

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2003-100

FINAL DECISION

Ulmer, Chair:

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 16, 2003, upon the Board's receipt of the applicant's complete application for correction of his military record.

This final decision, dated February 18, 2004, is signed by the three duly appointed members who were designated to serve as the Board in this case.

The applicant asked the Board to upgrade his RE-4 (not eligible for reenlistment) reenlistment code to an RE-3 (eligible for reenlistment except for disqualifying factor). He was discharged from the Coast Guard under honorable conditions (general discharge) by reason of fraudulent enlistment due to drug abuse. He was assigned an RE-4 (not eligible for reenlistment) reenlistment code and a JDT (fraudulent entry into military service, drug abuse) separation code. He had served 18 days on active duty at the time of his discharge.

APPLICANT'S ALLEGATION

The applicant alleged that his record is unjust because it is preventing him from reenlisting in the Coast Guard based on a mistake that he made when he was 19 years old and one that he has regretted ever since. He further stated the following:

I am 21 years old now and have matured greatly. I work full time and attend college in the evening. I feel it would be unjust to punish me a lifetime for one stupid mistake. I understand that the Coast Guard

performs law enforcement duties pertaining to drugs, probably more than most new recruits. I understand what I had and what I lost.

The applicant alleged that at the time of his discharge he was told that he "could re-apply after a year if [he] submitted character references and a letter of apology." He offered his statement that he has passed three private drug tests over the past two years as evidence that he will not repeat this mistake again. He stated that he sought the assistance of his congressman to show that he was serious and very sorry for what he had done.

The applicant submitted several character references from his current and previous employers recommending him for reenlistment in the Coast Guard.

SUMMARY OF RECORD AND SUBMISSIONS

The applicant enlisted in the Coast Guard on April 10, 2001. On this date, he completed DD Form 1966 (Record of Military Processing). In answer to the question in block 26 on this document, the applicant admitted that he had "tried [and] used . . . narcotic" In very small print at the top of block 26, it is noted that a "yes" answer requires an explanation in section VI of the document. Section VI was not located next to question 26, but instead was located many questions later at the bottom of the next page. The applicant did not provide an explanation in section VI on the bottom of the next page, and it would be speculation to guess whether the omission was intentional or an inadvertent mistake.

On April 10, 2001, the applicant verified by his signature in block 27 of the DD Form 1966 that the information he provided on the document was correct to the best of his knowledge. In this same paragraph, the applicant was warned that "if any of the information was knowingly false or incorrect, [he] could be tried in a civilian or military court and could receive a less than honorable discharge which could affect [his] future employment opportunities." On the same date, the recruiter signed a certification witnessing the applicant's signature and stated that he had verified the data in the documents. The recruiter further acknowledged that he could be tried by court-martial if he effected or caused the enlistment of anyone known to the recruiter to be ineligible for enlistment.

Despite the fact that Section VI had been left blank even though a "yes" answer in block 26 required that section VI be completed, the applicant's recruiter nevertheless also certified on April 10, 2001, that he had "reviewed all information contained in the document and to the best of his judgment and belief, the applicant fulfilled all legal policy requirements for enlistment." He further certified that "service regulations governing such enlistment have been strictly complied [with]."

At the time of his enlistment, the applicant signed an administrative remarks (page 7) page dated April 10, 2001, witnessed by his recruiter, advising the applicant 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. I understand that I am not to 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. I hereby affirm that I am drug free and ready for recruit training

On April 10, 2001, the applicant reported to recruit training, and on April 11, 2001, a sample of his urine was collected for drug testing. On April 19, 2001, the laboratory reported that the applicant's urine specimen had tested positive for marijuana.

On April 27, 2001, a page 7 was placed in the applicant's record documenting that he had been identified as a user of an illegal substance, as evidenced by a positive urinalysis test that was conducted upon his arrival at recruit training.

On April 27, 2001, the applicant signed a page 7 entry acknowledging the following: "I have read and been counseled on the contents of Article 12.B.53., Personnel Manual . . . about my rights on separation from the Coast Guard. I understand my rights as described there and have had all my questions answered." (Article 12.B.53 of the Personnel Manual advises the applicant about such matters as leave in conjunction with separation, reenlistment information (or the lack thereof), retaining or surrendering uniforms, veterans' rights, medical benefits, the Discharge Review Board and BCMR, and selective service registration.)

The applicant was discharged from the Coast Guard on April 27, 2001. He had served 18 days on active duty.

