

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-145

**XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX**

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 Chair docketed the application upon receipt of the applicant's completed application May 8, 2009, and subsequently prepared the final decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated January 14, 2010, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND BACKGROUND

The applicant asked the Board to correct his record by upgrading his discharge under honorable conditions (commonly referred to as a general discharge) to an honorable discharge.

The applicant enlisted in the Coast Guard on January 10, 2000, and was discharged under honorable conditions on February 16, 2001, by reason of misconduct. He was assigned an RE-4 reenlistment code and a JKK (drug abuse) separation code. At the time of enlistment and prior to recruit training, the applicant was counseled about the Coast Guard's policy on illegal drugs on an administrative remarks page (page 7) dated January 10, 2000. The page 7 stated the following, in pertinent part: "I have been advised that the illegal use or possession of drugs constitutes a serious breach of discipline which will not be tolerated . . . No member will use, possess, or distribute illegal drugs or drug paraphernalia."

During a command investigation that occurred from December 7, 2000 to December 18, 2000, the applicant admitted to a one-time use of marijuana while in the Coast Guard. At the time of the misconduct the applicant was approximately 20 years old. On December 20, 2000, the applicant was punished at captain's mast (also known as non-judicial punishment (NJP)) for wrongful use of a controlled substance.

APPLICANT'S ALLEGATIONS

The applicant stated that he wants nothing more than to serve his country and community, but he has been unable to do so because of the under honorable conditions discharge. He stated that he discovered the alleged error on April 12, 2007, and that it is in the interest of justice to waive the untimeliness because he has shown to the community that he can become an outstanding police officer.

In support of his application, the applicant submitted a statement from the Sheriff of [REDACTED]. The Sheriff believed that the applicant's discharge should be upgraded to honorable because the applicant is a good candidate for a career in law enforcement, but is prevented from working in the field due to his military discharge. The sheriff further explained:

[The applicant] spent several months working with the [REDACTED] Sheriff's Department as an intern doing a field practicum from [REDACTED] College. He was assigned to our investigative division, patrol division, and spent time working at our correctional facility. I received no negative comments from any of his supervisors during this time.

[The applicant] took our Civil Service Test for full-time employment and passed the written exam as well as the interview. However, his background check revealed the less than honorable discharge.

The applicant submitted a transcript from [REDACTED] College showing that he received an Associates Degree in criminal justice in February 2009.

The applicant submitted a statement from the Lead Criminal Justice Instructor at [REDACTED] College. She highly recommended the applicant for employment as a law enforcement officer. Her letter is dated June 18, 2008.

Discharge Proceedings

On December 28, 2000, the applicant's commanding officer (CO) advised the applicant that the CO was recommending that the Commandant discharge the applicant from the Coast Guard under honorable conditions due to a drug incident. The basis for the discharge was the applicant's admission that he had used marijuana while on active duty in the Coast Guard. The applicant was punished at captain's mast for wrongful use of marijuana on December 20, 2000. The applicant was advised in writing that he could submit a statement, that he could object to the discharge and that he had the right to consult with a lawyer.

On December 28, 2000, the applicant signed a statement in which he acknowledged the proposed discharge, did not object to it, and waived his right to submit a statement. He consulted with a lawyer on January 25, 2001.

On January 9, 2001, the CO recommended that the Commandant discharge the applicant with a general discharge due to a drug incident. The CO stated that his recommendation was based on the applicant's admission that he used marijuana on at least one occasion while assigned to the unit. In this regard the CO stated, "This admission was made during a preliminary investigation conducted from 11 December to 18 December 2000 as a result of allegations that [the applicant] was using drugs" The CO wrote that notwithstanding the off-duty use of drugs, the applicant had been an asset to the engineering department. "He spent numerous liberty hours ensuring [the cutter] was prepared to sail on time. Additionally, he always has an upbeat attitude and demonstrated strong initiative as he worked hard to qualify for his watchstations."

On January 22, 2001, the Commandant directed that the applicant be discharged with a general discharge by reason of misconduct due to involvement with drugs. The Commandant directed that the applicant receive a JKK separation code with the appropriate narrative reason indicated in the Separation Program Designator (SPD) Handbook.

Discharge Review Board (DRB) Decision

Prior to filing his application with the BCMR, the applicant submitted an application to the DRB for an upgrade of his discharge. The DRB members voted unanimously to recommend denial of relief. On August 24, 2007, the Commandant of the Coast Guard approved the DRB's recommendation. The DRB members recognized the applicant's one-time use of drugs as a youthful indiscretion and a lapse in judgment, but felt that the discharge was carried out in accordance with Coast Guard policy.

VIEWS OF THE COAST GUARD

On September 30, 2009, the Board received an advisory opinion from the Judge Advocate General (JAG), of the Coast Guard recommending that the applicant's request be denied. The JAG stated that Coast Guard policy and past BCMR findings dictated that in considering the character of a discharge, the Board should not upgrade a discharge based on post-discharge conduct alone, but may "take into account changes in the community mores, civilians as well as military, since the time the discharge was rendered, and upgrade a discharge if it is judged to be unduly severe in light of contemporary standards." The JAG further stated that Article 12.B.18.b.4.a. of the Personnel Manual mandates a separation for drug use with a characterization no higher than a general discharge. The applicant's discharge under honorable conditions is consistent with CG policy and not unduly severe.

