DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2012-020

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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 November 1, 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 June 21, 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

The applicant received a discharge "under other than honorable conditions," also known as an OTH discharge, from the Coast Guard on March 1, 1996, due to involvement with illegal drugs. He asked the Board to upgrade his discharge to "general under honorable conditions." He stated that the OTH discharge was not erroneous or unjust but that he needs a better discharge to get a job with the federal government, so he is asking for forgiveness.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on April 25, 1995, when he was 19 years old. On the same day, he acknowledged by his signature that he had been advised that the use or possession of illegal drugs is a serious offense, that he would be subject to urinalysis, and that if his urine tested positive for illegal drugs, he would be "subject to an immediate general discharge by reason of misconduct." During recruit training, the applicant signed another acknowledgement of having received a full explanation of the Coast Guard's drug and alcohol policies.

Upon graduating from recruit training in late June 1995, the applicant was assigned to the cutter SUNDEW, a 180' buoy tender plying the Great Lakes. On March 1, 1996, at age 20, he received an OTH discharge after just 10 months and 7 days of active service. The only documentation of his separation in his military record is his DD 214, which he signed. The DD 214 shows that he received the OTH discharge for "misconduct" pursuant to Article 12-B-18 of

the Personnel Manual with a JKK separation code, which denotes an involuntary separation due to involvement with drugs. The DD 214 shows his rank upon discharge as seaman recruit, pay grade E-1, and his effective date of rank as January 5, 1996.

A search of electronic court records reveals that in September 2006, the applicant was arrested and charged with disorderly conduct, intentional possession of a controlled substance, and operating a vehicle without a valid inspection. However, the charge of possession of a controlled substance was dismissed.

VIEWS OF THE COAST GUARD

On February 26, 2012, 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.

Regarding the applicant's request for forgiveness, the JAG, citing the Board's decision in BCMR Docket No. 2007-095, argued that past BCMR decisions "dictate that in considering the character of a discharge, the Board should not upgrade a decision based on post-discharge conduct alone, but may 'take into account changes in the community mores, civilian as well as military, since the time the discharge was rendered, and upgrade a discharge if it is judged to be unduly severe in light of contemporary standards." The JAG stated that Coast Guard policy continues to "mandate[] separation for drug use with a characterization no higher than a general discharge. Therefore, the applicant's discharge under other than honorable conditions is consistent with CG policy and not unduly severe."

The JAG concluded that the application should be denied because it is untimely and because the applicant "has not provided any documentation in support of his untimely application or proper justification to warrant a review."

The JAG also adopted the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC). PSC noted that an HKK separation code denotes "illegal drug involvement when supported by evidence not attributed to urinalysis." PSC noted that the applicant's DD 214 is presumptively correct, that he did not submit anything to substantiate an error, and that he did not claim that his discharge was erroneous or unjust. PSC also argued that under the doctrine of laches, the applicant's long delay in requesting the correction "has prejudiced the Coast Guard's ability to produce more evidence to show that the disputed military record is correct and just." *See Lebrun v. England,* 212 F. Supp. 2d 5, 13 (D.D.C. 2002). PSC stated that the applicant's DD 214 should remain unchanged "until it can be definitively shown that the Coast Guard erred or did not act in good faith."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On February 23, 2012, the Chair of the BCMR 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

Article 12-B-18.a. of the Personnel Manual in effect in 1996 states that "[a]n enlisted member may be separated by reason of misconduct with a discharge under other than honorable conditions, general discharge, or honorable discharge as warranted by the particular circumstances of a given case." Commander, Military Personnel Command was authorized to decide what type of discharge the member would receive.

Article 12-B-18.b.(4) states that any enlisted member "involved in a drug incident" could be discharged for misconduct with "no higher than a general discharge."

Article 12-B-18.d. states that "[a]ll cases where a discharge under other than honorable conditions by reason of misconduct is contemplated shall be processed as prescribed by Article 12-B-32."

Article 12-B-32 provides that no member may receive an OTH discharge unless they are afforded the right to appear before an Administrative Discharge Board, represented by counsel, unless the member is "beyond military control by reason of prolonged unauthorized absence, requests discharge for the good of the Service, or the member waives the right to board action in writing."

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

Under the Separation Program Designator (SPD) Handbook, an HKK separation code denotes an involuntary discharge for misconduct under Article 12.B.18. of the Personnel Manual "in lieu of further processing or convening of a board (board waiver) when member who commits drug abuse, which is 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 USC 812, when supported by evidence not attributed to urinalyses … ."

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.[1] The applicant was discharged in 1996, signed his DD 214, and thus knew what type of discharge he had received 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."[2] 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, but alleged, in essence, that it is in the interest of justice for the Board to waive the statute of limitations and upgrade his discharge to help him gain employment with the federal government. 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 has not claimed that his OTH discharge is erroneous or unjust but asks the Board to forgive his offense and upgrade his discharge. However, the record contains no grounds for the Board to forgive the offense other than an allegation that he would like a job with the federal government but cannot get one because of his OTH discharge. The Board has authority to upgrade discharges even if they were properly awarded under regulations in effect at the time, but the delegate of the Secretary has informed the Board 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."[4] Under Article 1.B.17. of the Separations Manual in effect today, members involved in a drug incident may receive an OTH discharge. Without more substantial evidence in the record, the Board is not persuaded that the applicant's OTH discharge for misconduct is disproportionately severe in light of current standards or that it constitutes an injustice that should be corrected at this time.

6. Based on the record before it, the Board finds that the applicant's request for correction of his OTH discharge, which is presumptively correct,[5] 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.

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[1] 10 U.S.C. § 1552; 33 C.F.R. § 52.22.
[2] *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).
[3] *Id*. at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).
[4] Memorandum of the General Counsel to J. Warner Mills, et al., Board for Correction of Military Records (July 7, 1976).
[5] 33 C.F.R. § 52.24(b); *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.").

ORDER

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

Philip B. Busch

Lynda K. Pilgrim

Vicki J. Ray