

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-103

**XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX**

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 docketed the application upon receipt of the applicant's completed application March 9, 2009, and subsequently prepared the final decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated December 4, 2009, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant asked the Board to correct his record by upgrading his discharge under honorable conditions (commonly referred to as a general discharge) to an honorable discharge.

The applicant enlisted in the Coast Guard on October 1, 2002, and was discharged under honorable conditions on March 29, 2007, by reason of misconduct. He was assigned an RE-4 reenlistment code and a JKK (drug abuse) separation code. At the time of enlistment and prior to recruit training, the applicant was counseled on an administrative remarks page (page 7) dated October 1, 2002, which stated the following, in pertinent part: "I understand that I am not to use, possess, or distribute illegal drug, drug paraphernalia of hemp oil products . . . If my urine test detects the presence of illegal drugs, I may be subject to discharge and receive a general discharge."

APPLICANT'S ALLEGATIONS

The applicant asserted that he was erroneously given an under honorable conditions discharge, when he should have been given an honorable discharge. He claimed that unbeknownst to him at the time, a friend had laced his drink with an illegal drug. He argued that his ingestion of the illegal drug was involuntary and should not have been characterized as a drug incident, which requires the intentional use of drugs. He stated that his CO and others told him

that he deserved an honorable discharge because his drug use was not a drug incident, but rather a matter of poor judgment.

According to the applicant, the incident occurred on the third weekend in August 2006 during a visit to his mother's home. He stated that he was hanging out with his brother and a friend of theirs in the basement when following the incident occurred:

I spent time at my mother's house . . . with [my brother]. That night we started drinking a few beers. We had a few beers that night and hung out in my mother's basement. A couple hours later, probably around 2300, a mutual friend from high school came over, [TJ]. He came downstairs and hung out. After a while and a couple glasses of wine, [TJ] went upstairs to grab another bottle. He said we should do a toast for [a deceased friend]. We toasted and drank the wine together, bottoms up. A couple of minutes later my mouth was tingling and numb and my brother was looking down into his glass. We asked [TJ] what he did and he just looked back smiling. I realized what happened and grabbed [TJ] and asked him what the hell he put in the wine. He said something about powder, and [my brother already] knew. I went to hit [TJ] and [my brother] pulled me away from him and made [TJ] leave. [My brother] walked him upstairs and [TJ] said "he just thought it would be funny." The rest of the night I felt awful . . . sweaty, itching, and couldn't sleep. I wanted to call the police on [TJ] but realized this happened in my mother's house and that I could get her into trouble. The following morning I woke up having to run to the bathroom to vomit and was covered in hives, itching like crazy. I woke my brother up and showed him the hives on my arms and my chest and in between my fingers. He stood by me while I was sick and wanted to go to the ER. But I was afraid that it would all go back to the Coast Guard, and I was scared to death.

* * *

I called [the Training Center] Yorktown and explained I was sick on Monday morning but did not feel well enough to drive the 8 hour trip until Tuesday afternoon. I arrived at Yorktown for class on Wednesday and reported to the MK Training Chief. I was scared to death and knew I was going to be subject to a urinalysis which I took and failed. I guess I was under some illusion that this would all go away. I prayed that I would pass the urinalysis. The morning I returned I saw the medical officer and showed him the scabs from the hives all over my body. I did not tell anyone exactly what happened until I was notified of the urinalysis results, at which point I asked to consult with an attorney.

I have contacted [TJ] since that night and asked that he write a sworn statement to show what happened and what he did. He agreed to do so. I have spoken to him again since. When I went home for Christmas it was my intention to get the signed statement from him and from my brother. I got the statement from my brother but was unable to get the statement from [TJ]. I am guessing that he may

feel that he has no reason to help me. Like many people, he is looking out for himself . . . either that, or he has legitimately been missing my messages.

The applicant submitted a supporting statement from his brother. The brother corroborated the applicant's statement that a friend of theirs had spiked the applicant's drink with drugs without the applicant's knowledge. After consuming the drink with the drug, the applicant became sick but refused to go to the hospital because he needed to return to duty and he was afraid that the Coast Guard would find out about the incident. According to the brother, the applicant was sick for two days and called his unit to inform them that he was too sick to drive back to the unit. The brother stated that the applicant was in trouble because of their friend's action and that the applicant hates drugs and would never do cocaine.

