

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2007-051

XXXXXXXXXX

XXXXXXXXXX, ANAET/E-3 (former)

FINAL DECISION

AUTHOR: Hale, D.

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 on December 19, 2006, upon receipt of the applicant's completed application for correction.

This final decision, dated July 31, 2007, 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 airman avionics electrical technician (ANAET; pay grade E-3) who served more than three years in the Coast Guard before being discharged for misconduct (marijuana use), asked the Board to correct his record by upgrading his "general" discharge to "honorable" so he can apply for Montgomery G.I. Bill education benefits.¹ He stated that his discharge was "inequitable because it was based on one isolated incident in 39 months of active duty service with no other adverse action." He alleged that he was coerced by two Coast Guard investigators into admitting that he had smoked marijuana on more than one occasion and that "everyone was out to pin me with this so instead of fighting it I chose to agree and save everyone a lot of time and effort." He further alleged that he was "in close contact with people smoking marijuana the days before the random urinalysis" and that he regrets this "one lapse."

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on December 10, 2002. On December 24, 2002, he signed a form to enroll in the Montgomery G.I. Bill program, under which a members'

¹ A veteran must receive an honorable discharge to be eligible for education benefits from the Department of Veterans Affairs (DVA). 38 U.S.C. § 3011. *Carr v. Brown*, United States Court of Veterans Appeals, 5 Vet. App. 2; 1993 U.S. Vet. App. (March 29, 1993)(explaining that a veteran was ineligible for DVA education benefits because he received a general discharge).

basic pay is reduced by \$100 for each of their first 12 months of service, but they become eligible for \$10,800 in educational benefits. The form states that, in addition to the payroll reduction, the member must complete at least 36 months of active duty and receive an honorable discharge to be eligible for the benefit. The form also states that the pay reduction cannot be refunded.

On November 21, 2005, the applicant participated in a random urinalysis, and on December 9, 2005, the specimen provided by the applicant tested positive for THC at a level of 30 ng/ml.²

On January 20, 2006, the applicant's Commander notified him that he was being discharged from the Coast Guard because of his involvement with illegal drugs as indicated by the urinalysis conducted on November 21, 2005.

On January 27, 2006, a Page 7³ was placed in the applicant's record by his unit's Executive Officer, notifying him that the results of the urinalysis constituted a drug incident and that this was in direct violation of U.S. Coast Guard regulations. The Page 7 further stated that pending the outcome of an investigation, he may be processed for separation due to his involvement with illegal drugs.

On January 27, 2006, the Commander of the applicant's unit sent a memorandum to the Coast Guard Personnel Command (CGPC) wherein he recommended that the applicant be administratively discharged from the Coast Guard by reason of misconduct.

On March 10, 2006, the applicant was discharged from the Coast Guard pursuant to Article 12.B.18. of the Coast Guard Personnel Manual. He received a discharge characterized as "general," a separation code of JKK,⁴ and "misconduct" as the narrative reason for separation. The record indicates that the applicant received an RE-4 reenlistment code (ineligible for reenlistment).

Prior to filing his application with the Board, the applicant submitted a request to the Coast Guard's Discharge Review Board (DRB)⁵ for an upgrade of his character of service from "general" to "honorable." On June 6, 2006, the DRB denied the applicant's request, stating that

² In its advisory opinion, the Coast Guard noted that the threshold for THC is 15 ng/ml. See Article 20.C.6. of the Coast Guard Personnel Manual.

³ A CG-3307 (Administrative Remarks, or Page 7) entry documents any counseling that is provided to a service member as well as any other noteworthy events that occur during that member's military career.

⁴ JKK denotes an involuntary discharge directed by established directive when a member who commits drug abuse, which is the illegal wrongful or improper use, possession, sale, transfer or introduction on a military installation of any narcotic substance, intoxicating inhaled substance, marijuana, or controlled substance, as established by 21 USC 812... The SPD Handbook also requires that an RE-4 reenlistment code and a narrative reason for separation of "Misconduct" be assigned to members being discharged with the JKK separation code. Separation Program Designator (SPD) Handbook, 2-56.

⁵ The DRB is a board consisting of five members of the U.S. Coast Guard, appointed by the Commandant of the Coast Guard, and vested with the authority to review the discharge of a former member. The board is empowered to change a discharge or issue a new discharge to reflect its findings, subject to review by the Commandant or the Secretary. 33 C.F.R. § 51.4.

his discharge had been carried out in accordance with Coast Guard policy and that his character of service listed on his DD 214 was proper. On September 5, 2006, the Commandant reviewed the DRB's decision and approved its finding that the applicant's DD 214 should stand as issued.

