DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 2003-041

FINAL DECISION

[redacted]

This is a proceeding under section 1552 of title 10 and section 425 of title 14 of the United States Code. The application was docketed on February 24, 2003,[1] the date the Board received the applicant's complete application for correction of his military record.

This final decision, dated October 30, 2003, is signed by three duly appointed members who were designated to serve as the Board in this case.

The applicant asked the Board: (1) to remove all references to his August 9, 199x urinalysis test; (2) to remove all documents which reference the positive urinalysis test as the basis for his discharge from the Reserve; (3) to delete misconduct as the reason for his discharge as well as the corresponding separation code (HKK); (4) to award him an honorable discharge; and (5) to award him all pay, entitlements, and allowances that he is due, if his record is corrected.

On August 9, 199x, the applicant gave a urine specimen that tested positive for marijuana. Subsequently, he was discharged from the Reserve on February 24, 199x, with a general discharge under honorable conditions, by reason of misconduct due to a drug incident. He was also assigned an RE-4 (not eligible for reenlistment) reenlistment code.

SUMMARY OF RECORD AND SUBMISSIONS

The applicant was a member of the Coast Guard Reserve from January 25, 197x, until his discharge on February 24, 199x. He stated that at the time of his discharge, he was a qualified and experienced machinist mate, having provided over sixteen years of excellent service in the Reserve. He stated that he participated in a random urinalysis collection on August 9, 199x. He alleged that he was never shown any evidence that his

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[1] The application was received on January 10, 2003, but was not docketed until February 24, 2003 after the Board received the applicant's military record, which constituted a complete application.

urine specimen actually tested "positive" for marijuana, that he was denied his right to see and refute the evidence against him, and that he was denied the right to have his urine specimen retested. He stated that he was advised of his Article 31 rights, but the fact that he chose to remain silent was used against him. More importantly, he asserted that the Coast Guard violated Article 12 of the Personnel Manual when it discharged him without first convening an administrative discharge board (ADB) [2] to hear his case.

The applicant stated that Article 12.B.18.d. of the Personnel Manual requires "All cases where a discharge under other than honorable conditions by reason of misconduct is contemplated" to be processed as prescribed by Article 12.B.32., which details regulations for ADB hearings. Under this provision, members entitled to an ADB have the right to counsel and to a hearing before a three-member board that weighs the evidence and recommends to the commandant whether the member should be retained in or discharged from the Coast Guard. In addition, he stated that Article 12.B.32.a.(1) of the Personnel Manual requires a waiver of an ADB to be in writing. He argued, therefore, that an ADB was mandatory in his case because he never waived his right to an ADB in writing or otherwise.

Discharge from the Coast Guard Reserve

On November 10, 199x, the applicant's commanding officer (CO) notified the applicant that he was recommending the applicant's discharge from the Coast Guard Reserve under other than honorable conditions for misconduct due to a drug incident. The applicant was advised that he had a right to an ADB and the right to be represented by a military attorney. He was also advised that he had a right to have his sample retested. There was also a place on this letter for the applicant to acknowledge by his signature that he had "received, read, and under[stood] this letter." (There is no evidence in the record that the applicant ever signed this acknowledgement.)

Also, on November 10, 199x, the CO recommended to the Commandant that the applicant be discharged from the Reserve. The CO wrote that he was notified on August 24, 199x, that the applicant's urine sample had tested positive for THC (marijuana metabolite) and the CO immediately resubmitted the sample to the laboratory for confirmation. He stated that on September 28, 199x, the laboratory reported to the unit drug coordinator that the applicant's resubmitted sample also tested positive for THC.

On February 7, 199x, the applicant's CO wrote to the Commander, First Coast Guard District recommending that the applicant's case be closed because the applicant

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[2] Article 12.B.31.a. of the Personnel Manual states that an administrative discharge board "is a fact-finding body appointed to render findings based on the facts obtained and recommend either retention in the Service or discharge. If recommending a discharge, the board also recommends a reason for discharge and the type of discharge certificate to be issued."

had not signed the November 10, 199x letter advising him that he was being recommended for a discharge from the Coast Guard.

