DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2011-249

Xxxxxxxxxxxxxxxxxxxxxxxxx
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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 after receiving the applicant's completed application on September 6, 2011, 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 June 7, 2012, 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, a former xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, asked the Board to correct his military record by upgrading his May 15, 2006, general discharge under honorable conditions to an honorable discharge. The applicant stated that he was discharged following a positive urinalysis result, which he believes was a false positive. He stated that he asked for the urine sample to be retested but does not believe it was done. The applicant alleged that at the time of the urinalysis, he was taking four medications that could have resulted in a false positive urinalysis result. He alleged that following the positive result, he was tested three additional times with negative results. The applicant also alleged that the Tripler Army Medical Center's drug testing division, which handles Coast Guard urinalyses, has no record of a positive urinalysis for him.

The applicant alleged that his military record now contains no evidence of misconduct and argued that there is therefore no basis for his general discharge. Therefore, he argued, the decision of the Discharge Review Board (DRB) not to upgrade his discharge is unjust.

SUMMARY OF THE RECORD

On July 5, 2000, the applicant enlisted in the Coast Guard. The same day, he acknowledged by signature that he had been informed of the Coast Guard's drug policy. In 2004, the applicant underwent training and became a xxxxxxxxxxxxxxxxx.

On January 30, 2006, while attending more advanced training at the Naval xxxxxxxxxx xxxxxxxxxxxxxxxxxx, the applicant underwent a random urinalysis. Print-outs from the Navy Drug Screening Laboratory in the applicant's record bear his Social Security Number, but the test result is blacked out. Notes taken during the urinalysis show that the applicant advised the personnel conducting the test that he was taking eight different medications and supplements. The applicant completed his training at the Navy school on February 3, 2006, and was transferred to a Coast Guard training center for duty.

On February 23, 2006, the applicant was notified of his Miranda/Tempia rights and advised that he was suspected of having used ecstasy (methylenedioxymethamphetamine or MDMA). He waived his right to consult an attorney and indicated that he would answer the investigator's questions.

On February 27, 2006, the applicant wrote a statement saying that on Saturday, January 28, 2006, he went to Tijuana with three classmates to celebrate their graduation:

> During our trip, one of the locals invited one of my classmates and myself to join him for a drink. The man buying the drinks didn't speak English so the bartender was translat[ing] for us. At this time, [a Navy classmate] and I were on the dance floor. The bartender came over and informed us the gentlemen had bought a drink. At first we [were] hesitant to [acc]ept the drink but later we decided to have a drink with the gentleman. After the first drink we left the gentleman and went back to the dance floor. After 15 minute[s], the bartender came back over to us and said the gentleman had bought us another drink. After some convincing by the bartender, we joined the gentleman for the second drink. [My classmate] was unable to finish both drinks, however I finished them both. After finishing the second drink the gentleman thanked us for joining him for a drink. At this point the gentleman became a little touchy feely with [the classmate]. At this time we both moved to the other side of the club and tried to avoid the gentleman for the remainder of the night. The gentleman continued to follow [the classmate]. About 30 minutes had passed and the other 2 of our classmates joined us. It's hard to describe the way I was feeling. It was hard to say but I felt as if I was starting to feel the effects of the drinks. We finally left the club at 3:30 a.m.
>
> The next afternoon I went to eat lunch with my brother and sister-in-law and I had a bad headache. I felt dizzy and some nausea. To the best of my knowledge this is the only time I could have come in contact with this drug. As I stated earlier, I would never knowingly use any drugs not prescribed by a medical doctor or physician.

On February 28, 2006, a lieutenant junior grade who was appointed to investigate the matter reported that upon being told on February 23, 2006, that his urine had tested positive for ecstasy, the applicant appeared surprised and then confused. The applicant told him that he expected the urinalysis to show only the prescription drugs he was taking. The applicant stated that he knew of only one way he could have come in contact with ecstasy. The applicant described to the investigator how, when he went to a club in Tijuana, there was a gentleman who insisted on buying them drinks. He stated that the "mixed drinks were delivered from the gentleman himself, not the bartender, and [the applicant] did not see them being prepared." After accepting two drinks from the gentleman, the applicant only drank bottled water that he bought at the bar for the rest of the night. He got back to the barracks at about 0400 and felt nauseous and somewhat dizzy and had a headache the rest of the day but attributed it to having had strong drinks the night before.

