

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2006-131

XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX

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 June 16, 2006, upon receipt of the applicant's application and military records.

This final decision, dated May 31, 2007, 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, who received an uncharacterized discharge with an RE-4 reenlistment code (ineligible to reenlist) on December 9, 2005, before completing boot camp, asked the Board to correct his record by reinstating him on active duty and by upgrading his reenlistment code to RE-1 (eligible to reenlist).

The applicant alleged that he was discharged during the sixth week of boot camp because he had "failed to inform [his] recruiter of a false arrest that [his] legal counsel advised not to disclose because from her perspective the arrest never occurred." The applicant stated that his "criminal history record has been expunged."

The applicant alleged that it "was never [his] intention to be dishonest or deceitful in any way concerning [his] arrest. It had been characterized from the beginning as a false arrest and based on the counsel [he] had received from [his] attorney, [he] did not realize that a case had been established against [him] and the arrest had been recorded on [his] criminal history record on [REDACTED]. At the time of [his] accession, [he] did not think that the arrest had been recorded as an arrest or that fact that [his] not disclosing the incident would result in a discharge from the Coast Guard."

The applicant alleged that the “false arrest” occurred at about 1:15 a.m. on Tuesday, December 15, 2004, when he was pulled over for speeding by a police officer. The applicant alleged that for no apparent reason, the officer had him get out of his car and gave him a sobriety test that involved standing straight with his arms to his sides and following a pen with his eyes. Then the police officer handcuffed him and his passengers and took them to a holding cell. The applicant alleged that when an officer took him out of the cell and read him his rights, he asked if he could call his father, but since his father was not an attorney, the officer did not let him. Later an officer told him that he had been arrested for driving under the influence (DUI) and should be detained but that, because the officer knew the applicant’s girlfriend, the applicant was going to be booked and released. Then he was taken to a precinct office where he was finger printed, photographed, and released to his father.

Then in September 2005, a month before he was supposed to begin boot camp, he “sought out legal help to cover [his] basis.” His case had not yet been processed and it was not clear that it would go to trial. His public defender told him “not to let [his] court date hold [him] back, and that the case has a big chance of being thrown out.” She had him sign a waiver giving her authority to appear on his behalf at trial should the case be processed.

On January 25, 2006, after he was discharged from the Coast Guard, the charges against him were “thrown out because of lack of probable cause.” On February 22, 2006, the charges were expunged. The applicant submitted a copy of a court order stating that it “is hereby ordered that this case be and is hereby dismissed and any and all records relating to the above-numbered Superior Court case and events described in Police Report No. [REDACTED] whereby [the applicant] is alleged to have violated the law, shall be expunged.”

SUMMARY OF THE APPLICANT’S MILITARY RECORD

On October 24, 2005, the applicant enlisted in the Coast Guard and began boot camp. He completed and signed a questionnaire on which he responded “No” to the following questions:

- Have you ever been charged with or convicted of any felony offense?
- Are there currently any charges pending against you for any felony offense?
- Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?
- In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in response to [the questions] above? (Leave out traffic fines of less than \$150 unless the violation was alcohol or drug related.)

The applicant also signed a Page 7 (form CG-3307) that day under the following statement.

I hereby certify that all information on my enlistment documents is current and accurate. I have not had any involvement with the police or had any changes in dependency unless noted on these documents. I understand withholding information is punishable under the Uniform Code of Military Justice (UCMJ) and may result in less than honorable discharge for fraudulent enlistment.

On December 9, 2005, after the Coast Guard discovered that the applicant had been arrested and had a criminal charge pending against him, the applicant received an “uncharac-

terized” “entry level separation” with a JDA separation code and an RE-4 reenlistment code in accordance with Article 12.B.20. of the Personnel Manual.

VIEWS OF THE COAST GUARD

On October 23, 2006, the Judge Advocate General of the Coast Guard recommended that the Board deny the applicant’s request. In so doing, he adopted the facts and analysis of the case provided in a memorandum by the Coast Guard Personnel Command (CGPC).

