DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2000-098

FINAL DECISION

[redacted]

This proceeding was conducted under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The application was received on March 22, 2000, and completed upon the BCMR's receipt of the applicant's military records on May 1, 2000.

This final decision, dated March 22, 2001, is 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, a former xxxxxxxx who received a general discharge under honorable conditions from the Coast Guard on xxxx, 1993, asked the Board to correct his record by upgrading his reenlistment (RE) code from RE-4 to RE-1 and by changing his separation code from HKK, which indicates an involuntary separation due to drug use, to one that does not reflect drug use.

The applicant alleged that in 1993 an angry ex-girlfriend told his command that he had smoked marijuana. He alleged that her accusation was a lie told to get revenge. He alleged that even though he passed a urinalysis test, a Coast Guard investigator badgered him unremittingly to get him to say he had smoked marijuana. He alleged that the investigator told him that the problems would "go away" if he made a voluntary statement confessing to drug use. He alleged that he did not feel as if he had any choice and that the statement he made on April 14, 1993, in which he admitted to having smoked marijuana three

times since he enlisted in 1987, was neither voluntary nor true. Therefore, he retracted that statement on May 10, 1993.

The applicant alleged that the Coast Guard took no action against him other than removing him from "A" School and discharging him at the end of his enlistment because there was no "physical proof" of his alleged drug use. He alleged that it was unfair for the Coast Guard to assign him the RE-4 and HKK separation codes solely on the basis of a statement he wrote under pressure. He alleged that the Coast Guard unjustly took these punitive administrative actions because it had insufficient evidence to prosecute him.

The applicant stated that he wants to join the Navy but was told by a Navy recruiter on January 25, 2000, that he cannot enlist with an RE-4 and HKK separation code. He alleged that, prior to that day, he did not know what the RE-4 and HKK meant. In support of his application, he submitted a letter from a Navy recruiter stating that he could be a definite asset to the Navy if he became eligible for reenlistment.

The applicant also submitted character references from (1) a chief boatswain's mate who was Officer in Charge of the applicant's station in xxxxx and who praised his professionalism, dedication, seamanship, responsibility, and leadership; (2) the Executive Petty Officer of the station, who called the applicant a "very professional individual" who "performed flawlessly"; (3) a former boatswain's mate second class, who supervised the applicant's search and rescue boatcrew from 1990 to 1993 and who praised the applicant's skill, drive, maturity, and leadership; and (4) a retired Army colonel, who "unhesitatingly recommended" the applicant as a "self motivated and well organized" man of "maturity."

SUMMARY OF THE RECORD

On xxxxxxx, 1987, the applicant enlisted in the Coast Guard for four years. After training, he was assigned as a seaman apprentice to the xxxxx in the xxxx. On February 28, 1989, as a crewmember of the xxxxxxx, he received a Special Operations Service Ribbon. After two years, he was promoted to seaman and transferred to a station in xxxxxx, where he continued to serve until February 1993.

On August 17, 1989, the applicant's command documented an "alcohol incident" in which he was determined to have driven "under the influence of alcohol with an EOTH level of .161% on xxxxx 1989." In 1991, he extended his enlistment for two years, from June 8, 1991, through June 7, 1993. On April 6, 1992, he was counseled about showing "disrespect towards his superiors."

On February 5, 1993, the applicant was transferred to the Coast Guard training center in xxxxx, to attend "A" School and become a xxxxxxxxxx.

On xxxxxx, 1993, upon returning from a few days' leave, the applicant's command required him to undergo urinalysis, apparently as a result of the accusation of a girlfriend with whom he had just broken up.

On April 14, 1993, at 10:36 a.m., the applicant signed an "Acknowledgment of Understanding of Rights," indicating that he knew that (1) he was being investigated for illegal drug usage; (2) he had the right to remain silent; (3) he had a right to consult a lawyer—either private or appointed by the military—and have that lawyer present during any further questioning; (4) the interviewer would stop questioning him if he requested a lawyer; (5) anything he said could be used against him "in any court-martial, nonjudicial proceeding, administrative proceeding or civilian court"; and (6) if he chose to speak, he could stop at any time and request a lawyer. On the same form, he indicated that he had previously been questioned about the matter and wanted to make a statement. He did not check either the box indicating that he wanted to consult a lawyer or the box indicating that he did not want to consult a lawyer.

