DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2020-034

[redacted]

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 on February 12, 2020, upon receipt of the completed application, and a staff attorney prepared the decision for the board as required by 33 C.F.R. § 52.61(c).

This final decision, dated October 21, 2022, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

STANDARD OF REVIEW

The BCMR may correct errors or remove injustices in a service member's records. 10 U.S.C. § 1552(a). "The Board begins its consideration of each case presuming administrative regularity on the part of the Coast Guard and other Government officials. The applicant has the burden of proving the existence of an error or injustice by the preponderance of the evidence." 33 C.F.R. § 52.24(b). "It is the responsibility of the applicant to procure and submit with his or her application such evidence, including official records, as the applicant desires to present in support of his or her case." 33 C.F.R. § 52.24(a).

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant received a "general under honorable conditions" discharge for "completion of required active service" on August 11, 2016, following the expiration of his term of enlistment. He asked the Board to either (1) return him to active duty with backpay from the date he was improperly discharged; (2) upgrade his discharge to honorable and provide him with backpay and benefits from the date he was improperly discharged; or (3) change his reenlistment code from RE-4 (ineligible) to RE-1 (eligible) and upgrade his discharge from general to honorable.

The applicant stated he is entitled to relief for two main reasons. First, he asserted that the Coast Guard denied him due process when it failed to follow its own regulations by not providing

him with a hearing before an administrative board.[1] He maintained he was entitled to a hearing pursuant to COMDTINSTs M1000.10, M1000.4, M1000.2, and PSCINST M1910.1 because he had over eight years of military service at all relevant times. The applicant maintained that the Coast Guard's failure to provide him with a hearing deprived him of the opportunity to confront his accusers and contest the allegations against him.

Additionally, the applicant stated the Coast Guard conducted an incomplete and flawed investigation into his use of cocaine. He pointed out that much of the evidence against him was provided by his ex-wife and her husband, who, the applicant maintained, had reason to fabricate evidence against him because of an ongoing custody battle. He pointed out that the main evidence against him consisted of screenshots provided by his ex-wife's husband of messages from an iPod touch that was in the care, custody, and control of his ex-wife's husband when the texts were allegedly sent and received. He maintained this evidence amounts to no more than text messages that were not drug-related and cannot be connected to him. He stated that the Coast Guard Investigative Service (CGIS) did not conduct a forensic examination of the iPod touch. He alleged the iPod touch could be used to send messages that would appear to have come from his iPhone. He also asserted that of the screenshots obtained in the investigation, only four clearly indicate they came from his son's iPod touch and the others could have come from any device. Further, the applicant asserted, the investigation did not find any tangible evidence that he had used, transported, or distributed cocaine. The applicant asserted that based on the information obtained from this investigation, his commanding officer (CO) lacked sufficient evidence to find that he had committed a drug offense by a preponderance of the evidence.

In support of his allegations, the applicant submitted copies of his military records and the following documents:

- Email dated September 30, 2015, from the applicant's ex-wife's spouse to a CGIS agent, titled Cocaine Investigation
- 8 pictures of an iPod
- 1 picture of a backpack
- Printout of September 2015 weather report for Tampa, Florida
- Summary of CGIS interview with the applicant's ex-wife's spouse
- Summary of CGIS interview with the applicant's ex-wife

SUMMARY OF THE RECORD

On April 19, 2004, the applicant enlisted in the Coast Guard. On September 30, 2015, the Coast Guard Investigative Service (CGIS) initiated an investigation into the applicant's alleged illicit drug use while he was on military permissive orders in September 2015 to participate in softball tryouts and tournaments. CGIS began its investigation after the applicant's former spouse

[1] The applicant also stated that the Coast Guard could have held a court-martial hearing. However, his arguments centered around the Coast Guard's failure to provide him with a required administrative hearing.

and her husband informed CGIS that on September 23, 2015, they had found the applicant's child's iPod touch in the husband's underwear drawer and once they powered it up, the iPod touch appeared to have received communications that allegedly originated from the applicant's cellular device and contained information associated with cocaine. The CGIS investigation included the testing of the applicant's urine sample and hair sample, both collected on October 19, 2015; a search of the applicant's person; a search of the applicant's possessions and car; a search of the applicant's computer files associated with his Coast Guard email address; a digital forensic analysis of the applicant's cellular device (identified by phone number, serial number, and Apple ID) and his child's iPod touch (identified by model number and serial number); and witness interviews.

The results of the urinalysis and hair analysis were both negative for drugs, including cocaine.[2] Additionally, the investigators did not find any drugs in the applicant's possession or in his car. The investigators also did not find any derogatory information in the applicant's computer files. However, the report of the forensic data extraction states, in pertinent part, that the following information was identified by the Coast Guard:

- Between September 12 and 17, 2015, the applicant used his Apple ID to engage in an instant/text message conversation with U.S. Navy members regarding "powering up."