Discharge Review Board (DRB) Proceeding

Prior to filing his application with the Board, the applicant exhausted his administrative remedies by filing an application with the DRB. On December 9, 2002, the DRB refused 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 Board thoroughly reviewed applicant's personnel record, medical record, letters of recommendation, and listened to [a] personal statement given by the applicant and [his] father. Applicant tested positive for marijuana during in processing at Cape May. Applicant and Board members felt that the discharge was carried out in accordance with Coast Guard policy, and was properly documented.

VIEWS OF THE COAST GUARD

On October 30, 2003, the Board received an advisory opinion from the Judge Advocate General (TJAG) of the Coast Guard. He recommended that the Board deny the applicant's request for relief.

TJAG stated that the Coast Guard did not commit an error or injustice in discharging the applicant from the service. In this regard, he noted that the applicant did not challenge the accuracy of the drug test administered to him during recruit training, but instead argued that the RE-4 reenlistment code was inappropriately severe. He argued that given the Coast Guard's prominent role in enforcing the nation's drug laws, the Coast Guard policy on separating drug abusers and assigning an RE-4 reenlistment code makes sense.

TJAG further stated that the applicant bears the burden of proving his case and 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). He stated that the applicant's record shows that he "lied about his drug use prior to entering recruit training and was appropriately separated once his illegal conduct came to light."

A memorandum from the Commander, Coast Guard Personnel Command (CGPC) was attached as Enclosure (1) to the advisory opinion. TJAG adopted the contents of the memorandum and asked the Board to accept them as part of the advisory opinion. CGPC stated that the applicant had been afforded full due process. He further stated the following:

I concur with the previous decision of the Commandant that the Applicant's discharge shall stand as issued . . . I find no evidence to conclude that the applicant's discharge for misconduct was in error or unjust. The record further indicates that the urinalysis conducted on April 11, 2001, was appropriately carried out. The record also indicates the applicant was counseled extensively concerning Coast Guard policies on the use of illicit substances and the consequences for violating them.

These policies are in keeping with the Coast Guard's law enforcement and drug interdiction missions.

During the entire enlistment process, applicant was specifically encouraged to be truthful in completing all documents, and was advised that admitting occasional drug use would not disqualify him for enlistment. Unfortunately, the applicant chose to make false official statements about his drug use . . . which were confirmed by the result of the urinalysis conducted in basic training. His enlistment was fraudulent, and he was separated for this reason.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On December 14, 2003, the Board received the applicant's reply to the views of the Coast Guard prepared on his behalf by his father. His father noted that the applicant joined the Coast Guard at the age of 19. He stated that he disagreed with the advisory opinion because it is unforgiving for a minor offense. He argued that the Chief Counsel's position does not allow for the correction of behavior or for second chances. He further stated the following:

[The applicant] made a stupid mistake at a young age. He knows it. It seems to be a mistake that many teenagers make. It is our jobs as adults to weigh the punishment, that it not be so severe that one's hopes are dashed forever. Our former president admitted to smoking marijuana. I am not equating politicians to military personnel, but if they were not allowed to run for public office, this country would have lost out on some good leaders. I am asking that someone in the Coast Guard not be afraid to think outside the box, that not every case be rubber stamped because no one wants to make a decision that may require further explanation or paperwork. A [Coast Guard officer] in Washington at the Discharge Review Board Meeting told me that the Coast Guard is reviewing its policy towards minor offenses in order to fall in line with the policies of the other military branches.

While [the applicant] acknowledges his transgression and deeply regrets it, he has also matured greatly in the past two and a half years. [The Secretary] said on November 14, that the main function of the Coast Guard is now Homeland Security. I am asking that the Board give a second chance to a young man who made a mistake at 19, who is now 22 and wants to serve his country on the home front.

APPLICABLE REGULATIONS

Coast Guard Personnel Manual

Article 12.B.18.b.2. of the Personnel Manual authorizes the Commander, Coast Guard Personnel Command (CGPC) to discharge a member by reason of misconduct 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."

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.

Article 12.B.18.e. states that a member with fewer than eight years of service who is recommended for an honorable or general discharge due to misconduct shall be informed of the reason for the discharge, afforded the opportunity to make a written statement, and afforded the opportunity to consult with a lawyer.

Article 12.B.20 of the Personnel Manual defines an uncharacterized discharge as a separation for members who have fewer than 180 days of active service on the date of discharge and who demonstrate poor proficiency, conduct, aptitude or unsuitability for further service during the period from enlistment through recruit training.

Article 12.B.20.c. states, "No discharge certificate will be issued to a member awarded an uncharacterized discharge. Only a DD-214 will be issued."

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 BCMR has jurisdiction over this matter pursuant to section 1552 of title 10, United States Code. The application was timely.

