

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2019-150



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 August 21, 2020, and assigned the case to the staff attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision dated September 22, 2022, 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, a former Senior Chief Petty Officer (SCPO/E-8) who received a General¹ discharge on June 3, 2018, after being denied reenlistment for the illegal use of Oxycodone and Oxymorphone, asked the Board to correct his record by reinstating him into the United States Coast Guard and reimbursing him for back pay and allowances.

The applicant, through counsel, alleged that the Coast Guard circumvented due process rights by choosing to deny him reenlistment instead of administratively separating him for misconduct, which would have allowed him the opportunity to appear before an Administrative Separations Board (ASB). The applicant also alleged that he was unjustly and erroneously denied the opportunity to appear before a reenlistment board as well. According to the applicant, his case is rife with procedural errors that must be corrected to cure the injustice that has taken place.

A complete summary of the applicant's allegations is provided below the Summary of the Record.

¹ There are five types of discharge: three administrative and two punitive. The three administrative discharges are honorable, general under honorable conditions, and under other than honorable (OTH) conditions. The two punitive discharges may be awarded only as part of the sentence of a conviction by a special or general court-martial.

SUMMARY OF THE RECORD

On March 27, 2017, the applicant participated in a Sector-wide urinalysis (drug test), which was administered by his Sector Command.

On April 21, 2017, the applicant's Sector Commander received notice that the applicant's urine had tested positive for prescription opioids for which he had no prescription.

On August 1, 2017, the applicant received a negative CG-3307 ("Page 7") wherein he was notified that he had incurred a "drug incident" and that he would be processed for separation in accordance with the Coast Guard Drug and Alcohol Abuse Program, COMDTINST M1000.10 (series). The applicant was also informed that the unit Command Drug and Alcohol Representative (CDAR) would arrange an appointment with a provider who would determine the nature of the applicant's relationship with drugs. The applicant signed and acknowledged this Page 7 on August 22, 2017.

On September 28, 2017, the applicant was issued a negative Page 7 following an investigation of an incident that had occurred on December 7, 2016. The applicant was counseled for having been arrested by civilian police for discharging a weapon within 100-yards of a residence, in addition to reckless endangerment. The applicant's Commanding Officer had found by a preponderance of the evidence that the applicant had violated Article 134 (Wrongful Interference with an Administrative Proceeding) of the Uniform Code of Military Justice (UCMJ).

On October 24, 2017, the applicant's Commanding Officer (CO), who was the Sector Commander, formally notified the applicant that he would be involuntarily separated in accordance with Article 1.B.17.b.(4) of the Coast Guard's Military Separations Manual, COMDTINST M1000.4, and the Coast Guard Enlisted Personnel Administrative Boards Manual, PSCINST M1910.1. As required by Article 1.C.1. of the Enlisted Administrative Separations Board Manual, PSCINST M1910.1, this 5-page memorandum also informed the applicant of the reason for the separation proceedings (illegal drug abuse); his right to an Administrative Separation Board (ASB); his right to counsel; the least favorable characterization of service he could receive upon completion of his separation; and the consequences that might flow from that type of characterization.

On November 1, 2017, the applicant signed a "First Endorsement," acknowledging that he had received the October 24, 2017, notice of involuntary separation, that he had read and understood the information contained within the notice, and that if he received a General Discharge, he might lose out on rights and privileges afforded to those service members receiving an honorable discharge. The applicant also signed and indicated that he wanted to consult counsel, but waived his right to submit a statement on his own behalf.

On November 1, 2017, the applicant signed an "Exercise of Rights – Involuntary Separation" memorandum, wherein he stated that he had consulted with an attorney on October 31, 2017, waived his right to submit a written statement, and requested the opportunity to appear before an ASB. The applicant further requested that a military lawyer be detailed to him.

On December 28, 2017, Commander, Personnel Service Center (PSC) at Coast Guard Headquarters issued a “Termination of Involuntary Separation” memorandum wherein the applicant was notified that upon review of his CO’s separation package it was determined that the applicant did not have enough time left in his current enlistment contract to complete ASB proceedings. Therefore, Commander, PSC ordered that the administrative separation process be terminated, without prejudice, and that the applicant be processed for separation in accordance with Article 1.A.5. of the Enlisted Accessions, Evaluations and Advancements, COMDTINST M1000.2A—Failure to Meet Reenlistment Eligibility Criteria. The applicant was also informed that he was ineligible to reenlist without securing a reenlistment waiver.

On February 12, 2018, the applicant’s CO presented the applicant with a Page 7 wherein the applicant was informed that in accordance with Article 1.B.4.b. of the Military Separations Manual, COMDTINST M1000.4, a reenlistment interview had been conducted and the applicant did not meet reenlistment eligibility requirements for reenlistment/extension under Article 1.A.5. of the Enlisted Accessions, Evaluations, and Advancements Manual, COMDTINST M1000.2, because of the drug incident documented on August 1, 2017, that resulted from the applicant’s March 27, 2017, failed drug test. Despite the applicant’s inability to meet eligibility requirements, his CO gave him a positive recommendation for an extension for the sole purpose of completing ASB proceedings. The applicant signed the Page 7 on February 13, 2018.