Later that day, the applicant signed the following sworn, "voluntary" statement, indicating that no threats or promises had been made and that he knew that making a false statement would be a violation of the Uniform Code of Military Justice:

> I, …, on three occasion [sic] in my Coast Guard career, have smoked pot. On all occasion [sic] I had been drinking. I'm not making excuses for my action and will take any punishment givein [sic]. I just wont [sic] to get on with my life. I regrette [sic] that it has come to this and I would like to say I'm sorry to all parties involved. I have enjoyed my enlistment a great deal, and have been proud to be a member of the Unite [sic] States Coast Guard. I'm not a drug abuser, and have only smoked on those three occasion [sic]. I apologize for what I have done.

Also on April 14, 1993, the applicant was disenrolled from "A" School due to his "voluntary confession of drug use."

On April 15, 1993, the investigator prepared his report. The investigator noted that the applicant had previously been questioned about allegations of drug use by the training center's military police, who concluded that he had been deceptive. The investigator reported that the applicant had been advised of the

charges against him—possession and use of illegal drugs—and of his right to have a lawyer present prior to and during the interview. He reported that the applicant had admitted smoking marijuana on three occasions since enlisting: while on vacation with friends in 1989; while "partying" with the same friends in 1992; and, most recently, while "partying" at his (now former) girlfriend's house on the weekend of March 19 through 21, 1993. The investigator stated that the applicant admitted to having drunk alcohol prior to each incident of drug use and to having lied to the military police when asked about his drug use. The investigator stated that the applicant indicated that he believed that the urinalysis conducted on xxxxxx, would show that he had smoked marijuana recently.

On April 29, 1993, the Environmental Chemical Corporation sent the applicant's command the results of the urinalysis conducted on xxxxxxx, 1993. The test results were negative.

On May 7, 1993, the applicant was notified that the commanding officer (CO) of the training center was requesting authority to discharge him for misconduct due to drug abuse. He indicated that he wanted to consult an attorney and make a statement. On May 10, 1993, after consulting with an attorney, the applicant signed a statement denying drug use "to set the record straight once and for all." He stated that he was hurt that his command had believed his angry ex-girlfriend instead of him and that he had felt pressure to confess to drug use because he was in a "no win" situation since the Coast Guard believed he was guilty. He stated that he did not "use his head" and signed the false statement on April 14, 1993, as the "easiest and fastest way out." He stated that the negative results of his urinalysis on xxxxxx, prove that his earlier statement was false because, if he had smoked marijuana on the weekend of March 19 through 21, 1993, his urinalysis would have been positive. He asked for an honorable discharge.

On May 25, 1993, the commanding officer of the training center requested authority to discharge the applicant due to his involvement with drugs. The commanding officer recommended to the Commandant that he be awarded a general discharge by reason of misconduct. On June 2, 1993, the Commandant ordered his command to award him a general discharge by reason of misconduct with an HKK separation code within 30 days.

On xxxxxxx, 1993, after serving six years and seven days on active duty, the applicant was discharged by reason of misconduct in accordance with Article 12.B.18. of the Personnel Manual. His DD 214 shows "under honorable conditions" as the character of discharge; "misconduct" as the narrative reason for separation; RE-4 as his reenlistment code; and HKK as his separation code.

VIEWS OF THE COAST GUARD

On November 30, 2000, the Chief Counsel submitted an advisory opinion in which he recommended that the Board deny relief in this case.

The Chief Counsel argued that the application should be denied for untimeliness and lack of merit. The application is untimely, he argued, because more than three years have passed since the applicant received his DD 214 with the HKK separation code and the RE-4 reenlistment code. He argued that the date the applicant received his DD 214 should be considered the day the applicant received constructive notice of the alleged error in his record. Moreover, the Chief Counsel argued, the applicant has not provided sufficient evidence to warrant the Board's finding that the untimeliness of the application should be waived in the interest of justice, as required under *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

The Chief Counsel further argued that, if the Board should waive the statute of limitations and accept the application, the request for correction should be denied for lack of merit because the applicant received all due process with respect to his discharge. As a member with less than eight years of active service, he argued, the applicant was not entitled to a hearing before an Administrative Discharge Board prior to being discharged. Under Article 12.B.16.d., members with less than eight years of service are entitled only to (1) notice of the reason for discharge, (2) an opportunity to consult counsel if they are being considered for a general discharge, and (3) an opportunity to make a statement. Therefore, the Chief Counsel argued, the applicant received all the process he was due during the processing of his discharge.

