

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-252

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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 September 12, 2009.

This final decision, dated July 8, 2010, 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 character of discharge and narrative reason for discharge. His DD 214 shows that on March 12, 2004, he received a general discharge "under honorable conditions" due to "Fraudulent Entry into Military Service, Drug Abuse," with a JDT separation code and an RE-4 reenlistment code (ineligible to reenlist). The applicant requested an honorable discharge.

The applicant was discharged because, upon his arrival at boot camp, his urine tested positive for cocaine. He stated that he cannot explain the test results but "can absolutely state under oath that I have never had anything to do at all with controlled substances in my entire life." He alleged that he did not intentionally ingest any controlled substance, did not know that it was in his system, and so did not fraudulently enlist in the Coast Guard or "conceal or misrepresent anything." He further alleged that he is "a victim of a terrible wrong-doing by someone who probably had no idea of the hardship, embarrassment, difficulty and consequences of the action they took."

In support of his request, the applicant submitted a letter from his father, who stated that his son was "probably a victim of a terribly unfortunate prank performed by someone at a social event held for [the applicant] prior to his departure for basic training." He also submitted documents showing that since his discharge the applicant has graduated from college and is now a high school history teacher and a basketball and swim coach. He submitted letters of reference from prior supervisors and professors praising his character, reliability, integrity, and responsibility.

ity. In addition, he submitted documents from the police departments of his university and home town indicating that they do not have any criminal records in the applicant's name.

SUMMARY OF THE RECORD

On February 24, 2004, the day before his 27th birthday, the applicant enlisted in the Coast Guard Reserve at a recruiting office in xxxxxxxxxxxxxx. Prior to his enlistment, he worked on his father's ranch. On page 2 of his Record of Military Processing, after initialing the right-hand block for "No" in response to the first thirteen questions on page 2, he initialed the left-hand block for "Yes" in response to the final question on the page, which appears as follows:

DRUG USE AND ABUSE *(If "Yes," explain in Section VI, "Remarks.")*

Have you ever tried, used, sold, supplied or possessed any narcotic (to include heroin or cocaine), depressant (to include Quaaludes), stimulant, hallucinogen (to include LSD or PCP), or cannabis (to include marijuana or hashish), or any mind-altering substance (to include glue or paint), or anabolic steroid, except as prescribed by a licensed physician?

There is no explanation for the applicant's "Yes" response in Section VI on page 4 of the form. At the recruiting office, the applicant also signed a separate form acknowledging that he would be tested by urinalysis upon arrival at the training center and that if his urine tested positive for illegal drugs, he would be subject to a general discharge. He certified by his signature that he was "drug-free and ready for recruit training." In addition, he acknowledged having been advised that if his enlistment documents were not accurate, he could receive a less than honorable discharge for fraudulent enlistment.

The applicant was immediately sent to the training center in Cape May, New Jersey. On February 25, 2004, the new recruits underwent a urinalysis. The urinalysis report sent to the training center on March 4, 2004, shows by his social security number that the applicant's urine tested positive for cocaine use at a level of 127 micrograms per milliliter.

On March 12, 2004, the applicant was discharged due to "Fraudulent Entry into Military Service, Drug Abuse," with a JDT separation code and an RE-4 reenlistment code.

On February 25, 2009, the Vice Commandant disapproved the recommendation of the Discharge Review Board (DRB), which had voted four to one to upgrade the applicant's discharge to honorable, his narrative reason for discharge to "Miscellaneous/General Reasons," and his reenlistment code to RE-1 (eligible to reenlist). The DRB had found that the applicant's discharge was both equitable and proper but, based upon the documents he submitted, recommended that his discharge be upgrade because "he presents a convincing argument for not knowingly ingesting drugs." The DRB noted that had the applicant tested positive for drug use after boot camp, he "would have had the opportunity to rebut the finding of a drug incident and evaluation testing could have been an option."

VIEWS OF THE COAST GUARD

On January 12, 2010, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the applicant's requests. In

so doing, he adopted the findings and analysis of the case provided in a memorandum prepared by the Personnel Service Center (PSC).