On March 9, 2018, the applicant filed a “Request for Ineligibility Waiver or Voluntary Extension for Administrative Separation Board...” memorandum wherein he requested a waiver to reenlist. In the alternative, the applicant requested that, if his waiver for reenlistment was denied, he be granted a one-year extension of his current reenlistment for the sole purpose of completing the ASB process. The applicant argued that he had been an upstanding service member throughout his career and provided in-depth details about his Coast Guard accomplishments.

On March 9, 2018, the applicant submitted a written request for an ASB to Commander, PSC wherein he asked PSC to reconsider its decision to terminate the applicant’s involuntary separation proceedings and allow his command to convene an ASB. The applicant argued the following to support his request:

- PSC’s decision to deny him the additional due process afforded him through the ASB process was arbitrary, capricious, against fundamental fairness, and not in keeping with the spirit of Coast Guard policy.
- Refusing him an ASB violated policy for the following reasons: 1) at the time of notice of termination there was sufficient time to convene an ASB; 2) Coast Guard policy does not state that ASB procedures will be terminated due to a member’s end of enlistment; 3) discharging a member based on his ineligibility to reenlist and end of enlistment greatly reduces due process protections; and 4) at no time was he provided a meaningful opportunity to be heard regarding the drug incident finding.
- The timeline for ASB processing was approximately 90 days, which would have been sufficient given that he still had 85 days remaining on his enlistment.

- Article 1.B.11.j. of the Military Separations Manual, COMDTINST M1000.4, states a member may not be involuntarily extended beyond the expiration of his current enlistment for the sole purpose of administrative discharge processing. However, a member may execute a voluntary extension for the purpose of exercising his or her right to an ASB. Therefore, the applicant argued, refusing him the right to extend his enlistment to exercise the option of an ASB was unfair and without support in Coast Guard policy.
- Because Coast Guard policy does not state that the reenlistment policy should/must/will supersede the ASB process, the Coast Guard cannot arbitrarily select one discharge procedure over another. Instead, the Coast Guard should consider all supporting policy and facts, including fairness to the member.
- Failure to authorize the extension of his enlistment contract significantly reduced his due process rights.
- The ASB process was provided to enlisted members with more than eight years of service because the Coast Guard believes that “[s]ound personnel management and ordinary concepts of fairness demand that a decision to separate, deny reenlistment, or reduce in rate a member must be carefully considered, and that a member entitled to a hearing must be provided an opportunity to be heard, to present evidence, and to challenge evidence that will be included in the record. The requirements in this Manual, Coast Guard policy, and U.S. law pertaining to board proceedings shall be administered equitably and in good conscience by all participants of a board hearing (Reference (c)).”
- The applicant deserved a meaningful opportunity to be heard.

On April 5, 2018, the Chief of the Advancement and Separations Branch of PSC issued a Separation Authorization wherein the applicant’s command was ordered to discharge him when his enlistment expired with a General – Under Honorable Conditions characterization, a narrative reason of Expiration of Enlistment, a separation code of JBK – Completion of Obligated Service, and a reenlistment code of RE-4 (ineligible to reenlist).

APPLICANT’S ALLEGATIONS

As noted in the Summary of the Record, on August 22, 2017, the applicant was notified that he had tested positive for oxycodone and oxymorphone for which he had no prescription. According to the applicant, nothing like this had ever happened before in his 18 years in the Coast Guard. The applicant argued that under Article 3.B.3.a. of the Coast Guard Drug and Alcohol Abuse Program Manual, COMDTINST M1000.10, his CO was required to process him for separation by reason of misconduct, which the applicant claimed his CO did. The applicant stated that he was notified of his Command’s intent to involuntarily separate him for drug abuse and of his right to counsel and to an ASB on October 24, 2017.

Although he elected to appear before an ASB, on December 28, 2017, Commander, PSC at Coast Guard Headquarters terminated the ASB proceedings, alleging that there was insufficient time to complete the ASB process before the end of the applicant’s enlistment on June 3, 2018, more than five months away. The applicant also noted that despite being recommended for an

extension from his CO, both of his requests for reconsideration and a reenlistment extension were denied.

The applicant stated that it was shocking that the Coast Guard would use a backdoor to separate him, rather than following the proper procedures and safeguards that are in place to prevent this very thing from happening. The applicant argued that the governing regulation for his situation is the Coast Guard Drug and Alcohol Abuse Program Manual, which he alleged requires a CO to process a member for separation after finding a drug incident has occurred, as his CO did. As such, the applicant argued that the next step in the process should have been to process him for involuntary separation, and with over 18 years of service, he wanted to fight to defend his career before an ASB.

The applicant also argued that according to the Enlisted Personnel Administrative Boards Manual, PSCINST M1910.1, Coast Guard members with eight or more years of military service are entitled to a board before they are administratively separated.² According to the applicant, this right is established in the Military Separations Manual Article 1.B.5.c. (Reenlistment Ineligibility) and Article 1.B.17.d. (Misconduct). The applicant stated that once a drug incident has been determined, the only proper reason for terminating ASB proceedings would be to find that a drug incident had not, in fact, occurred. The applicant argued that under Article 3.B.4.b. of the Coast Guard Drug and Alcohol Abuse Program Manual, COMDTINST M1000.10, a CO has the ability to withdraw a recommendation for discharge if they become aware of new information that determines that no drug incident occurred. The applicant alleged that, by all appearances, the Coast Guard continued to believe that a drug incident occurred because they used it as the basis for denying the applicant reenlistment. The applicant claimed that the Coast Guard cannot pick and choose which separation procedure it wants to follow in order to accomplish a task in an easier manner. The applicant argued he was entitled to an ASB, and the Coast Guard took that right away from him.

