

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2004-183

FINAL DECISION

AUTHOR: Andrews, J.

This proceeding was conducted under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The application was received on August 20, 2004, and docketed on September 9, 2004, upon receipt of the applicant's military records

This final decision, dated May 19, 2005, is 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, a former petty officer (pay grade E-4) in the Coast Guard Reserve, received a general discharge on September 11, 1985. He was administratively discharged for misconduct after his urine tested positive for marijuana. The applicant asked the Board to upgrade his discharge from general to honorable. He alleged that he did not discover the error in his record until March 5, 2003.

The applicant alleged that his discharge was inequitable because his drug use "was an isolated offense not characteristic of [his] overall quality of service." He argued that the following considerations outweigh the offense and sustain an honorable discharge:

1. He enlisted in the Army on March 20, 1972, "during a time of national crisis."
2. He "performed in an outstanding manner for 12 years, receiving an Honorable Discharge from U.S. Army Reserve."

3. He received "humanitarian awards and national defense decorations, for Mariel, Cuba Service," during his Coast Guard career.
4. He received an honorable discharge button and was recommended for reenlistment upon his discharge on November 30, 1981.
5. If he had been discharged "at the expiration of the normal term of service," excluding the conduct for which he was discharged, he would have received an honorable discharge.
6. If the DRB has previously upgraded an general discharge for drug use to honorable in a case where the veteran's overall quality of service was inferior to the applicant's, such a decision would be inconsistent with the DRB's decision not to upgrade his discharge.¹
7. He was discharged as a result of an Administrative Discharge Board that considered evidence of a "compelled urinalysis administered for the purpose of identifying drug abusers (either for purposes of entry into a treatment program or to monitor progress during rehabilitation or follow-up)," which would violate Article 31 of the Uniform Code of Military Justice (UCMJ) under the decision in *Giles v. Sec'y of the Army*, 475 F. Supp. 595, 7 MIL. L. REP. 2524 (D.C.C. 1979).
8. The decision in *Giles* and "the uniformity requirements of Pub. L. No. 95-126 mandate that [he] receive an Honorable Discharge."
9. Under 32 C.F.R. § 70.6(c)(1), the "current standards contained in DOD Dir. 1332.14 (1977) differ in material respects from the policies and procedures under which [he] was discharged in that they mandate an Honorable Discharge for a service member discharged for personal abuse of drugs when evidence developed as a direct or indirect result of a urinalysis was considered in the discharge proceeding."
10. DOD Directive 1332.14 "represents a substantial enhancement of the rights afforded [a servicemember] in such proceedings."
11. There is a "substantial doubt" about whether he would have received a general discharge if DOD Directive 1332.14 had been in effect at the time of his discharge.

SUMMARY OF THE RECORD

On December 1, 1978, the applicant enlisted in the Coast Guard Reserve for three years. He had prior service in the Army. On June 16, 1981, he became eligible to wear the Humanitarian Service Medal for his participation in "Operation Cuban Refugee Relief" from July 22 to August 4, 1980. On November 30, 1981, upon the expiration of the applicant's enlistment, he was honorably discharged and immediately reenlisted for six years. His final average conduct mark during the enlistment was 4.0 (out of 4.0).

¹ In a telephone call on May 9, 2005, the Coast Guard's coordinator for the Discharge Review Board stated that the DRB's database indicates that the applicant did not apply to the DRB within 15 years of his discharge, as allowed under 10 U.S.C. § 1553, and has had no communication with the DRB.

On September 8, 1984, members of the applicant's Reserve unit underwent a urinalysis. The laboratory report indicates that the urine of the applicant, which is identified by his Social Security number, tested positive for a metabolite of marijuana, THC, at a level of 90 nanograms per milliliter (ng/ml), and that the result was "confirmed by gas chromatography/mass spectrometry."

