


**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2004-133

FINAL DECISION


This is a proceeding 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 June 4, 2004, upon the Board's receipt of the applicant's complete application for correction of his military record.¹

This final decision, dated February 10, 2005, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant asked the Board to correct his record upgrading his under honorable discharge to an honorable discharge, by changing his RE-4 (not eligible) reenlistment code to RE-1 (eligible to reenlist), and by changing the reason for his discharged from misconduct to convenience of the government.

The applicant was discharged from the Coast Guard under honorable conditions (commonly known as a general discharge) by reason of misconduct (drug abuse). He was assigned an RE-4 (not eligible for reenlistment) reenlistment code and a JKK separation code.

APPLICANT'S ALLEGATIONS

¹ Even though the application was not placed on the docket until June 4, 2004, the Board received the DD Form 149 on May 6, 2003. The application could not be placed on the docket until the Board received the military record, which was June 4, 2004.

The applicant did not allege a specific error with respect to his discharge, but he stated that his record of promotions showed that he was an excellent service member and that he received awards and decorations as shown on his DD Form 214. He stated that since his discharge he has been an excellent citizen, employee and father. He submitted a letter from his employer who stated that the applicant is an asset to his company and recommended the applicant to anyone "looking for an honest, dedicated, professional person." The applicant also sent a letter from a family friend who works with the Virginia State Police and one from a fellow employee. Each of these individuals spoke highly of the applicant.

SUMMARY OF RECORD

The applicant enlisted in the Coast Guard on March 3, 1992. At that time, he signed an administrative remarks page (page 7), which advised him of the following:

I have been advised that the illegal use or possession of drugs constitutes a serious breach of discipline [,] which will not be tolerated. Also, illegal drug use or possession is counter to esprit de corps & mission performance and jeopardizes safety. No member will use, possess, or distribute illegal drugs, drug paraphernalia or hemp oil products. I also understand that upon reporting to recruit training, I will be tested by urinalysis for the presence of illegal drugs. If my urine test detects the presence of illegal drugs I may be subject to discharge and receive a general discharge.

On September 11, 1995, the applicant participated in a random unrinalysis screening by providing a urine sample to be tested for the presence of illegal drugs.

On September 20, 1995, the applicant's urine was found to contain THC (a marijuana metabolite).

On November 1, 1995, the applicant's commanding officer (CO) informed the applicant that he had initiated action to discharge the applicant from the Coast Guard with a general discharge under honorable conditions due to drugs. The CO advised the applicant that he could submit a statement in his own behalf and consult with a lawyer.

On November 1, 1995, the applicant acknowledged notification of the proposed discharge, did not object to being discharged, waived his right to submit a statement in his own behalf, acknowledged that he had been provided with the opportunity to consult with a lawyer but waived his right to do so.

On November 7, 1995, the applicant's CO recommended that Commander, Coast Guard Personnel Command (CGPC) discharge the applicant due to wrongful use of illegal drugs discovered in the applicant's urine specimen that was provided during a random urinalysis collection.

On November 15, 1995, CGPC directed that the applicant be discharged due to misconduct/drug abuse.

On December 8, 1995, the applicant was discharged from the Coast Guard. He had served three years, nine months, and six days on active duty.

VIEWS OF THE COAST GUARD

On October 19, 2004, the Board received an advisory opinion from the Judge Advocate General 9(TJAG), recommending that the Board deny the applicant's request for relief.

TJAG stated that instead of disputing the accuracy of the drug test administered to him, the applicant points to his generally good service while in the Coast Guard and his post-service conduct as evidence that the characterization of his Coast Guard service was unjust.

TJAG also stated that given the Coast Guard's prominent role in enforcing the nation's drug laws, the Coast Guard's policy on separating drug abusers and assigning a reenlistment code of RE-4 makes perfect sense. He stated that the applicant had failed to articulate why this rational policy should apply to everyone but himself.

Finally, TJAG asserted that absent strong evidence to the contrary, government officials are presumed to have carried out their duties correctly, lawfully, and in good faith. See Arens v. United States, 969 F.2d 1034, 1037 (D.C. Circuit 1992).