On February 16, 199x, the Commander, First Coast Guard District recommended to the Commandant that the applicant's case be closed because the applicant had not responded to the letter informing him of the recommended discharge and of the right to an ADB.

On February 24, 199x, the Commandant authorized the discharge of the applicant under honorable conditions due to misconduct, with an RE-4 reenlistment code.

The applicant stated in an affidavit to the BCMR that he never acknowledged in writing the letter advising him of his discharge and right to an ADB because legal counsel advised him not to sign it if he did not agree with it. The applicant stated, however, that he orally requested an ADB but was not given one. He also stated that he wanted to have the urine specimen retested but was told none of the sample was available. The applicant stated that he was removed from his pay billet and assigned to the individual ready reserve (IRR).

Discharge Review Board (DRB) Decision

The applicant filed an application with the Discharge Review Board (DRB) on November 22, 199x. On or about September 28, XXXX, he received a decision from the DRB refusing to upgrade his general discharge under honorable conditions to an honorable one. Although the DRB denied the applicant's request for an upgrade of his discharge, it made the following pertinent comments:

> The [DRB] was disturbed by weaknesses in the command's handling of the initial interview with [the applicant] on 31 October 199x, documentation of attempts at follow-up contact, preservation of documentation, and an error in documentation of the urinalysis. There is no written acknowledgement by the applicant of the initial interview by the Reserve Unit [CO] or Executive Officer on 31 October 199x. Nor is there a statement by the interviewer and a witness noting the applicant's refusal to sign. The 10 November 199x letter documenting the interview is incomplete. There is no first-hand record of the results of the urinalysis test, nor of the sample collection (in which individuals sign for their sample numbers). The 10 November 199x letter refers to urine samples "CG-1485-718" and C6 1482-717". The command's follow-up letter dated 7 February 1993 refers to these samples as "# 1482-717" and "#1482-718". Attempts at follow-up contact with the member are not documented, other than a general statement in the 7 February 199x letter addressed to [the applicant]. On executing the discharge on 24 February 199x, there is no record of notification being sent to the applicant.

> Although the 31 October 199x, interview was not acknowledged by the applicant at the time, he did recall the interview in his testimony before the [DRB]. He testified that he requested a copy of the urinalysis test results, but did not receive any. He was clearly aware that there had been a positive urinalysis test and that he had been advised of his rights. He also mentioned receiving a letter from his commanding officer. He testified that the pressures of managing his business prevented him from responding or taking follow-up action. It was the applicant's duty to respond to the command's letter, and he failed to do so. Knowing the implications of the proposed discharge, he failed to protest the discharge or contest the findings of the urinalysis. The record indicates that from the applicant's failure to respond, the command assumed that the applicant intended not to challenge the urinalysis results or the proposed discharge. While this may have been a mistaken assumption according to the applicant's testimony, the [DRB] concluded it was reasonable, and not improper, arbitrary, nor capricious.
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> . . . While there are weaknesses in the documentation as noted, the record as a whole, coupled with the applicant's testimony, shows that a positive urinalysis test took place and the command took appropriate administrative action which led to a General Discharge by reason of Misconduct. In effecting the discharge, there is no evidence that the Coast Guard acted improperly, arbitrarily, or capriciously. The discharge was proper.

Views of the Coast Guard

On July 7, 2003, the Board received an advisory opinion from the Chief Counsel of the Coast Guard. He recommended that the Board grant partial relief by correcting the applicant's record to show that he was honorably discharged for convenience of the government under Article 12.B.12.a.17 of the Personnel Manual. He did not recommend that the applicant's RE-4 reenlistment code be upgraded.

The Chief Counsel stated that the preponderance of the evidence refuted all of the applicant's allegations except for the error committed by the Coast Guard in not convening an ADB hearing in his case. He stated that the Coast Guard's failure to conduct an ADB hearing, absent a signed waiver from the applicant, constituted procedural error.

