

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2011-060

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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 case upon receipt of the applicant's completed application on December 20, 2010, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated August 18, 2011, is approved and 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 asked the Board to reinstate him on active duty or, in the alternative, to upgrade his character of discharge, narrative reason for discharge, and reentry code. His DD 214 shows that he enlisted on September 11, 2007, and on September 28, 2007, during his third week of boot camp, he received a general discharge under honorable conditions due to "Fraudulent Entry into Military Service, Drug Abuse," with a JDT separation code and an RE-4 reentry code (ineligible to reenlist). The applicant asked the Board for an honorable discharge for "Miscellaneous/General Reasons" and an RE-1 reentry code (eligible to reenlist).

The applicant alleged that before he enlisted on September 11, 2007, he honestly reported on his EQIP National Security Questionnaire, dated July 21, 2007, that he had not used an illegal drug since he was 16 years old. However, "[w]hen urine analysis test results came back on September 13, 2007, [he] tested positive for marijuana. Only two nights before that result, [he] had spent time with other individuals that were engaging in smoking marijuana inside of a vehicle. The close proximity and passive inhalation allowed for trace amounts of marijuana to enter [his] body." He argued that it was unfair for his passive inhalation of other's smoke to be characterized as drug abuse.¹

¹ The Board notes that the applicant alleged that he was discharged in part for concealing a history of Lyme disease. However, his JDT separation code shows that he was discharged for lying about illegal drug use, not about his medical history. The JDT code and corresponding narrative reason for discharge "Fraudulent Entry into Military Service, Drug Abuse" are used only for an "involuntary discharge directed by established directive (no board entitle-

The applicant noted that in 2008 the Discharge Review Board (DRB) recommended upgrading his discharge, reason for discharge, separation code, and reenlistment code, but those recommendations were denied by the Vice Commandant. The applicant argued that the DRB properly determined that “his actions amounted to no more than a youthful indiscretion” and that his subsequent apprenticeship with a carpenter’s union and work with handicapped children show that he has gained maturity. The applicant argued that the DRB’s recommendation should be implemented because the DRB “had the opportunity to more fully evaluate the case and make a decision based on an equitable and democratic approach.”

In support of his allegations, the applicant submitted several character references. His wrestling coach called him mature, conscientious, level-headed, open-minded, and honest. A friend of the applicant’s family who has served in the National Guard and as a Senior Corrections Officer for the State of New Jersey wrote that the applicant has high aspirations and “would be a tremendous asset to the service.” The Executive Director of a non-profit organization stated that he knows the applicant through Little League baseball and that the applicant is “a highly motivated individual, a talented athlete and a leader on his teams.”

SUMMARY OF THE RECORD

On September 11, 2007, at age 18, the applicant enlisted on active duty at the recruiting office in Atlantic City, New Jersey. Before taking the oath on that day, he and his recruiter completed a Record of Military Processing, on which the applicant admitted that he had previously “experimented with marijuana.” He also signed a form acknowledging that he had been advised of the Coast Guard’s drug policy and 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.” In addition, he signed a form certifying that “all information on my enlistment documents is current and accurate. ... I understand withholding information is punishable under the Uniform Code of Military Justice (UCMJ) and may result in less than honorable discharge for fraudulent enlistment.” After taking the oath, he reported to the Training Center in Cape May, New Jersey, approximately 50 miles away, for boot camp.

On September 28, 2007, the applicant was discharged from boot camp after his urine tested positive for THC. A Page 7 entry in his record shows that he received a general discharge for misconduct under Article 12.B.18. of the Personnel Manual because of his positive urinalysis result upon arriving at the Training Center. However, his DD 214 reflects a general discharge pursuant to Article 12.B.20. of the Personnel Manual as well as a JDT separation code, an RE-4 reentry code, and “Fraudulent Entry into Military Service, Drug Abuse” as his narrative reason for separation.

ment) when a member procured a fraudulent enlistment, induction or period of military service through deliberate material misrepresentation, omission or concealment of drug use/abuse.” Separation Program Designator (SPD) Handbook.

