 general discharge under honorable conditions for drug abuse to an honorable discharge.¹ He alleged that he was told at his "court-martial that if [he] stayed out of trouble for 6 months after being discharged [he] would be given an honorable discharge."

The applicant alleged that he discovered the error in his record on July 30, 2010. He argued that it is in the interest of justice for the Board to excuse his delay in applying for correction because "it's no more than fair to do what's right in God's name." He also wrote, "I was never told about this matter up until I did a little research on myself. Only want what's best for me and my family."

SUMMARY OF THE RECORD

On November 16, 1981, the applicant enlisted in the Coast Guard. While in boot camp in January 1982, the applicant was advised of the Coast Guard's drug policies. His military records indicate that he served without significant disciplinary incidents until July 1984, when a urinalysis detected both cocaine and THC, a metabolite of marijuana, in his urine. His THC

¹ The five 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.

level measured 165 ng/ml. As a result of this drug abuse, the applicant was punished at mast on August 10, 1984, with a reduction from pay grade E-3 to E-2 and a forfeiture of \$200 in pay per month for two months.

On August 22, 1984, the Seventh District Commander notified the applicant that he was initiating the applicant's general discharge due to drug abuse and that the applicant had a right to consult a lawyer, to object to the discharge, and to submit a written statement.

On August 27, 1984, the applicant acknowledged the discharge notification, the opportunity to consult an attorney, and the fact that he might encounter prejudice in civilian life because of the general discharge. On this acknowledgment, he indicated that he did not object to the general discharge and that he did not desire to submit a statement.

On September 10, 1984, the District Commander asked the Commandant to discharge the applicant and recommended a general discharge for drug abuse. On September 14, 1984, the Commandant ordered the applicant's command to discharge him with a general discharge for misconduct due to drug abuse in accordance with Article 12-B-18 of the Personnel Manual. The applicant was discharged on September 21, 1984, pursuant to this order. His DD 214, which he signed, shows that he was discharged "under honorable conditions" (a general discharge) because of "misconduct" with an HKK separation code, which denotes drug abuse.

VIEWS OF THE COAST GUARD

On December 17, 2010, the Judge Advocate General (JAG) of the Coast Guard recommended that the Board deny relief in this case. The JAG stated that the application is untimely and that the applicant was discharged in accordance with policy. The JAG stated that nothing in the record supports the applicant's claim that he was told that his discharge would be upgraded to honorable six months after his discharge. The JAG argued that relief should be denied because the applicant has failed to prove that his general discharge is erroneous or unjust.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 4, 2011, 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 REGULATIONS

Article 20.A.2.m. of the Personnel Manual in effect in 1984 stated that any occurrence of drug abuse constituted a "drug incident." Article 20.B.2.b.(1) authorized "administrative inspections" in the form of random or all-unit urinalyses. Article 20.B.3.c.(1) provided that after one "drug incident," a petty officer could be discharged or retained in the Service, depending upon his overall performance and conduct and completion of screening and treatment. Article 12.B.2.f.(2) provided that a "general discharge will be issued ... [w]hen a member has been identified as either a user, possessor, or distributor of illegal drugs or paraphernalia" unless the discharge was not administrative but punitive (by court-martial), in which case a bad conduct or dishonorable discharge could be assigned.

Instruction 5810.4, issued by the Seventh District Commander on March 26, 1984, provided that unit urinalysis was mandatory at least quarterly in the Seventh District due to the prevalence and availability of illegal drugs in the area, and that all members who were found by urinalysis to have THC levels above 50 ng/ml were deemed to have been involved in a “drug incident.” The instruction further noted that at court-martial, the maximum punishment for illegal drug use was a dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for five years.

ALCOAST 016/84, issued by the Commandant on July 30, 1984, stated that “[e]ffective upon receipt, any member involved in a drug incident as defined by [the Personnel Manual] ... will be processed for separation.” It noted that the then-current drug policy had been in effect for more than two years and had been widely publicized through recruit training and required unit indoctrination. It stated that in the Service’s attempt to rid itself of anyone who abused drugs, more than 700 members had received general discharges due to drug abuse since April 1982.

Under Article 12.B.18.b.4. of the current Personnel Manual, “[a]ny member involved in a drug incident ... will be processed for separation from the Coast Guard with no higher than a general discharge.”

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.
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.² Although the applicant claimed that he discovered the alleged error in his record on July 30, 2010, the record shows that he knew in 1984 that he was receiving a general discharge. 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.”³
4. The applicant did not explain his delay in seeking an upgrade of his discharge.

² 10 U.S.C. § 1552(b); 33 C.F.R. § 52.22.

³ *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).

5. A cursory review of the merits of this case shows that it lacks potential merit. The record shows that a urinalysis revealed that the applicant had used cocaine and marijuana. The District Commander's determination that the applicant had abused drugs and the resultant general discharge are presumptively correct under the Board's rules at 33 C.F.R. § 52.24(b).⁴ The applicant was afforded the same due process that members involved in a "drug incident" receive today (notification of the proposed discharge and the opportunity to consult a lawyer, to object to the discharge, and to submit a written statement),⁵ and he did not object to the proposed general discharge. The record contains no evidence supporting the applicant's claim that he was told his general discharge would be upgraded to honorable six months after his separation from the Service. Therefore, the Board finds that the applicant's claim cannot prevail on the merits.

6. 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]

⁴ See *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), for the required presumption, absent evidence to the contrary, that Government officials have carried out their duties "correctly, lawfully, and in good faith.").

⁵ Personnel Manual, Article 12.B.18.

ORDER

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

Andrew D. Cannady

Nancy L. Friedman

Dorothy J. Ulmer