The applicant alleged that not only was his right to an ASB taken from him, but he was also denied the option to have a reenlistment board. The applicant further stated that in addition to these violations, he was issued a General (Under Honorable Conditions) characterization of service, which could deprive him of some rights and privileges available to honorably discharged veterans under federal and state law.

Citing *Casey v. United States*, the applicant argued that courts have found that “whether he received an honorable discharge or a general discharge under honorable conditions was a distinction to him without merit as it would be to anyone in his circumstances. He wanted a chance to speak up for his career.”³ The applicant stated that a General discharge is less than an honorable one. Citing *Casey* again, the applicant argued, “Since the vast majority of discharges from the armed forces are honorable, the issuance of any other type of discharge stigmatizes the ex-serviceman. It robs him of his good name. It injures his economic and social potential as a member of the general community.”⁴ The applicant argued that these cases support his position that he had a fundamental right to an ASB in order to defend himself against the drug incident allegation.

² The applicant did not identify the article in the Enlisted Personnel Administrative Boards Manual he was citing.

³ *Casey v. United States*, 8 Cl. Ct. 234 (1985).

⁴ *Sofranoff v. United States*, 165 Ct. Cl. 470 (1964).

The applicant further argued that he had a fundamental right to challenge the characterization of service that was given to him. These rights, the applicant argued, were denied to him. The applicant alleged he was discharged through a loophole—the easy way out—instead of doing the hard work of convening an ASB and giving him his due process. He alleged that there was an abundance of time to meet all timelines proposed in regulations.

The applicant argued that the only remedy for his case is to void the denial of his reenlistment, which in turn would set aside the subsequent General discharge. The applicant argued that he should be returned to active duty with all back pay and allowances and with an opportunity to face the ASB that he was entitled to from the beginning.

To support his applicant, the applicant provided the following Coast Guard policies and relevant case law:

- Article 1.B.17. of the Military Separations Manual states that a member discharged for misconduct shall be processed for separation with no higher than a general discharge.
- Article 1.B.11.j. of the Military Separations Manual states that a member may not be involuntarily extended on active duty for the sole purpose of administrative discharge processing, but may “execute a voluntary extension for the purpose of exercising his or her right to an Administrative Board. . . . The voluntary extension must be executed for at least one year to allow the board to be completed, including final action.”
- Article 3.B.2. of the Drug and Alcohol Abuse Program Manual (DAAPM) states that a finding “of a drug incident shall be determined by the commanding officer and an [ASB], if the member is entitled to one, using the preponderance of evidence standard.”
- Article 3.B.3. of the DAAPM states that if a CO determines that a member has incurred a drug incident, the CO will process the member for separation due to misconduct, and an ASB is required for members with more than eight years of service.
- Article 1.B.1. of the Enlisted Personnel Administrative Boards Manual, PSCINST M1910.1, states that members with eight or more years of service are entitled to a hearing before a board before they are involuntarily discharged or denied reenlistment.
- Article 1.B.5.c. of PSCINST M1910.1 states that members with more than eight years of service who do not meet the reenlistment eligibility criteria are not entitled to a reenlistment board and must be processed for separation as directed in paragraph 1.E.4.b. of COMDTINST M1000.2, but they must be afforded the opportunity to submit a statement for consideration by Commander, PSC.
- Article 1.I. of PSCINST M1910.1 provides “time goals” for ASBs and states that ASBs should be initiated without delay; that the hearing should usually begin within 60 days of the notification to the member; that the hearing may take “as long as necessary,” but most are completed in a day; that the board continues deliberations after the hearing in private, usually for no more than three days; and that the member’s CO should forward the board’s report, along with the command’s endorsements and recommendations, to PSC for review within 30 days of receiving the ASB’s report.

- Appendix 2-1 states that administrative separation processing is required for members involved in a drug incident. It further states that a CO [s]hould rarely be faced with the question of which administrative action – involuntary separation or ineligibility for reenlistment – to pursue, and then probably only when conduct or performance issues come to a head at or about the same time that a member is due for an initial pre-discharge interview.
 1. Involuntary discharge action is appropriate when the convening authority determines that a basis for separation exists, the enlisted member’s conduct and/or performance warrant separation, and the member should be discharged as soon as possible. ...
 2. Determining that a member is ineligible to reenlist is appropriate when the member’s overall performance and conduct during the current period of service, and potential for continued productive service, lead to the conclusion that he/she should not be allowed to reenlist (see EAEA Article 1.A.5.c.). Some examples of situations that may result in a determination that a member is ineligible to reenlist include:
 - a. The member is deemed to be a poor risk due to indebtedness, non-support of dependents, or personal problems as described in [the Military Separations Manual] Article 1.B.4.a.
 - b. The member is the proverbial “administrative burden” who has repeatedly been placed on probation ... or who has a history of multiple NJPs ...
 - c. The member’s rating knowledge and/or performance is not commensurate with his or her years of military and specialty service and pay grade.
- COMDTINST M1000.2B states that members who are recommended for reenlistment by their COs but who are not eligible for reenlistment may appeal their ineligibility by submitting a memorandum to PSC.