DISCHARGE REVIEW BOARD

On December 3, 2008, the DRB recommended, on a vote of three to two, that the Commandant upgrade the applicant's discharge to honorable, his reentry code to RE-1, and his reason for discharge to "Miscellaneous/General." The DRB noted that the applicant attributed his urinalysis result, which was 43 nanograms of THC per milliliter (ng/ml), to his exposure to secondhand marijuana smoke two days before basic training. The DRB found that the applicant's discharge was equitable and proper but also the result of a "youthful indiscretion" by a young man with a strong and genuine desire to serve and the potential to be an asset if allowed to serve.

The majority of the DRB members found that the applicant "provided credible testimony and he was not dishonest. Studies conducted by Tripler AMC concluded that test subjects in a closed-door environment, subjected to secondhand smoke may test positive for THC. There is clearly reasonable doubt in this case, which supports the applicant's testimony. As stated above, this 19-year-old applicant has a huge potential for having a successful career in the military if offered the chance; it would be a waste not to provide him the opportunity."

Two of the DRB members stated that "the applicant's integrity is questionable. On several occasions during his testimony, he appeared to be dishonest, which calls all testimony into doubt. The Tripler AMC studies show that the test subjects in a closed-door environment (8 x 8 x 6), subjected to the secondhand smoke of 14 marijuana cigarettes for six hours tested positive on their urinalysis for THC. However, in this case the applicant was in a moving automobile for 40 minutes with four windows open while two marijuana cigarettes were smoked. In conclusion, the applicant's claim of second hand inhalation is incredulous."

On June 2, 2009, the Vice Commandant disapproved the DRB's recommendation for relief but noted that block 24 of the applicant's DD 214, which contains the character of the member's service, erroneously stated "general" instead of "under honorable conditions." Therefore, on June 22, 2009, the Coast Guard issued a DD 215 to correct block 24 to "under honorable conditions."

VIEWS OF THE COAST GUARD

On March 3, 2011, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the applicant's requests. In so doing, he adopted the findings and analysis of the case provided in a memorandum prepared by the Personnel Service Center (PSC).

The PSC stated that the applicant received a general discharge "for fraudulent entry into military service for his involvement with controlled substances [in] accordance with policy." The PSC stated that the applicant has failed to substantiate any error or injustice in his record and that it entirely concurs with the Vice Commandant's decision not to grant the requested relief.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On April 5, 2011, the Board received the applicant's response to the views of the Coast Guard. The applicant stated that since he addressed the decision of the DRB and the Vice Commandant in his original application and the Coast Guard stated only that it concurs with the decision of the Vice Commandant, the advisory opinion of the Coast Guard "does not necessitate a substantive response because the arguments contained in [the applicant's] CGBCMR application continue to provide a sufficient basis upon which to grant relief."

APPLICABLE REGULATIONS

Article 20.C.2.a.6.b. of the Personnel Manual in effect in 2007 states that new recruits must undergo urinalysis within three days of arriving at the Training Center.

Article 12.B.18.b.4.a. of the Personnel Manual states that "[a]ny member involved in a drug incident ... as defined in Article 20.A.2.k., 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 or prior service training program under this Article in specific cases of drug use before enlistment (as evidenced by a positive urinalysis shortly after entering training)." Under Article 20.A.2.k. illegal use of a controlled substance constitutes a drug incident.

Article 12.B.18.b.5. of the Personnel Manual states that a member may be discharged for fraudulent enlistment 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. ... Commanding Officer, Training Center Cape May, is delegated final discharge authority under this Article in these specific cases for members assigned to recruit training or prior service training program: a. Deliberately concealed criminal records or other information necessary to effect enlistment. ..."

Article 12.B.18.e. of the Personnel Manual states that a member with fewer than eight years of service who is being discharged for misconduct with a general discharge is entitled to (a) notice of the reason for the discharge; (b) an opportunity to consult a lawyer; and (c) an opportunity to submit a statement on his own behalf.