The investigator reported that the level of MDMA in the applicant's urine was 599 ng/ml, "which is only slightly above the 500 ng/ml threshold necessary for a positive test. This would be roughly consistent with timing of the possible exposure in Tijuana. … MDMA is typically cleared quickly from the body, usually within 24-72 hours." The investigator stated that the applicant "was taking several prescription medications, over-the-counter medications, and dietary supplements at or around the time of the urinalysis," but "[a]ll of the medications and supplements that were disclosed are not known to cause a false positive urinalysis for MDMA."

The investigator noted that the applicant's superiors asserted that he was an excellent performer and that the allegations "are grossly inconsistent with his reputation." He also noted that MDMA "is an inexpensive and widely used substance inside and out of the United States, especially in clubs and bars, and is known as a 'date rape' drug." The investigator included his opinion that the applicant had not willingly used ecstasy and noted that the story the applicant provided "has such a degree of plausibility as to cause reasonable doubt that his exposure to this substance was truly wrongful." The investigator also stated his opinion that the applicant "did not display willful ignorance in accepting the drinks provided to him in Tijuana, and he had a reasonable expectation that these drinks did not contain a contraband substance." He recommended that the applicant be "cleared of all charges."

On March 4, 2006, the applicant wrote a letter to his command asking that the decision to discharge him for drug abuse be reconsidered. The applicant stated that he understood the Coast Guard's policy but that his case was "highly different and difficult." He noted that he had undergone urinalysis upon reporting to the command and been found drug free and that he was willing to undergo a six-month urinalysis program as provided in Article 20.C.2. of the Personnel Manual. He asked for his original urine specimen to be retested. The applicant stated that his performance marks showed that he did "not fit the pattern of a person who takes drugs." He noted that some people had been drugged unwittingly in clubs and other social settings. He stated that he had been in the Coast Guard for six years but "with one questionable decision of accepting a drink from a stranger, all that is coming to an end. … I don't believe that's fair to me nor is that fair to the potential patients I have the ability to help … I am aware a piece of paper states I used an illegal drug; to me this is merely the underline condition. The true facts to me as I read them are, I [am] being punished for the actions of another …"

On March 16, 2006, the Navy classmate who, according to the applicant, had danced with him in the bar in Tijuana and accepted drinks from a stranger, was questioned by a Navy investigator about the incident and stated the following:

> I … took a trip to Tijuana, Mexico with [the applicant]. The trip began at 2200 [10:00 p.m.] and ended approximately 0300 [a.m.]. The initial plan was to go to a friend's party at a hotel (name unknown), but later moved to Club Animae. The night consisted of a couple of drinks, which I observed the bartender open and hand to us. An unknown gentleman offered myself and [the applicant] a strong drink, some type of liquor but no strange side effects were present. [We] returned to the United States and school the following morning. [The applicant] contacted me on 13th of March 2006 to give me a warning of the investigation.

The Navy classmate further stated that the applicant did not ask him to fabricate a story, that he did not see anyone put anything in their drinks while at the club, that the gentleman at the club bought two drinks for each of them and "was gay, acting like he was trying to pick someone

up"; that the applicant did not act out of the ordinary after drinking at the club; and that he was unaware of the applicant taking any drugs.

On May 1, 2006, the applicant's commanding officer (CO) formally notified him that he was initiating the applicant's discharge for misconduct due to illegal drug use and would recommend that he receive a general discharge. The CO stated that the applicant's urine had tested positive for MDMA during the urinalysis on January 30, 2006. The CO advised him of his right to consult counsel and to submit a statement on his own behalf. On May 2, 2006, the applicant acknowledged the CO's notification and his opportunity to consult an attorney. The applicant objected to the proposed discharge and attached his statements of February 27 and March 4, 2006.

