DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2002-044

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 docketed on February 13, 2002.

This final decision, dated October 31, 2002, 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 asked the Board to correct her record by upgrading her May 17, 1999, discharge for drug use from general "under honorable conditions" and her reenlistment code and by reversing the revocation of her entitlement to educational benefits under the Montgomery G.I. Bill (MGIB).

The applicant alleged that in March 1999 she "found [her]self in a situation [she] was ill prepared to deal with." The day after she passed the test to become a seaman, she alleged, she was encouraged by a petty officer to use marijuana and did so. She stated that upon discovery, she told the truth and took responsibility for her actions. She alleged that her confession was unsubstantiated by any drug test and that the consequences were unduly harsh since she was following a petty officer's example. She alleged that, even after she was taken to mast and knew that she would be discharged, she served the Coast Guard with honor and integrity.

In support of her request, the applicant submitted two letters of reference and a copy of her final performance evaluation. On the performance evaluation, she received

primarily marks of 4 and 5, a mark of 6 for the category "Integrity," but an "Unsatisfactory" conduct mark and mark of "Not Recommended" for advancement from her rating chain.

One of the letters of reference is written by a first class petty officer, who was the Executive Officer of her station and the supervisor on her rating chain. He wrote that the applicant was "an exceptional performer who excelled in taking on responsibility" He stated that she was "misguided by a few 'bad apples' and ultimately paid the price for her involvement. Throughout the ordeal, [she] remained loyal and dedicated to her duty." He urged that her discharge be upgraded to honorable and that her reenlistment be upgraded to permit her to pursue a military career. He also asked that her MGIB benefits be restored.

A veterinarian for whom the applicant worked after her discharge wrote a letter stating that she is "an exceptional worker" who "has handled difficult situations professionally and has always been a reliable and responsible employee."

SUMMARY OF THE RECORD

On January 13, 1998, at the age of 18, the applicant enlisted in the Coast Guard for four years. On January 27, 1998, she signed a form to enroll in the Montgomery G.I. Bill program, under which members' basic pay is reduced by $100 for each of their first 12 months of service, but they become eligible for $10,800 in educational benefits. The form states that, in addition to the payroll reduction, the member must complete at least 36 months of active duty and receive an honorable discharge to be eligible for the benefit. The form also states that the pay reduction cannot be refunded.

On February 26, 1998, the applicant signed a statement acknowledging that she received "a full explanation of the drug and alcohol abuse program" in compliance with Article 20.A.3. of the Personnel Manual.

On March 12, 1999, the applicant, who was still a seaman apprentice in pay grade E-2, was charged with violating Article 112a of the Uniform Code of Military Justice (UCMJ). A petty officer had told a Coast Guard investigator that he smoked marijuana with her at a local bar in January 1999.

The applicant's record contains a Miranda/Tempia Warning form indicating that she was advised of the charges against her, of her right to remain silent, and of her right to a lawyer. The form also states, "If I decide to make a statement, anything I say may be used as evidence against me in any court-martial, nonjudicial proceeding, administrative proceeding or civilian court." When questioned by the investigator, she submitted a written statement in which she admitted that she had made a "big mistake." She stated that she was "prepared to handle the consequences of my actions, but I don't

want it to jeopardize my career." The investigator reported that she orally admitted to him that she had smoked marijuana on two occasions. He concluded that she had used a controlled substance while serving on active duty.

In light of the evidence, the applicant's commanding officer offered to take her to mast for nonjudicial punishment (NJP), instead of court-martialing her. On March 16, 1999, she signed a form accepting NJP and waiving her right to trial by court-martial. She was advised that if she accepted NJP, her command could impose a maximum punishment of 60 days of restriction, forfeiture of one-half of her pay for two months, and reduction to the next lower pay grade. In addition, she was advised that the results of the proceeding would become a part of her permanent record and "may become the basis for adverse personnel actions." She was also advised that if she insisted on a court-martial and if the command chose to proceed to trial, the maximum punishment that could be imposed was a dishonorable discharge and confinement for up to 10 years.

On March 18, 1999, the applicant was taken to mast. She was represented by a petty officer whom she asked to represent her. She was found guilty and awarded NJP of 45 days of restriction, forfeiture of one-half of her pay for two months, and reduction to pay grade E-1. However, her command suspended all of the sentence and informed the applicant that he would be recommending that she be discharged administratively.

On March 22, 1999, the applicant's command formally notified her that, pursuant to Article 12.B.18. of the Personnel Manual, she was being recommended for discharge by reason of "misconduct due to drug abuse." She was informed of her right to submit a statement in her own behalf. On the same day, the applicant signed a statement indicating that she (a) had received the notice, (b) had been afforded an opportunity to consult a lawyer, (c) waived her right to submit a statement in her own behalf, (d) knew that if she received a general discharge under honorable conditions, she could expect to encounter prejudice in civilian life, and (e) did not object to being discharged.

On April 22, 1999, the Coast Guard Personnel Command ordered that, in accordance with Article 12.B.18. of the Personnel Manual, the applicant and two other members of her unit be administratively discharged by May 17, 1999, with general discharges by reason of misconduct and with the separation code JKK, which denotes an involuntary discharge due to drug abuse that has been proven by evidence other than a urinalysis.

