DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2000-125

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 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 seaman recruit (SR; pay grade E-1) in the Coast Guard, asked the Board to upgrade his reenlistment code from RE-4 (ineligible for reenlistment) to an RE-3 (eligible for reenlistment except for disqualifying factor which may be waived) so that he can enlist in the Navy.

The applicant alleged that prior to graduating from high school in May 1998, he enlisted in the Coast Guard under the delayed entry program. However, before beginning boot camp on xxxxxx, he made the mistake of using marijuana. As a result, he failed his initial urinalysis when he arrived at boot camp and was separated with a general discharge under honorable conditions for misconduct on xxxxxxxxxxx. He was awarded an RE-4 reenlistment code and a JDT separation code, which means "fraudulent entry into military service, drug abuse."

The applicant alleged that he regrets his mistake and has never been in any other trouble with the law, apart from a speeding ticket. He alleged that he has learned a great deal about responsibility and consequences from his mistake and knows that what he did was wrong.

The applicant alleged that when he was discharged, he was told that he would not be allowed to reenlist in the Coast Guard. In the fall of 1999, he contacted a Navy recruiter and began the process of enlisting in the Navy. However, in January 2000, the recruiter told him that the Navy had changed its rules and would no longer enlist persons with RE-4 reenlistment codes. He was advised that he should apply for an upgrade of his RE code if he wanted to join the Navy.

SUMMARY OF THE RECORD

On xxxxxxxx, the applicant enlisted in the Coast Guard Reserve under the delayed entry program. On xxxxxxxx, he enlisted in the Coast Guard and began boot camp at the training center in xxxxxxx. One of the enlistment papers he signed on xxxxxx, informed him that during recruit training he would be required to undergo urinalysis for the presence of illegal drugs. The enlistment paper further informed him that if his urine tested positive for illegal drug use, he would "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." On another enlistment form, he acknowledged that the Coast Guard's drug policies had been explained to him and that any questions he had concerning those policies had been answered.

On xxxxxxx, the applicant was awarded a general discharge by reason of misconduct with an RE-4 reenlistment code and a JDT separation code. On an administrative entry in his record that day, he acknowledged that he was being awarded the general discharge due to the positive result of a urinalysis that was conducted upon his arrival at the training center.

VIEWS OF THE COAST GUARD

On November 15, 2000, the Board received an advisory opinion from the Chief Counsel of the Coast Guard, in which he recommended that the Board deny the application.

The Chief Counsel argued that the Board should dismiss the application because the applicant did not exhaust his administrative remedies by filing an application with the Discharge Review Board (DRB). The Chief Counsel stated that the DRB "may upgrade a discharge or change the reason for discharge including the authority to review an make changes to an RE or SPD code." *See* 33 C.F.R. § 51.3 and 51.4.

With respect to the merits of the application, the Chief Counsel 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). He pointed out that the applicant did not dispute the results of his urinalysis or allege any procedural error by the Coast Guard. The Chief Counsel alleged that the

Coast Guard "followed established policy when it discharged the Applicant from the service." 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. However, the applicant did not prove or even allege any violation of these procedural rights.

The Chief Counsel also argued that the Coast Guard committed no injustice in discharging the applicant because he was expressly warned when he enlisted that he would be tested for drugs upon beginning boot camp and that a positive urinalysis would render him subject to a general discharge. *See Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976) (holding that an "injustice" requiring correction is treatment by a military authority that "shocks the sense of justice" but is not technically illegal). The Chief Counsel further argued that the applicant's admission that what he did was wrong is evidence that no injustice was committed.

The Chief Counsel alleged that the applicant's DD 214 reflects the proper codes and words prescribed by the Separation Program Designator (SPD) Handbook, which is used by all of the military services, for recruits whose urine tests positive for illegal drug use. He alleged that the fact that the Navy now refuses to enlist persons with an RE-4 reenlistment code does not prove that the Coast Guard committed any error or injustice when it assigned the code to the applicant in accordance with the SPD Handbook. He alleged that the Coast Guard is bound to follow its own regulations, and the Navy's decision not to enlist persons with an RE-4 "is an independent action with no legal moment as to the U.S. Coast Guard's authority to assign" the RE-4 code.

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 any grant of relief by the Board 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 17, 2000, the Board sent a copy of the Chief Counsel's advisory opinion to the applicant and invited him to respond. On December 6, 2000, the Board received the applicant's response.

Regarding his failure to apply to the DRB, the applicant stated that he had been advised by his congressman and by an attorney for the Army who works in his father's office that the proper procedure was to apply to the BCMR. He also stated that a Coast Guard recruiter gave him the DD 149 BCMR application form to use. He argued that because he has waited many months for the BCMR to complete its review, it would be unjust for the case to be dismissed.

