DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2011-129

Xxxxxxxxxxxxxxxxxx
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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 case after receiving the applicant's completed application on March 22, 2011, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated January 12, 2012, 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 ALLEGATIONS

The applicant, who received a general discharge from the Reserve for involvement with illegal drugs, asked the Board to either reinstate him in the Reserve or upgrade his discharge to honorable and his reentry code to RE-1 so he may reenlist in another military service. He also asked the Board to "have any entry removed from the National Crime Information Center" (NCIC). He stated that although he was never charged with an offense, much less tried or convicted, the Coast Guard entered a charge against him in the NCIC.

The applicant alleged that he never intentionally ingested any illegal substance but was apparently a victim of innocent ingestion. The applicant alleged that in his civilian work, he has clients who are severely mentally ill and after his urine tested positive for THC, a metabolite of marijuana, he "found that one [of his clients] in particular had given me a food item which I consumed not knowing that it contained an illegal substance (marijuana)."

The applicant alleged that he was not afforded any due process and is very disappointed that his "military career was cut short due to this unfortunate event." However, he is pursuing his second graduate degree, a master's degree in social work, and wants to be able to work with veterans and their families. Therefore, he wants his record corrected to negate "any potential negative impact on my future employment endeavors and for my own peace of mind." The applicant also complained that he is unaware of his military status because he never received a discharge form DD 214.

SUMMARY OF THE RECORD

The applicant enlisted in the Reserve on May 2, 2003, and served on extended active duty from June 28, 2004, to January 1, 2008, when he was released into the Reserve. Test results show that in a random urinalysis conducted at the applicant's Reserve unit on January 31, 2009, his urine was collected. It tested positive for THC, at a level of 318 ng/ml[1] on February 4, 2009. The result was verified by another test conducted on the sample. On March 7, 2009, the applicant was interviewed by agents of the Coast Guard Investigative Service (CGIS) regarding the urinalysis results.

On March 27, 2009, the applicant was notified by his commanding officer (CO) that the CO had initiated the applicant's discharge pursuant to Article 12.B.18. of the Personnel Manual based on the urinalysis results. The CO advised the applicant that he could object to the discharge and submit a statement in rebuttal, which would be forwarded with the CO's recommendation for discharge to the Personnel Command. The applicant acknowledged the notification, noted that he objected to the discharge, and noted that he had been afforded an opportunity to receive legal counsel and would exercise that right.

The applicant submitted a statement objecting to the proposed discharge. He called into question the procedures by which his urine sample was handled. He stated that during previous urinalyses, the observer had handed him a piece of red tape and told him to put the red tape over the top of his sample, but during the test on January 31, 2009, the tape was not put on the sample until after he signed it and handed it to the yeoman who put the sample in the box with others. He suggested that the tape may have been placed over a sample which was not his. He claimed that there must have been a mix-up because he was "in no way guilty of using any type of drug, including marijuana or anything containing THC." He offered to take a polygraph or hair drug test or to go before a separation board or court martial, though he knew he was not entitled to one. The applicant also noted that as a civilian he worked with clients with both physical and mental ailments and cancer and other debilitating diseases and that he was sometimes "exposed to clients' medical marijuana use," which could have resulted in a positive test result due to second-hand smoke.

The applicant submitted a second statement to his command stating that after consulting legal counsel, he had questioned his clients about "whether they, at any point, had given me any type of food or drink containing marijuana." One of his clients "came forth after some questioning and admitted that he had in fact given me a banana bread loaf containing marijuana in the latter part of January, which I recalled." The applicant stated that this client is mentally ill but did not know that the applicant was in the Coast Guard and had no malicious intent. "Recalling this event, I can remember consuming the entire loaf, and feeling sick for the next couple of days leading up to the random [urinalysis], which took place on 31 January 2009. I thought nothing of this at the time, being that some of my clients and family members were also sick about the same time. After reviewing my work calendar, I confirmed that I had last seen this client on 29 January 2009, during which this client had given me the banana bread loaf. My visit with this

[1] The Coast Guard's minimum cut-off level of THC for a "positive" urinalysis result is 15 ng/ml.

client is documented in my progress notes, which are kept on record with [redacted]." The applicant attached to this statement the following notarized statement:

> It has come to my attention that my case manager … has come into some trouble at his job [redacted] He asked me if I had put any kind of type of marijuana into something I had given to him. I have a medical marijuana card, and license to grow. I had put some bud into butter and made banana bread. I took a bite but felt little effect. I thought it would be okay to give some away. I would not have given it to my case manager if I [had] known he was going to get into trouble. I apologize … this was my mistake. [The applicant] has been a great case manager. I should know; I fired 2 before him. He is an expert in the mental health field.