The PSC noted the proceedings of the DRB and recommended that the Board uphold the decision of the Commandant. The PSC submitted a copy of an email from the Special Assistant to the Vice Commandant, who stated the following regarding the Vice Commandant's disapproval of the DRB's recommendation:

[The applicant's] record included a standard military processing form that [he] completed at recruitment in which he initialed under "yes" in response to the question about drug use and abuse. [The applicant] offered no explanation of his affirmative response as required in the remarks section of the form and there was no indication that the recruiter identified the admission/ omission. The DRB did not address this matter with the applicant, but they also did not overlook it. The DRB was persuaded that [the applicant] was truthful in his relief request and the DRB presumed that [he] answered the drug question at its broadest definition—which includes glue and paint in addition to drugs.

The DRB appeared to have acted based on these presumptions which made [the applicant's] statement in his letter to the DRB assuring that he never had anything to do with controlled substances consistent with his affirmative response to the drug use and abuse question ... presuming he merely misused glue or paint.

The Vice Commandant was not convinced by the narrow reading required to justify the affirmative response to drug use or abuse in the accession paperwork and [the applicant's] later statement claiming no use of controlled substances. Accordingly, she disapproved the board recommendation and left the record as is.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 11, 2010, the Board received the applicant's response to the views of the Coast Guard. The applicant repeated his allegation that he has "never knowingly or intentionally ingested any illegal substance. The collective record of my life before and after the Coast Guard experience confirms that, and it [is] based upon that record that I request the Board to approve my request." The applicant argued that if the Board upgrades his discharge but leaves the RE-4 code unchanged, it would "allow me to regain some measure of personal dignity in keeping with the record of my entire life, lessen the damage done to me by the perpetrator of the crime, and assure the Coast Guard that I will not re-apply for admission."

The applicant alleged that his initials on the Record of Military Processing form indicating that he had abused drugs was a mistake because he has not abused any illegal drug or any other substance, such as glue or paint. The applicant submitted a copy of another form he completed on March 7, 2003, pursuant to his enlistment. On this form, a "Questionnaire for National Security Positions," in response to an inquiry about whether he had ever been charged with or convicted of an offense related to drugs or alcohol, he admitted that he had been ticketed in March 2000 for selling alcohol to a minor. On the same form, he denied any use of illegal drugs within the prior seven years.

APPLICABLE REGULATIONS

Article 20.C.2.a.6.b. of the Coast Guard Personnel Manual in effect in 2004 states that new recruits must undergo urinalysis within three days of arriving at the training center.

Article 12.B.18. of the manual governs the administrative separation of members for misconduct. Article 12.B.18.a. states that the Commander of the Personnel Command may direct the discharge of a member for misconduct with an other than honorable, general under honorable conditions, or honorable discharge “as warranted by the particular circumstances of a given case.”

Article 12.B.18.b.2. states that a member may be discharged for fraudulent enlistment for “[p]rocurring a fraudulent enlistment, induction, or period of active service through any deliberate material misrepresentation, omission, or concealment which, if known at the time, might have resulted in rejection. ... Commanding Officer, Training Center Cape May, is delegated final discharge authority under this Article in these specific cases for members assigned to recruit training or prior service training program: a. Deliberately concealed criminal records or other information necessary to effect enlistment. ...”

Article 12.B.20.b.1. of the Personnel Manual in effect today states that “Commanding Officer, Training Center Cape May, when compelling circumstances exist, has the authority to award an uncharacterized discharge for service during boot camp in cases involving drug incidents.” This provision did not exist in 2004.

Under the SPD Handbook, a member involuntarily discharged for procuring “fraudulent enlistment, induction or period of military service through deliberate, material misrepresentation, omission or concealment of drug use/abuse” may be discharged under Article 12.B.18. of the Personnel Manual with a JDT separation code, an RE-4 reenlistment code, and “Fraudulent Entry into Military Service, Drug Abuse” as the narrative reason for discharge.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. Under 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22, an application to the Board must be filed within three years after the applicant discovers, or reasonably should have discovered, the alleged error or injustice. Although the applicant in this case filed his application more than three years after his discharge, he filed it within three years of the decision of the DRB, which has a fifteen-year statute of limitations. Therefore, under *Ortiz v. Secretary of Defense*, 41 F.3d 738, 743 (D.C. Cir. 1994), the application is considered timely.

