

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2021-040


AET3/E-4 (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 16, 2021, and assigned it to the Deputy Chair to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated June 16, 2023, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, an Avionics Electrical Technician, Third Class (AET3/E-4), received a General,¹ under honorable conditions, discharge on December 20, 2019, the narrative reason for separation listed is misconduct. The applicant alleged that his misconduct was a result of his documented mental health issues during his service with the Coast Guard and he asked the Board to correct his record and change his discharge type to a medical separation because he suffered from a mental health condition at the time of his misconduct and separation from service.

In his application, the applicant provided the following reasons as to why the Board should correct his record:

I have a plethora of records from the military that show my mental health issues, such as trips to the emergency room and given anxiety medicine. I was told I cannot continue to take it in the military. When speaking with the CO [], I was told if there were to give me a medical discharge, it would take almost a full year until I was finally removed from service. He explained that if we went with the General Under Honorable Discharge that I would be removed from service much faster. I did not know however that I would lose lots of benefits once out of service such as education benefits. The CO wanted me out quickly and didn't want to spend more time with me getting the medical discharge. See attached medical records while active

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.

duty. I also have medical records from visiting outside facilities and emergency rooms while on active duty as well.

Between August 2018 through August 2019, the applicant alleged, he had multiple physicals and medical appointments related to his mental health issues and was diagnosed with depression, anxiety, and panic attacks. He provided records showing that he had been prescribed Lorazepam (to relieve anxiety), Ondansetron (an antihistamine used to treat anxiety and nausea), and Hydroxyzine (to treat anxiety). He also stated that his parents were divorced and that his father had threatened to kill him and his family as a child.

To support his application, the applicant provided approximately 300 pages of medical records, active military records, and what the applicant referred to as “civilian ‘BR’ notes when active” and “active admin remarks.” The most relevant are included in the Summary of the Record below. The applicant stated that all documentation shows anxiety, depression, and the related medication he was prescribed while he was on active duty with the Coast Guard.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on December 6, 2016. The applicant disclosed in his onboarding paperwork, specifically a DD-2807, that he had been arrested for possession of marijuana prior to enlistment. He stated that it was his friend’s marijuana and that he had not known it was in the car. He stated that although he was charged with possession, the judge dismissed the case because he had not known the marijuana was in the car. The Coast Guard gave him a waiver for this arrest and enlisted him.

From August 20, 2018, through March 1, 2019, the applicant attended and successfully completed AET A School. On a DD-2992 (Medical Recommendation for Flying or Special Operational Duty) dated February 21, 2019, it was noted that he reported having experienced major depression and anxiety, which had caused him to have episodes of pounding heartbeat, chest pain, high blood pressure, and trouble sleeping.

In 2019, the applicant received several DD -2992s documenting his temporary disqualification from flight duty due to illness or injury. On August 29, 2019, the applicant was grounded for 24 hours. On August 30, 2019, the applicant was ordered “no duties involving flight”.

On August 30, 2019, the applicant was seen at an Emergency Room at a military medical facility for a panic attack

On September 9, 2019, the applicant was absent without official leave and told his chain of command that he was “not coming into work that day.” The applicant was initially unable to be located but was later located with the assistance of his mother. Once located, the applicant was taken to the Emergency Room (ER) for a psychological evaluation. Upon being admitted to the ER for the psychological evaluation, the medical facility conducted a urinalysis screening on the

applicant, which showed a presumptive positive, unconfirmed test result for Tetrahydrocannabinol (THC).²

According to a Page 7, on the evening of September 9, 2019, after speaking with the applicant's mother, members of the Command met with the applicant at his domicile to talk to him and confiscate his weapon. His weapon was found in his backpack on the kitchen island. It was a loaded semi-automatic handgun with a large capacity magazine.