The Chief Counsel stated that while partial relief is appropriate in this case, the applicant's RE-4 reenlistment code should not be changed. In this regard, the Chief Counsel noted that the applicant never denied that he was involved in a drug incident. He further stated the following:

> Applicant's discharge was originally effected in furtherance of the Coast Guard's zero-tolerance policy for illegal drug use. The compelling need

> for armed forces personnel to remain free of illegal substances warrants continued consideration in this case. Applicant's Commanding and Executive Officers determined that Applicant was involved in a drug incident . . . The Coast Guard DRB later affirmed this finding . . . The Coast Guard's administrative error does not change the facts underlying these determinations. Furthermore, Applicant has not provided any evidence to show that this error was anything other than a good faith mistake. Accordingly, the services' procedural oversight should not provide grounds to undermine the integrity of its ranks by affording Applicant the opportunity to reenlist.
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> . . . Applicant does not specifically request that he be allowed to reenter the armed forces. Accordingly, the nature of relief Applicant seeks can be granted without changing his reenlistment code.

The Chief Counsel stated a service member has 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. He stated that 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). He argued that the Coast Guard's error in this case was a "good faith mistake" and the applicant has not shown otherwise.

The Chief Counsel stated that he adopted the memorandum from Commander, Coast Guard Personnel Command, which was attached as Enclosure (1) to the advisory opinion. CGPC stated that Article 12.B.32 of the Personnel Manual provided only one exception for a requirement to obtain a written waiver for an ADB. That one exception applied to members in civilian confinement who after notification by registered mail could waive an ADB by declining to reply to the ADB notification letter. He stated that the applicant's case did not meet the exception for not obtaining a written waiver for an ADB hearing. He further stated that under Article 12.B.32 of the Personnel Manual "a board should have been convened after the Applicant was given a reasonable time to waive this right." He stated that because the applicant never waived, in writing, his right to an ADB hearing, the Coast Guard's failure to convene an ADB constituted error.

CGPC stated that he concurred with the DRB that the applicant was aware of the recommendation to discharge him and of his due process rights; that the applicant had sufficient time to exercise his due process rights because he was notified of them at least a month before his discharge; and that the applicant had engaged in a drug incident. However, CGPC noted that the DRB decision failed to address the Coast Guard's error of not convening an ADB in the applicant's case.

CGPC did not recommend upgrading the applicant's RE-4 reenlistment code, stating the following:

> [A]uthorizing the applicant's reinstatement is not in the best interest of the government. The Coast Guard's conclusion that the Applicant was involved in a drug incident is substantiated by the available record, and that allowing the Applicant the possibility of reenlistment would degrade its ability to enforce its zero tolerance policy on the illegal use of drugs and degrade its law enforcement mission. Furthermore, ten years have elapsed since the applicant's separation. He is no longer qualified for reenlistment in the rating he [held when] discharged, and the investment in time and money to reestablish the applicant's qualifications would be an unreasonable burden for the government to bear.

Applicant's Response to the Views of the Coast Guard

On April 15, 2003, the Board received the applicant's response to the views of the Coast Guard. He stated in the interest of compromise and expeditious resolution of his claim, he accepted the Coast Guard's recommendation for relief and he agreed not to further pursue upgrading his RE-4 reenlistment code.[3] In this regard, he stated the following:

> This agreement by the parties renders further analysis and argument on the issue superfluous and [Applicant] urges the [Board] to adopt the agreed position of both parties and enter a finding and order allowing the requested relief, with the exception of removal of the contested reenlistment code.

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 submission, and applicable law:

1. The Board has jurisdiction of this case pursuant to section 1552 of title 10 United States Code. The application was timely. An applicant has fifteen years from the date of discharge to apply to the Discharge Review Board (DRB) for an upgrade of his discharge. The applicant applied to the DRB approximately three and one-half years after his discharge, and the DRB issued a final decision on September 26, xxxx. According to Ortiz v. Secretary of Defense, 41 F. 3rd. 738 (D.C. Cir. 1994), the BCMR's three year statute of limitations begins to run at the conclusion of DRB proceedings for

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[3] Although the applicant agreed with the Chief Counsel's recommendation for relief, he took issue with several of the statements in the Coast Guard's advisory opinion. Since these differences are irrelevant to the major issue of whether the Coast Guard erred in not convening an ADB, they are not summarized in this final decision.

an applicant who is required to exhaust administrative remedies by applying to the DRB before seeking redress from the BCMR. Under 33 CFR § 52.13, the applicant was required to exhaust his administrative remedies by applying to the DRB. Therefore, the applicant's BCMR application, received by the Board on January 10, 2003, was timely.