VIEWS OF THE COAST GUARD

On May 1, 2007, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he adopted the findings provided in a memorandum on the case by CGPC and recommended that the Board deny the applicant's request. CGPC argued that the applicant was involved in a drug incident and his subsequent discharge was in accordance with Coast Guard policy for processing members for misconduct. CGPC asserted that "[a]llowing members of the Coast Guard to abuse illicit drugs and continue to serve runs counter to the Service's core values and is completely inconsistent with the Coast Guard's maritime law enforcement mission whereby the organization conducts counter-drug operations each and every day of the year." CGPC also noted that although the applicant argued that his performance prior to his drug incident negates the impact of the incident in defining his character of service, the "service policy dictates no greater than a general discharge in the applicant's case."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 3, 2007, the BCMR sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 days. The BCMR did not receive a response.

APPLICABLE REGULATIONS

Article 12.B.18.b.4. of the Coast Guard Personnel Manual provides that any member involved in a drug incident or the illegal, wrongful, or improper sale, transfer, manufacture, or introduction onto a military installation of any drug will be processed for separation from the Coast Guard with no higher than a general discharge.

Article 12.B.18.e. of the Manual provides that when discharging a member with fewer than eight years service for misconduct, Commanding Officers shall inform the member in writing of the reason(s) for being considered for discharge, afford the member an opportunity to make a written statement, and afford the member an opportunity to consult with a lawyer as defined if contemplating a general discharge.

Article 20.A.2.k.1. of the Manual states that the intentional use of drugs constitutes a "drug incident as determined by the commanding officer." Article 20.A.2.k.2. states that a "member need not be found guilty at court-martial, in a civilian court, or be awarded NJP [non-judicial punishment] for the conduct to be considered a drug incident."

Article 20.C.3.a. of the Manual provides that "[c]ommanding 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. The absence of a positive confirmed urinalysis result does not preclude taking action based on other evidence." Article 20.C.3.c. states that "[b]efore being questioned in relation to a drug incident, members

are entitled to be advised of their rights under Article 31, UCMJ [Uniform Code of Military Justice]. This applies whether or not disciplinary action under the UCMJ is contemplated.”

Article 20.C.3.e. of the Manual states that “[t]he findings of a drug incident shall be determined by the commanding officer ... using the preponderance of evidence standard. ... A preponderance of the evidence refers to its quality and persuasiveness, not the number of witnesses or documentation. A member's admission of drug use or a positive confirmed test result, standing alone, may be sufficient to establish intentional use and thus suffice to meet this burden of proof.”

Article 20.C.4. of the Manual states that “[i]f after completing the investigation described in Article 20.C.3, the commanding officer determines that a drug incident did occur, he or she will take these actions:”

1. Administrative Action. Commands will process the member for separation by reason of misconduct under Articles 12.A.11., 12.A.15., 12.A.21., or 12.B.18., as appropriate. ...
2. Disciplinary Action. Members who commit drug offenses are subject to disciplinary action under the UCMJ in addition to any required administrative discharge action.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code. The application is timely.
2. The applicant asked the Board to upgrade his general discharge so he can apply for Montgomery G.I. Bill education benefits. He argued that his discharge from the Coast Guard was inequitable because it was based on one isolated incident in 39 months of active duty service and that he previously had no other adverse actions against him. He also alleged that he was coerced by the Coast Guard into admitting that he used marijuana more than once. The applicant did not support this allegation with any evidence.
3. Under 33 C.F.R. § 52.24(b), the Board begins its consideration of each case presuming administrative regularity on the part of Coast Guard officials. Therefore, the Board must determine whether the applicant has overcome this presumption and proved that his commanding officer (CO) erred or committed an injustice in determining that a preponderance of the evidence indicated that the applicant had been involved in a drug incident by wrongfully using marijuana. The applicant must prove this alleged error or injustice by his CO by a preponderance of the evidence.
4. The record indicates that the applicant's urine tested positive for marijuana use after a random urinalysis on November 21, 2005. On January 20, 2006, he was informed that he was being discharged for misconduct because his urinalysis tested positive for an illegal substance. On January 27, 2006, the applicant acknowledged the notification and that he had

been provided with the opportunity to consult with a lawyer. The applicant did not submit a statement on his behalf, but indicated that he objected to the discharge.

5. The applicant has failed to prove by a preponderance of the evidence that his discharge for drug use was in any way erroneous or unjust or that he was denied any due process pursuant to his discharge under Article 12.B.18. of the Personnel Manual. The record shows that after his urine tested positive for illegal drug use, he was notified of his pending discharge and given a chance to submit a statement on his own behalf and to consult an attorney. Moreover, under Article 12.B.18.b.4., a general discharge is the only discharge authorized for a member discharged due to illegal drug use. Therefore, the applicant has not proved that his receipt of a general discharge is erroneous or unjust and this case does not constitute “treatment by military authorities that shocks the sense of justice.” *See Sawyer v. United States*, 18 Cl. Ct. 860, 868 (1989), *rev’d on other grounds*, 930 F.2d 1577 (citing *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976)).

6. Accordingly, the applicant’s request should be denied.

[ORDER AND SIGNATURES ON NEXT PAGE]

ORDER

The application of former ANAET XXXXXXXXXXXX, XXXXXXXXXXXX, USCG, for correction of his military record is denied.

Bruce D. Burkley

J. Carter Robertson

Dorothy J. Ulmer