On September 10, 2019, as a result of his misconduct and at the direction of his Command, the applicant underwent a mental health and safety check at the Naval Health Clinic, Mental Health by a Psychiatric Technician. The applicant reported to military medical personnel that he had been suffering from anxiety since he finished basic training three years ago and that the anxiety had increased after he finished A school and increased exponentially since then. He stated that he felt that his Command was mistreating him and that his further service in the Coast Guard would be detrimental to his mental health. The applicant reported that he endured stomach pain caused by anxiety and that he had been eating less so that the pain of hunger would distract him. The applicant also reported that he had lost 35 pounds in the last year. He stated that he had been experiencing severe panic attacks daily, which occurred before he went to work, as well as significant depressive symptoms, which significantly interfered with his quality of life. The applicant also reported that he suffered daily panic attacks characterized by sweating, shaking, hyperventilation, tachycardia, paralysis, stomach pain every night before he went to work. He denied other anxiety disorders, such as social phobia or post-traumatic stress disorder. Relevant portions of the applicant's medical record for this evaluation on September 10, 2019, are copied below:

Hx of Present Illness: The patient was a walk in from [the ER] Follow up. [He] stated that [he] went to the Emergency Room yesterday escorted by his command for a safety evaluation. He reported that he had an anxiety attack and didn't go to work. He texted his Senior Chief, and he notified his command. He stated that this is his first real duty station and has been here for 5 months. Prior to coming here he was in school. He did mention that [he] is depressed in regard to his work, and stated that there is a lot going on. [He] also mentioned that he [sought] services through Work Life, and they referred him to a network provider. He is seeing a [doctor] and met with him once, and will have another appointment on Thursday. He stated that he wants to continue seeing his network provider. He reported not eating well and is having around 5 hours of sleep. He reported no drinking, just vapes.

Current symptoms include anxiety/depression

Current stressors include work

Mental Status Exam: The patient presented as an average height and weight male dressed in the uniform of the day. The patient was oriented to person place, time and the purpose of the meeting. Maintained good eye contact throughout the session. Patient's speech was average in rate, variable in rhythm and volume, and productivity fell in the average range. The patient's mood was "tired", affect was euthymic. Patient's cognition and memory appeared to be at least grossly intact. Intellectual capacity appeared to be average. The patient expressed homicidal ideations without a plan and denied suicidal ideation plans and intentions. The patient denied any auditory or visual hallucinations and there was no evidence of altered sensorial. Insight, judgment, and impulse control appear intact.

Another medical provider at Naval Health wrote the following:

² THC is the major psychoactive component and one of the 113 cannabinoids recognized in cannabis.

Patient seen for safety check following ED visit for anxiety and command concern for S1 on the previous night.

[The applicant] is a 22yo M AD Coast Guard E-4 with no documented PPH but self-reported depression and anxiety [to command] because patient sent a text message stating that he would not be coming into work because he was too anxious and worried he might “snap.” Patient reports that he has daily panic attacks prior to going to work and feels that he is not getting the help he needs. He denies S1/H1 multiple times throughout interview and is able to articulate multiple reasons for living. He feels that getting out of the Coast Guard will improve his mental health, and agreed to cooperate with Command and administrative requirements, e.g. appointments in order to facilitate this.

PT presented to [mental health clinic on September 10, 2019, accompanied by a command representative.] [The command representative] endorsed that [the applicant] has ‘not adapted’ to stressors at new command, having trouble adapting to shift work scheduled, and has been seen by Coast Guard medical regarding stress. [The applicant] did not show to work yesterday and messaged his command that ‘I can’t do it anymore.’ They were not able to find him for several hours, and then he presented to work and was taken to the ED.

[The applicant] report[ed] that he had an ‘anxiety attack’ yesterday and could not go to work; [his symptoms] included increased HR and nervousness. He messaged command to let them know, then put his phone on silent and went for a drive with his ‘emotional support dog, Archie’ which usually calms him down. He later went into work when contacted by an ‘agent’, he [thought] CGIS. His mother called command to inform them about a loaded firearm at the patient’s house, per an email from command the weapon was voluntarily surrendered to policy. He denie[d] suicidal ideation or preparatory behavior; report[ed] that his mother has always taught him to keep his firearm loaded for safety and that this was common ‘in the south’ where he is from.

He report[ed] numerous problems at new command (x5 months) including being treated unfairly and difficulty shift work schedule that effects sleep. He has been seen in USCG medical but states “I do not trust CO medical providers”. He was seen in local ED (no documentation available) one month ago for panic and prescribed Ativan 2 mg for panic, which helps but is too sedating. He reported that USCG Captain has also prescribed this for him (not found in electronic medical record). He has recently started seeing a therapist in town, [] and [was] looking forward to continued care with her.