The applicant also noted that in *Casey v. United States*, 8 Cl. Ct. 234 (1985), the court found that the plaintiff’s discharge was stigmatizing; that Army regulations gave him a right to a hearing before an ASB; and that the Army was arbitrary and capricious in failing to grant him one. The plaintiff “wanted a chance to speak up for his career ... [and] show that he was not an alcohol rehabilitative failure,” and Army regulations entitled him to the hearing. And in *Sofranoff v. United States*, 165 Ct. Cl. 470 (1964), the court found that a General discharge was stigmatizing and that the Marine Corps’ failure to convene a medical board for a member who was being discharged administratively violated the Corps’ regulations.

VIEWS OF THE COAST GUARD

On January 2, 2020, a judge advocate (JAG) for the Coast Guard submitted an advisory opinion in which she recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center. The JAG argued that the termination of the ASB was proper because the applicant was not entitled to a reenlistment board, and his ineligibility to reenlist rendered a recommendation from the ASB moot. The JAG claimed the applicant’s case is predicated upon the erroneous assumption that the ASB could have led to his retention within the service. However, the JAG argued that because the applicant did not meet reenlistment eligibility criteria as outlined in Article 1.A.5.b. of the Enlisted, Accessions, Evaluations and Advancements Manual, COMDTINST M1000.2A, he was not entitled to a reenlistment board, even though he had eight or more years of total active service. According to the JAG, the ASB would have only considered whether there was a proper basis for early involuntary separation and the characterization of service upon discharge. The JAG

explained that an ASB does not make recommendations as to whether a member should be permitted to reenlist.

The JAG also argued that choosing to terminate the applicant's ASB due to time constraints resulting from the applicant's pending end of enlistment was not an "easy way out" or "loophole" as suggested by the applicant. Instead, the JAG claimed that it was a judicious use of Coast Guard resources based upon the circumstances of the applicant's case. According to the JAG, while the ASB could theoretically be conducted in a short timeframe, say 90 days, Coast Guard policy also explicitly acknowledges that timeframes are recommended and that "processing times will vary because of operational needs and local circumstances." The JAG claimed that in the applicant's case, there was no way to guarantee that the ASB could be completed in a timely manner, and as previously discussed, it would have been futile because the ASB would not have considered reenlistment, only retention until the end of the reenlistment term.

The JAG argued that the applicant's arguments omit any reference to the applicant's other instances of misconduct that occurred in close proximity to his drug incident. The JAG argued the applicant's additional misconduct could have served as a separate basis for the applicant's involuntary separation and made him once again ineligible for reenlistment. Specifically, the JAG highlighted the fact that the applicant was found to have (1) Interfered with a Coast Guard Administrative Investigation (UCMJ, Article 134); and (2) Formally charged by a civilian law enforcement with Reckless Endangerment and Unlawful Discharge of a Firearm. The JAG stated that these additional incidents of misconduct provided additional counseling against convening an ASB for the sole purpose of determining retention because the applicant's Article 134 violation also disqualified him from reenlistment because it constituted the commission of serious offense.

The JAG further argued that the applicant's arguments do not account for the fact that the ASB is not the final arbitrator for separation cases. According to the JAG, ASBs only provide recommendations to the Commander of PSC, who then evaluates their recommendations in the context of Coast Guard service wide needs and standards. The JAG claimed that nothing requires the Commander of PSC to adopt the ASB's recommendations and the Coast Guard can, and has, proceed with the discharge, despite an ASB recommendation for retention. The JAG pointed out that the Commander of PSC is also the approving authority for reenlistment eligibility waivers. Therefore, the JAG argued that regardless of the process—an ASB or reenlistment eligibility waiver—the Commander of PSC was the final decision authority in the applicant's case. In the applicant's case, the JAG argued that after careful consideration, the Commander of PSC determined that the applicant's drug incident do not warrant permitting the applicant's reenlistment. The JAG further speculated that the same result would have been reached in the context of involuntary administrative separation.

Finally, the JAG argued that the applicant was afforded his due process rights as required by policy. The JAG explained that in arguing that his due process rights were violated when he was not permitted the opportunity to appear before the ASB, the applicant ignores the other due process rights he was afforded by way of the reenlistment waiver process. Specifically, the JAG stated that the applicant was afforded an opportunity to submit and appear via memorandum, to the Commander of PSC via his chain of command in accordance with Article 1.A.5.d. of the Enlisted Accessions, Evaluations, and Advancements Manual, COMDTINST M1000.2A. The JAG argued that while the appeal was not a formal hearing before a board, it preserved the

applicant's due process rights and afforded him the opportunity to contest the legitimacy and propriety of his drug incident.

In conclusion, the JAG stated that Coast Guard policy does not require adjudication of a drug incident at a Court-Martial or other criminal justice forum. Instead, a positive urinalysis result will result in a drug incident finding, which forms the basis for a mandatory involuntary separation from the Coast Guard. The JAG argued that the applicant has presented no evidence or information to dispute the finding of a drug incident. The JAG also argued that because the applicant's separation from the service was mandatory, the Coast Guard did not commit an error or an injustice.

APPLICANT'S RESPONSE TO VIEWS OF THE COAST GUARD

On January 6, 2020, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within 30 days. The Chair received the applicant's response on January 23, 2020.

