

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

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2021-020**

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ENS

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**FINAL DECISION**

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on November 25, 2020, and assigned the case to a staff attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated June 16, 2023, 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, an active duty Ensign (ENS/O-1), asked the Board to correct his record by changing his commissioning date from July 23, 2020, to May 20, 2020, and by restoring his class rank from #248 to #17, which would raise his position on the Active Duty Promotion List.

The applicant explained that he was originally set to receive his commission with the rest of his class at the Coast Guard Academy on May 20, 2020, but because he was investigated for a drug incident, his commissioning was delayed and moved to July 23, 2020. The applicant stated that he is seeking to regain the class rank he would have graduated with had it not been for the investigation. The applicant explained that due to his delayed commissioning, he currently holds a class rank of #248, out of a class of 248. However, the applicant claimed that if this injustice is resolved, he will be returned to the class rank he earned, which is #17 out of 248. According to the applicant, if his record his corrected, his class rank will be raised by 231 spots. He alleged that the correction would greatly increase his competitiveness for promotion later in his career. The applicant claimed it was unjust for the Coast Guard not to restore his class rank after he was found innocent.

To support his application, the applicant submitted an email verifying that his class rank would have been #17 out of 248.

## SUMMARY OF THE RECORD

The applicant entered the Coast Guard Academy as a cadet on June 27, 2016.

On April 29, 2020, three weeks before graduation, a Captain from the Academy issued a memorandum, “Investigation into Possible Use of Narcotics/Controlled Substances by Three Cadets,” wherein an investigating officer was assigned to conduct a single officer administrative investigation into the facts and circumstances surrounding the alleged use of controlled substances by the three cadets, one of which was the applicant.

On May 15, 2020, the IO issued a memorandum, “Letter Incident Report; Investigation into Report of Possible Use of Narcotics/Controlled Substances by Three Cadets,” wherein he released the findings of his investigation. The IO’s report revealed that the applicant was implicated in another cadet’s national security questionnaire, SF-86. According to the other cadet, he had used marijuana on three occasions while attending the Academy, and one such occasion was at a party hosted by the applicant. As a result of these allegations, the applicant’s graduation and commissioning were postponed while an investigation into an alleged violation of Article 112a—Wrongful Use/Possession of a Controlled Substance of the Uniform Code of Military Justice (UCMJ) was conducted. During the course of the investigation, the applicant was interviewed by the IO. The IO stated that during the interview, the applicant admitted to prior drug use but did not specify when the drug use occurred. However, in Section 23 of his SF-86 certified on February 8, 2020, the applicant had denied prior drug use. Specifically, the applicant had certified that he had not used illegal drugs in the past 7 years or while holding a valid secret security clearance. Ultimately, the IO found that there was insufficient evidence to state with certainty that the applicant had violated Article 112a of the UCMJ but sufficient evidence to find that the applicant had violated Article 107—False Official Statement. The IO noted that the applicant had been very nervous during the interview and, when asked if he had used drugs as a cadet, he stopped the interview and requested counsel. Additionally, the applicant had denied drug use on his DoDMERB as well. The IO argued that the only way for the applicant not to have lied on the SF-86 is if the drug use he admitted to the IO had occurred after he certified his SF-86 on February 18, 2020.

On May 20, 2020, the applicant’s class graduated from the Academy and received their commissions. Academy graduates are placed on the Active Duty Promotion List (ADPL) in order of their class rank, and their position on the ADPL determines when they become “in zone” for promotions.

On July 23, 2020, the applicant was allowed to graduate from the Academy and received a commission.

On August 31, 2020, the Superintendent signed a memorandum titled, “Final Action for Investigation into Possible Use Of Narcotics/Controlled Substances By Three Cadets.” In this memorandum, the Superintendent noted that he had decided on May 22, 2020—two days after graduation—that there was insufficient evidence of the applicant’s involvement with drugs. He also noted that he had notified the cadet who had admitted to drug use on his SF-86 of his decision to disenroll him from the Academy on June 25, 2020.

### **VIEWS OF THE COAST GUARD**

On April 8, 2021, a judge advocate (JAG) for the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared by the PSC.

The JAG argued that the applicant's allegations regarding his unjustly postponed graduation and commissioning do not accurately summarize the findings of the investigation or the informed decision of the Superintendent. The JAG further argued that in accordance with 14 U.S.C. §§ 1901, 1928-29, the Superintendent of the Coast Guard Academy is granted the authority to determine a cadet's eligibility for graduation and commission. In addition, the JAG argued that under 14 U.S.C. § 2101, determining the eligibility of a cadet's graduation and subsequent commissioning entails assessing a potential graduate's "mental, moral, physical, and professional fitness." In the applicant's case, the JAG explained that while the investigation found that a violation of Article 112a of the UCMJ could not be substantiated, it was found that the applicant had falsified official documents in violation of Article 107 of the UCMJ. The JAG stated that although the Superintendent found that the applicant's violations did not outweigh the potential benefit the applicant could bring to the Coast Guard, it was the applicant's misconduct that set him apart from his peers. And it was within the Superintendent's discretion to postpone the applicant's graduation and commissioning. Accordingly, the JAG recommended that the Board deny relief in this case.

### **APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD**

On April 23, 2021, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. As of the date of this decision, no response has been received.