He denied SI/HI. No evidence of psychosis or mania on exam. He declined voluntary admission to the hospital and collaborated on a safety plan to facilitate discharge to his command.

[The applicant] advised that he was THC positive on labs last night. He reported that his mother has sent him some CBD oil that he has been using daily for about 3 weeks. He denied other marijuana/THC use. Advised [the applicant] that his command would likely require additional drug testing. He was not particularly bothered by this, stating that separation from the USCG would be most beneficial for him.

Safety: Patient has no history of suicide attempts, self-harm, or hospitalizations. He potentially has a substance use disorder which may increase risk. Anxiety also increased safety risk. He convincingly denied SI/HI, he was cooperative with assessment and collaborated on safety plan, he voluntarily surrendered firearm to policy to further mitigate risk. Acute risk of suicide is low, chronic risk possible elevated by use disorder. Voluntary hospitalization declined, does not meet criteria for involuntary hold at this time.

[The applicant] may return to clinic for complete eval if desired. Brief assessment c/w adjustment disorder with mixed disturbances of emotions and conduct (onset of symptoms likely related to new job, do not seem to have existed prior to arrival to new command, and would likely resolve if the stressors of military life were removed), rule out cannabis use disorder, r/o substance induced mood disorder. Consider referral to SARP if desired. Benzo not an ideal choice for this patient with suspected use disorder.

Offered trial of pm medication such as Atarax for anxiety but patient declined. Recommended cessation of CBD and other products.

Also on September 10, 2019, the applicant signed a urinalysis consent form providing his consent to provide a urine sample because he was suspected of having unlawfully used drugs. The consent form states that he could decline to consent to provide a sample of his urine for testing and that, if a sample was provided, any evidence of drug use resulting from urinalysis testing could be used against him in a court-martial. The consent form also provides: “This consent is given freely and voluntarily by me, and without any promises or threats having been made to me or pressure or coercion of any kind having been used against me.”

During a follow-up medical exam on September 11, 2019, regarding the positive THC test result, the applicant stated on a medical screening form that he had been using CBD products provided to him by his mother since A-School.

The urinalysis screening report dated September 17, 2019, shows “Presumptive Positive, for Tetrahydrocannabinol (THC), Unconfirmed (H)” for the test conducted on September 10, 2019. The report does not provide a number associated with this presumptive positive result for THC. A USCG Form 19J022026 dated September 17, 2019, titled “Results Report for: USCG” reflects a positive result. This positive result of the urinalysis conducted on September 10, 2019, confirmed the result of the one conducted at the ER on September 9, 2019.

Between September 9, 2019, and October 2, 2019, the applicant received the following Page 7s for misconduct:

- Page 7 for Misconduct on September 9, 2019 - Article 92 - Absence without Leave (AWOL) and Failure to Obey Order or Regulation

On September 9, 2019, the applicant was absent without official leave telling the command that he was “not coming into work that day.” The applicant was initially unable to be located, but was later located with the assistance of his mother. Applicant was then taken to the ER for a psychological evaluation. Upon being admitted to the ER for the psychological evaluation on September 9, 2019, the military medical facility conducted a urinalysis screening on the applicant, which showed a positive result for THC.

You were absent without leave on September 9, 2019. Upon failure to report for C-130 day shift, AETC [] contacted you via text message to ensure your safety and to remind you of your work responsibilities. You responded to him in an alarming manner that you were not coming into work that day. Your response to AETC [] prompted a wellness check by AETCM [], AETC [] and HS1 []. When they arrived at your domicile you are not found at home; you did not respond to further communication attempts by the command.

You are reminded of the obligation to report for duty which is governed by Article 86 “Absence Without Leave” and Article 92 “Failure to Obey Order or Regulation” of the Uniform Code of Military Justice (UCMJ).

This behavior is not acceptable and is contrary to the dedication and commitment required for a team-oriented workplace environment. Additional incidents of non-compliance with policy will lead to adverse administrative action.

The applicant acknowledged this Page 7 with his signature on September 13, 2019.