- Between September 22 and 23, 2015, the applicant and his softball team captain "engaged in a drug related instant/text message conversation in which they attempted to purchase '2 8balls for $170' that are 'fish scale' from an unidentified individual known only as [name redacted]."[3]

- Between September 23 and 24, 2015, the applicant engaged in instant text messaging conversations with his ex-girlfriend and softball team captain. The applicant's ex-girlfriend texted the applicant "you and [the softball team's captain] trying to buy 8 balls of Coke from a girl named [redacted] with a fish scale." CGIS interpreted this as the applicant's ex-girlfriend threatening to turn him in for using drugs.[4] The applicant did not reply to the message.

CGIS also interviewed numerous witnesses, including the applicant, the applicant's ex-wife, his ex-wife's current husband, several teammates and coaches, and a female acquaintance. These witnesses provided a significant amount of information, including the following:

- The applicant stated he had never used cocaine and "is not using or facilitating the sale of drugs" and "never communicated with anyone regarding the purchase, sale, transfer,

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[2] The results of the urinalysis test were obtained by Tripler Army Medical Center Forensic Toxicology Drug Testing Laboratory. The results of the hair test were obtained by Psychemedics Forensic Drug Test Laboratory.

[3] According to several online dictionaries, an "8 ball" is one-eighth of an ounce of cocaine, and "fish scale" means high quality cocaine (because of its pearly white appearance).

[4] Also, CGIS points out a separate text message conversation took place during the same time frame where the applicant texted the softball team captain "testing" and he replied "[c]an you call or text her before I kill her." However, the relevance of this text message conversation is not clear because there is no indication these two separate conversations are connected.

possession, or use of illegal substances." He stated he exchanged contact information with a woman at a gentleman's club, but they had never met outside the club.

- The applicant's ex-wife stated the applicant had admitted to her that he formerly used cocaine during a road trip from California to Nevada. The applicant's ex-wife's new husband also stated this admission took place.

- The captain of the applicant's softball team initially stated he "has no knowledge of anyone on the team using or talking about drugs or cocaine." However, after CGIS investigators informed him of his Uniform Code of Military Justice (UCMJ) Article 31(b) rights, he stated that he had witnessed the applicant "give $300 to a girl in the club. This $300 was to buy cocaine so [the applicant] and one of the strippers could party." Further, he stated the applicant told him "the girl he gave the $300 to had stopped texting him so [the softball team captain] started emailing the girl's number in an effort to help [the applicant] recoup his money." Additionally, he stated "powering up" refers to drinking alcohol before going out for the night, and he is not aware of the terms "snowing" or "fish scale."

- A female acquaintance who drove to North Carolina in September 2015 to meet the applicant during his softball tryouts/tournaments stated that while she was visiting him, the applicant told her "he had used coke during his time with the All Navy men's softball team" and during another conversation stated "he used the illegal drug, cocaine, with a small group of USN softball team members." She stated that she had gotten into an argument with the applicant and left North Carolina after spending a few hours with him. She stated she was not offered any drugs by the applicant. The file does not indicate whether she saw the applicant use any drugs.

- The coach of the applicant's softball team stated he "never witnessed behavior from any of the All Navy team members that would suggest drug use." Similarly, the assistant coach of the applicant's softball team stated he had no knowledge of drug use by anyone on the team and thinks powering up refers to drinking alcohol before a game. Additionally, one of the applicant's teammates also stated he "was not aware of any drug use by any members of the team."

On February 25, 2016, the applicant was charged with violating Article 81 of the Uniform Code of Military Justice (UCMJ)[5] by on or about September 23, 2015, conspiring to "commit an offense under the Uniform Code of Military Justice, to wit: wrongfully possess cocaine, a Schedule II controlled substance, with the intent to distribute said substance, and in order to effect the object of the conspiracy the [applicant] sent and received various text messages arranging to obtain '2 8balls for $170.'" Additionally, the applicant was charged with violating UCMJ Article 112a by wrongfully using cocaine on or about September 23, 2015. However, the applicant's CO did not

[5] The Manual for Courts-Martial states that the elements for a Conspiracy offense under Article 81 are the following:

(a) That the accused entered into an agreement with one or more persons to commit an offense under the UCMJ; and

(b) That, while the agreement continued to exist, and while the accused remained a party to the agreement, the accused or at least one of the coconspirators performed an overt act for the purpose of bringing about the object of the conspiracy.

convene a court-martial and instead elected to process the applicant for an administrative discharge for misconduct.

