DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2012-047

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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 December 19, 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 August 16, 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 asked the Board to upgrade his 1983 general discharge under honorable conditions for drug abuse to an honorable discharge.[1] The applicant stated that he has been serving as a police officer for the past 13 years and has been promoted to the rank of lieutenant over the Uniform Patrol Division of his city's police department. The applicant alleged that he has also served as a minister for the last 25 years.

In support of these allegations, the applicant submitted a certificate showing that he received a degree of Associate of Divinity in Pastoral Ministry from the xxxxxxxxxxxxxx Theological Seminary in 1990; two certificates showing that he completed training to become a police officer in 1998; and a photocopy of his badge and identity card, identifying him as a lieutenant in the police department.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on April 3, 1979. On January 22, 1981, he was found to be in possession of an ounce of marijuana aboard a cutter. He was taken to mast and

[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.

awarded non-judicial punishment of 6 days of restriction with extra duties and forfeiture of $135.00 in pay.

On November 2, 1982, the applicant's unit underwent a urinalysis and his urine tested positive for marijuana use. On December 7, 1982, the applicant's District Commander advised him in writing that he had initiated the applicant's discharge for drug abuse because of the urinalysis result. He also mentioned the applicant's prior NJP for possession of marijuana. The District Commander advised the applicant that he had a right to object to the discharge, to consult a lawyer, and to submit a statement that would be forwarded to the Commandant.

On December 8, 1982, the applicant's command informed him that his urine had tested positive for marijuana use; that under ALCOAST 007/82 and ALDIST 204/82, the District Commander could either initiate his discharge or refer him for rehabilitation; and that because the applicant had previously been disciplined for possessing marijuana, the District Commander had decided to initiate his discharge and recommend a general discharge. The applicant acknowledged the notification and noted his intent to appeal the recommended discharge.

On January 14, 1983, the applicant acknowledged the District Commander's December 7th notification and objected to the proposed discharge. The applicant hired a civilian lawyer who submitted a statement for the applicant on January 28, 1983. The attorney argued that the applicant "could have inhaled marijuana smoke in a room, a vehicle, or confined space, or even in an open air environment, known or unbeknownst to him, at any time prior to the drug screening process. Positive results would generally show up in any drug screening undertaken at that time or during the lengthy periods of detection following such inhalation." The attorney also argued that mandatory, urinalyses were improper, that the command should not have considered the fact that the applicant had previously been found in possession of drugs, and that the applicant should be retained because other members whose urine had tested positive were retained pursuant to a "first incident rule."

On January 31, 1983, the District Commander sent a memorandum to the Commandant requesting authorization to discharge the applicant "by reason of misconduct due to use of illegal narcotic substance." The District Commander alleged that the test results indicated that the applicant's "use is frequent if not heavy. It is felt that there is little hope for his rehabilitation. Although performing well at the present time, he is a poor risk if permitted to remain in the Coast Guard. This is evidenced by his poor initiative to become a petty officer after more than three years of service."

On March 2, 1983, 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 April 1, 1983, 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. During his service, he had been awarded a Humanitarian Service Medal and an Achievement Medal with Operational Device for Cuban refugee operations, two Meritorious Unit Commendations, and sharpshooter pistol and rifle ribbons.

VIEWS OF THE COAST GUARD

On February 24, 2012, the Judge Advocate General (JAG) of the Coast Guard recommended that the Board deny relief in this case.

The JAG noted that the applicant is not alleging that his general discharge was erroneous or unjust but that it should be upgraded because he has been a model citizen. He also noted that the application is untimely and argued that it should be denied for untimeliness because the applicant provided no excuse for his delay and his request lacks merit.

The JAG also argued that past BCMR decisions dictate that the Board should not upgrade a discharge based on post-service conduct alone, but may take into account changes in community mores and upgrade the discharge "if it is judged to be unduly severe in light of contemporary standards." The JAG stated that the applicant's general discharge is not unduly severe in light of current standards because under current policy any member who uses or possesses an illegal drug must be discharged with no better than a general discharge.

The JAG further argued that the use of illegal drugs "runs counter to the Service's core values and is completely inconsistent with the Coast Guard's maritime law enforcement mission whereby the organization conducts counter-drug operations each and every day of the year."

The JAG also adopted the findings and analysis in a memorandum prepared by the Personnel Service Center (PSC). PSC stated that the applicant was properly discharged for drug abuse and that his applicant's post-discharge conduct is commendable, but it cannot justify upgrading his Coast Guard discharge.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 21, 2012, 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 12-B-18(b)(4) of the Coast Guard Personnel Manual in effect in early 1982 stated a member could receive an administrative general discharge for misconduct due to "[t]he 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 … when supported by evidence not attributed to a urinalysis administered for identification of drug abusers or to a member's volunteering for treatment."

On March 9, 1982, the Department of Defense revised 32 CFR Part 41 to authorize the discharge of military members identified as drug abusers through mandatory urinalyses.

The Board does not have copies of ALCOAST 007/82 or ALDIST 204/82, which the District Commander relied on in initiating the applicant's discharge. 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 1.B.17.b.(4) of the current Separations 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] The applicant received his general discharge in 1983. 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 or justify his long delay in seeking an upgrade of discharge.

5. A cursory review of the merits of this case indicates that the applicant was properly awarded a general discharge for misconduct after his urine tested positive for marijuana use during a unit urinalysis. Although the Personnel Manual then in effect did not authorize misconduct discharges based on unit urinalyses, the preponderance of the evidence shows that in April 1982 the Commandant issued a new policy in ALCOAST 007/82 that authorized misconduct discharges for members whose urine tested positive for marijuana. The District Commander cited ALCOAST 007/82 and ALDIST 204/82 when initiating the applicant's discharge, and the Commandant approved the discharge. Their actions are presumptively correct.[4]

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[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).

[4] 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.").

6. The applicant, however, is not alleging that his general discharge was erroneous or unjust when he received it but that it is now unjust because he is a minister and police officer. In addition, the Board notes that the applicant was young when he committed the offense for which he was discharged and he has borne the consequences of his drug use for a long time. However, on July 7, 1976, the delegate of the Secretary provided the Board with the following guidance, which has not been countermanded:

> [T]he Board should not upgrade discharges solely on the basis of post-service conduct. The situation in which a man is granted a less than honorable discharge under circumstances all agree were just, and then goes on to become Albert Schweitzer, is one that—if it ever occurs—is properly handled by an exemplary rehabilitation certificate or a Presidential pardon.
>
> This emphatically does not mean that the justness of a discharge must be judged by the criteria prevalent at the time it was rendered. The Board is entirely free to take into account changes in community mores, civilian as well as military, since the time of discharge was rendered, and upgrade a discharge if it is judged to be unduly severe in light of contemporary standards. …. [T]he Board should not upgrade [a] discharge unless it is convinced, after having considered all the evidence [in the record], that in light of today's standards the discharge was disproportionately severe vis-à-vis the conduct in response to which it was imposed.[5]

Under Article 1.B.17. of the Separations Manual in effect today, members whose urine tests positive for marijuana 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.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

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

ORDER

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

Marion T. Cordova

Anthony C. DeFelice

Rebecca D. Orban