CGPC argued that the applicant “acknowledges in his statement to the Board that he deliberately concealed [information about his arrest] from the Coast Guard.” CGPC pointed out that although the applicant alleged that his attorney told him he was not required to reveal the arrest, the applicant did not submit anything to support this allegation. Moreover, CGPC argued that the “ultimate resolution of his case does not invalidate the applicant’s deliberate concealment of information to gain fraudulent entry into the Coast Guard.” CGPC alleged that the applicant’s discharge and RE-4 code were in accordance with Coast Guard policy and that there is no reason to reinstate him or to upgrade his reenlistment code to RE-1.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 25, 2006, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within thirty days.

On November 30, 2006, the Board received a letter from the applicant’s congresswoman, who repeated the applicant’s allegation about the poor advice he received from his attorney and asked the Board to expedite its decision so that the applicant could pursue a career in the Coast Guard. On December 5, 2006, the Chair informed the congressional representative that the applicant had not yet responded to the views of the Coast Guard but could request an extension to do so. The Chair also pointed out that a signed affidavit by the applicant’s attorney about the advice he allegedly gave the applicant might improve the applicant’s case before the Board.

On January 2, 2007, the applicant requested an extension of the time to respond to the views of the Coast Guard so that he could get an affidavit from his attorney. On January 3, 2007, the Chair granted the applicant 90-day extension of the original time to respond, through February 22, 2007. No response or further correspondence has been received.

APPLICABLE REGULATIONS

Article 12.B.18.b.2. of the Coast Guard Personnel Manual allows the Commander of the recruit training center to process a recruit for a misconduct discharge if the recruit

[p]rocur[es] 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.

Article 12.B.20. of the Personnel Manual authorizes the Commander of the recruit training center to award “uncharacterized” “entry level” discharges to members with less than 180 days of active duty who have demonstrated poor conduct during the enlistment process or boot camp. Article 12.B.20. also authorizes recruits being discharged for “fraudulent entry into military service” with the JDA separation code to receive “uncharacterized” discharges.

The Separation Program Designator (SPD) Handbook, which is an incorporated part of the Coast Guard manual for completing DD 214s, COMDTINST M1900.4, authorizes only an RE-4 reenlistment code for any member being discharged for fraudulent entry.

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. Because the applicant requested reinstatement on active duty—a correction that is not within the authority of the Discharge Review Board to make—he is considered to have exhausted his administrative remedies under 33 C.F.R. § 52.13(b). The application was timely.

2. The applicant's enlistment papers show that he denied having ever been arrested for or charged with a felony offense or any offense related to drugs and alcohol even though he had been arrested for DUI on December 15, 2004, and had a criminal charge pending against him. The applicant again denied the arrest and charge by signing the Page 7 indicating that all the information he had provided previously was accurate and that he had “not had any involvement with the police ... unless noted on these documents.”

3. The applicant alleged that the attorney who handled his DUI case advised him not to disclose the arrest to his Coast Guard recruiter. He failed to support this allegation with any evidence. Moreover, the applicant admitted that before he began boot camp, the attorney had him sign a “waiver” so that she could represent him in his absence if the case went to trial. Therefore, although the applicant may have hoped that the DUI charge would be dismissed and this wish was later fulfilled and his record expunged, the Board finds that when he signed his enlistment papers he knew that he had been arrested for DUI and that a DUI charge was pending against him and yet falsely denied this pertinent information on his enlistment papers.

4. The applicant has not proved by a preponderance of the evidence that the Coast Guard committed error or injustice in awarding him an uncharacterized entry level separation with an RE-4 reenlistment code after he lied on his enlistment papers about having been arrested and charged with DUI. Article 12.B.18. and 12.B.20. authorize the Commander of the training center to effect such discharges when recruits are found to have lied about important matters on their enlistment papers. The pending DUI charge was certainly a fact that could have resulted in the applicant's rejection for enlistment at that time. Under the SPD Handbook, the RE-4 code is the only reenlistment code authorized for members being discharged for fraudulent enlistment.

5. Accordingly, the applicant's request should be denied.

ORDER

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

