DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2010-159

XXXXXXXXXXXXXXX
XXXXXXXXXXXXXXX

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 upon receipt of the applicant's completed application on April 24, 2010 and subsequently prepared the final decision for the Board as required by 33 CFR § 52.61(c).

This final decision, dated January 13, 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

The applicant asked the Board to correct his record by upgrading his discharge under honorable conditions (commonly referred to as a general discharge) to an honorable discharge. He also requested a change in his JKK separation code, which means that the applicant was involuntarily discharged because of misconduct/drug abuse.

The applicant enlisted in the Coast Guard on June 26, 2001 and was discharged on April 7, 2005, under 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 the JKK separation code does not apply in his case because none of his alleged misconduct occurred on a military installation or during his duty hours. He stated that any alleged misconduct occurred on his off duty time away from his employment. He stated that he was never charged or convicted of any misconduct from the local police. He quoted the following with regard to the JKK separation code:

> [It] is assigned when there is an involuntary discharge directed by established directive (no board entitlement) when a member who commits drug abuse, which

> is 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 administered for identification of drug abusers or to a member's volunteering for treatment under the drug identification treatment program.

SUMMARY OF RECORD

The applicant enlisted in the Coast Guard on June 26, 2001. 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.

On February 16, 2005, the applicant's commanding officer (CO) informed the applicant that he had initiated action to discharge the applicant from the Coast Guard based on the results of a CGIS investigation that found that the applicant was involved in illegal activity related to drugs and drug trafficking between October 2004 and November 2004, which constituted a drug incident.[1] The CO advised the applicant that the decision to provide him with a general or honorable discharge rested with the Commandant. The applicant was advised that he could submit a statement in his own behalf and disagree with the proposed discharge and that he could consult with a military lawyer at government expense.

On February 16, 2005, 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; that he wanted to submit a statement; and that he wanted to consult with military counsel.

On February 25, 2005, the applicant's CO recommended that Commander, Coast Guard Personnel Command (CGPC) discharge the applicant based upon a CGIS investigation that found that the applicant was involved in trafficking in illegal narcotics on at least one occasion in October 2004. The CO stated that the applicant actively sought to connect a known drug dealer with potential customers, to include Coast Guard members and their families in government leased housing. The CO stated that even though there was no evidence that the applicant himself

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[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.

actually distributed illegal drugs, his actions were so contrary to the values of the service and its law enforcement mission, that he had determined that that the applicant's actions as described in the CGIS investigation constituted a drug incident. The CO noted that after consulting with a military lawyer on February 17, 2005, the applicant decided not to make a written statement, and verbally indicated that he did not intend to contest the discharge.

On February 26, 2005, the applicant signed another acknowledgement and election statement, declining the opportunity to submit a statement and requesting to consult with military counsel.

On March 8, 2005, CGPC directed that the applicant be discharged with a general discharge by reason of misconduct due to involvement with drugs under Article 12.B.18. of the Personnel Manual and be assigned JKK as the separation code.

On April 7, 2005, the applicant was discharged from the Coast Guard with a general discharge.

Discharge Review Board (DRB)

Prior to filing his application with the Board, the applicant applied to the DRB for an upgrade of his discharge, a change to the narrative reason for discharge (misconduct), and an upgrade to his RE-4 reenlistment code. The DRB denied relief. On November 10, 2009, the Commandant approved the DRB's decision not to make any changes to the applicant's record.

According to the DRB report, the applicant appeared in person before the DRB accompanied by his father. The applicant provided sworn testimony before the DRB and was questioned on the contents of the CGIS investigation. The DRB stated the following:

> The applicant admitted to CGIS investigators that he had solicited others to buy illegal drugs. The applicant admitted to Board members that his confession to CGIS was truthful. The applicant agreed with the [CO's] determination that this was a drug incident. The applicant's admission to soliciting others to purchase illegal drugs on behalf of a third party is tantamount to trafficking by materially participating in the distribution of illegal drugs. The Crux of the government's case is that this was a drug incident. The applicant presented no compelling evidence to dissuade the Board otherwise.
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> The Board members did uncover an administrative oversight with regard to the DD 214. Block 24 needs to be corrected to read Under Honorable Conditions.[2] The assignment of SPD Code JKK is appropriate as is the narrative reason.

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[2] The DRB corrected block 24 (character of service) of the DD 214 to read under honorable conditions which is the character of service instead of general. This type of discharge and character of service is commonly referred to as a general discharge under honorable conditions.

VIEWS OF THE COAST GUARD

On August 19, 2010, 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 Commander, Personnel Service Center (PSC), which was attached as enclosure (1) to the advisory opinion. PSC concurred with the findings of the DRB in their entirety. PSC noted that the Coast Guard is presumptively correct and the applicant had failed to substantiate any error or injustice in his military record.

APPLICANT'S REPONSE TO THE VIEWS OF THE COAST GUARD

On August 24, 2010, a copy of the Coast Guard view was mailed to the applicant for a response. The Board did not receive a response from the applicant.

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 commits drug abuse, which is the illegal, wrongful or improper use, possession, sale, transfer or introduction on a military installation of any narcotic substance … as established by 21 USC 812, when supported by evidence not attributed to urinalyses administered for identification of drug abusers or to a member's volunteering for treatment under the drug identification and treatment program."

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. An applicant has fifteen years from the date of discharge to apply to the Discharge Review Board (DRB) for an upgrade of his discharge. The applicant was required to exhaust his administrative remedies by applying to the DRB before filing an application with the Board. See 33 CFR § 52.13. According to Ortiz v. Secretary of Defense, 41 F. 3rd. 738 (D.C. Cir. 1994), the BCMR's three year statute of limitations begins to run at the conclusion of DRB proceedings for an applicant who is required to exhaust administrative remedies. The DRB issued a final decision on November 10, 2009. Therefore, the applicant's BCMR application received by the Board on March 29, 2010 was timely.

2. The applicant has failed to prove that the Coast Guard committed an error or injustice in discharging him with a general discharge under 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.

3. According to the DRB, the applicant admitted to CGIS investigators that he had solicited others to buy illegal drugs. The DRB found the applicant's admission to be a drug incident because it was "tantamount to trafficking, by materially participating in the distribution of illegal drugs." The Board agrees with the DRB that the applicant's actions constituted a drug incident.

4. The Board is not persuaded that the JKK separation code is in error because the applicant's misconduct allegedly occurred on his off duty time and away from his employment. According to the SPD handbook, the JKK applies not only when illegal drugs are introduced on a military installation, but also when there is the illegal, wrongful, or improper use, possession, sale or transfer of drugs. There is no limitation on where an illegal, wrongful or improper use, possession, sale or transfer of drugs must occur to be classified as a drug incident. As the DRB stated, according to the investigative report, the applicant was trafficking in (selling) drugs and the CO found that his misconduct constituted a drug incident. Article 20.A.2.K. of the Personnel Manual defines a drug incident as the intentional drug abuse, wrongful possession of, or trafficking in drugs. Moreover, according to the CO, the CGIS investigative report indicated that the applicant was attempting to connect members of the Coast Guard and their families who lived in Coast Guard housing with known drug dealers.

5. The fact that the applicant was off-duty when his misconduct occurred is not relevant to the finding of whether he was involved in a drug incident because an active duty service member is subject to the jurisdiction of the military twenty-four hours per day, seven days per week.

6. 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 XXXXXXXXXXXXXXX, USCG, for correction of his military record is denied.

Donna M. Bivona

Evan R. Franke

Dorothy J. Ulmer