The Chief Counsel alleged that the Coast Guard's decision not to prosecute the applicant did not estop it from administratively discharging him at the end of his enlistment on the basis of the information gained in the investigation. He argued that the applicant was expressly warned that the voluntary statement he provided could be used against him "in any court-martial, non-judicial proceeding, administrative proceeding, or civilian court." The Chief Counsel argued that the decision of the applicant's commanding officer to initiate his discharge "was reasonable in light of the credence afforded Applicant's voluntary admission." He alleged that the applicant's admission of April 14, 1993, as a statement against interest, is more credible than his later recantation. Furthermore, he pointed out that the admission is credible because the applicant provided details of his drug use.

Finally, the Chief Counsel argued that, even if the Board were to find the applicant's recantation more credible than his admission of drug use, the Board

must conclude that the applicant has signed and sworn to at least one false official statement and his discharge cannot be considered treatment by a military authority that "shocks the sense of justice" and therefore requires action by the Board. *Sawyer v. United States*, 18 Cl. Ct. 860, 868 (1989), *rev'd on other grounds*, 930 F.2d 1577 (citing *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976)).

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On December 4, 2000, the Chairman sent the applicant a copy of the advisory opinion and invited him to respond within 15 days. The applicant did not respond.

APPLICABLE REGULATIONS

Article 20.C.2.a.3. of the Coast Guard Personnel Manual states that a member may be required to undergo urinalysis whenever there is probably cause to believe he has used an illegal drug. Article 20.C.3.a. states that a commanding officer shall initiate an investigation of a possible "drug incident" following the receipt of a positive confirmed urinalysis or "any other evidence of drug abuse." Article 20.A.2.k. defines "drug incident" as "[i]ntentional drug abuse, wrongful possession of, or trafficking in drugs. … The member need not be found guilty at court-martial, in a civilian court, or be awarded NJP for the behavior to be considered a drug incident." Article 20.C.3.b. states that members must be advised of their rights under the UCMJ before being questioned about possible drug incidents.

Article 20.C.3.c. states that a commanding officer should determine whether a "drug incident" has occurred, warranting further action, based on the preponderance of all available evidence, including urinalysis results and statements. Article 20.C.3.d. states that a "member's admission of drug use or a positive confirmed test result, standing alone, may be sufficient to establish intentional use and thus suffice to meet this burden of proof."

Article 20.C.4. states that, if a commanding officer determines that a drug incident has occurred, he or she "will process the member for separation by reason of misconduct under Articles 12.A.11., 12.A.15., 12.A.21., or 12.B.18., as appropriate. Cases requiring Administrative Discharge Boards because of the character of discharge contemplated or because the member has served a total of eight or more years, will be processed under Articles 12.B.31. and 12.B.32., as appropriate."

Article 12.B.18.b.4. provides that the Commander of the Military Personnel Command shall discharge an enlisted member involved in a "drug incident,"

as defined in Article 20, with no higher than a general discharge. Article 12-B-2.c.(2) states that a "general discharge" is a separation "under honorable conditions."

Article 12.B.18.d. states that an Administrative Discharge Board shall be held whenever a member being administratively discharged has more than eight years of service and in "[a]ll cases where a discharge under other than honorable conditions by reason of misconduct is contemplated." Article 12.B.18.e. states that members with less than eight years of service who are being recommended for an honorable or general discharge by reason of misconduct must (a) be informed in writing of the reason they are being considered for discharge, (b) be afforded an opportunity to make a statement in writing, and (c) "[i]f a general discharge is contemplated, be afforded an opportunity to consult with a lawyer."

The Separation Program Designator (SPD) Handbook states that persons involuntarily discharged for illegal drug use, which is supported by evidence other than urinalysis or voluntary drug rehabilitation treatment, shall be assigned an HKK separation code, an RE-4 reenlistment code, and "misconduct" as the narrative reason for separation shown on their DD 214s. The Handbook requires that its contents be closely guarded because "codes contain extremely personal and intimate information about a service member's discharge." However, "specific information about the meaning of the SPD Code on a member's DD Form 214 can be given to that member."