2. The applicant asked the Board to upgrade his reenlistment code from RE-4 (not eligible for reenlistment) to RE-3 (eligible for reenlistment, except for disqualifying factor). He was discharged with a general discharge due to fraudulent enlistment drug use/abuse, for which only an RE-4 reenlistment code is authorized. Therefore, the Board must review the basis on which the applicant was discharged to determine whether an error or injustice exists with respect to his RE-4 reenlistment code. The applicant's own arguments were not persuasive. However, he was not represented by an attorney, and the Board's own review of the record has revealed a clear basis for granting partial relief, as discussed below.

3. The applicant enlisted in the Coast Guard on April 10, 2001. On enlistment documents of the same date, he answered truthfully, admitting on Form 1966 that he had used drugs including marijuana. Pursuant to the instructions on this form, a "yes" answer to the question "Have you ever tried or used [illegal drugs]?" required an explanation in section VI on the bottom of the next page. However, the applicant provided no explanation on the enlistment document, and the recruiter who reviewed it demanded none, even though the instructions required such an explanation. The Board finds that it was the recruiter's responsibility to ensure that either an explanation was given in section VI, or the recruiter should have made a notation in section VI and notified the Recruiting Command that the applicant refused to complete section VI, in which case he would not have been enlisted.

4. On April 10, 2001, the applicant also signed a page 7 advising him that drug use was against Coast Guard policy, that upon reporting to recruit training he would be tested by urinalysis for drug use, and that if his urine tested positive for drugs he would probably be discharged from the Coast Guard with a general discharge. He further acknowledged on this page 7 that he was "drug free and ready for recruit training." CGPC indicated that the portion of the entry that reads "I am drug free and ready for recruit training" is the only basis upon which the Coast Guard could have concluded that the applicant's enlistment into the Coast Guard was fraudulent.

5. On April 10, 2001, the applicant reported to recruit training. The next day on April 11, 2001, he provided a urine specimen that subsequently tested positive for marijuana on April 19, 2001. On April 27, 2001, the applicant was discharged from the Coast Guard with a general discharge under honorable conditions by reason of fraudulent enlistment drug use/abuse, with an RE-4 reenlistment code.

6. TJAG argued that the Coast Guard is entitled to the presumption of regularity in this case because the applicant has produced no evidence that Coast Guard officials failed to carry out their duties correctly, lawfully, and in good faith by discharging the applicant due to fraudulent enlistment. See, Arens v. United States, 969 F.2d 1034, 1037 (D.C. Circuit 1992). However, for the reasons discussed below, the Board finds that the Coast Guard's presumption of regularity in this case is rebutted by the fact that there is

insufficient evidence in the record to conclude that the applicant "procur[ed] a fraudulent enlistment . . . through deliberate material misrepresentation, omission, or concealment, which if known at the time, might have resulted in rejection."

7. On Form 1966, the applicant answered "yes" to the question in block 26, which asked if he had ever tried or used any narcotic or mind-altering substance. The instructions for completing this question required an explanation to a "yes" answer on the bottom of the next page. Despite the instruction, the recruiter did not require the applicant to explain his "yes" answer. Moreover, the recruiter signed an acknowledgement on the form that he had verified the data in the documents as required by his directives. Even more importantly, he certified that he had reviewed all information contained in the document, and to the best of his judgment and belief the applicant fulfilled the requirements for enlistment. The very fact that there is no explanation of the applicant's pre-service drug use on Form 1966 as required by the instruction is evidence that the recruiter failed in his duty to obtain all required data. Accordingly, the applicant was enlisted into the Coast Guard based on incomplete information, in direct violation of Article 6.A.2. of the Coast Guard Recruiting Manual, which states that "[o]missions or incomplete answers to questions will not be accepted." Since the recruiter failed either to make the applicant complete section VI or to explain in section VI that the applicant refused to complete section VI, there is no evidence that the applicant committed a fraud upon the Coast Guard when the applicant said he was "drug free." Rather, not realizing that THC remains in the blood stream for days and even weeks after exposure, the applicant could have reasonably believed at the time he signed the application that he was in fact "drug free."

8. Fraudulent enlistment is defined as procuring one's own enlistment in the armed forces by a knowingly false representation or deliberate concealment as to qualifications for the enlistment and by receiving pay or allowances thereunder. *See United States v. Nazario*, 56 M.J. 572 (CAA 2001); *see also* Article 12.B.18.b.2. of the Personnel Manual. The applicant did not conceal his drug use; he admitted to it. Therefore, the Board cannot find, based on the evidence in the record, that the applicant's statement that he was "drug free and ready for recruit training" was knowingly fraudulent, particularly when on the same day he signed the above statement, he also informed the recruiter on Form 1966 that he had used illegal drugs, and the recruiter did not require further explanation from the applicant, as required by the instruction on Form 1966.