- Page 7 for Misconduct on September 9, 2019 – Article 92 - Failure to Obey an Order or Regulation

You were absent without leave on September 9, 2019. AETCM [] contacted your mother to determine your [whereabouts] after multiple failed Command attempts. She informed AETCM [] that you were really struggling with adaptability and that your mental frame of mind was in a critical state; she was convinced that you may be a threat to yourself and potentially others. AETCM [] asked your mother whether or not you possessed a handgun; she confirmed that you in fact did. It was at that time AETCM [] briefed [the command] and conducted a wellness check at your domicile; you were not present. AETCM [] contacted your mother who convinced you to meet with the command that evening with both HPD and CGIS agent present to discuss a suitable path forward to getting you help and to ensure your safety and the confiscation of your weapon; a semi-automatic handgun that had a large capacity magazine. When your weapon was confiscated it was located in your personal backpack in the loaded condition, on your kitchen countertop presumably on person regularly; HPD confirmed that it was not registered with the state in accordance with [state law]. Later that night you were escorted by HIS [] and AETCM [] to the [medical center ER] for evaluation.

You are reminded of the obligation to comply with weapon state laws which is supported by Article 92 “Failure to Obey Order or Regulation” of the Uniform Code of Military Justice (UCMJ).

This behavior is not acceptable and is contrary to the Honor and Respect required for a team-oriented workplace environment. Additional incidents of non-compliance with policy will lead to adverse administration action.

The applicant acknowledged receipt of this Page 7 on October 2, 2019.

- Page 7 for Misconduct dated September 11, 2019

You are advised that as the subject of a Military Protective Order issued on [September 11, 2019], you are prohibited from accessing or possessing firearms or ammunition as explained in Discipline and Conduct, COMDTINST M1600.2., for the duration of the order. You are advised that this prohibition is a federal law and applies to personally owned firearms and ammunition, as well as government owned firearms and ammunition. Possession of any firearm or ammunition, including those previously privately owned, for the duration of the order, is a violation of the law as contained in 18 U.S.C. Section 922 and if you are found to be in the possession of a firearm or ammunition, you may be prosecuted by the civilian authorities or punished under the Uniform Code of Military Justice.

The applicant acknowledged receipt of this Page 7 on September 11, 2019.

- Page 7 for Misconduct on September 23, 2019 – Drug Incident – Positive for THC

On September 23, 2019, it was determined that you were involved in a drug incident. A Command directed urinalysis was given on September 10, 2019, following a preliminary screening at [] medical center that resulted in a [presumptively] positive test for THC on September 9, 2019. The command directed urinalysis also indicated the presence of THC resulting in a positive confirmed test result.

You were counseled on Chapter 2 of the Military Drug and Alcohol Policy COMDTINST M1000.10 (series). The unit Command Drug and Alcohol Representative (CDAR) will arrange an appointment with a provider who will determine the nature of your relationship with drugs.

You will be processed for separation, in accordance with Chapter 5 of the Military Drug and Alcohol Policy, COMDTISNT M1000.10 (series). If a medical officer determines that you are drug/chemical dependent, you will be offered treatment prior to separation.

The applicant acknowledged receipt of this Page 7 on October 2, 2019.

The applicant was seen at the Naval Mental Health Clinic on October 1, 2019, at which time he was diagnosed with (1) “Adjustment Disorder with mixed disturbance off emotions and conduct” and (2) Cannabis Use, uncomplicated.

On November 7, 2019, the applicant was notified by memorandum of his command’s intent to separate him, at which time he was advised: “If you are awarded a general discharge, you may expect to encounter prejudice in civilian life.” This Notification of Intent to Discharge from the Commanding Officer to the applicant states in relevant part:

1. This is to inform you that I have initiated action to discharge you from the U.S. Coast Guard pursuant to provisions of COMDTINST M1000.4 by reason of misconduct due to illegal use of a controlled substance. The reason for my action is your involvement with drugs as evidence of a positive result from a urinalysis screening conducted on [September 10, 2019].
2. The decision on your discharge and the character of the discharge you receive rest with Commander, Coast Guard Personnel Service Center (CG-PSC-EPM-1).
3. As you are being considered for a general discharge, you have the right to consult with a lawyer as defined by Article 27(b)(1) of the Uniform Code of Military Justice.
4. If you are awarded a general discharge, you may expect to encounter prejudice in civilian life.
5. You may submit a statement on your own behalf within five working days of today’s date.
6. You may disagree with my recommendation; if so, your rebuttal will be forwarded with my recommendation.
7. You must submit any statement regarding your separation within five working days using the attached form. If you decline to consult with military counsel, the five-day period will run from the date you receive this notification. If you elect to consult with military counsel, we will arrange for a consultation appointment, and the five-day period will run from the date of that appointment. If you do not exercise these rights by completing the enclosed form and returning it to the Executive Officer within this five day period, your right to submit a statement will be considered to be waived.