On October 21, 1984, the applicant's commanding officer (CO) informed him that he would be recommended for a general discharge by reason of misconduct due to his use of marijuana, as documented by a positive urinalysis. The CO also informed him that he had a right to consult counsel and to make a statement on his own behalf. The applicant waived his right to submit a statement, but he requested counsel and an Administrative Discharge Board (ADB).

On December 17, 1984, the applicant's CO recommended to the Commandant that the applicant be discharged for misconduct due to drug abuse. He noted that because the applicant had more than eight years of military service, he was entitled to consult counsel and to appear at a hearing before an ADB.

On March 20, 1985, an ADB was convened to hear the applicant's case. The applicant was represented by an attorney during the proceedings. In its report dated May 4, 1985, the ADB noted that the applicant's urine had tested positive for a metabolite of marijuana at a level of 90 ng/ml and that any result above 50 ng/ml was considered evidence of a "drug incident."² The ADB noted that it found the results of the urinalysis to be "valid and reliable" and that, under the provisions of ALCOAST 016/84, it could not recommend the retention of any member involved in a "drug incident." The ADB stated that the applicant "had no previous history of disciplinary action" and that he denied ever knowingly using marijuana. The transcript of the ADB hearing indicates that the applicant argued that he may have unintentionally ingested marijuana during his travels in the West Indies on business. The ADB recommended that the applicant receive a general discharge.

The report of the ADB was reviewed and concurred in by the Commander of the Seventh Coast Guard District on July 2, 1985, and approved by the Commandant on September 5, 1985. On September 11, 1985, the applicant received a general discharge "by reason of misconduct (drug abuse)."

APPLICABLE LAW

Commandant Instruction 5350.15, issued on May 20, 1983, concerned drug and alcohol abuse policy for reservists. It stated that Article 20 of the Personnel Manual applied to reservists on inactive duty as well as to members on active duty and that

² Currently, the cut-off level for a positive THC urinalysis is only 15 ng/ml.

reservists found to have been involved in a "drug incident" would be processed for discharge in accordance with that chapter. The instruction also stated that no criminal charges would be filed under the UCMJ unless the drug or alcohol abuse was known to have occurred while the reservist was in a duty status.

Article 20.A.2.m. of the Personnel Manual stated that any occurrence of drug abuse constituted a "drug incident." Article 20.B.2.b.(1) authorized "administrative inspections" in the form of random or all-unit urinalyses. Article 20.B.3.c.(1) provided that after one "drug incident," a petty officer might be retained in the Service, depending upon his overall performance and conduct and completion of screening and treatment. Article 20.B.3.c.(2) provided that after a second "drug incident," a petty officer "shall normally be processed for separation."

Article 12.B.2.e. of the Personnel Manual provided that the characterization of a member's service (honorable, general, etc.) "will be determined solely by the member's military record during that enlistment" and that conduct or performance during prior periods of military service "shall not be considered." Article 12.B.2.f.(2) provided that a "general discharge will be issued ... [w]hen a member has been identified as either a user, possessor, or distributor of illegal drugs or paraphernalia" unless the discharge was not administrative but punitive (by court-martial), in which case a worse character of service could be assigned.

ALCOAST 016/84, which was issued by the Commandant on July 30, 1984, stated that "[e]ffective upon receipt, any member involved in a drug incident as defined by [the Personnel Manual] ... will be processed for separation." It noted that the then-current drug policy had been in effect for more than two years and had been widely publicized through recruit training and required unit indoctrination. It stated that in the Service's attempt to rid itself of anyone who abused drugs, more than 700 members had received general discharges due to drug abuse since April 1982. The ALCOAST provided that if a member accused of drug abuse was entitled to an ADB, the ADB should make findings about the reliability of the evidence, including any test results, and about whether the member was involved in a drug incident. The ALCOAST stated that if a "drug incident" was found to have occurred, no recommendation regarding retention should be made. Instead, the ADB should make a recommendation as to whether the member should receive a general or other than honorable (OTH) discharge.

