

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 2000-097

FINAL DECISION

██████████ Deputy Chairman:

This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was docketed on March 22, 2000, upon the Board's receipt of the applicant's complete application for correction of his military record.

This final decision, dated February 8, 2001, is signed by the three duly appointed members who were designated to serve as the Board in this case.

The applicant, a former seaman recruit (SR; pay grade E-1) in the Coast Guard, asked the Board to upgrade his reenlistment code so that he would be eligible to reenlist. He was discharged under honorable conditions (general discharge) by reason of misconduct. He was assigned an RE-4 (not eligible for reenlistment) reenlistment code and a JDT (fraudulent entry into military service, drug abuse) separation code.

The applicant entered active duty on November 9, 1999, and was discharged on December 3, 1999, after testing positive for use of marijuana. He served 25 days on active duty.

SUMMARY OF RECORD AND SUBMISSIONS

The applicant alleged that his discharge by reason of misconduct and his RE-4 reenlistment code are unfair because he was encouraged by his recruiter to complete enlistment processing and start recruit training even though the recruiter was aware that the applicant had recently used marijuana.

The applicant admitted in pre-enlistment documents that he had used marijuana approximately 40 times. The applicant's father wrote the statement submitted by the applicant to the Board. He stated that prior to finalizing his enlistment in the Coast Guard, the applicant discussed his marijuana use with his recruiter. The recruiter told the applicant that he "probably [had] nothing to worry about." However, the applicant was not persuaded by this conversation and had his urine tested for marijuana by a civilian laboratory. According to the applicant, his urine was positive for THC (marijuana metabolites) at 48 nanograms per milliliter. The applicant stated that personnel at the laboratory advised him that the Coast Guard has a cutoff of 50 nanograms per milliliter before a urine specimen is called positive. Therefore, he was

advised by the "doctor" that if he waited two weeks before enlisting, he would meet the military measurement for a negative urine specimen.

The applicant stated that he informed the recruiter of his conversation with the "doctor". According to the applicant, the recruiter performed some research and later informed the applicant that he would have no problems passing the drug test upon his entry into recruiter training.

The applicant enlisted in the Coast Guard on November 9, 1999. At that time, he signed the following administrative remarks (page 7) entry:

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 or drug paraphernalia. 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 will be subject to an immediate general discharge by reason of misconduct. By signing below I am certifying I have not knowingly ingested any illegal drug for at least the last 60 days.

The applicant alleged that before signing this page 7 entry he sought the advice of the recruiter. He stated that the recruiter advised him to sign the page 7 entry. Three weeks after enlisting, the applicant's urine tested positive for marijuana.

On November 30, 1999, the applicant's commanding officer (CO) informed the applicant that he would be processed for separation from the Coast Guard by reason of misconduct due to drug use. The applicant acknowledge notification of the proposed discharge, acknowledged his right to consult with a lawyer, and submitted a written statement objecting to the discharge. He stated that he was honest about his prior service drug use and would not have chosen November 9, 1999 to enlist, except for the encouragement of his recruiter. The applicant was discharged from the Coast Guard on December 3, 1999.

According to the applicant, the recruiter assumed responsibility for this situation. He stated that the recruiter "knows that it was under his direction that [the applicant] went forward and that because of the information and advice [provided by the recruiter the applicant's] discharge occurred." The applicant stated that he has stayed away from marijuana since his decision to enlist in the Coast Guard.

The applicant's father wrote the following: "[The applicant] is a young man trying desperately to create a life for himself. He found what he truly loves and where he felt he truly belonged. We sincerely hope that [the Board] will take the time to seriously consider the request for a classification change from an RE-4 to an RE-3, that [the applicant] may at a future date reenlist with a waiver to start his career with the Coast Guard once again."

Views of the Coast Guard

On November 3, 2000, the Board received an advisory opinion from the Chief Counsel of the Coast Guard. He recommended that the Board dismiss the application for failure to exhaust administrative remedies or, alternatively, deny it for lack of merit.

The Chief Counsel asserted that the application should be dismissed because the applicant did not exhaust his administrative remedies by filing an application with the Discharge Review Board (DRB). The Chief Counsel stated that a premature application to the BCMR deprives the Coast Guard of the opportunity to develop the relevant factual record and to review its own actions.

With respect to the merits of the application, the Chief Counsel stated that the applicant received the full benefit of the due process to which he was entitled: notice of the discharge, the right to consult with a lawyer, and the right to make a statement. He stated that the applicant had no absolute right to remain in the service until the end of his enlistment period. Giglio v. United States, 17 Cl. Ct. 160, 166 (1989). Therefore, as a member of the armed forces, the applicant could be appropriately and administratively discharged prior to that time. Absent strong evidence to the contrary, government officials are presumed to have carried out their duties correctly, lawfully, and in good faith. Arens v. United States, 969 F.2d 1034, 1037 (1992).