Through counsel, the applicant requested that the Board find the Coast Guard's arguments both flawed and incomplete. The applicant argued that the JAG's contentions that his rights were not violated and that an ASB would have only considered whether there was a proper basis for an involuntary separation and the characterization of his service upon discharge are flawed because that is precisely what he wanted the ASB to consider. The applicant stated that by receiving a less than Honorable discharge, he had a vested interest in the outcome of his separation. According to the applicant, whether he would be reenlisted or not, his characterization of service is something that matters, and has a direct impact on his time after service. The applicant argued that by denying him the opportunity to challenge his characterization of service, his due process rights were violated.

The applicant further argued that the JAG's arguments that terminating the ASB proceedings was a judicious use of Coast Guard resources based upon the circumstances of his case, minimizes his right to a hearing, especially given that he requested a hearing before the ASB seven months before the expiration of his enlistment. The applicant argued that the Coast Guard's refusal to give him an ASB hearing was not judicious, but irresponsible, and it interfered with his rights to appear before the ASB.

APPLICABLE LAW AND POLICY

Article 1 of the Military Separations Manual, COMDTINST M1000.4 (August 2018), provides the necessary guidance on discharging a service member with eight or more years of active service. In relevant part:

1.B.2.f.2. Standards of Discharge. General Discharge. The member's commanding officer or higher authority may effect a separation with a general discharge if the member is subject to discharge and a general discharge is warranted under the standards prescribed in this paragraph. When a general discharge is issued for one of the reasons listed in Article 1.B.2.f. (1)(a) of this Manual, the specific reason shall be stated in an entry on an Administrative Remarks, Form CG-3307, entry in the member's PDR. A general discharge applies in these situations:

- a. The member either:

1. Has been identified as a user, possessor, or distributor of illegal drugs or paraphernalia;
1.B.5.a. Scope. If at the time of the initial pre-discharge interview conducted under Article 1.B.4.b. of this Manual or any time after a commanding officer determines an enlisted member is not eligible to reenlist, this Article's procedures apply.

...

1.B.5.c. More than Eight Years' Service. Members who have eight or more years of total active duty and/or reserve military service that meet the reenlistment eligibility criteria in reference (l), Enlisted Accessions, Evaluations and Advancements, COMDTINST M1000.2 (series), but are not recommended for reenlistment by their commanding officer, are entitled to a reenlistment board. However, members who do not meet the eligibility criteria are not entitled to a reenlistment board, even if they have eight or more years of total active and/or reserve military service. If a member is entitled to a reenlistment board, the commanding officer shall follow the procedures in Reference (q), Enlisted Personnel Administrative Boards Manual, PSCINST M1910.1 (series).

...

Article 3 of the Coast Guard Drug and Alcohol Abuse Program Manual, COMDTINST M1000.10, provides the relevant guidance on the preponderance of the evidence standard used when determining if a drug incident has occurred. In relevant part:

3.B.2. Preponderance of the Evidence. The findings of a drug incident shall be determined by the commanding officer and an Administrative Discharge Board, if the member is entitled to one, using the preponderance of evidence standard. That is, when all evidence is fairly considered, including its reliability and credibility, it is more likely than not the member intentionally ingested drugs. 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 1 of the Coast Guard Enlistments, Evaluations, and Advancements Manual, COMDTINST M1000.2A provides the necessary guidance on reenlistment eligibility. In relevant part:

1.A.5. Eligibility for Reenlistment and/or Extension. The Coast Guard offers reenlistments and/or extensions only to those members who consistently demonstrate the capability and willingness to maintain high professional standards, moral character, and an adherence to the Coast Guard's core values. To be eligible for reenlistment, or extension of enlistment, a member must receive a positive recommendation from their commanding officer in accordance with Article 1.A.5.a. of this Manual, and meet the eligibility criteria listed in Article 1.A.5.b. of this Manual. In addition, SELRES members, and IRR members on active duty, or approved to drill for points, must also meet the eligibility criteria listed in Article 1.A.5.c. of this Manual. Members who have eight or more years of total active duty and/or reserve military service that meet the eligibility criteria, but are not recommended for reenlistment by their commanding officer, are entitled to a reenlistment board, as outlined in reference (c), Military Separations, COMDTINST M1000.4 (series). However, members who do not meet the eligibility criteria are not entitled to a reenlistment board, even if they have eight or more years of total active and/or reserve military service. The procedures in Article 1.A.5.d of this Manual shall be followed for members who do not meet the eligibility criteria.

...

1.A.5.b. Eligibility Criteria. Each member must meet the basic eligibility requirements listed below during their current period of enlistment/reenlistment, including any extensions, unless an appeal is approved by Commander (CG PSC-EPM) or (CG PSC-RPM):

5. Have no documented offense for which the maximum penalty for the offense, or closely related offense under the UCMJ and Manual for Courts-Martial, includes a punitive discharge during the current period of enlistment. Use the following guidance to assist.