Article 12.B.20. of the Personnel Manual, which is the authority for discharge cited on the applicant's DD 214, is entitled "Uncharacterized Discharges." Article 12.B.20.a.1.b. states that the Commanding Officer (CO) of the Training Center may award recruits with less than 180 days of service an "uncharacterized" discharge if the recruits "[d]emonstrate poor proficiency, conduct, aptitude or unsuitability for further service during the period from enlistment through recruit training." Article 12.B.20.b.1. states that the CO of the Training Center "when compelling circumstances exist, has the authority to award an uncharacterized discharge for service during boot camp in cases involving drug incidents."

Article 12.B.20.d. of the Personnel Manual states that "[t]he availability of the uncharacterized discharge does not preclude awarding recruits with serious infractions a type of discharge

used for characterized service, usually General or Under Other than Honorable Conditions. If other than an uncharacterized discharge is appropriate, send requests to Commander (CGPC-epm-1) for consideration.”

Under Chapter 1.E. of COMDTINST 1900.4D, the manual for preparing DD 214s, the character of service entered in block 24 of a DD 214 should be “uncharacterized” for members separated under the authority of Article 12.B.20. of the Personnel Manual.

Under the SPD Handbook, a member involuntarily discharged under Article 12.B.18. of the Personnel Manual for procuring “fraudulent enlistment, induction or period of military service through deliberate, material misrepresentation, omission or concealment of drug use/abuse” receives a JDT separation code, an RE-4 reenlistment code, and “Fraudulent Entry into Military Service, Drug Abuse.”

ALCOAST 081/93, issued by the Commandant on August 20, 1993, states that the positive reporting level for THC in a urinalysis was decreased from 50 ng/ml to 15 ng/ml because clinical studies showed that passive inhalation results in levels below 15 ng/ml.

ALCOAST 125/10, issued by the Commandant on March 18, 2010, states that the default reentry code for a member being discharged with a JDT separation code is now RE-3 and that the RE-4 code “is prescribed by the separation approval authority only in cases with associated in-service misconduct (e.g., tampering with drug/alcohol test).”

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. Under 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22, an application to the Board must be filed within three years after the applicant discovers the alleged error or injustice. Although the applicant in this case filed his application more than three years after his discharge, he filed it within three years of the decision of the DRB. Therefore, the application is considered timely.²

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.³

3. The applicant alleged that his general discharge for fraudulent enlistment due to drug abuse was erroneous and unjust. The Board begins its analysis in every case by “presuming

² *Ortiz v. Secretary of Defense*, 41 F.3d 738, 743 (D.C. Cir. 1994).

³ See *Steen v. United States*, No. 436-74, 1977 U.S. Ct. Cl. LEXIS 585, at *21 (Dec. 7, 1977) (holding that “whether to grant such a hearing is a decision entirely within the discretion of the Board”); *Flute v. United States*, 210 Ct. Cl. 34, 40 (1976) (“The denial of a hearing before the BCMR does not *per se* deprive plaintiff of due process.”); *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

administratively regularity on the part of Coast Guard and other Government officials.”⁴ The applicant bears the burden of proving the existence of an error or injustice by a preponderance of the evidence.⁵ Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties “correctly, lawfully, and in good faith.”⁶

4. According to the applicant, when completing his pre-enlistment EQIP questionnaire in July 2007, he honestly reported that he had last used marijuana when he was 16 years old. The record shows that on the day he enlisted, September 11, 2007, the applicant (a) admitted to his recruiter that he had “experimented with marijuana” in the past, as noted on his Record of Military Processing; (b) acknowledged by his signature that he had been advised that he would undergo urinalysis upon arrival at the Training Center and that a positive test result would likely trigger a general discharge; (c) certified the continuing accuracy of all his enlistment papers; and (d) certified that he was “drug-free and ready for recruit training.” The applicant’s claims in this regard, however, were not accurate. Upon his arrival at the Training Center, his urine tested positive for THC at a level of 43 ng/ml, which indicates either that he had smoked, inhaled, or otherwise ingested marijuana within the last few days or that he had previously been a long-term, habitual marijuana user.⁷

5. The applicant alleged that on the day he enlisted, he had not used marijuana since he was 16 years old—more than two years earlier. He attributed his positive urinalysis result to his passive inhalation of the second-hand marijuana smoke of others. He told the DRB that he had unintentionally inhaled the second-hand smoke when two friends were each smoking a joint during a 40-minute car ride with the windows open. The applicant’s allegations are not credible because his THC level was 43 ng/ml—well above the Armed Forces’ cut-off of 15 ng/ml. The cut-off of 15 ng/ml was set expressly to exclude any positive results from “passive” inhalation of second-hand marijuana smoke.⁸ Therefore, the Board finds that the applicant has failed to prove

⁴ 33 C.F.R. § 52.24(b).