Attached to the advisory opinion as Enclosure (1) were comments from CGPC, who offered the following:

The applicant alleges no error in the proceeding that led to his separation, and I find no evidence of error or injustice in the record to recommend approval of the applicant's request . . . The record also indicates that the applicant was counseled extensively concerning Coast Guard policies on the use of illicit substances and the consequences for violating them.

[T]he applicant requests relief on the basis of his conduct as a civilian. In support of his request, he provides ample evidence of his good citizenship

subsequent to his discharge. However, the applicant's discharge was and is appropriate, and accurately reflects the character of the applicant's period of service with the Coast Guard. The applicant engaged in a serious infraction of the Coast Guard's core values of Honor, Respect, and Devotion to Duty that would result in a discharge with the same characterization today. The Coast Guard has no policy, nor is it contemplating a policy, to upgrade the discharge of members based solely on their subsequent good behavior in civilian life, especially discharges concerning the use of illegal drugs.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 20, 2004, a copy of the Coast Guard views was sent to the applicant for any response that he desired to make. He did not submit a response.

DISCHARGE REVIEW BOARD (DRB) PROCEEDINGS

Prior to filing his application with the Board, the applicant exhausted his administrative remedies by filing an application with the DRB. On April 17, 2001, the DRB issued a decision refusing to upgrade the applicant's general discharge under honorable conditions, the reason for his discharge, or his RE-4 reenlistment code. In denying relief to the applicant, the DRB stated the following:

The [DRB] determined that since there was no error in fact or law, and that the exercise of discretion by Coast Guard authorities was appropriate, the discharge was proper. The [DRB] determined that neither the character of the discharge nor reason or authority for the discharge should be changed, corrected, or modified.

APPLICABLE REGULATIONS

Article 12.B.18.b.4.a. of the Personnel Manual states the following:

Involvement with Drugs. Any member involved in a drug incident or the illegal, wrongful, or improper sale, transfer, manufacture, or introduction onto military installation of any drug . . . will be processed for separation from the Coast Guard with no higher than a general discharge. 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 the presence of drugs in their bodies is grounds for a general discharge for misconduct.

Separation Program Designator (SPD) Handbook, section two, authorizes only the assignment of an RE-4 reenlistment code for the JDT separation code. The SPD Handbook states that the JDT separation code is appropriate when there is an "[i]nvoluntary discharge directed by established directive (no board entitlement) when a member procured fraudulent enlistment, induction or period of military service through deliberate material misrepresentation, omission or concealment of drug use/abuse."

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 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 five years after his discharge, and the DRB issued a final decision on April 17, 2001. Pursuant to 33 CFR § 52.13, the applicant was required to exhaust his administrative remedies by applying to the DRB. 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 an applicant who is required to exhaust administrative remedies by applying to the DRB before seeking redress from the BCMR. Therefore, the applicant's BCMR application, received by the Board on May 6, 2003, was timely.

2. The applicant has failed to prove by a preponderance of the evidence that the Coast Guard committed an error in discharging him with a general discharge under honorable conditions because of misconduct/drug abuse. Article 12.B.18.b.4.a. of the Personnel Manual states that any member involved in a drug incident or the illegal, wrongful, or improper sale, transfer, manufacture, or introduction onto military installation of any drug . . . will be processed for separation from the Coast Guard with no higher than a general discharge. Moreover, when the applicant enlisted, he signed a page 7 entry warning him that the illegal use of drugs would result in discharge from the Coast Guard.

3. The applicant's post-service good conduct is not a sufficient basis for upgrading his discharge due to misconduct, particularly in light of the Service's zero

tolerance for drug use. According to a 1976 memorandum from the General Counsel who was then the Secretary's delegate, good post-service conduct is not a sufficient basis on which to upgrade a discharge.

4. The general discharge for misconduct drug use was assigned in accordance with regulations. The SPD handbook authorizes only the assignment of only an RE-4 reenlistment code with the JKK (drug use/abuse) separation code.

5. The applicant failed to prove an error or injustice in this case. Accordingly, relief should be denied.

ORDER

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