2. The Chairman has recommended disposition of the case without a hearing, pursuant to 33 CFR § 52.31. The Board concurs in that determination.

3. The Coast Guard admitted that it committed an error in the applicant's case by failing to convene an ADB before discharging him from the Coast Guard with a general discharge under honorable conditions due to misconduct. Therefore, the Chief Counsel recommended that the Board grant relief to the applicant by correcting his record to show that he was honorably discharged form the Coast Guard for the convenience of the government pursuant to Article 12.B.12.a.17 of the Personnel Manual, but the Coast Guard did not recommend upgrading the applicant's reenlistment code. The Separation Designator Code (SPD) Handbook permits an RE-4 reenlistment code with a discharge by reason of Secretarial authority. The applicant accepted the recommendation of the Coast Guard and agreed not to contest the RE-4 reenlistment code if the Board ordered the relief recommended by the Coast Guard.

4. The Board finds that the Coast Guard committed a substantial error by discharging the applicant with a general discharge due to misconduct without an ADB hearing, as required by the Personnel Manual. The error appears even more egregious in the applicant's case because he was a sixteen-year veteran of the Coast Guard Reserve. Article 12.B.18.d. of the Personnel Manual requires that a member who is being considered for an other than honorable discharge or a member with more than eight years of service, like the applicant, who is being considered for discharge by reason of misconduct shall be processed in accordance with Article 12.B.32 of the Personnel Manual, which provides for a hearing before an ADB. However, under Article 12.B.32.b. of the Personnel Manual, the Coast Guard could have discharged the applicant without convening an ADB hearing, if the applicant had waived his right to the hearing in writing. There is no written waiver of the applicant's right to an ADB in the record. Therefore, in light of the Coast Guard's violation of the applicant's due process rights, the Board will direct that the applicant's record be corrected in the manner recommended by the Coast Guard and agreed to by the applicant.

5. Neither the Chief Counsel nor the applicant discussed the separation code to be applied if the Board ordered the relief recommended by the Chief Counsel and agreed to by the applicant. In reviewing the SPD handbook, the Board finds that JFF is the appropriate separation code for the relief being granted. A JFF code means an "Involuntary discharge directed by established directive . . . when separation is made by order of the Department Secretary of the Service component in which member is serving."

6. The applicant is not entitled to a DD Form 214 (certificate of discharge or release from active duty) because he was not on active duty at the time of his discharge

but was serving on inactive duty in the Reserve. In correcting the applicant's record, the Coast Guard's attention is directed to Personnel Action Form (CG3312a), which describes the applicant's February 24, 199x discharge as a general discharge under honorable conditions due to misconduct, as well as any other documents that may contain this erroneous information.

7. Any other issues raised by the applicant in this application are rendered moot by his agreement not to challenge his RE-4 reenlistment code if the Board ordered his record corrected as recommended by the Coast Guard. The Board finds the relief recommended by the Coast Guard and accepted by the applicant to be an appropriate remedy for the failure of the Coast Guard to convene an ADB in the applicant's case.

8. Accordingly, the applicant is entitled to partial relief.

ORDER

The application of xxxxxxxxxxxxxxxxx, USCGR, for the correction of his military record is granted in part and denied in part. His record, including Coast Guard Form (CG3312a), shall be corrected to show that he was honorably discharged from the Coast Guard Reserve for the convenience of the Government by reason of Secretarial Authority, pursuant to Article 12.B.12. of the Personnel Manual, with a JFF separation code.

All other relief is denied.