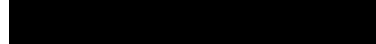


**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2024-026


AMT1 (former)

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 February 20, 2024, and assigned it to an attorney to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision dated February 27, 2025, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, a former Aviation Machinery Technician (AMT/E-6) was administratively separated for misconduct due to the alleged use of THC8 and THC9.

The applicant, through counsel, asserts that an Administrative Separation Board (ASB) convened on March 21, 2023 to review the charges against the applicant. The ASB concluded there was no basis for discharge and recommended the applicant be retained in the Coast Guard. Command and PSC rejected the ASB's findings and separated the applicant just shy of reaching twenty (20) years of service. The applicant had served in the Coast Guard for nineteen (19) years and five (5) months at the time of his discharge.

The applicant remains firm that he did not wrongfully use a control substance. The applicant alleges an accidental and without his knowledge ingestion of THC occurred potentially through a vape pen he shared from a friend. It was an isolated and unfortunate incident to which no other service blot occurs in the applicant's long career.

The applicant requests a change to his discharge to retired with a Honorable characterization and constructive credit for the remaining seven (7) months till he would have reached twenty (20) years and obtained retirement. All back pay and retirement benefits should begin from his date of retirement.

SUMMARY OF THE RECORD

On September 6, 2022, the applicant provided a sample as part of a routine urinalysis screening, which tested positive for THC8 with a concentration of 496 ng/ml and THC9 with a concentration of 91 ng/ml.

On March 21, 2023, the applicant appeared before an Administrative Separation Board (ASB) on the alleged wrongful use of a controlled substance. After review of the evidence the ASB returned a finding for, “no basis for discharge” based on the limited evidence. The ASB recommend the applicant be retained in the Coast Guard.

On January 16, 2024, the applicant was discharged from the Coast Guard under honorable conditions (General) for a narrative reason of Misconduct. The applicant was forced to end his career at nineteen (19) years and five (5) months.

VIEWS OF THE COAST GUARD

On October 31, 2024, a Judge Advocate (JA) for the Coast Guard submitted an advisory opinion in which it recommended that the Board deny relief in this case.

The JA concurred with the CG-PSC memo dated June 21, 2024 recommending the board deny relief to the applicant. PSC’s assessment concluded that the applicant was properly separated for misconduct due to wrongful drug use. PSC is entitled to disagree with an ASB recommendations if the recommendation is “contrary to the evidence the board considered or to law or regulation... or otherwise clearly in error.”¹ The Command and PSC found that the ASB did not properly apply CG policy to the facts of the applicant’s positive drug test and thus disagreed with the recommendation for retention.

The JA recommends to the Board to deny relief to the applicant.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 15, 2025, the Chair sent the applicant a copy of the Coast Guard’s views and invited him to respond within thirty (30) days.

On January 16, 2025, the applicant, through counsel, responded to the views of the advisory opinion offered by the Coast Guard. The applicant reasserts that the Command and PSC, while having the authority to reject the Administrative Separation Board’s findings is permitted, is not appropriate for accuracy of fact and protection of justice. The ASB found the applicant should be retained and did not participate in wrongful use of a prohibited substance. The regulation highlights the need for it to be wrongful ingestion of a prohibited substance must be knowingly and willfully ingested. The applicant did not willingly ingest THC and did not knowingly ingest THC. The incident was found by the ASB to be an accident and not one involving wrongful drug use. The amount found in the applicant of THC does not lend itself to conclude more intentional than accidental use. The applicant was sharing a vape pen throughout a period of time with a friend and was unaware that the friend’s vape held THC. There is no new evidence presented by the JA or PSC that the applicant willfully and thus wrongfully ingested a controlled substance. The ASB

¹ Commandant Instruction (COMDTINST) 1000.4A at Ch. 2.W.4.

reviewed the friend who offered the vape pen and his credibility through the lens if the applicant should have been sharing the pen with this person. The ASB believed the friend to be of trustworthy character and accepted the assertion that even the friend did not realize that the vape pen he offered the applicant had THC. The ASB determined the applicant to be of credible character, not a drug user, and his military record of over nineteen (19) years should not hinge on a less than likely intentional drug use. Therefore, the ASB found the applicant to be believable and recommended retention. To disregard the findings of the ASB makes the use of an ASB a façade of due process but not true due process. In particular, when the command and PSC offered no new evidence; they simply disagreed with the ASB and would not have believed the applicant. This behavior by PSC and command erodes the protections of military members to have a genuine opportunity to be heard. The applicant seeks full relief to be granted constructive credit time of seven (7) months, DD214 changes to a characterization of honorable, narrative reason to be retired, and the applicant placed on the appropriate retirement list.