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 section 1552 of title 10 of the United States Code.

2. The applicant alleged that his separation code and reenlistment code are in error. An application to the Board must be filed within three years after the applicant discovers the alleged error in his record. 10 U.S.C. § 1552. The Chief Counsel argued that those three years should be counted from the date the applicant received his DD 214 with the contested coded information because he should be considered to have had constructive knowledge of the codes since that time. Because the Coast Guard and other military services purposely guard the meaning of separation codes, the Board frequently waives the statute of limitations when members do not discover the meaning and effect of their codes until more than three years after they receive their DD 214s. Although the SPD Hand-

book allows members to be informed of the meaning of their own separation codes, there is no requirement that they be so informed and, in the Board's experience, veterans are often unaware of the meaning of their separation codes. The meaning and effect of reenlistment codes, on the other hand, are not kept secret and are fairly common knowledge in the military.

3. In the case at hand, the applicant signed an acknowledgement on May 7, 1993, of the fact that he was being recommended for a misconduct discharge due to drug abuse, which is the essence of an HKK separation code. Moreover, his recantation shows that he knew his pending discharge was based on his own admission of drug use rather than on the results of the urinalysis, which he knew were negative. Moreover, while it may be conceivable for some members not to be aware of the meaning and effect of an RE-4 reenlistment code when they receive their DD 214s, the applicant was advised by counsel concerning his pending discharge. Therefore, the Board finds that it is inconceivable that the applicant was not informed, at or before the time of his discharge, that he would not be allowed to reenlist in the military. While the applicant may have forgotten this fact by January 2000, a faulty memory does not justify waiving the statute of limitations. Therefore, the Board finds that the applicant knew or should have known the meaning and effect of his separation and reenlistment codes when he received his DD 214 in 1993, and his request for correction is untimely.

4. Pursuant to 10 U.S.C. § 1552, the Board may waive the three-year statute of limitations if it is in the interest of justice to do so. To determine whether it is in the interest of justice to waive the statute of limitations, the Board should conduct a cursory review of the merits of the case. *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

5. A cursory review of the merits of this case indicates that on April 14, 1993, the applicant signed a voluntary, credible, detailed admission of drug use on three separate occasions while he was serving on active duty. He provided no evidence of coercion or duress that would diminish the credibility of this statement, despite his later recantation. Under Article 20.C.3.d. of the Personnel Manual, the applicant's commanding officer could reasonably determine that he had been involved in a "drug incident" based solely on his admission and initiate his administrative discharge under Articles 20.C.4. and 12.B.18.

6. The record further indicates that the applicant was properly notified of his pending general discharge due to drug abuse on May 7, 1993; that he was afforded and took advantage of the opportunity to consult with an attorney on May 10, 1993; and that he was allowed to submit a statement on his own

behalf, in accordance with his rights under Article 12.B.18.e. of the Personnel Manual.

7. The Board's review of the record in this case indicates that the Coast Guard committed no error or injustice in processing the applicant's discharge or in awarding him an HKK separation code and an RE-4 reenlistment code. Under the SPD Handbook, these codes are appropriate and required for members, like the applicant, being involuntarily discharged due to drug abuse not proven by urinalysis but supported by other evidence, such as their own admission.

8. More than seven years have passed since the applicant's discharge and admission of illegal drug use, and he has presented statements indicating that his skills would be of use in the Navy. However, the military services have all determined through their common regulations that any intentional illegal drug use by a member automatically results in his or her absolute disqualification for reenlistment in any military service. Although a Navy recruiter may be interested in reenlisting him, the applicant has not proved that the Coast Guard committed any error or injustice by assigning him the HKK separation code and RE-4 reenlistment code that block his reenlistment under the regulations of the Navy and every other military service.

9. Accordingly, the applicant's request should be denied both on the basis of its untimeliness and for lack of merit.

[ORDER AND SIGNATURES APPEAR ON THE NEXT PAGE]

ORDER

The application of XXXXXXXXXXXX, USCG, for correction of his military record is hereby denied.