

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2011-174

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 May 23, 2011, 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 February 9, 2012, 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 7, 1990, for illegal use of cocaine, asked the Board to change the separation authority, separation code, and narrative reason for separation on his DD 214 in blocks 25, 26, and 28, respectively. His DD 214 currently shows in those blocks that he was discharged for "misconduct" with an HKK separation code (denoting an involuntary discharge for drug abuse) in accordance with Article 12-B-18 of the Personnel Manual.

The applicant admitted that the discharge was his fault but stated that he was "young and stupid." He stated that the discharge has haunted him and that he had never been in trouble before and has not been in trouble since his discharge from the Coast Guard.

The applicant argued that it is in the interest of justice for the Board to excuse the untimeliness of his application and to correct his DD 214 because he is applying for a State corrections job and was told that he would not be hired because his DD 214 shows that he was discharged for misconduct.

SUMMARY OF THE RECORD

On June 29, 1987, at age 18, the applicant enlisted in the Coast Guard as a seaman recruit (SR). On his enlistment application, he denied ever having used illegal drugs. On the day he enlisted, he signed the following statement for his record:

I have been advised that the illegal use or possession of drugs constitutes a serious breach of discipline which will not be tolerated. Also, illegal drug use or possession is counter to esprit de corps, mission performance and jeopardizes safety. No member will use, possess or distribute illegal drugs or drug paraphernalia.

During recruit training on July 7, 1987, the applicant signed another statement:

Member was given a full explanation of the drug and alcohol abuse program by the Command Drug and Alcohol Program Representative (D&A Rep) this date in compliance with Article 20-B-1, CG PERSMAN COMDTINST M1000.6 (old CG-207).

The applicant completed recruit training and advanced to fireman apprentice (FA) on August 21, 1987. He was assigned to work at the Coast Guard Yard in Baltimore.

On October 14, 1987, the applicant was counseled about drinking alcohol in the barracks contrary to regulation and advised that a further violation would result in disciplinary action. On the applicant's first semiannual performance evaluation, he received primarily "standard" marks of 4 (on a scale of 1 (worst) to 7 (best)). He advanced to fireman (FN/E-3), but on his performance evaluation dated October 31, 1988, he received "below standard" marks of 3 for the performance categories Loyalty and Integrity.

The applicant remained at the Yard, and on his performance evaluation dated April 30, 1989, he received marks of 3 for Uniform, Work Habits, Keeping Supervisor Informed, and Motivation Towards Advancement. On his performance evaluation dated November 30, 1989, he received marks of 3 for Work Habits, Workmanship, Requiring Supervision, and Motivation Towards Advancement. On December 11, 1989, the applicant was counseled about repeated tardiness for duty and advised that a further violation would result in disciplinary action.

On April 30, 1990, the day after the applicant's 21st birthday, a random urinalysis was conducted at the Yard. On May 17, 1990, the laboratory reported that the applicant's urine had tested positive for cocaine. On his performance evaluation dated May 31, 1990, the applicant received marks of 3 for Grooming, Conduct, Work Habits, Appearance, and Sobriety.

On June 6, 1990, the commanding officer (CO) of the Yard notified the applicant in writing that he was recommending that the applicant receive a general discharge for misconduct because of the urinalysis result. The CO advised the applicant that he had a right to consult a lawyer, to disagree with the CO's recommendation, and to submit a written statement. The applicant signed a form acknowledging the notification of discharge and noted that he objected to being discharged and would submit a statement. In his statement, the applicant wrote that he had learned a great deal during his three years in the Coast Guard and was striking (performing on-the-job training) to become an electrician's mate. He stated that just as "everything was coming together," he had made a foolish and critical mistake that would cost him his job and

possibly his career. He noted that he had let himself and the Coast Guard down and that he deeply regretted his error.

On June 7, 1990, the applicant was punished at mast because of his use of cocaine. His non-judicial punishment (NJP) was reduction in rate from FN/E-3 to FA/E-2. On a disciplinary performance evaluation, he received a mark of 2 for Conduct and marks of 3 for Grooming, Work Habits, Appearance, and Sobriety. His chief noted in this evaluation that the applicant's abuse of alcohol had "contributed to the experimental use of a controlled substance," but also that the applicant "is cheerful and highly cooperative. Exhibits a good application of skills. Has been known to waste time in the work factor."

On June 20, 1990, the laboratory reported that the applicant's urine sample had been re-tested and the result was positive for cocaine at a level of 760 ng/ml.¹

On June 22, 1990, the Commandant ordered the CO of the Yard to discharge the applicant within 30 days with a general discharge for misconduct due to his involvement with drugs in accordance with Article 12-B-18 of the Personnel Manual.