(a) This criteria [sic] is aimed at serious offenses, analogous to those warranting the "Commission of a Serious Offense" basis for discharge identified in Reference (c), Military Separations, COMDTINST M1000.4 (series). Commission of a serious offense does not require adjudication by non-judicial or judicial proceedings. In some circumstances, military justice action is precluded due to state or federal court proceedings, but a commanding officer may remain convinced that credible evidence establishes, by a preponderance of the evidence, that the member has committed a serious offense. In these circumstances, if warranted by the particular facts of the case, Commander (CG PSC-EPM) or (CG PSC-RPM), may determine that a serious offense has been committed, even without a judicial adjudication, and deny the member the opportunity to reenlist.

(b) An acquittal or finding of not guilty at a judicial proceeding or not holding nonjudicial punishment proceeding does not prohibit proceedings under this provision. However, the offense must be established by a preponderance of the evidence. Police reports, Coast Guard Investigative Service reports of investigation, etc., may be used to make the determination that a member committed a serious offense.

f. Have no special or general courts-martial conviction(s) during the current period of enlistment.

g. Have no conviction(s) by a civil court (or other civilian judicially imposed decision amounting to a conviction such as, but not limited to: adjudication withheld; deferred prosecution; entry in a pretrial intervention program; or any similar disposition of charges which includes imposition of fines, probation, community service, etc.) for any civilian offense, that could warrant a punitive discharge if prosecuted under the UCMJ and Manual for Courts-Martial, during the current period of enlistment.

...

1.A.5.d.(2) Members Not Eligible to Reenlistment. Commands *shall* also submit a memorandum to Commander, (CG PSC-EPM-1) or (CG PSC-RPM-1) to discharge members who do not meet the eligibility criteria and are not recommended for reenlistment/extension by their commanding officer. The memorandum (with enclosures as required) shall contain sufficient facts to establish, by a preponderance of the evidence, that the member does not meet the eligibility criteria. The member shall be afforded the opportunity to submit a written statement for consideration by Commander (CG PSC-EPM-1) or Commander (CG PSC-RPM-1). (Emphasis added.)

Article 1.E.4.c. of COMDTINST M1000.2C states that members who are discharged from the active or reserve component because they do not meet the eligibility criteria will be issued an RE-3 or RE-4 reentry code.

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 is 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 denied him his right to due process when it denied him reenlistment instead of processing him for administrative separation, which would have afforded him the opportunity to be heard before an ASB. He further alleged that the Coast Guard also erroneously denied him the ability to appear before a reenlistment board. 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.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. Under Article 1.A.5.b. of the Enlistments, Evaluations, and Advancements Manual, COMDTINST M1000.2A, to be eligible to reenlist, an enlisted member must have "[n]o documented offense for which the maximum penalty for the offense, or closely related offense under the UCMJ and Manual for Courts Martial, includes a punitive discharge during the current period of enlistment." Under Article 112a of the UCMJ—Wrongful Use, Possession of a Controlled Substance—the maximum punishment for the illegal use of drugs is a dishonorable discharge. Therefore, documentation of illegal drug use in violation of Article 112a of the UCMJ is one of circumstances that makes a member ineligible to reenlist under Article 1.A.5.b. of COMDTINST M1000.2A.

5. The applicant alleged that when the Coast Guard discharged him without an opportunity to appear before and be heard by an Administrative Separations Board (ASB), they violated his due process rights. For the following reasons, the Board disagrees:

- a. The record shows that in April of 2017, the applicant's OIC learned that he had tested positive for oxycodone and oxymorphone, neither of which he had a prescription for, and both of which are considered narcotics on the Schedule II under 21 CFR §1308.⁷ This positive drug test constituted the illegal use of drugs while on active duty under Article 112a (Wrongful Use or Possession of an Illegal Substance) thereby rendering the applicant ineligible to reenlist under Article 1.A.5.b. of the Coast Guard Enlistments, Evaluations, and Advancements Manual, COMDTINST M1000.2A. Immediately upon the finding that the applicant was guilty of a drug incident, he no longer met the reenlistment eligibility criteria. In accordance with Article 1.B.5.a. of the Military Separations Manual, COMDTINST M1000.4, "If at the time of the initial pre-discharge interview conducted under Article 1.B.4.b. of this Manual *or any time after a commanding officer determines an enlisted member is not eligible to reenlist*, this Article's procedures apply." (Emphasis added.) Article 1.A.5.d.(2) of the same instruction required the

⁵ 33 C.F.R. § 52.24(b).

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 A requirement provided in Article 112a of the UCMJ.

applicant's command to submit a memorandum to Commander, PSC to discharge the applicant because he did not meet the eligibility criteria and was not recommended for reenlistment by his CO. The record shows these procedures were followed. Therefore, the Board finds that the applicant had a documented drug incident which rendered him ineligible to reenlist. Upon the finding of ineligibility, policy required that he be processed for separation at the end of his enlistment contract.