9. An explanation of the applicant's pre-service drug use, as required on Form 1966, might have given the Board and the Coast Guard some insight into the extent of his pre-service drug use. The applicant might not have been allowed to enlist at all if he had a history of extensive drug use because Chapter 2 of the Recruiting Manual states that prior drug use may disqualify one from enlisting. The failure of the recruiter to obtain and submit a completed Form 1966 has resulted in insufficient evidence in the

record to establish fraudulent enlistment on the part of the applicant. Under the facts of this case, the April 11, 2001 positive urinalysis is not proof that the applicant concealed his drug use at the time of his enlistment because he admitted to such drug use on April 10, 2001. The positive urinalysis sample established only that, at some point prior to providing the urine specimen, the applicant used illegal drugs, which he had clearly admitted on Form 1966. Documenting when the admitted prior drug use occurred was the responsibility of the recruiter, which he neglected. Had the facts been different—had the applicant checked “no” in block 26 or checked “yes” in block 26 and explained in section VI that he had not used illegal drugs for years, or had the recruiter noted in section VI that the applicant refused to explain his drug use—then the Coast Guard’s position that the applicant fraudulently enlisted might have been valid. These, of course, are not the facts on the record.

10. In addition to the above, there is no evidence in the military record that the applicant was advised of his right to object to his discharge, the right to make a statement in his own behalf, and his right to consult with a lawyer. The absence of such documentation strongly suggests that the Coast Guard committed a harmful error by failing to notify the applicant of these rights prior to his discharge. Article 12.B.18.e. of the Personnel Manual mandates these rights for individuals being involuntarily discharged due to misconduct with less than eight years of service. Procuring a fraudulent enlistment is a type of misconduct. *Id.* Whether or not the applicant would have made a statement objecting to his discharge, or whether such statement would have made a difference in the decision to discharge him, we do not entertain. Nor do we think it is wise to ignore this apparent violation of due process because the applicant did not raise it as an error. In this regard, if he were not informed of his due process rights, he would not have known to raise the issue. It was a denial of due process not to advise the applicant of such rights.

11. Therefore, the Board must determine what, if any, corrections should be made to the applicant's record under the circumstances of this case. The Board does not object to the Coast Guard discharging members from the service who test positive for drug use at recruit training or while serving on active duty thereafter. However, the applicant should have been advised of his due process rights prior to his discharge, and the reason for discharge that is recorded on the DD Form 214 should describe as accurately as possible the circumstances under which he was separated. The record does not support the finding of deliberate concealment of drug use on the part of the applicant.

12. After reviewing the Personnel Manual and the SPD Handbook, the Board finds that an “uncharacterized discharge” is the most accurate description of the applicant's service at the time of his discharge. In arriving at this conclusion the Board considered the applicant's positive urinalysis test for drug use, the fact that he served only 18 days on active duty, the recruiter's failure to submit a completed Form 1966,

and the Coast Guard's apparent failure to advise the applicant of his due process rights associated with his discharge. Article 12.B.20 of the Personnel Manual authorizes an "uncharacterized discharge" for members who are separated at the entry level with fewer than 180 days of active service and who have demonstrated "poor proficiency, conduct, aptitude or unsuitability" for further service. The applicant's positive urinalysis demonstrates his poor conduct and unsuitability for further active service.

13. Block 24 of the applicant's DD Form 214 should show the character of the applicant's discharge as "uncharacterized" and block 25 should list Article 12.B.20. of the Personnel Manual as the Separation Authority. It should list JGA (entry level performance and conduct) as the separation code, and RE-3L (eligible for reenlistment except for disqualifying factor) as the reenlistment code. With the RE-3L, the applicant must obtain a waiver before he can reenlist in any branch of the service.

14. The applicant is entitled to the relief discussed above.

[ORDER AND SIGNATURES ON NEXT PAGE]

ORDER

The application of former XXXXXXXXXXXXXXXXXXXX, USCG, for correction of his military record is granted in part. His record shall be corrected to show that he was discharged from the Coast Guard with an uncharacterized discharge. Specifically, his DD Form 214 shall be corrected to show the following:

Block 23 shall show that the applicant was discharged.

Block 24 shall show that his discharge was uncharacterized.

Block 25 shall show Article 12.B.20 of the Personnel Manual as the separation authority.

Block 26 shall show JGA as the separation code.

Block 27 shall show RE-3L as the reenlistment code.

Block 28 shall show entry level performance and conduct as the narrative reason for separation.

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