### **APPLICABLE LAW AND POLICY**

Title 14 U.S.C. § 1901 (Administration of Academy) states, "The immediate government and military command of the Coast Guard Academy shall be in the Superintendent of the Academy, subject to the direction of the Commandant under the general supervision of the Secretary."

Title 14 U.S.C. § 1928 (Cadets; Degree of Bachelor of Science) states, "The Superintendent of the Academy may, under such rules and regulations as the Secretary shall prescribe, confer the degree of bachelor of science upon all graduates of the Academy and may, in addition, confer the degree of bachelor of science upon such other living graduates of the Academy as shall have met the requirements of the Academy for such degree."

Title 14 U.S.C. § 2101 (Original Appointment of Permanent Commissioned Officers) states:

(a)(1) The President may appoint permanent commissioned officers in the Regular Coast Guard in grades appropriate to their qualification, experience, and length of service, as the needs of the Coast Guard may require, from among the following categories:

A. Graduates of the Coast Guard Academy.

...

(b) No individual shall be appointed a commissioned officer under this section until his mental, moral, physical, and professional fitness to perform the duties of a commissioned officer has been established under such regulations as the Secretary shall prescribe.

(c) Appointees under this section shall take precedence in the grade to which appointed in accordance with the dates of their commissions as commissioned officers in such grade. Appointees whose dates of commission are the same shall take precedence with each other as the Secretary shall determine.

### FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction over this matter under 10 U.S.C. § 1552(a) because the applicant is requesting correction of an alleged error or injustice in his Coast Guard military record. The Board finds that the applicant has exhausted his administrative remedies, as required by 33 C.F.R. § 52.13(b), because there is no other currently available forum or procedure provided by the Coast Guard for correcting the alleged error or injustice that the applicant has not already pursued.

2. The application was timely because it was filed within three years of the applicant's discovery of the alleged error or injustice in the record, as required by 10 U.S.C. § 1552(b).

3. The applicant alleged that the Coast Guard committed an error and injustice by postponing his graduation and commissioning from May 20, 2020, to July 23, 2020. In addition, the applicant claimed it was unjust for the Coast Guard not to restore his class rank after he was found innocent. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in the military record, and the applicant bears the burden of proving, by a preponderance of the evidence, that the disputed information is erroneous or unjust.<sup>1</sup> 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."<sup>2</sup>

4. According to the applicant, it was erroneous for the Coast Guard to delay his graduation and commissioning because he was found innocent of being involved with drugs. The Board's review of the record shows that on April 29, 2020, the applicant was implicated in illegal drug involvement as the host of a party where a controlled substance was used. Therefore, his graduation and commissioning were properly delayed while the allegation was investigated.<sup>3</sup> On

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<sup>1</sup> 33 C.F.R. § 52.24(b).

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

<sup>3</sup> 14 U.S.C. § 2101(b) ("No individual shall be appointed a commissioned officer under this section until his mental, moral, physical, and professional fitness to perform the duties of a commissioned officer has been established under such regulations as the Secretary shall prescribe.").

May 15, 2020, the IO submitted his report to Academy officials for review. The record indicates that on May 22, 2020, two days after the applicant's class graduated and received their commissions, the Superintendent reviewed the report of the investigation and decided that the allegations of drug involvement were unsubstantiated.

By that point, however, the applicant's possible involvement with drugs was not the only concern. The IO had uncovered the fact that the applicant had not been truthful about his drug use on his SF-86 and original DoDMERB medical history. The record shows that on his DoDMERB medical history questionnaire, the applicant denied having used illegal drugs, and on his SF-86, he denied having used them in the past 7 years. But during the course of the administrative investigation, the applicant told the IO that he had used illegal drugs in the past. This discrepancy resulted in a finding that the applicant had violated Article 107 of the UCMJ by making a false official statement. Therefore, the Superintendent also had to decide whether the violation of Article 107—which is a serious offense with a maximum punishment of a dishonorable discharge, total forfeitures, and confinement for 5 years—warranted disenrolling the applicant from the Academy because 14 U.S.C. § 2101(b) states, “No individual shall be appointed a commissioned officer under this section until his mental, moral, physical, and professional fitness to perform the duties of a commissioned officer has been established under such regulations as the Secretary shall prescribe.” Although the cadet who had admitted to using drugs on his SF-86 was disenrolled from the Academy, the record shows that the Superintendent ultimately decided not to disenroll the applicant and allowed him to graduate and receive his commission on July 23, 2020. Therefore, the Board finds that the applicant has failed to prove, by a preponderance of the evidence, that the Coast Guard committed an error or injustice by delaying his graduation and commission and refusing to restore his class rank. The fact that the applicant lost the benefit of his class rank in his position on the Active Duty Promotion List as a result of his lie is not an error or injustice.<sup>4</sup>

5. Accordingly, the Board finds that the applicant has not met his burden, as required by 33 C.F.R. § 52.24(b), to prove by a preponderance of the evidence that the Coast Guard erroneously or unjustly postponed his graduation and commissioning and refused to restore his class rank. Accordingly, the applicant's request should be denied.

**(ORDER AND SIGNATURES ON NEXT PAGE)**

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<sup>4</sup> For the purposes of the BCMRs, “injustice” is sometimes defined as “treatment by the military authorities that shocks the sense of justice but is not technically illegal.”<sup>4</sup>

