

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2007-211

**XXXXXXXXXXXXX
XXX XXXXXXXXX**

FINAL DECISION

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case on November September 21, 2007, upon receipt of the applicant's completed application and subsequently prepared the final decision for the Board as required by 33 CFR § 52.61(c).

This final decision, dated June 12, 2008, 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 asked the Board to correct his record by upgrading his discharge under other than honorable conditions to a general discharge under honorable conditions (general discharge).

The applicant enlisted in the Coast Guard on April 13, 1999, and was discharged on July 19, 2004, under other than honorable conditions by reason of misconduct due to involvement with drugs. He was assigned an RE-4 (not eligible to reenlist) reenlistment code and a JKK (misconduct/drug abuse) separation code.

APPLICANT'S ALLEGATIONS

The applicant alleged that he should have been discharged with a general discharge because Article 12.B.18. of the Personnel Manual states that a member involved in a drug incident will be processed for separation with no higher than a general discharge. He argued that the drug incident in which he was involved occurred away from the cutter and did not disgrace the Coast Guard. He requested a "fair discharge based upon [his] record of service."

SUMMARY OF RECORD

The applicant enlisted in the Coast Guard on April 13, 1999. At that time, he signed an administrative remarks (page 7) entry, which advised him of the following:

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, drug paraphernalia or hemp oil products. I also understand that upon reporting to recruit training, I will be tested by urinalysis for the presence of illegal drugs. If my urine test detects the presence of illegal drugs I may be subject to discharge and receive a general discharge.

A February 2, 2004 administrative remarks page (page 7) indicates that the applicant was in the custody of the Baltimore, Maryland police on suspicion of conspiracy to import cocaine.

On February 10, 2004, the applicant was indicted by a grand jury in the U.S. District Court for the District of Maryland for conspiracy to import cocaine, importation of cocaine, possession of a firearm in the furtherance of a drug trafficking crime, and aiding and abetting.

On April 30, 2004, the applicant's commanding officer (CO) informed the applicant that he had initiated action to discharge the applicant from the Coast Guard due to a drug incident.¹ The CO advised the applicant that he could receive a discharge under other than honorable conditions and the decision whether he would receive a general or other than honorable discharge rested with the Commandant. The applicant was further advised that a discharge under other than honorable conditions could only be awarded if an administrative separation board recommended such a characterization. The applicant was advised that he could disagree with the recommended discharge; that he could submit a statement in his own behalf; that he could elect to have his case heard by an administration separation board, with the assistance of a military lawyer; and that he could consult with a military lawyer prior to deciding whether to request an administration separation board.

On April 30, 2004, the applicant signed a statement in which he acknowledged that he had read and understood the discharge notification; that he understood that anything less than an honorable discharge could deprive him of some or all Department of Veterans' Affairs benefits; and that he wanted to consult with an attorney regarding his decision to request an administrative separation board.

On June 7, 2004, the applicant signed a statement affirming that he had consulted with a military lawyer on May 12, 2004; that he waived his right to submit a statement regarding the discharge; and that he waived unconditionally his right to an administrative separation board.

On June 9, 2004, the applicant's CO recommended that Commander, Coast Guard Personnel Command (CGPC) discharge the applicant expeditiously with an OTH (other than

¹ Chapter 20 of the Personnel Manual defines a drug incident as intentional drug abuse, wrongful possession of, or trafficking in drugs. This definition further states that a civil or military conviction for wrongful use, possession, etc., of controlled substances is prima facie evidence of a drug incident. The member need not be found guilty at court-martial, in a civilian court, or be awarded non-judicial punishment for the behavior to be considered a drug incident.

honorable discharge) by reason of misconduct due to involvement in a drug incident. The CO noted that the applicant was incarcerated at the Maryland Correctional Adjustment Center and that he had been indicted on various drug and gun charges.²

On July 19, 2004, CGPC directed that the applicant be discharged under other than honorable conditions by reason of misconduct due to involvement with drugs under Article 12.B.18. of the Personnel Manual.

On July 19, 2004, the applicant was discharged from the Coast Guard under other than honorable conditions.

Discharge Review Board (DRB)

Prior to filing his application with the Board, the applicant applied to the DRB to have his under other than honorable conditions upgraded. On September 5, 2006, the Commandant approved the DRB's decision not to upgrade the applicant discharge. According to the DRB report, the applicant stated that his discharge was unfair under the circumstances; that he was never convicted of any criminal charges while in the Coast Guard; and that page 7 entries and absences without leave are not a sufficient basis on which to award an other than honorable discharge.

In denying relief to the applicant, the DRB discussion and conclusion were as follows:

[DRB] members thoroughly reviewed the applicant's record of service and all available documentation. The discharge package clearly documented the circumstances and basis for the Under Other Than Honorable Discharge. The applicant was given all required notices and accorded all of his rights. The applicant was indicted by civil authorities for numerous drug trafficking charges and was incarcerated at the time of his discharge. The applicant did not provide the Board with the outcome of the civil criminal indictment. Despite the applicant's assertion that he was not convicted while on active duty, the indictment was sufficient to warrant discharge due to a drug incident. The [DRB] felt that the discharge was carried out in accordance with Coast Guard policy.

VIEWS OF THE COAST GUARD

On February 1, 2008, the Board received an advisory opinion from the Judge Advocate General (JAG), recommending that the Board deny the applicant's request for relief. The JAG adopted the facts and analysis provided by CGPC, which was attached as enclosure (1) to the advisory opinion. CGPC offered the following:

² The Coast Guard submitted evidence with its advisory opinion that the applicant was subsequently convicted of the charges alleged in the indictment and sentenced to over 17 years in prison.

