

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2013-095

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 received the applicant's DD 149 on August 14, 2012; docketed the case upon receipt of the applicant's military records on April 11, 2013; and assigned it to [REDACTED] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated January 23, 2014, 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 was discharged from boot camp on February 4, 2005, after failing his urinalysis upon enlistment, asked the Board to upgrade his discharge and reenlistment code. The applicant received a general discharge under honorable conditions with an RE-4 reenlistment code (ineligible to reenlist) and "fraudulent entry into military service, drug abuse," as his narrative reason for separation (code JDT).

The applicant stated that after he was honorably discharged from the Army on September 5, 2004, he attended a celebration party with family and friends back home and unthinkingly "decided to partake in marijuana usage." He alleged that he took "4 to 5 pulls of a joint and nothing more." However, he began boot camp to join the Coast Guard about a month later and underwent urinalysis. A week before the end of boot camp, he was advised that he had failed the urinalysis. Upon discharge, he quickly applied to the Coast Guard's Discharge Review Board (DRB) to no avail. He concluded that he had applied too soon and decided to wait before applying to this board, the BCMR.

The applicant noted that since his discharge from the Coast Guard, he has served as a deputy sheriff, a police officer, and in other law enforcement jobs. In addition, he has received a Bachelor's Degree in Criminal Justice and a Master's Degree in Education. He submitted documentation and transcripts supporting these claims. The applicant stated that he wants to get a

federal job, but the nature of his discharge is a deterrent. He stated that the character and nature of his discharge are holding him back in life as if he had committed a felony. He wants his discharge upgraded to get a second chance and continue serving his country.

SUMMARY OF THE RECORD

On September 5, 2004, the applicant was honorably discharged from the Army upon completion of a four-year enlistment. He had trained and served as a [REDACTED].

On January 6, 2005, at age 23, the applicant enlisted in the Coast Guard. On January 28, 2005, he signed a Page 7 acknowledging that he was receiving a general discharge from the Coast Guard with an RE-4 reenlistment code (ineligible to reenlist) because he was “identified as a user of illegal substance as evidenced by a positive urinalysis test conducted upon arrival to Training Center Cape May.” The applicant also acknowledged having been counseled about his rights on separation.

The applicant’s DD 214, dated February 4, 2005, reflects a general discharge for “fraudulent entry into military service, drug abuse” and an RE-4 reenlistment code.

Following his discharge, the applicant quickly applied to the DRB for an upgrade. On November 21, 2005, the DRB denied his request, finding that although the applicant “appears remorseful in his letter to the Board, he acknowledged the use of a controlled substance prior to his arrival at Cape May. The record also reflects that the applicant tested positive for THC [a metabolite of marijuana] at Cape May.” The DRB found that the discharge was conducted in accordance with policy and was both proper and equitable.

VIEWS OF THE COAST GUARD

On July 26, 2013, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant partial relief by upgrading the applicant’s reenlistment code from RE-4 to RE-3 (eligible to reenlist with waiver). In so doing, he adopted the findings and analysis of the case provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC noted that the applicant was not timely filed and argued that it should be denied for that reason. Regarding the merits of the case, PSC stated that in accordance with recruiting regulations, the applicant was presumably counseled about Coast Guard drug policies and about undergoing urinalysis upon enlistment before he enlisted. He admitted to have smoked marijuana before enlisting, and his general discharge for procuring his enlistment fraudulently was correct under the regulations.

PSC noted, however, that on March 18, 2010, the Commandant issued ALCOAST 125/10, which states that the default reentry code for a member being discharged with a JDT separation code for “fraudulent entry into military service, drug abuse” is now RE-3. Under ALCOAST 125/10, in cases of fraudulent enlistment due to drug abuse, the RE-4 code “is prescribed by the separation approval authority only in cases with associated *in-service* misconduct

(e.g., tampering with drug/alcohol test).” (Emphasis added.) Because the applicant’s misconduct consisted of smoking marijuana only *before* he enlisted and he was not accused of tampering with the urinalysis conducted following his enlistment, PSC argued, the Board should upgrade his RE code from RE-4 to RE-3 to comport with the new policy. However, PSC argued, no other relief should be granted.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 12, 2013, the applicant responded to the views of the Coast Guard. He acknowledged the recommendation for a partial adjustment and stated that “if any further upgrade can be granted, it would be appreciated.