On March 3, 2016, the applicant's CO determined the applicant had been involved in a "drug incident."[6] Specifically, he found CGIS's investigation into the applicant demonstrated by a preponderance of the evidence that on or about September 23, 2015, the applicant had conspired to possess cocaine with the intent to distribute the substance. Further, he also found the investigation proved by a preponderance of the evidence that on or about September 23, 2015, the applicant had used cocaine. This determination was entered into the applicant's record via a CG-3307 form ("Page 7"). The CO's comments also informed the applicant he would be processed for separation in accordance with COMDTINST M1000.10, the Coast Guard's Drug and Alcohol Abuse Program Manual.

On March 7, 2016, the applicant received a notice of initiation of involuntary separation for misconduct from his CO. The notice stated that the proposed separation was based on Article 1.B.17.b.(4) of COMDTINST M1000.4, the Military Separations Manual, because the applicant was involved in a drug incident on September 23, 2015, when he used cocaine and conspired to possess and distribute cocaine. The notice stated that if the applicant was separated from the Coast Guard, he could be discharged "under other than honorable conditions" (OTH). The notice informed the applicant the Coast Guard Personnel Service Center (PSC) could approve a discharge under OTH conditions if the Administrative Separation Board (ASB) recommended such a discharge, or if he waived his opportunity to appear before the ASB. In response, the applicant chose not to waive his rights to a hearing before the ASB and elected to consult with a military lawyer. However, an ASB was never convened.

On May 11, 2016, the applicant's CO conducted a reenlistment interview with the applicant because his enlistment contract was due to end on August 11, 2016. The CO informed him he did not meet the eligibility requirements for reenlistment under COMDTINST M1000.2A, Article 1.A.5., and was not recommended for reenlistment based on his previously documented drug incident. The CO documented the interview on a Page 7 and provided the applicant written notice that "you are not eligible to reenlist or extend nor are you eligible to request a waiver from Commander (CG PSC) or request review by the reenlistment board."

On May 16, 2016, the applicant acknowledged he had been informed that he did not meet the eligibility criteria for reenlistment and that he did not receive a positive recommendation from his CO for reenlistment. This acknowledgment was formally documented in a Page 7.

On August 11, 2016, the applicant's enlistment ended, and he was discharged. His DD 214 shows that he received a general discharge "under honorable conditions" due to "completion of required active service" (rather than "misconduct"). As of the date of discharge, the applicant had served on active duty for a period of 12 years, 3 months, and 23 days.

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[6] A "drug incident" includes the intentional use, wrongful possession, or trafficking of drugs as determined by the member's CO based on the preponderance of the evidence. COMDTINST M1000.10.

VIEWS OF THE COAST GUARD

On June 10, 2020, a judge advocate (JAG) submitted an advisory opinion adopting the findings and analysis contained in a memorandum submitted by PSC. The advisory opinion recommended the Board deny the applicant's request for relief.

The JAG argued the Board should deny relief for several reasons. First, the JAG maintained the applicant was not entitled to a hearing before a reenlistment board because he did not meet the eligibility criteria for reenlistment due to his documented drug incident. In support of its position, the JAG explained "[u]nder Section 1.B.5.c, COMDTINST M1000.4 and Section 1.A.5, COMDTINST M1000.2A, members who have eight or more years of total active duty and/or reserve military service who do not meet the reenlistment eligibility criteria in COMDTINST M1000.2A are not entitled to a reenlistment board and must be processed for separation as directed by Section 1.A.5d, COMDTINST M1000.2A."

The JAG maintained that the determination that a serious offense had occurred, such as being involved in a drug incident under COMDTINST M1000.2A, does not require adjudication by judicial or non-judicial proceedings. The JAG stated that "if warranted by the particular facts of the case, Commander (CG PSC-EMP) or (CG PSC-RPM), may determine that a serious offense has been committed, even without judicial adjudication, and deny the member the opportunity to reenlist."[7] However, the JAG acknowledged that the incident serving as the basis for ineligibility under COMDTINST M1000.2A must be established by a preponderance of the evidence.

Next, the JAG asserted the applicant failed to overcome the presumption of regularity afforded to his CO's determination regarding his drug incident on or about September 23, 2015. The JAG stated the applicant's position that his CO failed to meet this standard was based on unsubstantiated allegations that the relevant texts and other evidence used to establish the drug incident were fabricated by his ex-wife and/or her husband. Further, the JAG stated the applicant's contentions are without evidentiary support and are contrary to common sense. The JAG maintained the circumstantial evidence gleaned from the CGIS report was sufficient to establish that the applicant engaged in a drug incident. The JAG pointed out that in addition to the statements of the applicant's ex-wife and her husband, there was a statement by a female friend of the applicant that he had told her he had used cocaine and a statement by a softball teammate that he had given $300 to a girl in a club to buy cocaine.