Also on November 7, 2019, the applicant endorsed the Notification of Intent to discharge, “First Endorsement,” the relevant portions are copied below.

1. I hereby acknowledge notification of my proposed discharge.
2. I waive my right to submit a statement on my behalf.
3. I understand if I receive a general discharge under honorable conditions I may expect to encounter prejudiced in civilian life.
4. I hereby acknowledge I have been provided the opportunity to consult with a military lawyer.
5. I do not object to being discharged.

On December 20, 2019, the applicant was discharged from the Coast Guard with a General–Under Honorable Conditions character of service for Misconduct. At the time of his discharge, the applicant had 3 years and 15 days of creditable service, which is less than the 8 years required to be entitled to an administrative separation board. The applicant’s DD 214 at this time of his discharge provides the following information:

Type of Separation: Discharge
Character of Service: Under Honorable Conditions

Separation Code: JKK (involuntary discharge for illegal drug use with no Administrative Separation Board entitlement)

Reentry Code: RE-4 (not eligible for reenlistment)

Narrative Reason for Separation: Misconduct.

VIEWS OF THE COAST GUARD

On August 16, 2021, a judge advocate (JAG) of 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 (PSC). According to the JAG, the applicant has failed to provide sufficient evidence to support his allegations of error or injustice for the following reasons.

The JAG argued that the plethora of medical evidence provided by the applicant failed to show that the applicant was entitled to a medical discharge. She argued that, to the contrary, the medical documents provided by the applicant show multiple diagnoses of “Adjustment Disorder” which, according to Coast Guard Policy, is not qualifying for medical discharge under the Physical Disability Evaluation System, and would still have applicant administratively separated vice medically. The JAG explained that even if there was something in applicant's medical record which would have entitled him to a medical separation, Coast Guard policy specifically states that in cases where there could be concurrent medical and disciplinary separations, “Commander (CG PSC-PSD-de) suspends the disability evaluation and Commander (CG PSC-EPM-1) considers the disciplinary action.” In this case, where the applicant was found to have an “adjustment disorder” (a condition not entitling the applicant to a disability evaluation), he was also found to have THC in his system and that it was based on this that the applicant's command recommended to process him for separation due to misconduct.

The JAG pointed out that even though the command recommended separation for misconduct due to illegal drug use and misconduct, the command still included in their memo to the separation authority an enclosure showing the diagnosis for adjustment disorder, ensuring the separation authority was fully informed when making its discharge decision. Thus, the applicant has not provided sufficient evidence to prove error or injustice and, as such, 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.⁸ Accordingly, the JAG argued that the applicant was properly separated in accordance with Coast Guard drug policy described by Military Separations, COMDTINST M1000.4 (April 2017), art. 1.B.17.b.4.a.

In response to the applicant's claim that “[t]he [command] wanted me out quickly and didn't want to spend more time with me getting the medical discharge,” the JAG argued that the applicant failed to provide evidence to support this bare assertion and that therefore the applicant was not entitled to a medical discharge. In addition, the JAG expressed the opinion that the documentation showed that it was the applicant that “expressed his eagerness to be discharged from the Coast Guard as quickly as possible on several occasions.” The JAG therefore concluded that the applicant has not provided sufficient evidence to prove error or injustice and has not met his burden as required by 33 C.F.R. § 52.24(b).

Regarding the applicant's allegations that he was the victim of error and/or injustice claiming, “I did not know however that I would lose lots of benefits once out of the service such as education benefits,” the JAG argues that the evidence provided by the applicant failed to support this assertion

The JAG highlighted the fact that on November 7, 2019, the applicant acknowledged a memo that provided notice of the command's intent to discharge him with a general discharge, in which it stated, "If you are awarded a general discharge, you may expect to encounter prejudice in civilian life."