The applicant's employer submitted a statement to his command, dated March 17, 2009, noting that as part of his job the applicant worked with clients who had medical marijuana licenses "and is therefore potentially exposed."

On May 8, 2009, the Reserve Personnel Management Branch issued orders for the applicant to receive a general discharge for misconduct due to his involvement with drugs. The applicant was separated with a general discharge for misconduct on June 9, 2009. No DD 214 was issued.

VIEWS OF THE COAST GUARD

On June 23, 2011, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant partial relief by ordering the Coast Guard to issue the applicant a DD 214.

The JAG stated that the applicant is entitled to a DD 214 even though he was not on active duty when he was separated from the Reserve because he was separated for cause. The JAG cited DoDI 1336.01, Enclosure 3, paragraph 2.d., which states that "[p]ersonnel being separated from a period of active duty for training, full-time training duty, or active duty for special work will be furnished a DD Form 214 when they have served 90 days or more … Personnel shall be furnished a DD Form 214 upon separation for cause or for physical disability regardless of the length of time served on active duty."

The JAG also stated that the Coast Guard "has not provided any information regarding the applicant to the National Crime Information Center (NCIC)" so his request for removal is not applicable. The JAG also argued that the applicant has not provided any information that warrants granting the rest of the relief he requested.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 9, 2011, the Board received the applicant's response to the views of the Coast Guard. The applicant stated that his CO erred by finding that he had been involved in a drug incident because he did not knowingly ingest marijuana. He also argued that the sworn statement of his client that he gave the applicant a loaf of banana bread containing marijuana without divulging that it contained marijuana overcomes the presumption of regularity accorded his CO's finding and proves by a preponderance of the evidence that he did not knowingly ingest mari-

juana. The applicant also stated that the CGIS agents did not interview his client and that his civilian employers did not fire him because they knew his client and knew that the applicant's ingestion of marijuana was not intentional. Therefore, he stated, his discharge should be reversed.

APPLICABLE REGULATIONS

Article 20 of the Personnel Manual (COMDTINST M1000.6A (Change 41)) contains regulations regarding suspected illegal drug use by members. Article 20.A.1.b. states that "[t]he goal of the substance and alcohol abuse program is to enable the Coast Guard to accomplish its missions unhampered by the effects of substance and alcohol abuse." Article 20.C.3.a. states that "Commanding officers shall initiate an investigation into a possible drug incident, as defined in Article 20.A.2., following receipt of a positive confirmed urinalysis result or any other evidence of drug abuse."

Article 20.A.2.k. defines a "drug incident" as the intentional use of drugs, the wrongful possession of drugs, or the trafficking of drugs. It further states that "[t]he member need not be found guilty at court-martial, in a civilian court, or be awarded NJP for the conduct to be considered a drug incident" and that "[i]f the conduct occurs without the member's knowledge, awareness, or reasonable suspicion or is medically authorized, it does not constitute a drug incident."

Article 20.C.3.e. states that in determining whether a drug incident has occurred, the CO shall use "the preponderance of the evidence standard" and that a positive confirmed urinalysis result may by itself be "sufficient to establish intentional use and thus suffice to meet this burden of proof." Article 20.C.4.1. states that if a CO determines that a drug incident did occur, the CO should process the member for separation by reason of misconduct.

Article 12.B.18. of the Personnel Manual governs administrative discharges for misconduct. Article 12.B.18.b.4. states that "[a]ny member involved in a drug incident … will be processed for separation from the Coast Guard with no higher than a general discharge." Article 12.B.18.e. states that when recommending that a member with less than eight years of service be administratively discharged for misconduct, the CO must do the following:

> 1. Inform the member in writing of the reason(s) for being considered for discharge (specifically state one or more of the reasons listed in Article 12.B.18.b. supported by known facts).
>
> 2. Afford the member an opportunity to make a written statement. …
>
> 3. Afford the member an opportunity to consult with a lawyer as defined by Article 27(b)(1), UCMJ, if contemplating a general discharge. …

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's 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 because it was filed within three years of the applicant's discharge. 10 U.S.C. § 1552(b).