A complete review of the applicant's record does not reveal an error or injustice with regard to the applicant's separation processing or the assignment of an other than honorable discharge. The applicant was involved in a drug incident as determined by the command and was provided with legal counsel and he voluntarily elected to unconditionally waive his right to an administrative separation board . . . The applicant's case was reviewed by the Coast Guard Discharge Review Board whose unanimous recommendation, as approved by the Commandant, that the applicant's discharge remain unchanged . . .

The applicant alleges that his conduct while in the service supports the assignment of a general discharge and since his drug incident did not occur on Coast Guard property that he is being unjustly served by the assignment of an other than honorable discharge. The applicant's record manifestly supports a drug incident through his federal indictment . . . The applicant does not deny a drug incident or the appropriateness of his discharge, only the character of service assigned. The applicant maintains that he was subject to a conspiracy making him a scapegoat, and that he was sentenced regarding the charges after his discharge from the Coast Guard. However, there is nothing in the applicant's record to support such, nor does the applicant's subsequent conviction and incarceration on these charges . . . lend credibility to his assertions of injustice by the federal agents/prosecutors.

Article 12.B.18. of the Personnel Manual prescribes not less than a general discharge for involvement with drugs. This does not prohibit granting a less desirable discharge than general. The grave nature of the applicant's misconduct relative to the drug incident sufficiently justifies the other than honorable discharge he was awarded.

APPLICANT'S REPOSENSE TO THE VIEWS OF THE COAST GUARD

On March 13, 2008, the Board received the applicant rebuttal to the views of the Coast Guard. The applicant suggested that the conspiracy charge was a trumped up charge and that "the proceedings are still pending court rulings." He alleged that the military lawyer, who advised him on whether to waive the administrative board hearing and other issues, reassured him that he would receive a general discharge "since the case was still pending trial and there was no conviction at that time." He alleged moreover that the military lawyer did not explain to him that he could have a military lawyer at the government's expense, but that he would have to pay his civilian lawyer to represent him before an administrative board. He again requested to be granted a general discharge in accordance with his interpretation of the Personnel Manual.

APPLICABLE REGULATIONS

Coast Guard Personnel Manual

Article 12.B.18.b.4.a. of the Personnel Manual states the following:

Involvement with Drugs. Any member involved in a drug incident or the illegal, wrongful, or improper sale, transfer, manufacture, or introduction onto military installation of any drug . . . will be processed for separation from the Coast Guard with no higher than a general discharge . . .

Article 20.A.2.K. of the Personnel Manual states the following:

This provision of the Personnel Manual defines a drug incident as intentional drug abuse, wrongful possession of, or trafficking in drugs. This definition further states that a civil or military conviction for wrongful use, possession, etc., of controlled substances is prima facie evidence of a drug incident. The member need not be found guilty at court-martial, in a civilian court, or be awarded non-judicial punishment for the behavior to be considered a drug incident.

Separation Program Designator (SPD) Handbook

Section two of the SPD Handbook authorizes only the assignment of an RE-4 reenlistment code for the JKK separation code. The SPD Handbook states that the JKK separation code is appropriate when there is an "[i]nvoluntary discharge directed by established directive (no board entitlement) when a member is involved in drug abuse, which is the illegal, wrongful or improper use, possession, sale, transfer or introduction on a military installation of any narcotic substance . . ."

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's submissions and military record, the Coast Guard's submission, and applicable law:

1. The Board has jurisdiction of this case pursuant to section 1552 of title 10 United States Code. The application was timely.
2. The applicant has failed to prove that the Coast Guard committed an error or injustice in discharging him under other than honorable conditions for involvement in a drug incident. Article 12.B.18.b.4.a. of the Personnel Manual states that any member "involved in a drug incident or the illegal, wrongful, or improper sale, transfer, manufacture, or introduction onto military installation of any drug . . . will be processed for separation from the Coast Guard with no higher than a general discharge." Article 20.A.2.k. of the Personnel Manual states that a member need not be found guilty at court-martial, in a civilian court, or be awarded NJP for such conduct to be considered a drug incident. The applicant's arrest and subsequent indictment by civilian authorities for various drug and gun charges formed a sufficient basis for his command to find that he was involved in a drug incident. The Board notes that the applicant was subsequently convicted and sentenced to more than 17 years in prison for orchestrating a cocaine shipment through Baltimore-Washington International Airport.
3. The applicant's interpretation that under Article 12.B.18.b.4.a. of the Personnel Manual, he should have been awarded a general discharge under honorable conditions is incorrect. The provision merely limits the highest discharge that can be awarded in a drug case

to a general discharge. It does not prevent the Commandant from awarding a discharge under other than honorable conditions, a less favorable discharge than a general discharge under honorable conditions. In this case, the Commandant determined that a discharge under other than honorable conditions was appropriate. The Board notes that the DRB was also satisfied that the applicant's discharge was proper. The evidence presented by the applicant does not persuade the Board that the Commandant abused his discretion in awarding a discharge under other than honorable conditions to the applicant under the circumstances of this case.

4. The applicant was provided with his due process rights and chose to waive his right to an administrative discharge board hearing. The applicant's current allegation that his military lawyer assured him that he would receive a general discharge even if he waived his right to an administrative discharge board fails for lack of proof. The only evidence in the record is the applicant's signed statement waiving his right to an administrative discharge board without any conditions. Accordingly, the applicant's allegation in this regard is not sufficient to prove that he did not knowingly waive his right to an administrative discharge board.

5. The applicant failed to prove an error or injustice in this case. Accordingly, relief should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

Evan R. Franke

Robert S. Johnson

Adrian Sevier