The Chief Counsel stated that even if the Coast Guard were to accept the applicant's allegations that his Coast Guard recruiter provided him inaccurate advice, the Government is not estopped from repudiating that advice if it was erroneous. Utah Power & Light Co. v. United States, 243 U.S. 389, 409, 37 S. Ct. 387 (1917). He further stated that the applicant is estopped from asserting error or injustice in view of his signature acknowledging that he was subject to "[a]n immediate general discharge by reason of misconduct" and declaring that he had not "knowingly ingested any illegal drug for at least the last sixty days" prior to November 9, 1999.

The Chief Counsel stated that the applicant was aware that the recruiter did not possess expert knowledge of the Coast Guard's urinalysis program. The applicant admitted in his statement that the recruiter had to make calls to find out "what level the labs tested at." According to the Chief Counsel this statement by the applicant shows that he was aware that his recruiter was not routinely responsible for providing information related to drug testing or that he was an expert in drug related matters.

The Chief Counsel stated that there was no injustice in discharging the applicant from the Coast Guard with a general discharge. He further stated as follows:

Applicant, who was of majority age on the date of his entry [into the Coast Guard], knowingly signed a false statement attesting that he had not ingested any illegal drug for at least the last 60 days when he had, in fact ingested an illegal drug within 28 days of entry. . . . Applicant has neither alleged, nor is there any . . . evidence indicating he signed the 09 November 1999 CG-3307 under duress or by fraudulent inducement. Furthermore, he was forewarned in the same CG-3307 that he would be

tested for illegal substances upon reporting for basic training and that he would receive an "immediate general discharge" if urinalysis testing revealed the presence of an illegal substance. Hence, Applicant was fully aware of the Coast Guard's zero tolerance urinalysis policy and the consequences of reporting to basic training having recently ingested an illegal substance. . . . His discharge was effected in furtherance of Coast Guard policy and the compelling need for armed forces personnel to remain free of illegal substances. Hence, there was no injustice in this case.

Applicant's Response to the Views of the Coast Guard

On November 6, 2000, a copy of the Coast Guard views was sent to the applicant for any response that he desired to make. He did not submit a response.

APPLICABLE REGULATIONS

Article 12-B-18b.4.a. of the Personnel Manual states that as follows:

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. Commanding Officer, Training Center Cape May is delegated final discharge authority for members assigned to recruit training under this Article in specific cases of drug use before enlistment (as evidenced by a positive urinalysis shortly after training). New inductees shall sign a CG-3307 entry acknowledging the presence of drugs in their bodies is grounds for a general discharge for misconduct.

Separation Program Designator (SPD) Handbook, section two, authorizes only the assignment of an RE-4 reenlistment code for the JDT separation code. The SPD Handbook states that the JDT separation code is appropriate when there is an "[i]nvoluntary discharge directed by established directive (no board entitlement) when a member procured fraudulent enlistment, induction or period of military service through deliberate material misrepresentation, omission or concealment of drug use/abuse."

FINDINGS AND CONCLUSIONS

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

1. The BCMR has jurisdiction over this matter pursuant to section 1552 of title 10, United States Code. It was timely.

2. The Chairman has recommended that the case be determined without a hearing. 33 CFR 52.31. The Board concurs in that recommendation.

3. The applicant has provided insufficient evidence to prove his claim that the general discharge by reason of misconduct (concealing drug use) and the corresponding RE-4 reenlistment code are unfair because his recruiter advised him to finalize his enlistment into the Coast Guard even though the recruiter was aware that he had recently used marijuana.

4. The evidence shows that the applicant was honest about his drug use on his pre-enlistment documents. The evidence also shows that the applicant was warned in a page 7 entry, which he acknowledged by his signature, dated November 9, 1999 that if he tested positive for marijuana upon entering recruit training he would be discharged by reason of misconduct. ~~The applicant also declared in this page 7 that he had not used marijuana within the last 60 days.~~

5. On November 22, 1999, the applicant's urine specimen tested positive for marijuana. The Coast Guard followed its regulation by discharging the applicant from the Coast Guard on December 3, 1999, after his urine specimen tested positive for marijuana. The general discharge by reason of misconduct was in accordance with the regulation. The SPD handbook authorizes the assignment of only an RE-4 reenlistment code with the JDT (fraudulent entry into military service, drug abuse) separation code.

6. Accordingly, the Board finds that the applicant failed to prove an error or injustice in this case. Relief should be denied.

ORDER

The application of former SR [REDACTED]
correction of his military record is denied.

JSCG, for

