DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2000-119

FINAL DECISION

[redacted] **Attorney-Advisor:**

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 27, 2000, and completed upon the BCMR's receipt of the applicant's military records on May 1, 2000.

This final decision, dated March 29, 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 [redacted]; pay grade E-5), received a general discharge under honorable conditions from the Coast Guard on February 5, 1999, after his urine tested positive for cocaine use during a random urinalysis. He asked the Board to correct his record by upgrading his discharge from general to honorable.

The applicant alleged that his general discharge did not accurately reflect the quality of his work for the Coast Guard during his six years of active service. He alleged that his "evaluations were always of the highest standards." He stated that an upgraded discharge was very important for his family because it would enable him to pursue his career.

In support of his allegation, the applicant submitted a statement by a chief warrant officer serving as a maintenance officer at [redacted] where the applicant worked as a [redacted] The chief warrant officer stated that the applicant "demonstrated superior performance while serving aboard Coast Guard [redacted] He has consistently showed a high level of proficiency with his assigned duties. [He] was personally responsible for maintaining a fleet of ground support equipment required for responding to Aircraft launches and retrieval."

SUMMARY OF THE RECORD

On June 2, 1992, the applicant enlisted in the Coast Guard for four years. The same day, he signed two forms acknowledging that he had been advised about Coast Guard policies concerning illegal drug use.

The applicant attended "A" School to become a [redacted] and extended his enlistment through June 1, 2000. He received good evaluations, and his record contains no negative administrative or disciplinary entries.

On November 19, 1998, the applicant participated in a required random urinalysis test. On December 3, 1998, the testing laboratory reported that his urine had tested positive for cocaine metabolites and that the results of the initial test had been confirmed by gas chromatography and mass spectrometry. The report indicated that his urine contained the cocaine metabolite benzoylecgonine at a concentration of 906 nanograms per milliliter. The Coast Guard's minimum "cut-off" concentration for a "positive" test result is 100 nanograms per milliliter.

On December 9, 1998, the applicant's commanding officer (CO) initiated an investigation into a possible "drug incident," pursuant to Article 20 of the Personnel Manual. On December 12, 1998, the investigating officer reported that he had interviewed the persons responsible for conducting the urinalysis and determined that it had been properly conducted in accordance with the Urinalysis Drug Testing Procedures Manual. The applicant signed a "Miranda/ Tempia Warning," which advised him of the reason for the investigation and of his rights, including his right to remain silent, to consult a lawyer, and to have a lawyer present at any questioning. On the same form, the applicant indicated that he did not wish to consult a lawyer but did wish to submit a statement, in which he wrote the following:

> My work performance clearly shows that I do not engage in such activities as drug use. I am a responsible person to which [sic] my duties include: driving heavy equipment and in charge of all government vehicles on base, among many other tasks. I am a person that practices many sports like surfing, motocross, hiking and inter-island tourism with Coast Guard friends. This kind of active life-style does not have any room for drug use.
>
> On this date I will submit a nutritional supplement which I had been using to which I suspect is the cause of the test results. I will also submit the names of the establishments I went with my wife and [two friends] the night before testing as requested by the investigating officer.

The applicant also told the investigator he had attended sick call that morning and been given two over-the-counter cold medicines. The investigating officer verified this fact and called a doctor of toxicology at the testing laboratory about the applicant's hypotheses regarding the cause of the positive test result. The doctor stated that neither of the two over-the-counter cold medicines nor the nutritional supplement could have caused the positive result for cocaine meta-

bolites. A report submitted by the laboratory states that "[c]ocaine is the only substance known which metabolizes to benzoylecgonine." The doctor also stated that there was no reason for a bartender to add cocaine to a drink because although "cocaine ingested by mouth could trigger a positive result, ... when ingested orally [cocaine has] no psychological effect; the only sensation might be numbness of the lips, tongue, or other mouth parts, since cocaine acts as an anesthetic on direct contact." The investigating officer also reported that a Coast Guard attorney told him that although members often claim their positive urinalyses have resulted from cocaine added to their drinks without their knowledge, the explanation has little credibility because there is no reason for a "drinking establishment [to] incur the expense and risk of adding a controlled substance to its mixed drinks."

The applicant's supervisor at [redacted] signed a statement on his behalf for the investigation. The supervisor stated that since the applicant's marriage about seven months before, his job performance, which had been average, had shown steady improvement. In addition, he stated that the applicant had taken on new responsibilities and that his performance and leadership during the aftermath of a hurricane had "far exceeded" the supervisor's expectations.