The applicant alleged that while assigning him the general discharge, JDT separation code, and RE-4 reenlistment code were clearly within the discretion of the commanding officer of the training center, his exercise of that discretion in this case is not necessarily just. The applicant alleged that the other services do not usually discharge recruits who "test hot" upon entry, and that in the Army, such recruits are usually just assigned to "special detail." The applicant alleged that given (a) the disparate treatment accorded to recruits who "test hot" by the different military services; (b) the fact that his misconduct occurred before he entered on active duty; (c) his young age; and (d) his otherwise clean record, the Board should upgrade his reenlistment code so that he can serve his country in the Navy. He alleged that since his discharge, he has been working as a swimming instructor and lifeguard and that he is enrolled in an Emergency Medical Training program to become a licensed EMS provider.

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 enlisted members involved in a "drug incident," as defined in Article 20, shall be discharged with no higher than a general discharge. It also provides that the "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 that the presence of drugs in their bodies is grounds for a general discharge for misconduct."

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 SPD Handbook states that the JDT separation code is to be assigned when the member's "[i]nvoluntary discharge [is] directed by established directive (no board entitlement) when the member procured fraudulent enlistment, induction or period of military service through deliberate material misrepresentation, omission or conceal-

ment of drug use/abuse." The handbook requires an RE-4 reenlistment code to be assigned when the JDT separation code is used.

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 of the United States Code. The application was timely.

2. The Chief Counsel argued that the case should be dismissed for failure to exhaust administrative remedies by applying to the DRB. Under 33 C.F.R. § 51.3, veterans "may apply to the DRB for a change in the character of, and/or the reason for, the discharge." Under 33 C.F.R. § 51.4, the term "discharge" is defined to include "the assignment of a separation program designator, separation authority, the stated reason for the discharge, and the characterization of service." However, the applicant has asked only for a change in his RE code, which is not mentioned in either 33 C.F.R. § 51.3 or § 51.4. Although a change in the character of discharge ordered by the DRB may sometimes result indirectly in a change of RE code and the BCMR sometimes revises discharges along with RE codes, veterans need not apply to the DRB before applying to the BCMR when their requests concern solely their RE codes. 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 Coast Guard committed no procedural or other legal errors in awarding the applicant a general discharge with a JDT separation code and an RE-4 reenlistment code for testing positive for drug use during boot camp. The applicant neither alleged nor proved any such error.

4. In the absence of error, the Board must determine whether the Coast Guard committed an injustice when it assigned the applicant the RE-4 reenlistment code. The BCMR has "an abiding moral sanction to determine insofar as possible, the true nature of an alleged injustice and to take steps to grant thorough and fitting relief." *Caddington v. United States*, 178 F. Supp. 604, 607 (Ct. Cl. 1959). However, the Deputy General Counsel has ruled that in the absence of legal error, an applicant's treatment by military authorities must "shock the sense of justice" to justify correction by the Board. Decision of the Deputy General Counsel, BCMR Docket No. 346-89 (citing *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976)).

5. The applicant was expressly warned that he would be tested for drug use upon his arrival at boot camp and that he would be subject to a general discharge if he ever tested positive for illegal drug use. He signed an acknowledgement of this warning and certified that he had not used illegal drugs during the previous 60 days.

6. The applicant argued that, although his commanding officer acted within his discretion, his RE-4 code is unjust because (a) the other military services do not automatically discharge recruits who "test hot" upon enlistment, (b) he made this mistake at a young age, and (c) he used the marijuana before beginning military service.

(a) A significant part of the Coast Guard's mission is to prevent the importation and distribution of illegal drugs. In light of this mission, the Coast Guard may be more rigorous in applying the regulations to discharge members and recruits who test positive for illegal drug use. However, the applicant has not only failed to prove this disparity in treatment, he has also failed to prove that the alleged disparity is illegal or unjust in any way. He has not proved that all of the military services must or should treat young recruits who "test hot" identically or leniently.

(b) The fact that the applicant is young does not mean that the Coast Guard committed an injustice when it discharged him and assigned him the JDT and RE-4 codes. The codes were correctly assigned in accordance with the SPD Handbook. The fact that the Navy has now determined that it does not ever want to enlist persons who have been assigned JDT and RE-4 codes for failing urinalysis tests during boot camp does not render the Coast Guard's accurate use of those codes in the applicant's case unjust.

(c) The applicant entered the Coast Guard under the delayed entry program. While he may not have been serving on active duty when he ingested the marijuana, he was presumably already a member of the Coast Guard Reserve and subject to the Uniform Code of Military Justice. Moreover, upon enlisting in the Coast Guard, he signed a false statement denying illegal drug use during the previous 60 days.

7. The applicant has failed to prove by a preponderance of the evidence that the RE-4 reenlistment code on his DD 214 constitutes an error or injustice.

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

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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