Instruction 5810.4, which was issued the Commander of the Seventh Coast Guard District on March 26, 1984, provided that although not mandatory in other districts, unit urinalysis was mandatory in the Seventh District due to the prevalence and availability of illegal drugs in the geographic area. Unit urinalysis would be conducted on an "all hands" or random selection basis at least quarterly and with no forewarning. Rule 313 of the Manual for Courts-Martial made the results of these urinalyses admissible as evidence in judicial and non-judicial proceedings. Instruction 5810.4 noted that

the primary purpose of such urinalyses was to “ensure the security, operational readiness, safety, health, military fitness, and good order and discipline of the command.” It also noted that all members, including reservists, who were found by urinalysis to have THC levels above 50 ng/ml were deemed to have been involved in a “drug incident” whether or not the drug abuse occurred on base or while serving on active duty. The instruction further noted that at court-martial, the maximum punishment for illegal drug use was a dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for five years.

Article 20.C.2. of the current Personnel Manual permits the administrative inspection of any unit, regular or Reserve, by mandatory urinalysis “to determine and maintain the unit’s security, military fitness, and good order and discipline.” Under Article 20.C.3.e., a positive urinalysis test result is sufficient to prove a drug incident. Under Article 12.B.18.b.4. of the current Personnel Manual, “[a]ny member involved in a drug incident ... will be processed for separation from the Coast Guard with no higher than a general discharge.”

VIEWS OF THE COAST GUARD

On January 26, 2005, the Judge Advocate General (JAG) of the Coast Guard recommended that the Board deny relief in this case.

The JAG argued that the application was untimely and that the applicant had failed to show that it is in the interest of justice for the Board to excuse his delay. He argued that the applicant’s claim that he did not discover the alleged error in his record until 2003 is blatantly false since he received his DD 214 upon his discharge in 1985 and was assisted by counsel at his ADB. The JAG argued that because there is no substantive reason for the delay in the record and because there is no reasonable chance that the applicant will prevail on the merits, the Board should find that it is not in the interest of justice to waive the statute of limitations.

Furthermore, the JAG argued, even if the Board should waive the statute of limitations, the application should be denied for lack of merit. The JAG noted that “[a]bsent strong evidence to the contrary, government officials are presumed to 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).

The JAG pointed out that the applicant does not dispute the accuracy of the urinalysis but instead argues that his general discharge was *ultra vires*. The JAG stated that the DOD directives cited by the applicant “have no applicability to the Coast Guard.” Regarding the applicant’s arguments about *Giles v. Secretary of the Army*, 627 F.2d 554 (D.C. Cir. 1980), the JAG stated the following:

Applicant's reliance on *Giles* is misplaced. First, *Giles* only addressed a small sub-group of those identified as having abused drugs, a sub-group to which Applicant does not belong. [*Id.* at 557.] Secondly, the court in *Giles* was concerned about giving deference to the Court of Military Appeals ... and based its decision on cases decided by C.M.A. that held use of a compelled urinalysis violated Article 31, Uniform Code of Military Justice (UCMJ). C.M.A. later repudiated that position, leading to a different analysis by the Circuit Court. See *Walters v. Secretary of Defense*, 725 F.2d 107, 109 (D.C. Cir. 1983), citing *Murray v. Haldeman*, 16 M.J. 74, 81 (C.M.A. 1983). See also Military Rules of Evidence 313.

Finally, the JAG argued that the Coast Guard's policy of separating drug abusers with a general discharge is proper as applied to the applicant since he "violated the Coast Guard's core values by using illegal drugs and did not complete his obligated service honorably. To award him an Honorable Discharge would be to inappropriately impugn the significance of that achievement and to insult all those men and women who actually earned such a characterization."