Further, the JAG argued that being provided a hearing before an ASB[8] would not have provided the applicant with additional due process because the ASB would only have considered whether there was a basis for the applicant's early involuntary separation. Since the applicant served the full term of his enlistment before being denied reenlistment, the JAG reasoned, any decision by the ASB would be moot. The JAG also pointed out any decision by the ASB is only a recommended course of action for the Commander, PSC to decide; thus, Commander, PSC is

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[7] This provision permits a Commanding Officer to determine a serious incident has occurred without a hearing having first taken place. However, an Administrative Board Hearing could still be required once such a determination is made. See COMDINST M1000.10, Articles 3.B.2 and 3.B.3.

[8] The JAG referred to the board as an Administrative Discharge Board (ADB) but most of the manuals use the term Administrative Separation Board (ASB).

not required to follow the recommendation. The JAG maintained the applicant was afforded sufficient due process rights when he was given the opportunity to submit a Re-Enlistment Eligibility Waiver request via the chain of command in accordance with COMDINST M1000.2A following his May 11, 2016 notice of ineligibility for reenlistment. The JAG highlights the fact the applicant did not submit a waiver request, but also acknowledged this request would not have resulted in a hearing before a board.[9]

Lastly, the JAG conceded that an ASB hearing could have theoretically been conducted following the finding of the drug incident and prior to the date the applicant's enlistment expired. However, the JAG stated the Coast Guard's decision not to have an ASB hearing due to time constraints because of the upcoming end of the applicant's enlistment was not an "easy way out" or loophole. Rather, it was a judicious use of Coast Guard resources.

Based on these arguments, the JAG concluded the Board should deny the applicant relief because he failed to meet his burden of establishing by a preponderance of the evidence that the Coast Guard had committed an error or injustice in refusing to reenlist him and discharging him with a General discharge and RE-4 reenlistment code.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

In response to the views of the Coast Guard, the applicant stated the Coast Guard erred because "[l]egally, he was entitled to a separation board. Factually, he was entitled to a fair and impartial investigation."

In regard to the ASB, the applicant stated that because he had over 8 years of service at the time his CO determined he was involved in a drug incident, such determination was required to be made by an ASB pursuant to COMDTINST M1000.10, Article 3.B.2. Therefore, the Coast Guard denied him due process because it did not provide him a hearing before an ASB, where he could have properly defended himself against the allegations that he was involved in a drug incident.

In regard to the investigation, the applicant maintains the evidence from the investigation was not sufficient to prove by a preponderance of the evidence that he was involved in a drug incident. In support of his position, he points out (1) no drugs were ever found in his possession; (2) no witnesses ever admitted to actually purchasing drugs from the applicant, and they did not produce any drugs allegedly sold by the applicant; (3) the hair test and urine test conducted during the relevant time period were both negative for drugs, and the applicant never tested positive for drugs during his 12 year Coast Guard career; (4) none of the text messages found in the investigation ever specifically referred to drugs; (5) the applicant never admitted those texts were his, and a proper chain of custody was never created for those texts; (6) the two main witnesses, his ex-wife and her husband, were biased by their involvement in a child custody case with the

[9] It is noteworthy the record does not contain evidence of the applicant being presented with an opportunity to submit a waiver request. To the contrary, after the applicant's Commanding officer conducted his initial pre-discharge interview during which he informed applicant he did not meet the eligibility requirements to reenlist and was not being recommended for reenlistment, he provided the applicant written notice stating "you are not eligible to reenlist or extend nor are you eligible to request a waiver from Commander (CG PSC) or request review by the reenlistment board."

applicant; (7) two other witnesses were threatened by investigators into giving statements that were derogatory toward the applicant; and (8) the investigators conducted an investigation based on their belief the applicant was guilty, not to find the truth.

Based on these arguments, the applicant concludes the Coast Guard errored by denying him the due process he was entitled to under the applicable Coast Guard instructions. Thus, he asks the Board to correct this error by granting him the relief sought.

APPLICABLE LAW AND POLICY

Coast Guard Drug and Alcohol Abuse Program Manual, COMDTINST M1000.10

Article 1.A.2.k. of COMDTINST M1000.10 defines "drug incident" as follows:

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

Article 3.A.2. of COMDTINST M1000.10 requires COs to initiate investigations when a "drug incident" is suspected:

> Commanding officers shall initiate an investigation into a possible drug incident, as defined in Article 1.A.2.k. of this Manual, following receipt of a positive confirmed urinalysis result or any other evidence of drug abuse. The absence of a positive confirmed urinalysis result does not preclude taking action based on other evidence. Situations which should be carefully evaluated to determine if drugs are an underlying factor include: civil arrest, habitual association with persons who abuse or traffic in drugs, possession of drug paraphernalia, sudden decreases in job performance, repeated absenteeism or lateness for work, unexplained public or domestic disturbances, and accidents or unexplained circumstances requiring medical care. [Emphasis added.]