On May 2, 2006, the CO sent the Personnel Command a recommendation that the applicant receive a general discharge for illegal drug use. The CO stated that he found that the applicant had been involved in a "drug incident" pursuant to Article 20.C. of the Personnel Manual. He included copies of the applicant's statements and the investigation with his recommendation. He also noted that the applicant had reported taking prescription medications. On May 8, 2006, Commander, Personnel Command ordered that the applicant be awarded a general discharge for misconduct due to involvement with drugs in accordance with Article 12.B.18. of the Personnel Manual. The applicant received the general discharge on May 15, 2006.

On June 13, 2008, the applicant applied to the Discharge Review Board (DRB) and asked for an honorable discharge. The DRB stated that it could not properly adjudicate the case because the applicant's separation documents were not in his record. The DRB stated that because the applicant claimed he was discharged because of a positive urinalysis result, the DRB had asked the Tripler Army Medical Center to search their records, but Tripler had found no evidence of a positive urinalysis result. The DRB recommended that, in the absence of any documentation corroborating the general discharge for drug abuse documented on the applicant's DD 214, his discharge be upgraded to honorable and the reason for discharge be changed from misconduct to "general/miscellaneous reasons."

On January 6, 2010, the Commandant disapproved the recommendation of the DRB. The Commandant noted that the DRB's decision was based "on portions of the applicant's official records (separation package) not being available for review." The Commandant noted that in his DRB application, the applicant acknowledged the drug incident and did not dispute it. The Commandant noted that the applicant's separation package (which had been obtained) showed that he had received due process under the Personnel Manual and that even in the absence of such evidence, the applicant would be presumed to have been discharged in accordance with policy. The Commandant noted that block 24 of the applicant's DD 214 should be corrected to show the character of service "under honorable conditions," rather than the type of discharge, "general," and denied all other relief.

VIEWS OF THE COAST GUARD

On January 11, 2012, the Judge Advocate General (JAG) submitted an advisory opinion in which he recommended that the Board deny the requested relief. In so doing, he adopted the

findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC).

The PSC stated that the evidence of record shows that the applicant was discharged due to a drug incident in accordance with policy and that the applicant has submitted insufficient evidence to overcome presumption of regularity accorded the drug incident and the general discharge for misconduct. The PSC noted that the Personnel Manual requires that anyone discharged because of a drug incident receive "no higher than a general discharge." Therefore, the PSC recommended that the Board deny the request for relief.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 18, 2012, the applicant responded to the views of the Coast Guard. The applicant disagreed with the Coast Guard. He again alleged that his urine sample was never retested, that the results of subsequent urinalyses were negative, that two of the medications he was taking could generate a false positive test result, including sudifed and an antipsychotic, and that the CO had other options than to discharge him.

APPLICABLE REGULATIONS

Article 20 of the Personnel Manual in effect in 2006 (COMDTINST M1000.6A contains most of the regulations regarding suspected illegal drug use by members. Article 20.C.1.a. states that "Coast Guard members are expected not only to comply with the law and not use illegal drugs, but also, as members of a law enforcement agency, to maintain a life-style which neither condones substance abuse by others nor exposes the service member to accidental intake of illegal drugs. Units shall conduct random urinalysis tests throughout the fiscal year on a consistent basis."

Article 20.C.1.d. states that a unit CO should "investigate all incidents or circumstances in which the use or possession of drugs appears to be a factor, and take appropriate administrative and disciplinary action." Article 20.C.3.a. states that "Commanding 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."

Article 20.A.2.k. defines a "drug incident" as the intentional use of drugs, the wrongful possession of drugs, or the trafficking of drugs. It further states that "[t]he member need not be found guilty at court-martial, in a civilian court, or be awarded NJP for the conduct to be considered a drug incident" and 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."