- b. The applicant contended that regardless of his drug incident and expiring enlistment, he had a right to an ASB. He argued that the ASB process is provided to enlisted members with more than eight years of service because the Coast Guard believes that:

[s]ound personnel management and *ordinary concepts of fairness demand that a decision to separate, deny reenlistment*, or reduce in rate a member must be carefully considered, and *that a member entitled to a hearing* must be provided an opportunity to be heard, to present evidence, and to challenge evidence that will be included in the record. The requirements in this Manual, Coast Guard policy, and U.S. law pertaining to board proceedings shall be administered equitably and in good conscience by all participants of a board hearing (Reference (c)). (Emphasis added.)⁸

The applicant ignores the key words in this policy— “entitled to.” The following Coast Guard policy is instructive:

Article 1.B.5.c. of the Military Separations Manual, COMDTINST M1000.4 states,

Members who have eight or more years of total active duty and/or reserve military service that meet the reenlistment eligibility criteria in reference (l), Enlisted Accessions, Evaluations and Advancements, COMDTINST M1000.2 (series), but are not recommended for reenlistment by their commanding officer, are entitled to a reenlistment board. However, *members who do not meet the eligibility criteria are not entitled to a reenlistment board, even if they have eight or more years of total active and/or reserve military service.* If a member is entitled to a reenlistment board, the commanding officer shall follow the procedures in Reference (q), Enlisted Personnel Administrative Boards Manual, PSCINST M1910.1 (series). (Emphasis added.)

Here, as clearly outlined in the above-referenced policy, and despite the applicant's contentions to the contrary, he was not entitled to a hearing under Article 1 of the Coast Guard Enlisted Accessions, Evaluations, and Advancements Manual, COMDTINST M1000.2A. To be eligible, policy states that the applicant must have had no documented offense for which the maximum penalty under the UCMJ includes a punitive discharge. Here, as stated above, the applicant tested positive for two narcotics (oxycodone and oxymorphone) for which he had no prescription, thereby violating the Coast Guard's substance abuse policies. Under Article 112a of the UCMJ (Wrongful Use, Possession, etc. of a Controlled Substance), the maximum punishment is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for two years. Therefore, the Board finds that because

⁸ Article 1.E.1.c. of the Coast Guard Enlisted Personnel Administrative Boards Manual, PSCINST M1910.1.

the applicant had violated Article 112a of the UCMJ, which carries a maximum penalty of a punitive discharge, he failed to meet the basic reenlistment eligibility criteria and was therefore ineligible to reenlist and not entitled to a hearing before the reenlistment board even though he had eight or more years of total active service.

- c. Regarding the applicant's allegations that the Coast Guard violated his due process rights when they denied him the opportunity to appear before the ASB, the Board finds his arguments unpersuasive. The applicant's misconduct and the fact that he was approaching the end of his enlistment rendered him ineligible to remain in the service. The applicant's ineligibility afforded him the opportunity to apply for a waiver and provide a statement to PSC, which the record shows he did, but his request for a waiver was denied by PSC. The applicant is under the impression that the ASB could have rendered a different, more beneficial outcome than the one his commanders arrived at, but his belief is misplaced. Article 1.J.1. of the Enlisted Personnel Administrative Boards Manual, PSCINST M1910.1, states:

[A] board's report, including its findings of fact, opinions, and recommendations, is advisory only; it will be thoroughly and carefully reviewed and considered, but it is not binding on CG PSC. CG PSC is responsible for enforcing policy that is in the best interests of the entire Coast Guard and for ensuring the consistent application of military personnel policy across the Coast Guard.

The record shows that the applicant submitted two memoranda to Coast Guard PSC. One requested a waiver of his ineligibility to reenlist or a voluntary extension to appear before an ASB. The second was a request for PSC to reconsider terminating his ASB proceedings. The applicant was afforded multiple opportunities to present his case before PSC, which is the final separation authority. In light of the applicant's drug incident and military record, PSC found the applicant's requests to be unpersuasive and found that the applicant's separation at the end of his enlistment was in the best interest of the Coast Guard. The Board finds that the Coast Guard followed appropriate policy and afforded the applicant with all rights reserved for him in policy.

Even if the ASB had been promptly convened in the Fall of 2017 and recommended that the applicant be retained, the record indicates that PSC would have separated the applicant at its earliest convenience. As stated in the above-referenced policy, PSC is responsible for enforcing policy that is in the best interests of the entire Coast Guard and for ensuring application of military personnel policy across the Coast Guard. The Coast Guard has long maintained a strict no-tolerance policy for drug use, and PSC is bound to enforce that policy uniformly throughout the Coast Guard, as it did here. Under Article 1.B.17. of the Military Separations Manual, a member who incurs a drug incident by illegally using drugs must be discharged with no higher than a General discharge.

5. The applicant argued that after his command initiated his separation for misconduct on October 24, 2017, there was more than enough time to process his ASB proceedings and claimed that it should have taken no more than 90 days. However, the applicant neglects to account

for the process that follows the completion of the actual hearing, including the preparation of the ASB report and proceedings; the applicant's first review period; the review by the Staff Judge Advocate for compliance with policy and legal sufficiency; time for further proceedings and corrections following the legal review; the applicant's second opportunity to review and respond; the chain of command's reviews and endorsements with comments; and finally, PSC's reviews and decision-making. It is noteworthy that after the applicant's review period, no timeline is given that requires the SJA's office or PSC to act within a certain timeframe. Therefore, the Board finds the applicant's argument that there was sufficient time to complete the ASB process before the applicant's enlistment ended to be unpersuasive and speculative.⁹

6. Significantly, at no point throughout the separation process or before the BCMR has the applicant disputed the accuracy of the urinalysis or claimed that his ingestion of opioids in 2017 was not illegal but prescribed or unknowing. Given the positive drug test and the applicant's failure to allege or prove that his drug use was legal or unknowing, the preponderance of the evidence shows that the applicant's CO accurately concluded that he willingly ingested illegal drugs in violation of Article 112a of the UCMJ and Coast Guard policy.¹⁰ The Coast Guard is a law enforcement agency; drug interdiction is one of its major missions; and its zero-tolerance policy is strongly enforced. Therefore, had the applicant appeared before the ASB, this Board finds that both the ASB's recommendation and PSC's decision would have been to administratively separate the applicant for misconduct due to his drug abuse. The applicant has submitted no evidence to support his claim that, after incurring a drug incident due to opioid abuse, there is any possibility that he might have been retained on active duty if he had appeared before an ASB.