Article 3.B.1. of COMDTINST M1000.10 states the following about collection of evidence:

> In determining whether a drug incident occurred, a commanding officer should consider all the available evidence, including positive confirmed urinalysis test results, any documentation of prescriptions, medical and dental records, service record (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.

Article 3.B.2. of COMDTINST M1000.10 states the following about the standard of proof:

> 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 3.B.3. states that if a CO determines that a member has incurred a "drug incident," the CO may impose punishment and refer a member for dependency screening and treatment but must initiate the member's discharge for misconduct:

> a. Administrative Action. Commands will process the member for separation by reason of misconduct under Articles 1.A.10., 1.A.14., 1.A.20., or 1.B.17.of reference (c), Military Separations, COMDTINST M1000.4 (series), as appropriate. Cases requiring Administrative Discharge Boards because of the character of discharge contemplated or because the member has served a total of eight or more years, will also be processed under Articles 1.B.22. and 1.B.23. of reference (c), Military Separations, COMDTINST M1000.4 (series), as appropriate.

Coast Guard Enlistments, Evaluations, and Advancements Manual, COMDTINST M1000.2A

Article 1.A.5. of 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. … 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.
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> **l.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):
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> > 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.
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> > > (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.

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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.)

Military Separations Manual, COMDTINST M1000.4

Article 1.B. of the Military Separations Manual, COMDTINST Ml000.4, provides the policy for discharging enlisted members, including the procedures to be followed for each basis for discharge. It states in relevant part:

1.B.2.f. Standards of Discharge.

(1) **Honorable Discharge**. A member's commanding officer or higher authority can effect a separation with an honorable discharge if the member is eligible for or subject to discharge and the member merits an honorable discharge under the standards prescribed here.

(a) The member is eligible for discharge for one of these reasons:
[1] Enlistment expires.
[2] Service obligation fulfilled.
[3] Convenience of the Government.
[4] Dependency or hardship.
[5] Minority (age).
[6] Unsuitability.
[7] Misconduct (except involvement with illegal drugs or obstructing drug urinalysis testing by tampering). [Emphasis added.]
[8] The Commandant so directs.

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(2) 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:
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> a. The member either:
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> 1. Has been identified as a user, possessor, or distributor of illegal drugs or paraphernalia;

Article 1.B.17. of the Military Separations Manual contains the policies and procedures for discharging a member due to misconduct:

> **1.B.17.b.4. Involvement with Drugs.** Any member involved in a drug incident or illegal, wrongful, improper sale, transfer, manufacture, or introduction onto a military installation of any drug, as defined in the Military Drug and Alcohol Policy Manual, COMDTINST M1000.10, Ch.7, will be processed for separation from the Coast Guard with no higher than a general discharge (under honorable conditions).
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> **1.B.17.d. Discharging Members with More than Eight Years Service for Misconduct.** Commanding officers shall process all cases in which they contemplate a discharge under other than honorable conditions for misconduct as Article 1.B.23. of this Manual prescribes. In addition, they shall follow that Article's procedures if considering discharging any member with eight or more years of total active and inactive military service for misconduct, even if contemplating an honorable or general discharge.

Article 1.B.4. of the Military Separations Manual states that approximately six months before a member's enlistment contract ends, the command shall review the member's record to determine whether the member is eligible to reenlist. Then the member shall undergo a pre-discharge interview regarding the member's eligibility to reenlist and any available reenlistment bonus.

Article 1.B.5. of the Military Separations Manual contains the procedures to follow for members whose reenlistments are ending within six months and are ineligible to reenlist. Article 1.B.5.a. states, "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." Article 1.B.5.c. states the following about discharging a member with more than eight years of service due to his or her ineligibility to reenlist:

> Commanding officers must notify a member with eight or more years of total active and/or Reserve military service at the time of the interview of the ineligibility determination. The member must sign a statement on an Administrative Remarks, Form CG- 3307, entry in his or her PDR acknowledging this notification. The notice shall include this information:
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> (1) The basis for the determination.
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> (2) The member has the right to present the case and appear in person before a reenlistment board.
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> (3) The member has the right to be represented by counsel.
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> (4) The member may waive these rights in writing; however, he or she may do so only after legally qualified counsel has fully counseled the member on the matter. If the member then waives the right to a hearing before a board, he or she must submit a signed statement in this general format: …

However, ALCOAST 093/14, issued on March 7, 2014, amended Article 1.B.5. as follows:

> SUBJ: IMPLEMENTATION OF ADDITIONAL REENLISTMENT CRITERIA

A. Enlisted Accessions, Evaluations, and Advancements, COMDTINST M1000.2 (series)
B. Military Separations, COMDTINST M1000.4 (series)

1. To ensure the Coast Guard retains a disciplined, high-performing workforce, reenlistments and/or extensions should only be offered to those members (active and reserve) who maintain high professional standards and adhere to the Coast Guards core values. Therefore, to be eligible for reenlistment or extension of (re)enlistment, a member must meet two basic criteria: receive a positive recommendation from their commanding officer and meet the eligibility criteria listed in REF A and paragraph 2 below.