The JAG also adopted the facts and analysis provided by Commander Personnel Service Command (PSC) as a part of the Coast Guard's advisory opinion. PSC stated that the discharge was in accordance with Coast Guard policy and noted that the CO's discharge recommendation, the applicant's discharge, and the DRB decision support that policy. PSC stated that the applicant did not contest the findings of the DRB or allege that he had been treated unjustly. PSC concurred with the findings of the DRB and argued that the Coast Guard's actions are presumptively correct in the absence of evidence to the contrary.

APPLICANT'S REPOSENSE TO THE VIEWS OF THE COAST GUARD

On October 1, 2009, a copy of the Coast Guard views was sent to the applicant for any response that he wanted to make. The BCMR did not receive a response from the applicant.

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.

Article 20.A.2.k. of the Personnel Manual then in effect defined a drug incident as follows:

Intentional drug abuse, wrongful possession of, or trafficking in drugs. If the use occurs without a member's knowledge, awareness, or reasonable suspicion or is medically authorized, it does not constitute a drug incident. A civil or military conviction for wrongful use, possession, etc., of controlled substances is prima facie evidence of a drug incident. 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.1.b. places responsibility on COs for ensuring their unit's compliance with the Coast Guard's Drug Abuse Program. "Commanding officers shall investigate all circumstances in which the use or possession of drugs appears to be a factor, and take appropriate administrative and disciplinary action.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's submissions and military record, 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.

2. Under 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22, an application to the Board must be filed within three years after the applicant discovers, or reasonably should have discovered, the alleged error or injustice. Although the applicant filed his application with the Board more than three years after he knew or should have known of the alleged error on his DD 214, he filed it within three years of the DRB decision. The DRB has a fifteen-year statute of limitations. Under *Ortiz v. Secretary of Defense*, 41 F.3d 738, 743 (D.C. Cir. 1994), the application is considered timely because the Board's statute of limitations is tolled during the DRB proceedings.

3. The applicant's admission that he had used marijuana while in the Coast Guard constituted a drug incident for which he was punished at captain's mast. Article 20.A.2.k. of the Personnel Manual defines a drug incident as the intentional use of drugs, the wrongful possession of drugs, or the trafficking in drugs. Article 20.A.2.k.1. of the Personnel Manual gives the applicant's CO the authority to determine if the applicant's drug use was a drug incident. Article 20.C.3.c. states that in determining whether a drug incident occurred, a commanding officer should consider all the available evidence. Under Article 20.D.3.d. of the Personnel Manual, a preponderance of the evidence is the evidentiary standard for finding that a member is involved in a drug incident. The applicant's admission that he had used marijuana, particularly in the absence of other evidence to the contrary was sufficient for the CO to conclude that he was involved in a drug incident.

4. Under the Personnel Manual, an under honorable conditions discharge is appropriate for a discharge due to a drug incident. Article 12.B.18.b.4.a. of the Personnel Manual makes it clear 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." The applicant signed an administrative remarks page (page 7) on January 10, 2000, advising him of the Coast Guard's drug policy. The applicant was afforded his due process rights prior to discharge and does not make any claim that he was denied any such rights. Based upon the above, the applicant has failed to prove an error with respect to his discharge.

5. The applicant has not shown that his under honorable conditions discharge was unjust. "[i]njustice', when not also 'error', is treatment by the military authorities, that shocks the sense of justice, but is not technically illegal." *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976). The applicant was warned about the Coast Guard's policy with regard to the illegal use of drugs when he entered active duty. The applicant's admission, his youthful age at the time of the offense, his work ethic and his upbeat attitude did not dissuade the CO from recommending the applicant's discharge or CGPC from approving the discharge. The Coast Guard has a zero tolerance policy toward drug use and its decision to discharge members involved in drug incidents with no higher than a general discharge is reasonable given its mission of drug interdiction.

6. The Board is sympathetic to the applicant's plea for an honorable discharge so that he can work in the law enforcement field. However, the applicant's inability to serve in the civilian law enforcement field does not prove that the Coast Guard committed an injustice by discharging him with an under honorable conditions discharge in accordance with the applicable regulation. The Secretary's delegate stated in a 1976 memorandum¹ that Board should not upgrade a discharge based on post-discharge conduct alone, but may "take into account changes in the community mores, civilians as well as military, since the time the discharge was rendered, and upgrade a discharge if it is judged to be unduly severe in light of contemporary standards." There has not been a change in the manner in which the Coast Guard treats members involved in drug incidents since the applicant's discharge. The Coast Guard looked unfavorably upon

¹ Department of Transportation, Office of the Secretary Memorandum, *BCMR and "Clemency,"* July 2, 1976.

illegal drug use at the time of the applicant's discharge and continues to do so today, and it still refuses to grant honorable discharges for member discharged due to drug incidents.

7. Accordingly, the applicant has failed to prove an error injustice and his request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