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation. *See Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

3. The applicant alleged that his general discharge for drug abuse on June 9, 2009, following a positive urinalysis conducted on January 31, 2009, was erroneous and unjust. He asked to be reinstated in the Reserve or, in the alternative, to have his discharge and reentry code upgraded. The Board begins its analysis in every case by presuming that the disputed information in the applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust. 33 C.F.R. § 52.24(b). Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees 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).

4. The applicant alleged that on January 29, 2009, he was given a loaf of banana bread containing marijuana as a present from a client who uses medical marijuana; he did not suspect or ask whether the loaf contained marijuana and his client did not inform him; he can recall eating the whole loaf sometime before reporting for drill on January 31, 2009, when his urine sample was taken; and he felt sick for a couple of days after he ate the loaf but was not suspicious because some family members and clients were also sick at the time. To support his allegations, the applicant submitted evidence from his civilian employer showing that some of his clients use medical marijuana. In addition, he submitted a notarized statement from a person who said that he baked banana bread containing marijuana, "took a bite and felt little effect" and so he "thought it would be okay to give some away," and gave it to the applicant, his case manager from [redacted] The client stated that he would not have given the applicant the banana bread if he had known the applicant was going to get in trouble. However, the client did not state that he did not tell the applicant that the banana bread contained marijuana.

5. The Board finds the applicant's allegations and evidence insufficient to overcome the presumption that the CO's determination that the applicant was involved in a "drug incident," as defined in Article 20.A.2.k. of the Personnel Manual, is correct. In particular, the Board does not find credible the client's claim that he took a bite of banana bread containing marijuana, which he presumably needed to alleviate the symptoms of a medical condition; judged it to be ineffective based on that bite; and gave the loaf away as a present to his case manager, the applicant, without mentioning that it contained marijuana. Nor does the Board find credible the applicant's own claim that he took the banana bread from his medical marijuana-using client without any suspicion or question about whether it contained marijuana even though banana bread is a common vehicle for medical marijuana; ate the whole loaf at once; and had no suspicion that he was high but felt only a bit sick (not sick enough to miss drill) although his urine

tested positive for THC at a level of 318 ng/ml. The Board concludes that the applicant has not proved by a preponderance of the evidence that his CO erred in determining that he had been involved in a "drug incident" and was therefore subject to an administrative discharge for misconduct pursuant to Article 12.B.18. of the Personnel Manual.

6. The applicant alleged that he did not receive due process. However, the applicant's signature on his acknowledgement of rights dated March 27, 2009, shows that he was advised of his right to object to the discharge, to consult legal counsel, and to submit a written statement. His own statements show that he exercised those rights. Therefore, the Board finds that the applicant received all due process under Article 12.B.18.e. of the Personnel Manual as a member with less than eight years of service receiving a general discharge for misconduct.

7. The Board finds that the applicant has not proved by a preponderance of the evidence that the Coast Guard committed any error or injustice in discharging him from the Reserve for misconduct with a general discharge under honorable conditions and an RE-4 reentry code.

8. The applicant asked the Board to order the Coast Guard to remove any entry it has made in the NCIC. The Coast Guard denied providing the NCIC with any information about the applicant. In the absence of any evidence that the Coast Guard has provided the NCIC with information about the applicant, the Board finds no grounds for ordering any correction in this regard.

9. The applicant complained that the Coast Guard failed to notify him of his discharge or to issue him a discharge form DD 214. Reservists serving on inactive duty do not normally receive DD 214s when they are discharged, but the Coast Guard has noted that DoDI 1336.01, Enclosure 3, paragraph 2.d., states that "[p]ersonnel shall be furnished a DD Form 214 upon separation for cause or for physical disability regardless of the length of time served on active duty." Because the applicant was discharged "for cause"—i.e., misconduct—the Board agrees with the Coast Guard that he should receive a DD 214.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of former xxxxxxxxxxxxxxxxxxxxxxxx, USCGR, for correction of his military record is granted in part in that the Coast Guard shall issue and send him a properly prepared DD 214 documenting his general discharge for misconduct in 2009. All other requests for relief are denied.