The JAG also highlighted the fact that the applicant endorsed this memorandum with a memo of his own where he wrote, "I hereby acknowledge I have been provided the opportunity to consult with a military lawyer" and "I understand if I receive a general discharge under honorable conditions I may expect to encounter prejudice in civilian life."¹¹ The applicant also concluded his memorandum by stating, "I do not object to being discharged."

The JAG further stated that the applicant's argument that he did not know that he would lose benefits is unsupported and insufficient to prove the existence of an error or injustice because the applicant was provided notice that he would encounter prejudice with a general discharge. The JAG went on to argue that if the applicant was unaware or unsure of exactly what prejudices he would encounter, he was provided opportunity to seek counsel; however, applicant apparently waived this opportunity. The JAG argued that, as such, the applicant has not met the 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.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 5, 2021, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. No response was received.

APPLICABLE LAW AND POLICY

The Coast Guard Military Separations Manual, COMDTINST M1000.4 (August 2018) (hereinafter "MILSEP") provides the following guidance:

- 1.B.1.e. Cases Involving Concurrent Disability Evaluation and Disciplinary Action
 - (1) Disability statutes do not preclude disciplinary separation. The separations described here supersede disability separation or retirement. If Commander (CG PSC-PSD-de) is processing a member for disability while simultaneously Commander (CG PSC-EPM-1) is evaluating the member for an involuntary administrative separation for misconduct, or disciplinary proceedings which could result in a punitive discharge or an unsuspended punitive discharge is pending, Commander (CG PSC-PSD-de) suspends the disability evaluation and Commander (CG PSC-EPM-1) considers the disciplinary action.
- 1.B.15.b. Causes for Discharge for Unsuitability.
 - (3) Apathy, defective attitudes, adjustment disorders as listed in Reference (d), Coast Guard Medical Manual, COMDTINST M6000.1 (series), Chapter 5, inability to expend effort constructively, or other observable defect for which a separation designator code (SPD code) exists that renders a member unsuitable for further military service.
- 1.B.17.b.(4). Drugs.
 - (a) Involvement with Drugs. Any member involved in a drug incident or illegal, wrongful, or improper sale, transfer, manufacture, or introduction onto a military installation of any drug, as defined in Chapter 7 of Reference (h), Military Drug and Alcohol Policy, COMDTINST M1000.10 (series), will be processed for separation

from the Coast Guard with no higher than a general discharge (under honorable conditions).

1.B.17.e. Discharging Members with Fewer than Eight Years' Service for Misconduct

Commanding officers shall process members with fewer than eight years of total active and inactive military service recommended for honorable or general discharge for misconduct as follows:

- (1) Inform the member in writing of the reason(s) for being considered for discharge (specifically state one or more of the reasons listed in Article 1.B.17.b. of this Manual supported by known facts).
- (2) Afford the member an opportunity to make a written statement. If the member does not desire to do so, the commanding officer sets forth that fact in writing over the member's signature. If the member refuses to sign a statement his or her commanding officer will so state in writing.
- (3) Afford the member an opportunity to consult with a lawyer as defined by Article 27(b)(1), UCMJ, if contemplating a general discharge. If the member requests counsel and one is not available, the commanding officer must delay discharge COMDTINST M1000.4 1-105 CH-6 proceedings until such time as counsel is available.
- (4) Send the case containing a recommendation and these documents to Commander (CG PSCEPM-1) for action.

Military Drug and Alcohol Policy, COMDTINST M1000.10A, (June 2018) states:

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.

The Coast Guard Medical Manual, COMDINST M6000.1F (June 2018) states:

3.16.e. Adjustment Disorders. Transient, situational maladjustment due to acute or special stress does not render an individual unfit because of physical impairment. However, if these conditions are recurrent and interfere with military duty, are not amenable to treatment, or require prolonged treatment, administrative separation should be recommended (see Chapter 5 Section B of this Manual).

5.A.3. Adjustment Disorders. These disorders are generally treatable and not usually grounds for separation. However, when these conditions persist or treatment is likely to be prolonged or non-curative (e.g., inability to adjust to military life/sea duty, separation from family/friends), process in accordance with Military Separations, COMDTINST M1000.4 (series) is necessary.