The applicant submitted a statement that had been presented at his non-judicial punishment (NJP)¹ for illegal use of drugs from a BMCS (senior chief boatswain's mate) who was his previous officer-in-charge (OIC) from 2003 to 2006. The BMCS stated that the applicant was an extremely high performer and that he had been the unit's sailor of the quarter and had been nominated as the sector's enlisted person of the year. The BMCS stated, "While I certainly cannot attest to his actions as they pertain to the [drug] charges, I find it unlikely, based solely on my past interactions with him that the member would consciously use narcotics, other than those prescribed by a physician."

The applicant also submitted a statement that was used at his NJP from a BMC (chief boatswain's mate) who was the applicant's past executive petty officer (XPO). The BMC stated that he has always had the highest confidence in the applicant, and "Having witnessed his character, his honesty and his desire to do the right thing regardless of the repercussions, I have full confidence in his word when he tells me he did not intentionally ingest cocaine but believes it was surreptitiously given to him."

The applicant submitted the statement that he wrote dated February 8, 2007, objecting to his discharge from the Coast Guard due to misconduct (drug abuse).² In the statement, he denied having intentionally used drugs and noted the difficulty of proving his innocence in the absence of any actual physical evidence of what happened on the night in question. The applicant stated that he has served honorably in the Coast Guard for four and one-half years and questioned the fairness of an under honorable conditions discharge due to misconduct (drug abuse) for someone with an excellent service record like himself.

A page 7 and the DD214 stated that the applicant was discharged under honorable conditions on March 29, 2007, by reason of misconduct.

¹ The actual NJP documents are not in the applicant's military records. However, in his application to the Discharge Review Board (DRB) the applicant stated that he went to captain's mast as a result of the positive urinalysis. According to the DRB report the NJP was held on January 29, 2007.

² The notification to the applicant of his proposed discharge is not in the military record.

Discharge Review Board (DRB) Decision

The applicant submitted an application to the DRB for an upgrade of his discharge. The DRB recommended by a vote of 4 to 1 not to change the applicant's discharge. The Vice Commandant of the Coast Guard approved the majority DRB recommendation. The majority of the DRB found the applicant's claim that he unintentionally ingested cocaine to be "incredulous". They stated that at the time, the applicant was 27 years of age, had over four years of service, and was a second class petty officer with strong evaluations, and therefore, he should have known to report the incident immediately to his command. They also noted that when the applicant's brother suggested that the applicant go to the hospital, the applicant refused because he was afraid that the Coast Guard would find out about the incident.

The dissenting member of the DRB believed the applicant's account, although he agreed that the applicant had used poor judgment in not reporting the incident immediately after the fact. The minority member felt that because of the applicant's exemplary performance evaluations coupled with his receipt of the Coast Guard Achievement Medal,³ there is sufficient information to suggest that the applicant's claims have merit in that he did not intentionally use drugs, and therefore, should have been afforded an opportunity to remain in the Service.

VIEWS OF THE COAST GUARD

On July 21, 2009, the Board received an advisory opinion from the Judge Advocate General (JAG), adopting the facts and analysis provided by Commander, Coast Guard Personnel Service Center (PSC), who recommended denial of the applicant's request. PSC stated the following:

The applicant participated in a random urinalysis and tested positive for a controlled substance. The applicant affirms that his positive test for Cocaine was as a result of his wine being laced with a drug while he was associating with known drug abusers (his brother and friend). The applicant provides a statement from his brother corroborating this story. However, given the nature of the incident, the applicant did not come forward regarding the drug incident until after he tested positive on a urinalysis. Had the incident been involuntary as the applicant claims, the applicant's failure to disclose the alleged involuntary use until after he tested positive on a urinalysis does not lend credibility toward his argument.

Current Coast Guard policy clearly defines that individuals involved in a drug incident shall receive no higher than a General Discharge . . . A review of the applicant's record does not reveal any awards that would merit special consideration under Article 12.B.2.f.1.f. The applicant's discharge was in accordance with Coast Guard policy for processing personnel for misconduct.

³ According to the DD 214, in addition to the Coast Guard achievement Medal, the applicant also earned the Good Conduct Medal, Coast Guard Pistol Expert Medal, Coast Guard Presidential Unit Citation; Coast Guard Rifle Marksman Ribbon, and the Global War on Terrorism Service Medal.

