

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2020-147

██████████ ██████████ ████

ENS

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on September 18, 2020, and assigned the case to a staff attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated April 14, 2023, 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, an active duty Ensign (ENS/O-1), asked the Board to correct his record by changing his commissioning date from July 23, 2020, to May 20, 2020, and by restoring his class rank.

The applicant alleged that he was originally set to receive his commission with the rest of his class at the Coast Guard Academy on May 20, 2020, but because he was investigated for a drug incident—one that he claimed to have had no involvement or knowledge of—his commissioning was delayed and moved to July 23, 2020. The applicant explained that due to the change in his commissioning date, he is now behind everyone in his 2020 class for promotion consideration and the class rank he worked for means nothing. The applicant alleged that it is not fair that he has fallen behind his peers for promotion due to an investigation that proved his innocence.

SUMMARY OF THE RECORD

The applicant entered the Coast Guard Academy on June 27, 2016.

On April 29, 2020, three weeks before graduation, a Captain from the Academy issued a memorandum, “Investigation into Possible Use of Narcotics/Controlled Substances by Three Cadets,” wherein an investigating officer was assigned to conduct a single officer administrative

investigation into the facts and circumstances surrounding the alleged use of controlled substances by the three cadets, one of which was the applicant. The applicant was implicated in another cadet's national security questionnaire, SF-86, wherein the cadet admitted to having used drugs and stated that on two separate occasions the applicant was the person who had provided him with the drugs. As a result of these allegations, the applicant's graduation and commissioning were postponed while an investigation into an alleged violation of Article 112a—Wrongful Use/Possession of a Controlled Substance of the Uniform Code of Military Justice (UCMJ) was conducted.

On May 15, 2020, five days before graduation, the Investigating Officer (IO) released his report wherein he found that based on the available facts, there was not enough evidence to state with certainty that the applicant had used or possessed drugs while a cadet. According to the IO, although the applicant had been accused of using drugs and providing drugs to the other cadet, there were no witnesses to corroborate the allegations. The IO wrote that during his interview with the applicant, the applicant was relaxed, did not hesitate in his answers, and displayed no telltale signs of deception such as hesitation, voice cracking, confusing tenses, over-simplifying incident details, and excessive negativity. The IO further stated that the applicant spoke more like a witness with nothing to hide. However, during the course of the investigation, the applicant did admit to using drugs while in high school, which contradicted his answers on the DoDMERB medical history questionnaire, wherein the applicant had denied any past drug use. Therefore, the IO found that there was enough evidence to support a finding that the applicant had violated Article 107 of the UCMJ by making a false official statement. Although the IO found that the applicant's differing accounts of drug use indicated that the applicant had a history of untruthful behavior, the IO was hesitant to use those false official statements to support a finding that the applicant had also lied in his statements to the IO.

Subsequently, on May 22, 2020, the Superintendent of the Academy reviewed the IO's report and found that, despite the evidence that the applicant had violated Article 107 of the UCMJ by making a false official statement, it was in the Coast Guard's best interest that the applicant be retained and commissioned as a Coast Guard officer.

On July 23, 2020, the applicant was graduated from the Academy and received a commission.

On August 31, 2020, the Superintendent signed a memorandum titled, "Final Action for Investigation Into Possible Use Of Narcotics/Controlled Substances By Three Cadets." In this memorandum, the Superintendent noted that he had decided on May 22, 2020—two days after graduation—that there was insufficient evidence of the applicant's involvement with drugs and that he had notified the cadet who had admitted to drug use on his SF-86 of his decision to disenroll him from the Academy on June 25, 2020.

VIEWS OF THE COAST GUARD

On April 8, 2021, a Judge Advocate (JAG) for the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared by the PSC.

The JAG argued that the applicant’s allegations regarding his unjustly postponed graduation and commissioning do not accurately summarize the findings of the investigation or the informed decision of the Superintendent. The JAG further argued that in accordance with 14 U.S.C. §§ 1901, 1928-29, the Superintendent of the Coast Guard Academy is granted the authority to determine a cadet’s eligibility for graduation and commission. In addition, the JAG argued that under 14 U.S.C. § 2101, determining the eligibility of a cadet’s graduation and subsequent commissioning entails assessing a potential graduate’s “mental, moral, physical, and professional fitness.” In the applicant’s case, the JAG explained that while the investigation found that a violation of Article 112a of the UCMJ could not be substantiated, it was found that the applicant had falsified official documents in violation of Article 107 of the UCMJ. The JAG stated that although the Superintendent found that the applicant’s violations did not outweigh the potential benefit the applicant could bring to the Coast Guard, it was the applicant’s misconduct that set him apart from his peers. And it was within the Superintendent’s discretion to postpone the applicant’s graduation and commissioning. Accordingly, the JAG recommended the Board deny relief in this case.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On April 23, 2021, the Chair sent the applicant a copy of the Coast Guard’s views and invited him to respond within thirty days. As of the date of this decision, no response has been received.