APPLICABLE LAW AND POLICY

Administrative Separation Board Manual, COMDTINST M1910.2

1.B.1. Eight Years of Service. Coast Guard members with eight or more years of military (active and/or Reserve) service are entitled to a board before they are involuntarily administratively separated or denied reenlistment.

UCMJ Article 112a. Wrongful use, possession, etc., of controlled substances

(a) Any person subject to this chapter who wrongfully uses, possesses, manufactures, distributes, imports into the customs territory of the United States, exports from the United States, or introduces into an installation, vessel, vehicle, or aircraft used by or under the control of the armed forces a substance described in subsection (b) shall be punished as a court-martial may direct.

(b) The substances referred to in subsection (a) are the following:

(1) Opium, heroin, cocaine, amphetamine, lysergic acid diethylamide, methamphetamine, phencyclidine, barbituric acid, and marijuana and any compound or derivative of any such substance.

(2) Any substance not specified in clause (1) that is listed on a schedule of controlled substances prescribed by the President for the purposes of this article.

(3) Any other substance not specified in clause (1) or contained on a list prescribed by the President under clause (2) that is listed in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812).

Military Drug and Alcohol Policy: COMDTINST 1000.10A

Chapter 5 C. Drug Incident. Any of the following conduct constitutes a drug incident as determined by the CO/OIC:

1. Intentional use of drugs for non-medical purposes;
2. Wrongful possession of drugs;
3. Trafficking of drugs--distributing, importing, exporting, or introducing to a military facility;
4. The intentional use of other substances, such as inhalants, glue, cleaning agents, or over-the-counter (OTC), or prescription medications to obtain a "high," contrary to their intended use; or
5. 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 civilian court, or be awarded non-judicial punishment for the conduct to be considered a drug incident).
6. *However, if the conduct occurs without the member's knowledge, awareness, or reasonable suspicion or is medically authorized, it does not constitute a drug incident. (Emphasis added)*

The Coast Guard Military Separations Manual: COMDTINST 1000.4A chapter 2.W provides as follows:

7. Discharge Authority. Except as appropriate sections in this Instruction otherwise specify, Commander (CG PSC) is the discharge authority in all cases of administrative separations. Send the Administrative Separation Board report through the chain of command for review and endorsement in accordance with procedures promulgated by Commander (CG PSC). When Commander (CG PSC) receives the record of administrative discharge proceedings they will review the board record and approve or disapprove the board's findings of fact, opinions, and recommendations in whole or in part. Commander (CG PSC) may disapprove findings and opinions if they were made based on incomplete evidence, contrary to the evidence the board considered or to law or regulation, a misunderstanding or misapplication of written policy, or otherwise clearly in error. If Commander (CG PSC) disapproves the findings of fact, opinions, or recommendations; they may:
 - a. Amend, expand, or modify findings of fact and opinions or take final action other than that recommended without returning the record, if evidence of record supports that action and the final action states the specific reasons; or

b. Return the record to the board for further consideration with a statement of the specific reasons to disapprove the findings of fact, opinions, or recommendations.