⁵ *Id.*

⁶ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁷ U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, Office of Applied Studies, *Comparing Drug Testing and Self-Report of Drug Use Among Youths and Young Adults in the General Population*, June 2007, at 59 (“Carboxy-THC is detectable in the urine for 1 to 3 days after casual use and for 7 or more days after moderate use. Higher doses through either increased frequency of use or increased potency of the marijuana may extend the window of detection. The elimination phase of urinary THC metabolites may be extended for up to 30 days after cessation of use among heavy marijuana smokers [citations omitted.]”); U.S. Navy Bureau of Personnel, Public Health Center, *The Navy Drug Testing Program and Navy Drug Screening Laboratories (NDSLs)*, August 30, 2010, at 18 (stating that the detection period for THC above the 15 ng/ml level is just 5 days except when there has been prior chronic, daily use).

⁸ U.S. Coast Guard, ALCOAST 081/93, August 20, 1993 (noting that the cut-off was lowered from 50 ng/ml to 15 ng/ml because research had shown that exposure to second-hand marijuana smoke would not result in a THC level above 15 ng/ml); *see also* R. S. Niedbala *et al.*, *Passive Cannabis Smoke Exposure and Oral Fluid Testing. II. Two Studies of Extreme Cannabis Smoke Exposure in a Motor Vehicle*, JOURNAL OF ANALYTICAL TOXICOLOGY, October 2005, at 607 (finding that when 4 test subjects sat in an unventilated van with 4 other people who were smoking 1 cannabis cigarette each for 1 hour, oral tests for THC conducted after the non-smoking test subjects were removed from the van were negative, and “[u]rine analysis confirmed oral fluid results.”); S. J. Mule, P. Lomax, S. J. Gross, *Active and Realistic Passive Marijuana Exposure Tested by Three Immunoassays and GC/MS in Urine*, JOURNAL OF

by a preponderance of the evidence that the Coast Guard committed an error or injustice in finding that he intentionally used marijuana within a few days of his enlistment, falsely claimed that he had last used marijuana two years earlier, and falsely claimed to be “drug free” to ensure his enlistment.

6. The Board notes that the applicant stated that he received the positive urinalysis result on September 13, 2009, and that he had been in the car with the second-hand marijuana smoke “[o]nly two nights before that result.” Therefore, it may be that the applicant is claiming that the pertinent car ride occurred on September 11, 2009, after he enlisted at the recruiter’s office in Atlantic City, N.J., and before he reported for training to Cape May, N.J. The Board finds, however, that whether his drug use occurred a day or two before he enlisted or on the day of his enlistment, his claim that he was “drug free” was patently false.

7. Recruits whose urine tests positive for THC as a result of drug use that they concealed upon their enlistment may be discharged by the CO of the Training Center for fraudulent enlistment under Article 12.B.18.b.5. of the Personnel Manual. In light of this rule and the applicant’s intentional, illegal use of marijuana within a day or two of his enlistment, the Board finds that the CO committed no error or injustice in discharging him by reason of misconduct, specifically “Fraudulent Entry into Military Service, Drug Abuse,” in accordance with the SPD Handbook. The applicant is not entitled to reinstatement on active duty or to have the reason for his discharged changed to “Miscellaneous/General” as he requested.