7. The Coast Guard's decision to discharge the applicant due to his ineligibility to reenlist, instead of pursuing a discharge for misconduct, provided the applicant with the most favorable possible outcome available to him after he incurred a drug incident. Had the applicant been administratively separated for misconduct through an ASB pursuant to Article 1.B.17. of the Military Separations Manual, his DD-214 would have reflected a narrative reason for discharge of "Misconduct" and separation code of "JKK," both of which are significantly more prejudicial to the applicant than his current narrative reason of "Completion of Required Active Service" and separation code JBK on his DD-214. But, under Article 2.B.2.f.2. of the Military Separations Manual, COMDTINST, even members discharged for completing their required active service must receive a General discharge if they incurred a drug incident within the period of enlistment. Therefore, the Board finds that, contrary to the applicant's arguments, the Coast Guard provided the applicant with a separation process that was the least prejudicial to him.

8. The applicant argued that under *Casey v. United States*,¹¹ because his discharge was stigmatizing, he was entitled to an ASB. However, the facts in *Casey* are substantially different than the facts of the case before us. The facts in *Casey* involved an Army serviceman, not a Coast Guardsman, and an Army regulation that was in conflict with a Department of Defense (DoD)

⁹ The arguments contained within this finding were based on timelines and requirements found in Articles 1.I., 7.C., 1.H., and 8.B. of the Enlisted Personnel Administrative Boards Manual.

¹⁰ Article 3.B.2. of the Coast Guard Drugs and Alcohol Abuse Program Manual, "[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 his burden of proof."

¹¹ *Casey v. U.S.*, 8 Cl. Ct. 234 (1985).

regulation. The Army regulation at issue did not provide certain service members with the right to appear before a separation board, whereas the DoD regulation did. The Court in *Casey* stated, “Regulations that are promulgated by the Army must be in accord with those regulations promulgated by the DoD. To the extent that Army regulations are in conflict with those of the DoD, the service regulations must give way.” Not only is the Coast Guard not bound by the regulation at issue in *Casey*, but the applicant’s case does not involve conflicting Coast Guard regulations. Coast Guard policy is clear that when a member is ineligible for reenlistment under the basic reenlistment criteria, Article 1.A.5. of the Military Separations Manual, COMDTINST M1000.4, authorizes separation at the end of the member’s enlistment contract with no right to reenlist or a hearing. The fact that there are other regulations authorizing other reasons and procedures for separation does not mean that these regulations conflict.

The applicant also cited *Sofranoff v. United States*¹² to support his arguments. However, as in *Casey*, the facts in *Sofranoff* are distinguishable from the facts here and so the decision is not determinative of the outcome in this case. In *Sofranoff*, the applicant argued that the doubts that his mental disability was the cause of his unsuitability should have been resolved by a Board of Medical Survey, and involved a Marine who was arrested for child molestation. The Board therefore finds the applicant’s citations to these cases to be unpersuasive as to the applicant’s rights in this case.

9. The applicant made numerous arguments and allegations that the Coast Guard used a “loophole” to process him for separation, thereby taking the “easy” way out. Although the applicant’s CO did properly initiate involuntary discharge proceedings for misconduct under Article 1.B.17. of the Military Separations Manual, the applicant has not shown that PSC at Coast Guard Headquarters abused its discretion or acted in bad faith when it terminated those proceedings in December 2017 after finding that the applicant’s enlistment was ending in June 2018; that he was ineligible for reenlistment; and that there remained insufficient time in his current enlistment to complete the entire separation process under Article 1.B.17. There is no law or regulation that required PSC to follow the applicable set of discharge procedures under Article 1.B.17., which likely would have required an extension of his enlistment contract, instead of the applicable set of discharge procedures under Article 1.B.5. of the Military Separations Manual. Even though the applicant did not contest the validity of the drug incident, as a result of PSC’s action, the applicant received a discharge for “Completion of Required Active Service,” instead of a discharge for “Misconduct” with a separation code denoting drug abuse.

10. The applicant made varied allegations and arguments. Those not specifically addressed above are considered to be unsupported by substantial evidence sufficient to overcome the presumption of regularity and/or are not dispositive of the case.

11. For the reasons outlined above, the applicant has not met his burden, as required by 33 C.F.R. § 52.24(b), to overcome the presumption of regularity afforded the Coast Guard that its administrators acted correctly, lawfully, and in good faith.¹³ He has not proven by a preponderance of the evidence that his General discharge for “Completion of Required Active Service” with an

¹² *Sofranoff v. U.S.*, 165 Ct. Cl. 470 (1964).

¹³ *Muse v. United States*, 21 Cl. Ct. 592, 600 (1990) (internal citations omitted).

RE-4 reenlistment code is erroneous or unjust. Accordingly, the applicant's request should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

