

UNITED STATES COAST GUARD DISCHARGE REVIEW BOARD
Docket #: 2018-044

Discharge Issued

Character: Other Than Honorable Conditions

Narrative Reason: Misconduct

SPD/RE Code: HKQ / RE4

Authority of Discharge: COMDTINST M1000.4 Art 1.B.17

Date of Separation: 2018-03-01

DRB Decision

Character: No Change

Narrative Reason: No Change

SPD/RE Code: No Change / No Change

New Authority: No Change

Discharge Review Board Discussion and Decision:

ISSUES: The Applicant was discharged for Misconduct with an Under Other Than Honorable Discharge characterization. The Applicant is seeking relief by requesting an Honorable discharge and to change their Separation Authority, Narrative Reason for Separation, and Separation Code to Secretarial Authority. The Applicant makes the following claims of impropriety/inequity: 1) no evidence against them to justify discharge, 2) claims statute of limitations were violated regarding non-judicial punishment, 3) claims they were not informed of ramifications of an Other Than Honorable (OTH) discharge. 4) OTH discharge was overly harsh and actions were not severe enough to warrant a OTH discharge, 5) waiver to Administrative Separation (ADSEP) Board/lawyer consultation was in violation of regulatory mandate, 6) claims they were informed ADSEP Board could take up to a year, pressuring the Applicant into agreeing to separation without a board.

A discharge is deemed proper unless the Applicant can show 1) an error of fact, law, procedure or discretion associated with the discharge that prejudiced their rights; or 2) there has been a change in policy made expressly retroactive to the type of discharge under consideration.

A discharge is presumed to be equitable unless the Applicant can show 1) the policies and procedures under which the Applicant was discharged differ in material respects from current policy; 2) the discharge was inconsistent with standards of discipline at the time of separation; or 3) the evidence presented does not fairly support the type of discharge.

In reviewing the evidence, the DRB considered 1) the quality of the Applicant's service, 2) the Applicant's capability to serve, 3) any evidence of arbitrary, capricious, or discriminatory actions against the Applicant, or 4) any other relevant information relating to the Applicant's discharge.

DISCUSSION: The Applicant was discharged in March of 2018 for Misconduct after serving a total of 13 years, 7 months, and 5 days on Active Duty. The Board thoroughly reviewed all documentation available in the Applicant's service record. The Applicant's Character of Service is Under Other Than Honorable Conditions and the Separation Authority listed on the DD-214 is COMDTINST M1000.4 Article 1.B.17. The Separation Program Designator (SPD) Handbook prescribed a Reentry (RE) Code of RE4 for a SPD Code of HKQ.

The Applicant seeks relief to their DD-214, which currently reflects a discharge on grounds of Misconduct - Involvement with Drugs. In June 2017, the Applicant self-reported their use of drugs to their Commanding Officer where they admitted to using marijuana, cocaine, and other drugs which were not disclosed. In addition, they admitted to an inappropriate relationship with an officer, which was described as a one-night stand. After self-reporting in June 2017, the Applicant was notified of the command's intent to involuntarily separate them from the Coast Guard in November 2017. The day that they were notified of intent to discharge, the Applicant submitted a conditional waiver of their rights for a General (under honorable conditions) discharge or more favorable. This request was ultimately denied by CG PSC-EPM-1. In January 2018, the Applicant was given the choice to request an ADSEP Board or to waive their rights and leave the service. The Applicant stated that they chose to waive their rights due to pressure they felt to leave the service and help their ill father with the family business. In addition, the Applicant stated they felt they would be ostracized from their shipmates while waiting for the ADSEP Board.

In response, the Applicant's counsel argues that unlike the Coast Guard, other services would give an Honorable discharge for self-reporting for the purpose of treatment. Counsel further states that the Applicant's character of service was too harsh based on the facts of the case. In addition, it was noted that the Applicant has made contributions to the service and the civilian community. The Applicant's counsel also argues that there were issues with equity and propriety in this case. Counsel argues that the Applicant had never tested positive for drugs and their career was otherwise exceptional. Additionally, counsel claims that the charges for drug use violated the two-year statute of limitations under Article 15, Uniform Code of Military Justice (UCMJ), and should have been dismissed. Counsel argues that since the NJP was imposed in November 2017, the charged offenses could only go back as far as November 2015. The Applicant's statement indicates their last use of a controlled substance was August 2016. Therefore, the range of dates in Charge 2, Specification 1 should have been between November 2015 and August 2016. They also argue that the Convening Authority did not comply with Coast Guard regulations, in that they did not fully apprise the Applicant of the ramifications of an OTH discharge.

To this end, the Applicant is requesting an upgrade to their Discharge Characterization, Separation Authority, Narrative Reason for Separation, and Separation Code. The Applicant claims there was mishandling of administrative steps in their discharge. The Applicant feels their behavior was a situational anomaly at the time and it is not indicative of who they are as a person. Their motivation for pursuing these changes stems from a desire for positive closure. During the Applicant's testimony and subsequent discussions with the Board, the Applicant's defense asserted that they do not feel that an OTH discharge was what the Coast Guard had in mind, and they question why a General discharge was not given. The Applicant's counsel points out that their client could have decided not to confess and/or waited until their contract was up. Counsel questioned whether the type of discharge is the right message to send to junior members with respect to self-referral. In addition, they point out that not allowing an ADSEP Board for a year is poor leadership. The Board reviewed the Applicant's application and took into consideration the Applicant's testimony. The Board concluded that despite the Applicant's claims that

there was no evidence of their crimes, self-admission of these multiple offenses constitutes sufficient evidence to support that these crimes were in fact committed. To the Applicant's claim that the statute of limitation had expired on these offenses, the Board finds that the Applicant was found guilty of Article 112a (Wrongful Used of a Controlled Substance) nine months after the Applicant admitted to using marijuana. This is well within the two-year statute of limitations. In addition, the Applicant was also found guilty of Article 92 (Failure to Obey Lawful Order) nine months after the crime occurred. This is also within the statute of limitations for this offense. Regardless, a discharge IAW COMDTINST M1000.4 Article 1.B.17 is not bound by the statute of limitations, making the Applicant's claim irrelevant.