On May 17, 1999, the applicant received a general discharge under honorable conditions by reason of misconduct with a JKK separation code and an RE-4 reenlistment code, which makes her ineligible to reenlist. She had completed one year, four months, and five days of active duty.

Following her discharge, the applicant applied to the Coast Guard's Discharge Review Board. However, that board denied her request on April 30, 2001.

VIEWS OF THE COAST GUARD

On June 28, 2002, the Chief Counsel submitted an advisory opinion in which he recommended that the Board deny relief in this case.

The Chief Counsel stated that a service member "has no absolute legal right to remain in the service" and "may be appropriately and administratively discharged" prior to the end of her enlistment. *Giglio v. United States*, 17 Cl. Ct. 160, 166 (1989); *Rowe v. United States*, 167 Ct. Cl. 468, 472 (1964), *cert. denied*, 380 U.S. 961. He argued that "absent strong evidence to the contrary," the Board should presume that the applicant's command carried out its 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).

The Chief Counsel argued that the preponderance of the evidence in the record indicates that the applicant—after having been notified of her Miranda rights—orally admitted to having smoked marijuana while serving on active duty. Moreover, her statement was corroborated by a fellow member, and she admitted in writing to having made a big mistake. Therefore, the Chief Counsel concluded, the applicant's "commanding officer had a reasonable basis to conclude that she had ingested an illegal substance."

The Chief Counsel alleged that the applicant was not denied any due process with respect to her discharge. As a member with less than eight years of active service, she 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 she was due during the processing of her discharge.

The Chief Counsel also argued that "there is no injustice in Applicant receiving a general discharge" since she signed a form acknowledging that she had been fully informed of the Coast Guard's drug policies. He alleged that she was informed she would receive a general discharge if she was ever discovered to have used illegal drugs. He argued that "[h]er discharge was effected in furtherance of Coast Guard policy and the compelling need for armed forces personnel to remain free of illegal substances."

The Chief Counsel further argued that even if the Board upgraded the applicant's discharge, she would not qualify for MGIB benefits because she failed to complete at least three years of active duty, as required under 38 U.S.C. § 3011.

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 July 1, 2002, the Chair sent the applicant a copy of the advisory opinion and invited her to respond within 15 days. No response was received.

APPLICABLE REGULATIONS

Article 20.A.3.b. states that "[a]ll members entering the Coast Guard, recruits, officer candidates, direct commission officers, and cadets shall have the Commandant's policies on drug and alcohol abuse explained to them during their initial training, documented by appropriate Administrative Remarks (CG-3307) entry in each member's Personnel Data Record."

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."

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 10 U.S.C. § 1552. The application was timely, and the applicant exhausted her administrative remedies by applying to the Discharge Review Board before applying to this Board.

2. The record indicates that the applicant was fully advised of the Coast Guard's drug policies on February 26, 1998, while she was still at boot camp. The record further indicates that, after she was accused by another member of smoking marijuana, she was advised of her Miranda rights by a Coast Guard investigator and admitted that she had in fact smoked marijuana on two occasions. In light of her admission and the corroborating evidence, the Board finds that her commanding officer reasonably concluded 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., she was subject to an immediate general discharge.

3. The applicant did not allege and there is no evidence in the record that the Coast Guard committed any procedural errors in conducting the investigation into the drug incident or in processing her for discharge by reason of misconduct due to drug abuse. The record indicates that the applicant was informed of and afforded her due rights prior to being questioned by the investigator, prior to accepting NJP and waiving her right to court-martial, and prior to being discharged, in accordance with Articles 12.B.18.e. and 20.C.3.b. of the Personnel Manual and Article 15 of the UCMJ.

4. When the Coast Guard has not committed any errors, the Board must still consider whether the applicant's record contains an injustice. 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). The applicant was just 19 years old when she was apparently encouraged to smoke marijuana by an older petty officer. When confronted, she honestly admitted her mistake. In light of these facts and the consequences to the applicant, her general discharge seems harsh. However, the Deputy General Counsel has held that, in the absence of error or a denial of due process, not every seeming injustice in an applicant's record should be corrected by the Board. Only serious injustices, such as those that "shock the sense of justice," require correction. *See 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)).

5. In light of the fact that the applicant was fully warned on February 26, 1998, about the legal consequences of using illegal drugs in the Coast Guard, the Board cannot find that the applicant's general discharge and RE-4 reenlistment code constitute a serious injustice. The Board finds that the applicant has not proved by a preponderance of the evidence that her character of discharge or reenlistment code should be upgraded.

6. Upon enlisting in the Coast Guard, the applicant enrolled in the MGIB program and signed an acknowledgment of the statutory requirements for earning the benefits. As the Chief Counsel argued, she is not entitled to those benefits not only because of the character of her discharge, but also because she failed to complete at least three years of active duty. The Board finds that the applicant has not proved that her failure to qualify for MGIB benefits is the result of an error or injustice committed by the Coast Guard.

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

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of former xxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of her military record is denied.

(abstained)*

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* The member participated in the deliberations of this case but chose to abstain in the vote. Under the Board's rules at 33 C.F.R. § 52.11, two members constitute a quorum of the Board. Therefore, the Board's decision is final.