Article 20.C.3.e. states that in determining whether a drug incident has occurred, the CO shall use "the preponderance of the evidence standard" and that a positive confirmed urinalysis result may by itself be "sufficient to establish intentional use and thus suffice to meet this burden of proof." Article 20.C.3.d. states that

> 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 (PDR), and chain of command recommendations. Evidence relating to the member's performance of duty, conduct, and attitude should be considered only in measuring the credibility of a member's statement(s). If the evidence of a possible drug incident includes a positive urinalysis result, the command should also determine whether the urinalysis was conducted in accordance with this article and whether the collection and chain of custody procedures were properly followed. The commanding officer may delay final determination to pursue any of these options deemed appropriate:

1. Ask the member to consent to a urinalysis test as outlined in Article 20.C.2.a.
2. Direct the member to participate in a urinalysis evaluation program for a maximum of six months as outlined in Article 20.C.2.a.
3. Request the laboratory reexamine the original documentation for error.
4. Request the laboratory retest the original specimen. …

Article 20.C.4. states that if a CO determines that a drug incident did occur, the CO will do the following:

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.

3. Eligibility for Medical Treatment. Members who have been identified as drug-dependent will be offered treatment prior to discharge. …

Article 12.B.18.b.4. states that "[a]ny member involved in a drug incident … will be processed for separation from the Coast Guard with no higher than a general discharge." Article 12.B.2.f.2.a. states that a general discharge will be awarded when a member "has been identified as a user, possessor, or distributor of illegal drugs or paraphernalia."

Article 20.C.2.a.5. states that when a member receives a positive urinalysis result but the CO "remains doubtful whether the member has used drugs wrongfully," the CO may order evaluation testing for a period of two to six months, during which time up to 16 urine specimens may be taken at irregular intervals. In such situations, however,

the original positive urinalysis result may still be used as a basis for disciplinary action under the UCMJ, administrative separation, and characterization of discharge depending on the basis for ordering the original test; e.g., probable cause, administrative inspection, consent or competence-for-duty test ([see] Article 20.C.2.a.8.).

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 10 U.S.C. § 1552. The application was timely filed within three years of the decision of the DRB.[1]

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

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.[2]

3. The applicant alleged that his general discharge under honorable conditions is erroneous and unjust. The Board begins its analysis in every case by presuming that the disputed information in the applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.[3] 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."[4]

4. The record shows that after interviewing the applicant, a lieutenant junior grade concluded that his ingestion of ecstasy was unknowing and that a friend in the Navy later corroborated some of the applicant's explanation of how he might have unknowingly ingested ecstasy. Nevertheless, the applicant's commanding officer apparently found that the applicant's explanation lacked credibility and concluded that the applicant had incurred a drug incident in accordance with Article 20.A.2.k. of the Personnel Manual. The applicant has submitted no evidence to cast doubt on his CO's conclusion, which is accorded the presumption of regularity.

5. The applicant alleged that because Tripler Army Medical Center reported to the DRB that it has no record of a positive urinalysis result for the applicant, his urinalysis report must be erroneous. However, the record shows that the Navy conducted the applicant's urinalysis and used its own facility to test the applicant's urine. Although the result of that test is not in the record, the record shows that the result was reviewed and that the applicant's urine tested positive for ingestion of ecstasy. The record further shows that the applicant's command properly investigated the incident and accorded the applicant all due process. Although the applicant argued that his CO had options other than to discharge him, the Personnel Manual allows a CO to order a retest of a urine sample or to place members in a six-month urinalysis program at the CO's discretion when the CO is in doubt about whether a drug incident occurred. The applicant has not proved that the CO abused his discretion in this regard.

6. The Board finds insufficient evidence in the record to overturn the CO's finding that the applicant incurred a drug incident in accordance with Article 20.A.2.k. of the Personnel Manual. Under Article 12.B.18., all members who incur a drug incident must be separated with no better than a general discharge due to misconduct.

7. Accordingly, the applicant's request should be denied.

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[2] *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).

[3] 33 C.F.R. § 52.24(b).

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

ORDER

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

Donna M. Bivona

Randall J. Kaplan

Paul B. Oman