One of the express objectives of the Coast Guard's Alcohol and Substance Abuse program is to "Detect and separate from the Coast Guard those members who abuse, traffic in, or unlawfully possess illegal drugs: . . . (PERSMAN Article 20.A.1.c.) Allowing 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."

APPLICANT'S REPOSENSE TO THE VIEWS OF THE COAST GUARD

On August 14, 2009, a copy of the Coast Guard views was sent to the applicant for any response that he wanted to make. The BCMR did not receive a response from the applicant.

APPLICABLE REGULATIONS

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.

Article 20.A.2.k. defines a drug incident as any of the following conduct as determined by the commanding officer (CO):

- "a. Intentional use of drugs;
- "b. Wrongful possession of drugs;
- "c. Trafficking (distribution, importing, exporting, or introduction into a military facility) of drugs;
- "d. The intentional use of other substances, such as inhalants, glue, and cleaning agents, or over-the-counter (OTC), or prescription medications to obtain a "high," contrary to their intended use; or,
- "e. A civil or military conviction for wrongful use, possession, or trafficking of drugs, unless rebutted by other evidence."

This provision also 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. The provision further states that "[i]f the conduct occurs without the member's knowledge, awareness, or reasonable suspicion or is medically authorized, it does not constitute a drug incident."

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction of this case pursuant to section 1552 of title 10 United States Code. The application was timely.

2. The applicant does not deny that his urine tested positive for an illegal drug, but he argued that because his drug ingestion was not intentional it does not meet the definition of a drug incident. Article 20.A.2.k. of the Personnel Manual defines a drug incident as the intentional use of drugs, the wrongful possession of drugs, or the trafficking in drugs. It further provides that if the use occurs without the member's knowledge, awareness, or reasonable suspicion or is medically authorized, it does not constitute a drug incident.

3. Article 20.A.2.k.1. of the Personnel Manual gives the applicant's CO the authority to determine if the applicant's drug use was a drug incident. Article 20.C.3.c. states that in determining whether a drug incident occurred, a commanding officer should consider all the available evidence, including positive confirmed urinalysis test results, any documentation of prescriptions, medical and dental records, service record, and chain of command recommendations. This provision further provides that evidence relating to the member's performance of duty, conduct, and attitude should be considered only in measuring the credibility of a member's statements. Article 20.D.3.d. of the Personnel Manual states that preponderance of the evidence is the standard for finding a drug incident.

4. The applicant had the opportunity during his NJP to present the CO with his own statement explaining how his urine tested positive for an illegal drug. The CO also had the applicant's brother's statement and the character references from the applicant's past OIC and XPO. The applicant also had an opportunity to write a statement objecting to his proposed discharge. Yet, as evidenced by the applicant's discharge, the CO determined that the applicant had been involved in a drug incident and recommended his discharge from the Coast Guard, which required the approval of the commander, Coast Guard Personnel Command (CGPC).

5. As the applicant has not presented any evidence other than that reviewed by the CO and has not alleged that he was denied of any due process rights afforded under applicable regulation, the only basis for the Board to overturn the CO's and CGPC's determination that the applicant was involved in a drug incident is to give more weight and credibility to the statements of the applicant and his brother than did the CO or the Coast Guard. The CO had the opportunity to observe and weigh the applicant's credibility during the NJP hearing and to consider the applicant's brother's written statement. Despite the applicant's excellent service record and the character references from his previous OIC and XPO, apparently the CO did not believe the applicant's explanation that he did not intentionally use drugs. Moreover, the Coast Guard has entrusted the CO with making these judgments and, in the absence of a violation of the Personnel Manual or compelling evidence of an injustice, the Board will not substitute its judgment for that of the CO or CGPC.

6. With regard to the applicant's argument that it is unfair for someone with his record of service to be prejudiced with a general misconduct discharge, Article 12.B.18.b.4.a. of the Personnel Manual makes it clear that 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.” The applicant signed an administrative remarks page (page 7) on October 1, 2002, advising him of the Coast Guard’s drug policy.

7. The applicant has failed to prove that the Coast Guard committed an error or injustice in discharging him with a general discharge for involvement in a drug incident.

8. Accordingly, the application should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

Nancy L. Friedman

Patrick B. Kernan

George A. Weller