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 concerning this matter pursuant to 10 U.S.C. § 1552 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 his receipt of a General discharge for misconduct, instead of a medical separation with a disability rating, is erroneous and unjust because his mental health conditions caused his discharge. When considering allegations of error and injustice, the Board begins its analysis by presuming that Coast Guard officials acted properly and the applicant bears the burden of proving by a preponderance of evidence that Coast Guard actions were erroneous or unjust.³ Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."⁴

4. The record reflects that the applicant was discharged by reason of misconduct because he incurred a drug incident due to his illegal use of a controlled substance found during urinalyses conducted on September 9 and 10, 2019, after he refused to report for duty without authority on September 9, 2019. The record also reflects that shortly after this misconduct, the applicant was diagnosed by a military medical doctor with an adjustment disorder. His symptoms included panic attacks, anxiety, and depression. The applicant told his doctors that his symptoms began when he was in recruit training and had continued to increase since then. Both he and his mother identified his military service as the cause of his symptoms. Therefore, the preponderance of the evidence supports a finding that the applicant was unsuitable for service with the Coast Guard because he could not adjust to military service and it was causing his symptoms of anxiety, panic attacks, and depression. According to the applicant, his positive urinalyses resulted from his use of CBD oil to curb these symptoms. However, a member who incurs a drug incident by knowingly using illegal substances must be discharged from the Coast Guard with no higher than a general discharge.⁵

5. Although the applicant alleged that he should have been medically separated due to his mental health conditions, the preponderance of the evidence shows that he had an adjustment disorder because he could not adjust to military service, and members who are separated because of diagnosed adjustment disorders do not receive medical board processing and medical

³ 33 C.F.R. § 52.24(b).

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

⁵ MILSEP, Article 1.B.17.b.4.

separations. Instead, they receive administrative separations for unsuitability.⁶ Therefore, the preponderance of the evidence shows that if the applicant's urine had not tested positive for THC, he would have been administratively separated due to his diagnosed adjustment disorder. He would not have been medically separated. The applicant has not proven by a preponderance of the evidence that he should have been medically separated based on his mental health.

6. The Board further notes that even if the applicant had been diagnosed with a disability that normally requires medical board processing and medical separation, pursuant to MILSEP Article 1.B.1.e, the military disability separation statutes at 10 U.S.C. § 1201 *et seq.* do not preclude disciplinary separation. Disability separation proceedings are normally suspended and then terminated for a member being discharged due to misconduct. Thus, the applicant's separation proceedings for misconduct due to his drug use would have superseded a disability discharge even if he had been diagnosed with a mental disability instead of an adjustment disorder.

7. The Board therefore finds that in discharging the applicant, Coast Guard acted in accordance with MILSEP COMDINST M6000.1F (June 2018), Article 1.B.17.E, based on the evidence for the following reasons: (1) On November 7, 2019, the Coast Guard provided the applicant with a memorandum informing him of the command's intent to discharge him with a general discharge for drug use and this memorandum clearly stated that "if you are awarded a general discharge you may expect to encounter prejudice in civilian life." Therefore, the applicant was appropriately provided notice consistent with Article 1.B.17.E. The fact that the applicant acknowledged this notification with his own memorandum is further evidence that he was provided notice. (2) The applicant was afforded the opportunity to make a written statement and, in fact, did so when he acknowledged the November 7, 2019, notification with a memorandum of his own. Specifically, he acknowledged that he had "been provided the opportunity to consult with a military lawyer" and that he understood that "if [he received] a general discharge under honorable conditions [he could] expect to encounter prejudice in civilian life." (3) The applicant acknowledged that he had been provided the opportunity to consult with a military lawyer but chose not to do so. (4) The applicant concluded this memorandum by explicitly stating "I don't object to being discharged." Therefore, the preponderance of the evidence shows that the applicant received all due process under MILSEP Article 1.B.17.e., and his claim that the Coast Guard erroneously failed to medically separate him because of a disability lacks merit.

8. The lack of error is not dispositive of the case, however, because the Board may also grant relief in the interest of justice. The Board has authority to determine whether an injustice exists on a "case-by-case basis."⁷ And in considering the documentation of his discharge on his DD-214, the Board notes that its liberal consideration guidance applies to his character of service, his narrative reason for separation, and his separation code and reenlistment code.⁸ Under this guidance, when deciding whether to upgrade the discharge of a veteran based on an alleged mental health condition, the Board must liberally consider the evidence, including the applicant's claims,

⁶ Coast Guard Medical Manual, COMDTINST M6000.1F, Chapters 3.16.e and 5.A.3., and Military Separations Manual, COMDTINST M1000.4, Article 1.B.15.b.3.