2. In addition to the eligibility requirements listed in Articles 1.A.5. and 1.A.7. of REF A, all active and reserve members, regardless of duty status, must meet the following eligibility requirements during their current period of enlistment (to include any extensions):

a. Achieve a minimum factor average of 3.5 on their enlisted performance evaluations,
b. Have no more than one unsatisfactory conduct mark,

• • •

f. 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.[10]

• • •

3. The commanding officers recommendation remains an integral part of the reenlistment process and provides commands an opportunity to clearly articulate a member's suitability for continued service. …

4. Members must meet all eligibility requirements to reenlist/extend. Members who meet the eligibility criteria but are not recommended for reenlistment by their commanding officer who have less than eight years total active and/or reserve military service may submit an appeal to CG PSC-EPM-1 for active duty members or CG PSC-RPM-1 for reserve members. Members who have eight or more years of total active and/or reserve military service are entitled to a reenlistment board. Additionally, members who do not meet the eligibility criteria, but are recommended for reenlistment/extension by their commanding officer, may also submit an appeal to CG PSC-EPM-1 for active duty members or CG PSC-RPM-1 for reserve members, regardless of total years of service.

5. These updated reenlistment eligibility criteria are effective 17 March 2014. Article 1.B.4.b. of REF B requires commands to conduct a pre-discharge interview approximately six months prior to a member's expiration of enlistment (EOE) to notify a member whether they are eligible to reenlist. To accommodate this provision, members whose EOE is within six months of the 17 March 2014 effective date (17 September 2014) will not be screened against these updated reenlistment criteria. Members whose EOE is after 17 September 2014 who desire to reenlist or extend their enlistment must be screened against these updated reenlistment criteria within the timeframe of Article 1.B.4.b. of REF B. Commanding officers should coordinate with their servicing personnel office for electronic and paper records reviews prior to effecting enlistments/ extensions. The updated reenlistment eligibility criteria shall not be used as a tool to separate members that would otherwise be eligible under Article 1.B. of REF B.

6. Members not eligible for reenlistment/extension of enlistment will be discharged from the active or reserve component, as applicable, upon the expiration of their enlistment in accordance with the provisions of Article 1.B.11. of REF B with an RE-3 reenlistment code.

On October 1, 2014, PSC's attorney reported to the JAG's office that PSC's interpretation of paragraph 4 of ALCOAST 093/14 is as follows:[11]

1) Eligible & recommended = reenlist

[10] The maximum punishment for intentionally using, possessing, or trafficking illegal drugs under Article 112a of the UCMJ includes a punitive discharge. Manual for Courts-Martial United States, Appendix 12. Likewise, the maximum punishments for Attempts (UCMJ Article 80) or Conspiracy (UCMJ Article 81) to use, possess, or traffick illegal drugs also include an illegal discharge.

[11] *See* BCMR Docket Nos. 2015-002, 2015-150, 2016-003, and 2016-196 (upholding PSC's interpretation).

2) Eligible & not recommended = request a waiver/appeal from epm-1 (less than 8 years' service) or reenlistment board (over 8 years' service)

3) Not eligible & recommended = request a waiver/appeal from epm-1 regardless of years in service – no reenlistment board

4) Not eligible & not recommended = no reenlistment, no waiver/appeal

On July 6, 2015, before the applicant's discharge, the Coast Guard released ALCOAST 274/15, which stated that ALCOAST 093/14 "remains valid" but added the following clarification, which conforms to the PSC's legal interpretation of ALCOAST 093/14 dated October 1, 2014:

SUBJ: AMENDMENT TO ALCOAST 093/14 REENLISTMENT CRITERIA

A. COMDT COGARD WASHINGTON DC 0720542 MAR 14/ALCOAST 093/14

B. Enlisted Accessions, Evaluations, and Advancements, COMDTINST Ml000.2 (series)

1. REF A remains valid.

2. Effective immediately. paragraph 4 of REF A is amended to include the following: Members who do not meet the reenlistment eligibility criteria are not entitled to a reenlistment board. even if they have eight or more years of total active and/or reserve milita1y service.

3. Members meeting criteria in REF A, but who are not recommended for reenlistment, and who have eight or more years' total active and/or reserve milita1y service, are entitled to a reenlistment board.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions based on 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.

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.[12]

3. The applicant alleged that his general discharge for misconduct without a hearing before a board was erroneous and unjust because he had more than eight years of service. In 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 his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.[13] 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."[14]

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[12] *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).