On July 20, 1990, the applicant was awarded a general discharge "under honorable conditions" for misconduct in accordance with Article 12-B-18 of the Personnel Manual with an HKK separation code and an RE-4 reentry code. He was counseled about his discharge and his rights under Article 12-B-53 of the Personnel Manual.

VIEWS OF THE COAST GUARD

On August 25, 2011, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief in this case. He stated that the application should be denied because it is untimely and lacks merit because the Coast Guard committed no error or injustice in discharging the applicant.

The JAG also 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 1990 and noted that under the Personnel Manual, any member involved in a drug incident is discharged "with no higher than a general discharge." The PSC stated that nothing the applicant wrote on his application "negate[s] the cause that led to his separation." The PSC argued that the applicant's 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.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 12, 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.

¹ The U.S. military's current threshold level for a positive urinalysis result for cocaine use is just 100 ng/ml. U.S. DEPARTMENT OF DEFENSE, ARMY CENTER FOR SUBSTANCE ABUSE PROGRAMS, COMMANDER'S GUIDE & UNIT PREVENTION LEADER (UPL) URINALYSIS COLLECTION HANDBOOK (1 June 2006), para. 2-4-1.E.6.e.

APPLICABLE LAW

Under Article 12-B-18.b.(4) of the Personnel Manual in effect in 1990, the Commandant could separate a member for misconduct due to drug abuse as follows:

Involvement with drugs. Any member involved in a drug incident as defined in article 20-A-2h., ... will be processed for separation from the Coast Guard with no higher than a General Discharge.

Under Article 12-B-18, 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 reason for the recommended discharge, (b) consult an attorney, (c) object to the discharge, and (d) submit a statement in his own behalf.

These regulations remain essentially the same under Article 1.B.17. of the current Coast Guard Separations Manual.

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.² The applicant was discharged in 1990 and was informed of the reasons for his discharge at that time. 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."³ 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."⁴

4. The applicant did not explain his delay in seeking an upgrade of his separation code and narrative reason for separation, but argued that it is in the interest of justice for the

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

³ *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

⁴ *Id.* at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

Board to waive the statute of limitations because he has been denied a job opportunity at a State correctional department because of his misconduct discharge. The Board does not find this argument compelling because it does not explain why he could not have applied for the correction of his DD 214 much sooner.

5. A cursory review of the merits of this case indicates that the applicant was properly awarded a general discharge for misconduct, in accordance with Article 12-B-18 of the Personnel Manual then in effect, with an HKK separation code and an RE-4 reentry code after his urine tested positive for cocaine use during a random urinalysis. He received due process as provided in Article 12-B-18. The applicant did not allege that the Coast Guard committed any error but argued that his misconduct discharge on his DD 214 is unjust because it has caused him to be denied a job with a civilian employer. The Board notes that the applicant submitted no evidence to support this claim, but even assuming his claim is true, the strict employment policy of one civilian employer does not render the applicant's misconduct discharge, or the Coast Guard's regulations mandating that discharge, unjust.⁵ The record contains no evidence that substantiates the applicant's allegations of injustice in his official military record, which is presumptively correct under 33 C.F.R. § 52.24(b).⁶

6. The Board notes that the applicant also argued that his misconduct discharge should be changed because he was young at the time (21 years old) and he had never been in serious trouble before and has not been in trouble since his discharge. The urinalysis was conducted the day after the applicant's 21st birthday, and his chief noted in his record that his consumption of alcohol had contributed to his poor decision-making regarding drug use. 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."⁷ Under Article 1.B.17. of the Separations Manual in effect today, members involved in a drug incident are discharged for misconduct with no better than a general discharge. Therefore, the Board is not persuaded that the applicant's general discharge for misconduct is disproportionately severe in light of current standards.

7. Based on the record before it, the Board finds that the applicant's request for correction of his general discharge for misconduct cannot prevail on the merits. Accordingly, the Board will not excuse the application's untimeliness or waive the statute of limitations. The applicant's request should be denied.

⁵ Under 10 U.S.C. § 1552, the Board is authorized not only to correct errors but to remove injustices from any Coast Guard military record. For the purposes of the BCMRs, "[i]njustice", when not also 'error', is treatment by the military authorities, that shocks the sense of justice, but is not technically illegal." *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976).

⁶ 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.").

⁷ Memorandum of the General Counsel to J. Warner Mills, et al., Board for Correction of Military Records (July 7, 1976).

ORDER

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

Troy D. Byers

Dana Ledger

Donna A. Lewis