⁷ Docket No. 2002-040 (DOT BCMR, Decision of the Deputy General Counsel, Dec. 4, 2002).

⁸ DHS Office of the General Counsel, "Guidance to the Board for Correction of Military Records of the Coast Guard Regarding Requests by Veterans for Modification of their Discharges Based on Claims of Post-Traumatic Stress Disorder, Traumatic Brain Injury, Other Mental Health Conditions, Sexual Assault, or Sexual Harassment" (signed by the Principal Deputy General Counsel as the delegate of the Secretary, June 20, 2018).

and decide whether the preponderance of the evidence shows that the veteran had a mental health condition while in the Service that could excuse the veteran's misconduct; whether the mental health condition actually excused the behavior that adversely affected the discharge; and, if not, whether the mental health condition outweighs the misconduct or otherwise warrants upgrading the veteran's discharge.⁹ In this case, the records show that the applicant had a significant adjustment disorder in response to his military service, which was causing him anxiety, panic attacks, and depression. He alleged that he ingested the CBD to try stop these symptoms and that the CBD caused his positive urinalysis result. The applicant did not prove that CBD use caused his urine to test positive for THC, however, and pure CBD is unlikely to cause a positive urinalysis result because it does not contain THC. But some CBD products are not pure, and daily use of them could cause a positive test result.¹⁰

In light of the liberal consideration guidance, the Board finds that the applicant's adjustment disorder does not excuse his misconduct, and so the Board will not upgrade his character of service. However, taking into consideration (1) the applicant's diagnosed mental health conditions at the time of his misconduct as a mitigating factor and (2) the clear nexus between the applicant's mental health disorders and the misconduct that caused his discharge, the Board finds that in the interest of justice, the narrative reason for separation on the applicant's DD 214, which is currently "misconduct," should be changed to "condition, not a disability" with the corresponding separation code JFV because of the applicant's diagnosed adjustment disorder with symptoms including panic attacks, anxiety, and depression at the time of his misconduct.¹¹ Accordingly, the Coast Guard should issue the applicant a new DD 214 reflecting this corrected entry and also the following notation shall be made in Block 18 of the DD 214: "Action taken pursuant to order of BCMR."

(ORDER AND SIGNATURES ON NEXT PAGE)

⁹ *Id.*

¹⁰ Dennis J. Sholler *et al.*, "Urinary Pharmacokinetic Profile of Cannabidiol (CBD), Δ 9-Tetrahydrocannabinol (THC) and Their Metabolites following Oral and Vaporized CBD and Vaporized CBD-Dominant Cannabis Administration," *JOURNAL OF ANALYTICAL TOXICOLOGY*, 46(5) (June 2022), p. 494 ("Although pure CBD is unlikely to impact drug testing, it is possible that hemp products containing low amounts of Δ 9-THC may produce a cannabis-positive urine drug test.") Available here via the online library of the National Library of Medicine, last viewed on June 15, 2023: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9122505/>.

¹¹ The Board notes that there is an authorized "Adjustment Disorder" narrative reason for separation but declines to put a medical diagnosis on a DD-214, which veterans must present to future employers and others to prove their military service.

ORDER

The application of former AET3 [REDACTED] [REDACTED] USCG, for the correction of his military record is denied, but alternative relief is granted. The Coast Guard shall issue him a new DD 214 showing "Condition, Not a Disability" as the narrative reason for separation and separation code JFV. The following notation shall be made in the block for remarks: "Action taken pursuant to order of BCMR."

June 16, 2023

[REDACTED] Digitally signed by [REDACTED]
Date: 2023.06.27 14:43:11 -04'00'

[REDACTED]

[REDACTED] Digitally signed by [REDACTED]
Date: 2023.06.22 10:40:38 -04'00'

[REDACTED]

[REDACTED] Digitally signed by [REDACTED]
Date: 2023.06.27 10:47:13 -04'00'

[REDACTED]