[13] 33 C.F.R. § 52.24(b).

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

4. The record shows that the applicant's CO determined that he had incurred a "drug incident" during the final year of his enlistment based on evidence gathered by CGIS that he had conspired to buy and used cocaine in violation of Articles 81 and 112a of the UCMJ. He was charged with both offenses. According to the Page 7 dated March 3, 2016, the CO found that the preponderance of the evidence showed that the applicant had committed both offenses. With respect to those determinations, the Board finds as follows:

a. The applicant did not demonstrate that his CO erred when he found CGIS's investigation into the applicant demonstrated by a preponderance of the evidence that on or about September 23, 2015, the applicant conspired to possess cocaine with the intent to distribute the substance. The investigation contained text messages linked to the applicant that appear to be requests to purchase and distribute cocaine, specifically two "8 balls" of "fish tail," or two eighths of an ounce of high-quality cocaine. These texts, in combination with a witness's statement that the applicant did try to purchase and distribute $300 worth of cocaine at a club for purposes of partying, are sufficient to support the CO's determination that the applicant had conspired to possess cocaine with the intent to distribute the substance. Because the preponderance of the evidence shows that the applicant conspired to purchase cocaine while on active duty, he was both subject to a misconduct discharge and ineligible for reenlistment because he had committed a serious offense.[15]

b. The evidence supporting the CO's finding that the applicant had used cocaine while on active duty is substantially weaker. Three witnesses told CGIS that the applicant had admitted having used cocaine while on a cross-country trip, but two of the three were the applicant's ex-wife and her new husband, who could have had ulterior motives. The CO may also have concluded that the evidence of the conspiracy to purchase cocaine to "party" while at a club was also evidence of drug use. The applicant's urinalysis and hair tests provided negative results, however, which is substantial evidence that the applicant had not recently used an illegal drug.

A preponderance of the evidence exists "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." COMDTINST M1000.10, Article 3.B.2. (Preponderance of the Evidence Standard). On the other hand, "[t]he absence of a positive confirmed urinalysis result does not preclude taking action based on other evidence." Article 3.A.2. Because the applicant's conspiracy to purchase cocaine by itself constituted a serious offense under the UCMJ and rendered the applicant ineligible to reenlist,

[15] COMDTINST M1000.4, Articles 1.B.5., 1.B.17., and ALCOAST 093/14. *See* Appendix 12 and Article 81, p. IV-7, Manual for Courts-Martial United States (2016).

however, the Board need not reach a decision on whether the CO erred in determining, by a preponderance of the evidence, that the applicant had used cocaine.

5. The applicant argued that as a member with more than eight years of service, he was entitled to a hearing before an ASB before being discharged. An ASB is a board convened to make a recommendation to PSC regarding whether a member should be retained in the Service. PSCINST M1910.1, Article 1.J.1., titled "Years of Service and Due Process" states that members with more than eight years of military service are entitled to greater due process rights, and "it is in both the Coast Guard's and the member's best interests to allow the member to participate in developing the record by objecting to evidence, submitting evidence, and calling witnesses." And Articles 3.B.1. and 3.B.3. of COMDINST M1000.10 state that when a CO determines there is a drug incident involving a member with more than 8 years of service, the CO will process the member for separation due to Misconduct via Article 1.B.17. of the Military Separations Manual, COMDTINST M1000.4, and the procedures provided for an ASB.[16]

The record establishes that after the applicant was formally charged with serious offenses under Article 81 and 112a of the UCMJ, his CO found that he had incurred a drug incident and notified him on March 7, 2016, that he intended to involuntarily separate the applicant based on this drug incident pursuant to COMDTINST M1000.4, Article1.B.17.d., as required by Articles 3.B.1. and 3.B.3. of COMDTINST M1000.10. Under COMDTINST M1000.4, Article 1.B.17.d, commanding officers shall follow procedures for a hearing before an ASB "if considering discharging any member with eight or more years of total active and inactive military service for misconduct, even if contemplating an honorable or general discharge." However, the applicant never received such a hearing, and the record does not contain any evidence establishing the applicant waived his right to a hearing. Instead, the record shows that the Coast Guard suspended the discharge procedures under Article 1.B.17. upon realizing during the applicant's pre-discharge reenlistment interview that the applicant was also subject to discharge under Article 1.B.5. and ALCOAST 093/14 because his enlistment was ending and he was ineligible to reenlist. The Board notes that Articles 1.B.5. and 1.B.17., as well as others, are separate and equal discharge authorities for Commander, PSC in the Military Separation Manual, and nothing therein requires the Coast Guard to pursue one in lieu of or faster than another.