8. Options of Discharge Authority. Commander (CG PSC) may then take one of these final actions:

a. Approve the board's findings of fact, opinions, and recommendations and direct their execution.

b. Approve the board's recommendation for discharge, but change its type either to one more favorable than recommended if the circumstances warrant it or to one less favorable than recommended based on a determination the type of discharge recommended does not fall within the guidelines of Section 2.B of this Instruction.

c. Approve the board's recommendation for discharge but change the basis for discharge when the record indicates such action would be appropriate, except Commander (CG PSC) will not designate misconduct if the board has recommended discharge for unsuitability. However, Commander (CG PSC) may designate misconduct if the board designated unsuitability in violation of Sections 2.Q.2.c (2) and 2.Q.2.d of this Instruction.

d. Approve a discharge, but suspend its execution for a specified probationary period. (See Section 2.Z of this Instruction).

e. Disapprove the recommendation for discharge and retain the member in the Service.

f. Disapprove the recommendation for retention and direct either an honorable discharge or a general (under honorable conditions) discharge as warranted.

g. Disapprove the findings, opinions, and recommendations and refer the case to a new board based on a finding of legal prejudice to the substantial rights of the respondent. If the case is referred to a new board:

(1) No member of the new board will have served on a previous board which considered the same matter; and

(2) The record of the earlier board's proceedings, minus the findings, opinions, recommendations, and unduly prejudicial matter may be furnished to the succeeding board.

Enlisted Personnel Administrative Boards Manual PSCINST M1910.1:

1.J. BOARD RECOMMENDATIONS AND FINAL ACTION BY CG PSC. Unless terminated as authorized by Article 8.C. of this Manual, final action on all boards controlled by this Manual is taken by Commander, Coast Guard Personnel Service Center. 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.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's military record and submissions, the Coast Guard's 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 applicant brings this request within three years of its occurrence making the application timely for review. Accordingly, the request for review shall be considered by the Board.

3. The applicant is requesting an upgrade to his discharge type from "less than honorable" to Honorable and constructive credit of seven (7) months to complete his military retirement of twenty (20) years.

4. The ASB performed a thorough review of the evidence, interviewed eyewitnesses, and character witnesses to formulate their recommendation. This included taking statements from the applicant who asserted the defense of unwilling and unknowingly ingesting THC from the use of a friend's vape pen. The ASB pushed why he didn't suspect the friend would have a vape pen containing THC. The friend provided a statement that he also did not realize the vape pen he purchased contained THC. It was not apparent from the packaging and neither the friend nor the applicant were known drug users. After a review of the evidence the ASB concluded there was no basis for discharge and the applicant was recommended for retention.

5. The command and PSC rejection of the recommendations from the Administrative Separation Board (ASB) is without any substantial reasoning or new evidence. Even if this Board were to accept the Coast Guard's position that the PSC may disapprove board findings, COMDTINST 1000.4A limits Commander, PSC's ability to do so only when their finds are "based on incomplete evidence, contrary to the evidence the board considered or to law or regulation, a misunderstanding or misapplication of written policy, or otherwise clearly in error." Furthermore, when disapproving an ASB's findings, they should have been returned to the administrative separation board "with a statement of the specific reasons to disapprove the findings of fact, opinions, or recommendations." In addition, the COMDTINST identifies referral to a new board as an available final action in cases where the findings are disapproved.

6. The Board Report memorandum creates some confusion in this regard. The applicable COMDTINST and PSCINST clearly reference the *finding of fact, opinions, and recommendations* of separation boards. The memorandum format includes all such board actions in a paragraph entitled "Recommendations." The PSC Commander's letter disapproving the board's action refers to the *finding* that a basis for separation did not exist as a *recommendation*, treating the terms as synonymous when the COMDTINST makes each distinct. The COMDTINST provides guidance for when a finding of fact may be disregarded as described above, and those elements are not met in these facts. The Commander disapproves simply by reaching a different

factual conclusion without any basis other than the evidence already in the record and considered by the board. The PSC Commander appears to acknowledge that he is disapproving and substituting a new finding by stating, “[b]ased on a preponderance of the evidence, I find that there is a basis for separation for Misconduct due to involvement with drugs.”

7. It is not this Board’s place to dictate to the Coast Guard how to conduct their administrative separation boards. Nothing in this opinion should be read as an advisory statement on how the Coast Guard can or should generally take action on recommended factual findings, opinions, or recommendation by such boards. But it is apparent from the record in this case that a distinction was not made by the PSC Commander between a factual finding by the board and a recommendation. This stands in contrast to established Coast Guard policy that clearly distinguishes these board functions. In addition, the substituted factual finding of the PSC does not rest on consideration of new evidence, law or policy that the board had failed to consider, defects in the board proceedings, or other basis to disapprove the board’s finding of fact. While the Coast Guard may not have been required to grant the applicant a board based on their policy, they chose to do so. Arbitrary action on the board’s findings and recommendations is not justifiable on the basis that the board may not have been required in the first place.