APPLICABLE REGULATIONS

Coast Guard recruits are asked about illegal drug use on their applications to enlist, and they are ineligible to enlist if they admit to having used illegal drugs within a year or frequently in the past. Recruiting Manual, Table 2-A: People Not Eligible to Enlist. After a recruit’s application has been approved, on the day of enlistment, the recruit must certify on an Administrative Remarks entry (Page 7) that all of the information on his application is “current and accurate” and acknowledge that “withholding information is punishable under the Uniform Code of Military Justice (UCMJ) and may result in less than honorable discharge for fraudulent enlistment.” Recruiting Manual, Art. 2.D.2.e.3. In addition, before enlisting, every enlistee must be advised of the Coast Guard’s drug policy and sign a Page 7 acknowledging the counseling and the fact that “on 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.” Recruiting Manual, Art. 2.C.1.i.

Article 20.C.2.a.6.b. of the Personnel Manual in effect in 2005 states that new recruits must undergo urinalysis within three days of arriving at the Training Center.

Article 12.B.18.b.4.a. of the Personnel Manual states that “[a]ny member involved in a drug incident ... as defined in Article 20.A.2.k., 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 or prior service training program under this Article in specific cases of drug use before enlistment (as evidenced by a positive urinalysis shortly after entering training).” Under Article 20.A.2.k. illegal use of a controlled substance constitutes a drug incident.

Article 12.B.18.b.2. of the Personnel Manual states that a member may be discharged for fraudulent enlistment for “[p]rocurring a fraudulent enlistment, induction, or period of active service through any deliberate material misrepresentation, omission, or concealment which, if known at the time, might have resulted in rejection. ... Commanding Officer, Training Center Cape May, is delegated final discharge authority under this Article in these specific cases for members assigned to recruit training or prior service training program: a. Deliberately concealed criminal records or other information necessary to effect enlistment.”

Under the SPD Handbook, a member involuntarily discharged under Article 12.B.18. of the Personnel Manual for procuring “fraudulent enlistment, induction or period of military service through deliberate, material misrepresentation, omission or concealment of drug use/abuse” receives a JDT separation code, an RE-4 reenlistment code, and “Fraudulent Entry into Military Service, Drug Abuse.”

ALCOAST 125/10, issued by the Commandant on March 18, 2010, states that the default reentry code for a member being discharged with a JDT separation code is now RE-3 and that the RE-4 code “is prescribed by the separation approval authority only in cases with associated *in-service* misconduct (e.g., tampering with drug/alcohol test).”

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. 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 the alleged error or injustice. Although the applicant in this case filed his application more than three years after his discharge, he filed it within three years of the issuance of ALCOAST 125/10. Therefore, the application is considered timely at least with regards to the applicant’s reentry code.

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.¹

3. The applicant alleged that his general discharge for fraudulent enlistment due to drug abuse is unjust because he has become a law enforcement officer and graduated from college since his discharge. The Board begins its analysis in every case by “presuming administratively regularity on the part of Coast Guard and other Government officials.”² The applicant bears the burden of proving the existence of an error or injustice by a preponderance of the evidence.³ 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.”⁴

¹ See *Steen v. United States*, No. 436-74, 1977 U.S. Ct. Cl. LEXIS 585, at *21 (Dec. 7, 1977) (holding that “whether to grant such a hearing is a decision entirely within the discretion of the Board”); *Flute v. United States*, 210 Ct. Cl. 34, 40 (1976) (“The denial of a hearing before the BCMR does not *per se* deprive plaintiff of due process.”); *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).

² 33 C.F.R. § 52.24(b).

³ *Id.*

⁴ *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 preponderance of the evidence shows that the applicant was properly discharged in accordance with the policy in effect in 2005 because he fraudulently gained his enlistment in the Coast Guard by failing to admit to his recruiter that he had recently smoked marijuana. This policy, mandating a general discharge for recruits who have lied about their prior drug use, has not changed in the interim except with regards to the reentry code assigned. Under ALCOAST 125/10, such recruits receive an RE-3 reentry code unless they have also committed misconduct after being enlisted. An RE-3 code allows a veteran to reenlist if a recruiter is able to get a waiver from the Recruiting Command.

5. The applicant has asked the Board to upgrade the character and narrative reason for his discharge based on his post-discharge conduct. However, the delegate of the Secretary informed the Board on July 7, 1976, by memorandum that it “should not upgrade a discharge unless it is convinced, after having considered all the evidence ... that in light of today’s standards the discharge was disproportionately severe vis-à-vis the conduct in response to which it was imposed.” Under Article 1.B.17. of the Separations Manual in effect today, members whose urine tests positive for THC are discharged for misconduct with no better than a general discharge. Therefore, the Board is not persuaded that the applicant’s general discharge for misconduct is disproportionately severe in light of current standards.

6. Accordingly, the applicant’s reentry code should be upgraded to RE-3, but no further relief is warranted.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of former SN [REDACTED] USCG, for correction of his military record is granted in part as follows:

The Coast Guard shall correct his reentry code on his DD 214 from RE-4 to RE-3.

No other relief is granted.

January 23, 2014

