

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction
of Coast Guard Record of:

BCMR Docket
No. 157-96

FINAL DECISION

██████████ Chairman:

This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was commenced on September 10, 1996, upon the BCMR's receipt of the applicant's request for correction of his military record.

The final decision, dated October 10, 1997, is signed by the three duly appointed members who were designated to serve as the Board in this case.

Applicant's Request for Relief

The applicant is a former ██████████ (██████████ pay grade E-6). The Coast Guard concluded that the applicant tested positive for THC in a urinalysis test conducted on June 22, 1995. As a result of the test findings, he was discharged from the Service with a general discharge.

On September 7, 1995, an administrative discharge board (ADB) was convened to render findings concerning whether the applicant was involved in a drug incident. On September 28, 1995, the ADB concluded unanimously that the applicant had been involved in a drug incident, and it recommended that he be separated from the Coast Guard with a general discharge. The ADB found that the tests performed on respondent's sample "confirmed at 44 ng/ml [nanograms/milliliter] for THC and that the threshold for a positive as defined by Commandant policy is 15 ng/ml for THC." The ADB found that the Coast Guard Air Station conducted the random urinalysis in accordance with unit instruction. The ADB further found that clerical errors by the urinalysis coordinator did not compromise the collection procedure or the chain of custody, nor did the observer's unfamiliarity with his role as observer compromise the integrity of the sample collection process. The ADB expressed its opinion that passive inhalation of marijuana at a party on June 9, 1995, could not have resulted in a positive THC result during the June 22 urinalysis.

The applicant disagreed with the findings of the ADB. He alleged that he did not receive a fair ADB hearing, and he alleged that the findings of the ADB were unsupported by substantial evidence. He also alleged that he was denied the right to be present at one session of the ADB, a session at which the ADB received evidence and held discussions with the government representative, alone, the day before the scheduled hearing. The applicant alleged that there was "a substantial question as to the impartiality of the ADB members," and he alleged that he was denied the right to examine and to object to documentary evidence. He alleged that the ADB refused to accept his evidence of the possibility of flaws in the urinalysis process. The applicant's attorney also alleged that the ADB never considered "good military character as a defense to the charge, a fatal flaw."

Defense counsel alleged that the urinalysis was not based on a truly random sampling method. The applicant said that random is defined, in COMDTINST 5335.1D, as meaning a method in which "all possible specimens have equal probability of selection." He alleged that the urinalysis was not random because seven individuals were chosen on the ground that they were new to the command while seven other individuals were chosen on the basis of their social security number.

Views of the Coast Guard

On August 28, 1987, the Chief Counsel of the Coast Guard recommended denial of relief in this applicant's case.

The Chief Counsel said that the requested relief should be denied because the applicant's ADB was procedurally correct, and its results were factually supported. The Chief Counsel said that an applicant can prevail only if he establishes that his or her discharge was carried out in violation of a substantial right. Skinner v. United States, 594 F. 2d 1199, 1203-1204 (Fed. Cir. 1993).

An ADB should not grant relief, according to the Chief Counsel, absent a showing that the discharge was the product of a clear violation of a procedural right, a clear abuse of discretion, or a clear error of material fact.

The Chief Counsel said further that an ADB is a fact-finding body, not an adversarial one. Its hearings involve only one party, the individual being investigated. "The respondent is the only party designated at an ADB. The Coast Guard is not a party, it is conducting the investigation" (emphasis in text). The Chief Counsel said that ADB members sit solely for the purpose of making a recommendation to the chain of command.

The applicant has a right to be present during the proceedings of the ADB. The applicant does not, however, have a right to be present during pre-hearing communications with the recorder that are conducted "so that the formal hearing portion of the investigation may proceed in an orderly and efficient fashion."

The applicant accused the recorder and the president of the ADB of being too aggressive and hostile toward the applicant. Because the ADB is an investigative rather than an adjudicative entity, active involvement in the ADB's fact-finding role is not proof that the recorder or president is biased or hostile against the applicant. The applicant does have the right to challenge ADB members for cause, but the applicant did not exercise that right.

FINDINGS AND CONCLUSIONS

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

1. The BCMR has jurisdiction of the case pursuant to section 1552 of title 10, United States Code. The application is timely, and the applicant requests an oral hearing before the Board. The Chairman, acting pursuant to 33 CFR § 52.31, denied the request and recommended that the case be disposed of without a hearing. The Board concurs in that recommendation.

2. The Coast Guard did not commit an error or injustice by denying the applicant and his attorney access to pre-hearing communications between the senior member and the recorder. These communications are designed, inter alia, to insure that the recorder has done adequate advance investigation and assembled witness statements so that the formal hearing session can be held in an orderly and efficient fashion. The applicant is not entitled to be present during sessions involving such communications because they concern "procedural matters." Administrative Investigations Manual (AIM), COMDTINST M5830.1 Art. 2-D-16, 4-D-2a, 3-E-1 (made applicable to ADB by Art. 4-D-5f).

3. The applicant alleged that seven individuals were selected for urinalysis on the basis that they were new to the command, but no proof was introduced that this was the method used by the Coast Guard. The Coast Guard alleged that the "members were selected [for the June 22 urinalysis] by numbers drawn from a hat."

4. The applicant's attorney alleged that the applicant's ADB never considered good military character as a defense to a charge of use of drugs. Art. 20.D.3.d. of the Coast Guard Personnel Manual provides that "a positive

confirmed test result, standing alone, may be sufficient to establish intentional use and thus suffice to meet [the preponderance of evidence standards].

5. The findings of the applicant's ADB proceeding were supported by substantial evidence. The Board notes that the applicant's sample for THC, the active ingredient in marijuana, is three times higher than the threshold for a positive as defined by the Commandant.

6. The applicant has not submitted sufficient evidence to support any of the other allegations of error or injustice that he has made.

7. The applicant should be denied the relief requested because he has not established that the Coast Guard committed any material error or injustice.

8. Accordingly, the application should be denied.

[ORDER AND SIGNATURES ON FOLLOWIING PAGE]

ORDER

The application of _____
the correction of his military record is denied.

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