The investigating officer concluded that the applicant knowingly and intentionally used cocaine and that his illegal drug use constituted a "drug incident" as defined in Article 20.A.2.k. of the Personnel Manual. He recommended that the applicant be evaluated for drug dependency and administratively separated in accordance with Articles 20.C.4. and 12.B.18.e. of the Personnel Manual. He recommended that no criminal charges be made because the applicant had been performing well and had "not been a source of disciplinary problems for the command."

On December 18, 1998, the applicant's CO notified him that he was recommending that the applicant be discharged for misconduct due to his use of illegal drugs. The CO advised him that no criminal charges would be made and that he had a right to make a statement and consult with a lawyer. He also ordered the applicant to undergo drug dependency screening. In response, the applicant signed a statement indicating that he did desire to consult a lawyer but that he did not wish to submit a statement.

On January 5, 1999, the applicant's CO informed the Commander of the Coast Guard Personnel Command (CGPC) of his recommendation that the applicant be awarded a general discharge by reason of misconduct. He made the recommendation based on his finding that a "drug incident" had occurred since the applicant's urine had tested positive for cocaine. He also stated that the applicant had refused to submit to drug dependency screening and had rejected counseling.

On January 7, 1999, CGPC ordered the CO to discharge the applicant by no later than February 5, 1999, with a general discharge by reason of misconduct due to involvement with drugs and with a JKK separation code.

On February 5, 1999, 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 (ineligible for reenlistment) as his reenlistment code; and JKK (involuntary discharge due to illegal drug abuse) as his separation code.

VIEWS OF THE COAST GUARD

On November 14, 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 dismissed for failure to exhaust administrative remedies because the applicant has not yet sought relief from the Discharge Review Board (DRB). He argued that under 33 C.F.R. § 52.13(b), "[n]o application shall be considered by the Board until the applicant has exhausted all effective administrative remedies afforded under existing law or regulations." Because veterans may apply to the DRB for an upgrade of their discharge anytime within 15 years of being discharged, the Chief Counsel argued, the applicant's case must be considered by the DRB before being reviewed by the BCMR.

The Chief Counsel further argued that, if the Board should for some reason decide not to dismiss this case for failure to exhaust administrative remedies, it should deny the application for lack of merit. He alleged that 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.18.e., 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 also argued that "[a]bsent 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 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979). Moreover, he argued, the applicant has neither disputed the results of the urinalysis nor provided any evidence of error or injustice regarding the urinalysis and his discharge.

Finally, the Chief Counsel stated that, because of the Coast Guard's role in enforcing drug laws, the application involves a significant issue of Coast Guard policy and would be subject to review by the Secretary under 33 C.F.R. § 52.64(b).

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 20, 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.1. of the Coast Guard Personnel Manual states that members may be required to undergo periodic random urinalysis for illegal drug use. 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. 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 Uniform Code of Military Justice 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.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, without being tried by court-

martial, shall be assigned a JKK separation code, an RE-4 reenlistment code, and "misconduct" as the narrative reason for separation shown on their DD 214s.

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. The application was timely.

2. The Chief Counsel argued that, under 33 C.F.R. § 52.13(b), the case should be dismissed for failure to exhaust administrative remedies because the applicant has not yet applied to the DRB for relief. The Board agrees that this case should have been dismissed upon receipt for this reason, and the applicant should have been directed to apply to the DRB before applying to this Board. However, because the Board failed to notice that the applicant had not exhausted his administrative remedies, ten months have passed without action. Therefore, the Board concludes that it would be unfair for it to dismiss this case without ruling on the merits. Moreover, the Board notes that, even if the applicant is dissatisfied with the Board's decision, he can still apply to the DRB for an upgrade of his discharge within 15 years of his date of discharge.

3. The record indicates that the applicant was advised of the Coast Guard's drug policies on the day he enlisted. The record further indicates that after a urinalysis conducted in accordance with regulation on November 19, 1998, the applicant's urine tested positive for cocaine metabolites. Upon receipt of the test results, his commanding officer ordered an investigation, at the conclusion of which he reasonably determined that the applicant had been involved in a "drug incident" as defined in Article 20.A.2.k. of the Personnel Manual. Therefore, under Articles 20.C.4. and 12.B.18., the applicant was subject to an immediate general discharge.

4. The record further indicates that the Coast Guard committed no procedural errors in conducting the investigation into the drug incident or in processing the applicant for discharge by reason of misconduct due to drug abuse. The applicant was informed of and afforded his due rights under Articles 12.B.18.e. and 20.C.3.b.

5. The fact that the applicant's drug abuse did not seem to harm his job performance at [redacted] is insufficient grounds for upgrading his discharge from "general under honorable conditions" to "honorable."

6. Accordingly, the application should be denied for lack of merit.

ORDER

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

[redacted]