In response to the Applicant's claim that they were not made aware of the consequences of an OTH, the Board makes note of the memo in the Applicant's separation package that indicates the possibility of a OTH discharge and details the consequences of such. The Applicant initialed a memo stating that they had received and reviewed the memo detailing the consequence of an OTH discharge. In the same memo, the Applicant was encouraged to consult a lawyer and was informed of the options entitled to them. On two separate occasions, the Applicant initialed that they requested to waive their right to consult with an attorney.

The Applicant's counsel also makes a claim that their client should not have been allowed to waive their right to counsel and that a member facing an Other Than Honorable discharge must seek counsel. IAW COMDTINST M1000.4 Article 1.B.23.a, the member shall be afforded the right to speak with counsel and obtain their advice and assistance. The Applicant was afforded the right to counsel on two separate occasions. On both occasions, the Applicant freely and knowingly waived their right to speak with counsel. There is no language in 1.B.23 that states a member is not permitted to waive their right to counsel.

Finally, the Board considered the Applicant's claim that they felt pressured to agree to separation without a ADSEP Board due to the timeframe they were informed of. It is this Board's opinion that the Applicant was aware of their rights and the consequences of their decisions. The details of all options available to the Applicant were clearly stated in the memo the Applicant initialed that they reviewed and understood. The Applicant on two separate occasions voluntarily waived their right to an ADSEP Board.

The Coast Guard maintains a Zero Tolerance for Illicit Drug Use. As a Service with a law enforcement mission, it is imperative that we hold ourselves to the highest standards. Per Military Drug and Alcohol Policy, COMDTINST M1000.10, if, after an investigation, the commanding officer determines that a drug incident did occur, Commands will process the member for separation by reason of misconduct. Additionally, these members are subject to disciplinary action under the UCMJ. However, they 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. Members who have been identified as drug dependent will be offered treatment prior to discharge. If accepted, immediately on completing this treatment, the member will be discharged from the Service for misconduct. The Coast Guard does not have a policy that permits an upgrade in character of service due to post-service conduct.

The Board reaffirmed that there were no discernible errors in fact, law, or policy in the initial discharge process. The Applicant was separated for misconduct IAW COMDTINST M1000.4 Article 1.B.17 which allows for an Other Than Honorable discharge if warranted by the circumstances. An investigation revealed, under a preponderance of the evidence, the Applicant committed a serious military/civilian

offense – Specifically violations of Art. 92 and 112a - for which a punitive discharge is a penalty. The Applicant was given the opportunity to consult with legal counsel concerning their discharge. IAW COMDTINST M1000.4 Article 1.B.23 as well as the Enlisted Personnel Administrative Boards Manual, PSCINST M1910.1.1.K.1, a member shall have the right to counsel, and waiver or forfeiture of counsel must be documented as outlined in the noted policies referenced. As documented in memorandum signed by the Applicant dated November 17, 2017, the Applicant waived applicable counsel and ADSEP Board rights. A SPD Code of HKQ is authorized when a member has committed a serious offense and for which an RE4 is prescribed. An RE4 Code signifies that the Applicant is not recommended or is ineligible for reenlistment.

MAJORITY OPINION:

The majority opinion (3 members) recommended that the Applicant's character of service not be upgraded from Under Other Than Honorable to Honorable and their Authority, Narrative Reason for Separation, and Separation Code matched the Coast Guard's policy regarding drug incidents.

The Board's comprehensive review of the Applicant's discharge has revealed no errors in fact, law, or policy. Additionally, there have been no pertinent policy adjustments since the discharge date. The Board has determined that the discharge was warranted and consistent with established disciplinary standards. In particular, the Board deemed that the Applicant's character of service, authority, reason for separation, and separation code are appropriate and should not be changed. Ultimately, the Board finds the separation was both proper and equitable.

DISSENTING OPINION:

In a dissenting opinion, two board members voted in support of relief based on concerns pertaining to equity. The issuance of an Other Than Honorable discharge appears to be disproportionately severe and not in alignment with established policy. As per COMDTINST 1000.4 discharges administered for Misconduct due to the commission of a serious military or civilian offense, specifically in cases involving illegal drugs, typically result in a characterization of service as "General Under Honorable Conditions."

Furthermore, the Applicant voluntarily waived their right to an ADSEP board, a choice made in comparable cases with the aim of obtaining a more favorable character of service discharge. Consequently, the Applicant's decision to waive their ADSEP Board resulted in the issuance of the lowest feasible discharge designation for the committed offense.

Given the aforementioned circumstances, in conjunction with the Applicant's decision to self-report the committed offense, it is only equitable that they be awarded the same discharge classification as individuals who are subjected to random drug testing and subsequently yield positive findings for illicit drug use.

SUMMARY:

The Board members thoroughly reviewed the Applicant's record of service and all available documentation and evidence. The Board deemed that the Applicant's character of service, authority, reason for separation, and narrative reason are appropriate and should not be changed. The Applicant has not substantiated any error or inequity.

Propriety: Discharge was proper.

Equity: Discharge was equitable.

Board Conclusion: The Board voted 3-2 for no relief.

In reviewing discharges, the Board presumes regularity in the conduct of governmental affairs unless there is substantial credible evidence (to include evidence submitted by the Applicant) to rebut the presumption.