The JAG attached to and adopted in his advisory opinion a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC). CGPC stated that the urinalysis was proper, that the applicant received prior notice of the Coast Guard's policies, and that he received all due process in his discharge proceedings. CGPC stated that the Coast Guard's policies on discharging drug abusers "are in keeping with the Coast Guard's law enforcement and drug interdiction missions and *must be maintained with strict adherence.*" In addition, CGPC argued that the general discharge "accurately reflects that the Applicant performed honorably in some aspects of his service, but also reflects that he engaged in serious misconduct (use of illegal substance), which brought discredit to him and the service."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 27, 2005, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 days. No response was received.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's military records and submissions, the Coast Guard's submissions, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552.

2. An application to the Board must be filed within three years after the applicant discovers the alleged error in his record. 10 U.S.C. § 1552(b). The applicant received his general discharge in 1985. Therefore, he knew or should have known of the alleged error in his record in 1985. His application was untimely.

3. Pursuant to 10 U.S.C. § 1552(b), the Board may waive the three-year statute of limitations if it is in the interest of justice to do so. To determine whether it is in the interest of justice to waive the statute of limitations, the Board should conduct a cursory review of the merits of the case and consider the length of and reasons for the delay. *Dickson v. Sec'y of Defense*, 68 F.3d 1396 (D.D.C. 1995); *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

4. The applicant failed to explain his reason for waiting almost nineteen years to apply for an upgrade of his discharge.

5. The Board's review indicates that the application lacks merit. Absent evidence to the contrary, the Board presumes that Coast Guard officials have acted 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). The applicant has not denied the accuracy of the urinalysis in his application; he challenges only the legality of its consideration by the ADB and of the characterization of his discharge as general under honorable conditions.

6. Article 20.B.2.b.(1) of the Personnel Manual in effect in 1985 authorized "administrative inspections" in the form of random or all-unit urinalyses. Instruction 5810.4, which was issued by the Commander of the Seventh Coast Guard District on March 26, 1984, authorized the mandatory urinalysis of all active duty members and reservists in the district. These regulations are consistent with the regulations in effect today under Article 20.C.2. of the current Personnel Manual. Moreover, as the JAG

stated, the applicant's reliance on Article 31 of the UCMJ and the decision in *Giles v. Secretary of the Army*, 627 F.2d 554 (D.C. Cir. 1980), is misplaced because in *Walters v. Secretary of Defense*, 725 F.2d 107, 109 (D.C. Cir. 1983), the court held that "[a]s a matter of Article 31 law, then, the introduction of compulsory urinalysis evidence into administrative discharge proceedings is now lawful." Therefore, the applicant's argument that the ADB should not have considered the positive result of his compelled urinalysis is incorrect.

7. The applicant alleged that he should have received an honorable discharge based on the overall character of his service and receipt of awards during his enlistment. However, under ALCOAST 016/84 and Article 12.B.2.f.(2) of the Personnel Manual, anyone identified as a user of illegal drugs received a general discharge. In this respect, the Board notes that ALCOAST 016/84 amended Article 20.B.3.c. of the Personnel Manual, under which a member would only be discharged after his second drug incident.

8. The applicant alleged that he should have received an honorable discharge because he had previously received honorable discharges and had been recommended for reenlistment. However, under Article 12.B.2.e. of the Personnel Manual, the characterization of a discharge is determined solely by the member's performance and conduct during the enlistment. Therefore, the character of the applicant's service during prior enlistments for which he received honorable discharges is irrelevant in the determination of what type of discharge he should have received in 1985.

9. The applicant alleged that his general discharge was unjust because the purpose of the urinalysis program was to get members into treatment programs. However, ALCOAST 016/84 clearly states that the Coast Guard's intent was to rid itself of drug users.

10. The applicant alleged that under current law, he would likely have received an honorable discharge. The applicant is wrong. Article 12.B.18.b.4. of the current Personnel Manual mandates that Coast Guard members involved in a drug incident be discharged with no better than a general discharge. As the JAG stated, DOD Directive 1332.14 does not apply to the Coast Guard.

11. Accordingly, the Board finds no reason to waive the statute of limitations. The application should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

William R. Kraus

Dorothy J. Ulmer

George A. Weller