6. When the applicant's CO determined that he had incurred a "drug incident" on March 3, 2016, approximately 5 months remained to run before his enlistment on August 16, 2016. Pursuant to PSCINST M1910.1, Article1.I, "the time from the date the member is notified of the Coast Guard's intent to pursue administrative action to the commencement of a board hearing should usually be no more than 60 calendar days." Thus, there was more than sufficient time to hold the ASB hearing before the applicant's enlistment ended. However, besides the hearing itself, completing ASB procedures includes additional time for the preparation of the ASB report and proceedings; for the applicant's first review period; for the review by the Staff Judge Advocate for compliance with policy and legal sufficiency; for further proceedings and corrections following

[16] If a "commanding officer determines that a drug incident did occur, he or she will . . . process the member for separation by reason of misconduct . . . [and] [c]ases requiring Administrative Discharge Boards because . . . the member has served a total of with years or more will be processed under Articles 1.B.22 and 1.B.23 of reference (c), Military Separations, COMDTINST M1000.4 (series)." COMDINST M1000.10 3.B.3

the legal review; for the applicant's second opportunity to review and respond; for the chain of command's reviews and endorsements with comments; and finally, for PSC's reviews and decision-making. Therefore, when an ASB is held, the full proceedings frequently take up to a year to complete. Although the Coast Guard could have extended his enlistment to provide time for these procedures, it was not required to do so.[17]

7. Moreover, Article 1.B.5.a. of COMDTINST M1000.4 states, "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." The record shows that when the applicant had his pre-discharge interview on May 11, 2016, he was advised that he was ineligible to reenlist and would not be reenlisted when his contract ended on August 16, 2016. This advice was accurate because the applicant was ineligible based on the Page 7 dated March 3, 2016, which documented his conspiracy to purchase and possess cocaine. That offense made him ineligible to reenlist because paragraph 2.f. of ALCOAST 093/14 states that to be eligible, a member must "[h]ave 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," and the maximum offense for conspiracy to use, possess, or distribute cocaine includes a punitive discharge.[18]

8. Under Article 1.B.5. of the Military Separations Manual, as amended by ALCOAST 093/14 and clarified by ALCOAST 274/15, members with more than eight years of service who are eligible to reenlist but not recommended for reenlistment by their COs are entitled to a hearing before a Reenlistment Board. Members, such as the applicant, who are ineligible to reenlist by regulation are not entitled to a hearing even if they have more than eight years of service. Although the applicant was not entitled to a hearing to argue why he should be reenlisted despite his serious offense, the Board notes that the Coast Guard's decision to discharge the applicant due to his ineligibility to reenlist, instead of pursuing a discharge for misconduct, ultimately provided the applicant with the most favorable outcome available to him after he was found to have conspired to purchase cocaine. 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 "HKK" (involvement with drugs) 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.

9. Under Article 1.B.2.f. of the Military Separations Manual, COMDTINST M1000.4, even members discharged for completing their required active service are ineligible for an honorable discharge and so may receive no higher than a general discharge "Under Honorable Conditions" if they have been involved in illegal drugs during their enlistment. Therefore, the Board finds that his DD 214 is correct in showing a discharge "Under Honorable Conditions." However, paragraph 6 of ALCOAST 093/14 states that members discharged due to their ineligibility to reenlist "will be discharged from the active or reserve component, as applicable, upon the expiration of their enlistment in accordance with the provisions of Article 1.B.11. of REF

[17] COMDTINST M1000.4, Article 1.B.11.j.

[18] Manual for Courts-Martial United States (2016), Article 81, p. IV-7, and Appendix 12.

B [the Military Separations Manual, COMDTINST M1000.4] with an RE-3 reenlistment code." Although it seems anomalous to pair an RE-3 reenlistment code with a general discharge, nothing in the ALCOAST, in Article 1.B.11. of the Military Separations Manual, in that manual as a whole, or in the DD 214 manual, PSCINST 1900.1, expressly precludes assigning an RE-3 to someone receiving a general discharge. Therefore, the Board finds that the applicant's reenlistment code should be upgraded to RE-3 as prescribed by ALCOAST 093/14.

10. Therefore, 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 in processing him for discharge due to his ineligibility to reenlist.[19] He has not proven by a preponderance of the evidence that his discharge "Under Honorable Conditions" for "Completion of Required Active Service" is erroneous or unjust. However, in accordance with paragraph 6 of ALCOAST 093/14, the Board finds that his reenlistment code should be upgraded to RE-3. Accordingly, the applicant's request should be denied except that the Coast Guard should correct his reenlistment code on his DD 214 to RE-3.

(ORDER AND SIGNATURES ON NEXT PAGE)

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

ORDER

The application of former [redacted] for correction of his military record is denied except that the Coast Guard shall correct the reenlistment code on his DD 214 to RE-3 in accordance with ALCOAST 093/14.

October 21, 2022

[redacted]