8. The idea of a zero-tolerance policy against *testing positive* for a prohibited substance conflicts with the requirements in the UCMJ charge of being willful or knowingly.² It is noted that the separation for “drugs” or a “drug incident” is a subset of a broader category of misconduct separations. “Involvement with drugs” is not an independent basis, although it goes without saying that most involvement with illegal drugs would necessarily involve misconduct (i.e., the commission of an offense punishable under the UCMJ). In short, the conclusion the command and PSC arrive at creates a concern for due process. This logic applied by PSC and command equates that if a member tests positive for a controlled substance, they are guilty of a UCMJ offense. The role of the ASB should not be for pageantry and production without any real protection or member rights observed. To ignore an ASB that comes back with a finding of fact that the applicant did not commit the alleged crime of willfully or knowingly ingesting a prohibited substance and retention is recommended is arbitrary and capricious of the command and PSC. It undercuts any value holding an ASB would serve to the member if the command can ignore the ASB’s findings of fact and recommendations without additional evidence or sound reasoning from reviewing additional facts. There was no discussion on holding a new panel for an ASB or that the current ASB acted in a biased or unethical manner. It appears the command and PSC just decided they did not believe the applicant and disregarded the ASB fact finding. While the Board does not conclude that PSC could never overrule an ASB’s findings or recommendations, the facts in this case fail to properly apply COMDTINST guidance on how to challenge an ASB’s fact finding and thus created an illusory process for the applicant.

9. Of greater concern is the matter of justice and the treatment of a service member with nineteen (19) years and five (5) months of service at time of separation after being recommend by the ASB for retention. This action by the command and PSC, while potentially permitted by Coast Guard policy, is clearly harmful and inequitable to the applicant. The applicant took the steps to participate in the ASB and provide his evidence, which led the ASB to agree with the applicant’s

² Article 112a of the UCMJ establishing elements required.

claim that he did not willfully or knowingly ingest a prohibited substance. The applicant served honorable for over nineteen (19) years and proved his innocence to the ASB and was still discarded by command and PSC.

10. After full review of the applicant's application, service record, and applicable law and policy, the Board finds it in the best interest of justice to grant the applicant full relief. Constructive service credit time will be granted to back pay the applicant as if he completed twenty (20) years of creditable service for regular retirement. Pursuant to Article 1.C.1.b. of the Military Separations Manual, COMDTINST M1000.4 (September 2011)³ the Board finds that the Coast Guard should grant the applicant constructive credit for time in service as active duty from his date of separation to his natural retirement date of September 1, 2024. The Board finds that as a result of this change, the applicant is also entitled to retroactive retirement pay with his name added to the retirement roster with a retirement date of September 1, 2024. Finally, the Coast Guard should issue the applicant a new DD-214 that reflects a narrative reason of separation as "Retired", characterization as "Honorable", and a reenlistment code of RE-2. The Board finds that these changes are necessary to ensure that a full restoration of justice is achieved.

(ORDER AND SIGNATURES ON NEXT PAGE)

³ 1.C.1.b. Effective Retirement Date- Commander (CG PSC-EPM) or (CG PSC-OPM) issues orders containing the effective retirement date, the laws governing the retirement, and travel authorization. Under 5 U.S.C. §8301, all non-disability retirements occur on the first day of a calendar month with the member usually detaching on the last day of the preceding month. If the member detaches earlier, the time between detachment and the effective retirement date is charged as annual leave.

ORDER

The application of former E-6 [REDACTED], USCG, is granted full relief. The Coast Guard shall issue the applicant a new DD-214 that reflects a narrative reason of separation as “Retired”, characterization as “Honorable”, and a reenlistment code of RE-2. The applicant shall be placed on the retired list with a starting date of September 1, 2024, with retirement backpay. The applicant shall also receive constructive service credit of seven (7) months of service and awarded any back pay resulting from this correction. The Board finds that these changes are necessary to ensure that a full restoration of justice is achieved.

February 27, 2025