8. The CO of the Training Center may award recruits being discharged for pre-enlistment drug use either an uncharacterized discharge pursuant to Article 12.B.20.b.1. of the Personnel Manual or a general discharge under honorable conditions pursuant to Article 12.B.18. Recruits discharged for misconduct under Article 12.B.18. are entitled to due process as prescribed in Article 12.B.18.e., but under Article 12.B.20., recruits receive uncharacterized discharges without any particular procedures. Chapter 1.E. of COMDTINST 1900.4D states that the character of service entered in block 24 of a DD 214 should be “uncharacterized” for members separated under the authority of Article 12.B.20. of the Personnel Manual. However, the applicant’s DD 214 shows that he was discharged under Article 12.B.20. but awarded a general discharge. This combination is inconsistent with the regulations. Nor is it clear that the applicant received the due process required under Article 12.B.18.e. of the Personnel Manual even though he was awarded a general discharge for misconduct. The copy of his military record received by the Board contains none of the documentation of due process under Article 12.B.18.e. that normally appears in the record of a veteran who has been awarded a general discharge for misconduct.

ANALYTICAL TOXICOLOGY, May/June 1988, at 113 (“Passive inhalation experiments under conditions likely to reflect realistic exposure resulted consistently in less than 10 ng/ml of cannabinoids. The 10 – 100 ng/ml cannabinoid concentration range essential for detection of occasional and moderate marijuana users is thus unaffected by realistic passive inhalation.”); E. J. Cone *et al.*, *Passive Inhalation of Marijuana Smoke: Urinalysis and Room Air Levels of Delta-9-Tetrahydrocannabinol*, JOURNAL OF ANALYTICAL TOXICOLOGY, May/June 1987, at 89 (finding that when test subjects were exposed to the second-hand smoke of 4 marijuana cigarettes for 1 hour each day for 6 consecutive days in a small, unventilated room, urine “specimens tested positive only infrequently or were negative.”).

9. Although the Coast Guard was entitled to discharge the applicant for “Fraudulent Entry into Military Service, Drug Abuse,” the applicant’s DD 214 was not completed in accordance with regulation and it is thus unclear whether the CO of the Training Center intended to discharge him in accordance with Article 12.B.20. or Article 12.B.18. of the Personnel Manual. Given the lack of any evidence that the command afforded the applicant the due process required for a general discharge under Article 12.B.18.e., the Board finds that his record should be corrected to show that he received an uncharacterized discharge in accordance with Article 12.B.20., which is the authority for discharge cited on his DD 214.

10. The applicant asked the Board to upgrade his reentry code from RE-4 to RE-1 to allow him to reenlist. In 2007, the RE-4 was the only reentry code authorized in the SPD Handbook for members discharged for “Fraudulent Entry into Military Service, Drug Abuse.” However, on March 18, 2010, the Commandant issued ALCOAST 125/10, which amended the SPD Handbook. Under ALCOAST 125/10, the default reentry code for a member being discharged with a JDT separation code is now RE-3, and the RE-4 code “is prescribed by the separation approval authority only in cases with associated in-service misconduct (e.g., tampering with drug/alcohol test).” An RE-3 code allows a veteran to reenlist if a recruiter is able to get a waiver from the Recruiting Command. The applicant’s continuing lack of honesty with regard to his marijuana use is disturbing, but there is no clear evidence in the record before the Board that he committed any misconduct while on active duty. In addition, the Board notes that during his hearing before the DRB, three members were persuaded that he has “a huge potential for having a successful career in the military if offered the chance.” Therefore, although the applicant has not proved that he should receive an RE-1, the Board finds that his reentry code should be upgraded from RE-4 to the new default of RE-3 pursuant to ALCOAST 125/10.

11. Accordingly, the applicant’s DD 214 should be corrected. Specifically, the Board will correct block 24 to show that he received an uncharacterized discharge and block 27 to show a reentry code of RE-3. Moreover, these corrections should be made by the issuance of a new DD 214, not by issuance of another DD 215. He is not entitled to any other relief.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of former SR xxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is granted in part as follows:

The Coast Guard shall issue him a new DD 214 incorporating the following corrections:

- Block 24 shall show an uncharacterized discharge; and
- Block 27 shall show an RE-3 reentry code.

The following notation may be made in Block 18 of the DD 214: “Action taken pursuant to order of BCMR.”

No other relief is granted.

Donna A. Lewis

Paul B. Oman

Darren S. Wall