2. The applicant alleged that his general discharge for fraudulent enlistment due to drug abuse was erroneous and unjust. The Board begins its analysis in every case by “presuming

administratively regularity on the part of Coast Guard and other Government officials.”¹ The applicant bears the burden of proving the existence of an error or injustice by a preponderance of the evidence.² Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties “correctly, lawfully, and in good faith.”³

3. The record shows that about a year before his enlistment, the applicant denied having used an illegal drug during the prior seven years. On the day he enlisted, February 24, 2004, the applicant admitted to having used illegal drugs at some time in the past on his Record of Military Processing, but he also certified on another form that he was “drug-free and ready for recruit training.” The applicant was not drug-free, however, because his urine tested positive for cocaine use the next day, which indicates that he had ingested the drug within the prior three days.⁴

4. The applicant now alleges that he has never intentionally ingested cocaine, that he must have mistakenly initialed the wrong block on his Record of Military Processing, and that he was the victim of a prank. The Board is not persuaded that the applicant’s response on the Record of Military Processing was a mistake. The question about drug use, for which he initialed the left-hand “Yes” block, is the last question on the page, and he had initialed the right-hand “No” block for all of the thirteen questions above it. Therefore, his initials in the “Yes” block stand out as an obvious change. Given the format of the page, had the applicant been initialing the form carelessly, it is extremely unlikely that he would have accidentally switched to the “Yes” block for the last question about drug use after initialing the “No” block for the first thirteen questions on the page.

5. It is theoretically possible that someone played a prank on the applicant by tricking him into ingesting cocaine. His own assertion that he never used illegal drugs—contrary to his answer on the Record of Military Processing—and his father’s claim that it could have happened at a social event prior to the applicant’s enlistment, however, are insufficient to persuade the Board that the Coast Guard erred in concluding that he knowingly ingested the cocaine.

6. The applicant was 26 years old when he enlisted and knew or should have known that the cocaine might still be in his system since he must have ingested it just a couple of days before he enlisted. His positive urinalysis suggests that he made an all-too-common error among recruits by simply hoping or assuming that the cocaine would be out of his system by the time of the urinalysis. The Board does not believe that someone who has knowingly ingested cocaine

¹ 33 C.F.R. § 52.24(b).

² *Id.*

³ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁴ See U.S. Department of Justice, National Institute of Justice, “Testing Hair for Illicit Drug Use” (January 1993), www.druglibrary.org/schaffer/GovPubs/hairt.txt, stating that urinalysis detects cocaine use for two to three days following ingestion; Substance Abuse & Mental Health Services Administration www.oas.samhsa.gov/SROS/sros8027.htm, stating that urinalysis detects cocaine use for up to three days following ingestion; *but see* National Institute on Drug Abuse, www.nida.nih.gov, stating that the urine of habitual cocaine users may test positive more than three days after the last ingestion.

within the last couple of days can honestly claim to be drug-free. Therefore, the Board finds that the applicant has not proved by a preponderance of the evidence that the Coast Guard erred in concluding that he had lied about being drug-free on the day he enlisted.

7. The Board notes, however, that the applicant's recruiter erred by failing to ensure that the applicant explained his "Yes" response to the inquiry about past drug use on the Record of Military Processing, as the form requires. It is possible that, had the recruiter demanded an explanation, their discussion of the matter would have deterred the applicant from certifying that he was drug-free and from enlisting with cocaine in his system. Because the recruiter did not ensure that the form was fully completed and the applicant presumably ingested the cocaine before he began active duty, the Board believes his discharge should be upgraded from general to "uncharacterized." Although drug abuse was not one of the listed bases for an uncharacterized discharge under the Personnel Manual in effect in 2004, it is today pursuant to Article 12.B.20.b.1. of the current Personnel Manual.

8. Therefore, relief should be granted in part by upgrading the applicant's discharge from a general discharge for misconduct under Article 12.B.18. of the Personnel Manual to an uncharacterized discharge under Article 12.B.20. However, because he has not proved by a preponderance of the evidence that his narrative reason for discharge, "Fraudulent Entry into Military Service, Drug Abuse," is erroneous or unjust,⁵ no other corrections are warranted.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

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). The Board has authority to determine whether an injustice exists on a "case-by-case basis." Docket No. 2002-040 (DOT BCMR, Decision of the Deputy General Counsel, Dec. 4, 2002).

ORDER

The application of former SA xxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is granted in part as follows:

The Coast Guard shall issue him a new DD 214 incorporating the following corrections:

- Block 24 of his DD 214 shall show an uncharacterized discharge; and
- Block 25 shall show Article 12-B-20 of the Personnel Manual as the separation authority.

The following notation may be made in Block 18 of the DD 214: “Action taken pursuant to order of BCMR.”

No other relief is granted.