APPLICABLE LAW AND POLICY

Title 14 U.S.C. § 1901 (Administration of Academy) states, “The immediate government and military command of the Coast Guard Academy shall be in the Superintendent of the Academy, subject to the direction of the Commandant under the general supervision of the Secretary.”

14 U.S.C. § 1928 (Cadets; Degree of Bachelor of Science) states, “The Superintendent of the Academy may, under such rules and regulations as the Secretary shall prescribe, confer the degree of bachelor of science upon all graduates of the Academy and may, in addition, confer the degree of bachelor of science upon such other living graduates of the Academy as shall have met the requirements of the Academy for such degree.”

14 U.S.C. § 2101 (Original Appointment of Permanent Commissioned Officers) states:

(a)(1) The President may appoint permanent commissioned officers in the Regular Coast Guard in grades appropriate to their qualification, experience, and length of service, as the needs of the Coast Guard may require, from among the following categories:

A. Graduates of the Coast Guard Academy.

...

(b) No individual shall be appointed a commissioned officer under this section until his mental, moral, physical, and professional fitness to perform the duties of a commissioned officer has been established under such regulations as the Secretary shall prescribe.

(c) Appointees under this section shall take precedence in the grade to which appointed in accordance with the dates of their commissions as commissioned officers in such grade. Appointees whose dates of commission are the same shall take precedence with each other as the Secretary shall determine.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction over this matter under 10 U.S.C. § 1552(a) because the applicant is requesting correction of an alleged error or injustice in his Coast Guard military record. 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 that the applicant has not already pursued.

2. The application was timely because it was filed within three years of the applicant's discovery of the alleged error or injustice in the record, as required by 10 U.S.C. § 1552(b).

3. The applicant alleged that the Coast Guard committed an error and injustice by postponing his graduation and commissioning from May 20, 2020, to July 23, 2020. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in the military record, and the applicant bears the burden of proving, by a preponderance of the evidence, that the disputed information is erroneous or unjust.¹ 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."²

4. According to the applicant, it was erroneous for the Coast Guard to delay his graduation and commissioning because he was found innocent of being involved with drugs. The preponderance of the evidence shows that on April 29, 2020, the applicant was implicated in the illegal distribution of a controlled substance. Therefore, his graduation and commissioning were properly delayed while the allegation was investigated.³ On May 15, 2020, the IO submitted his report to Academy officials for review. The record indicates that on May 22, 2020, two days after the applicant's class graduated and received their commissions, the Superintendent reviewed the report of the investigation and decided that the allegations of drug distribution were unsubstantiated.

However, the IO had also uncovered the fact that the applicant had not been truthful about his drug use on his original DoDMERB medical history. The record shows that on his DoDMERB

¹ 33 C.F.R. § 52.24(b).

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

³ 14 U.S.C. § 2101(b) ("No individual shall be appointed a commissioned officer under this section until his mental, moral, physical, and professional fitness to perform the duties of a commissioned officer has been established under such regulations as the Secretary shall prescribe.").

medical history questionnaire, the applicant stated that he had not previously used illegal drugs, but during the course of the administrative investigation, the applicant told investigators that he had used illegal drugs while in high school. This discrepancy resulted in the Superintendent finding that the applicant had violated Article 107 of the UCMJ by making a false official statement on his DoDMERB. Therefore, the Superintendent also had to decide whether the violation of Article 107—which is a serious offense with a maximum punishment of a dishonorable discharge, total forfeitures, and confinement for 5 years—warranted disenrolling the applicant from the Academy because 14 U.S.C. § 2101(b) states, “No individual shall be appointed a commissioned officer under this section until his mental, moral, physical, and professional fitness to perform the duties of a commissioned officer has been established under such regulations as the Secretary shall prescribe.” Although the cadet who had admitted to using drugs on his SF-86 was disenrolled from the Academy, the record shows that the Superintendent ultimately decided not to disenroll the applicant and allowed him to graduate and receive his commission on July 23, 2020. Therefore, the Board finds that the applicant has failed to prove, by a preponderance of the evidence that the Coast Guard committed an error or injustice by delaying his graduation and commission. The fact that the applicant lost the benefit of his class rank in his position on the Active Duty Promotion List as a result of his lie is not an error or injustice.⁴ His request for relief should be denied.

5. For the reasons outlined above, the applicant has not met his burden, as required by 33 C.F.R. § 52.24(b), to overcome the presumption of regularity afforded the Coast Guard that its administrators acted correctly, lawfully, and in good faith.⁵ He has not proven, by a preponderance of the evidence, that the Coast Guard erroneously or unjustly postponed his graduation and commissioning. Accordingly, the applicant’s request should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

⁴ For the purposes of the BCMRs, “injustice” is sometimes defined as “treatment by the military authorities that shocks the sense of justice but is not technically illegal.”⁴

⁵ *Muse v. United States*, 21 Cl. Ct. 592, 600 (1990) (internal citations omitted).

ORDER

The application of Ensign [REDACTED] [REDACTED] USCG, for correction of his military record is denied.

April 14, 2023

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