DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2024-018

[redacted]
EMC

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The applicant originally submitted an application to the Board for the Correction of Military Records of the Coast Guard ("Board") in March 2022, and the Board granted partial relief in a decision issued in February 2023. The applicant's request for reconsideration was received by the Board on November 23, 2024. The Board subsequently assigned the case to a staff attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c). For the reasons discussed in the "Findings and Conclusions" section below, the Board has determined that the applicant's new submission has met the criteria for reconsideration by the Board.

This final decision, dated February 20, 2025, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

INITIAL APPLICATION (DOCKET NO. 2022-025)

The original application in this case was received by the Board on March 15, 2022. Subsequently, the Coast Guard was provided an opportunity to, and did, submit its views to the Board, and the applicant submitted a reply. The Board issued its decision, granting partial relief, on February 3, 2023.[1] The applicant's service, the basis for his application, and the evidence and arguments submitted by the applicant and Coast Guard are detailed at length in the February 2023 decision. *See* BCMR Docket No. 2022-025. Because the matter now before the Board is a request for reconsideration, the purpose of the Board's review of the 2022 case in this section is to provide context for the Board's primary focus herein, that being the new evidence submitted by the applicant. Accordingly, the summary

[1] Although the Board members' signatures on the decision are dated in May 2023, the date of decision is considered to be February 3, 2023, when the Board met.

provided here is somewhat abridged, and the parties are referred to Docket No. 2022-025 for a more detailed discussion of the evidence, if desired.

APPLICANT'S INITIAL REQUEST

The applicant, a former Chief Electronics Mate (EMC/E-7), received a General[2] discharge on September 30, 2021, and was denied reenlistment based on illegal use of codeine. In his March 2022 application to the Board, he requested that his record be corrected as follows:

- Provide him with a medical retirement or process him through the Physical Disability Evaluation System ("PDES");
- Upgrade his characterization of service from General: Under Honorable Conditions, to Honorable;
- Change his reenlistment code from RE-4 to RE-1, or the appropriate code for a medical retirement, which is RE-2;
- Remove a negative Administrative Remarks form, CG-3307 ("Page 7"), dated March 15, 2021, from his record, wherein he was counseled for a "drug incident" ("DI"); and
- Remove another Page 7 dated March 18, 2021, from his record, wherein he was informed that he did not meet the criteria for reenlistment and was therefore ineligible to reenlist at the end of his current enlistment.

The applicant, through counsel, alleged that the Coast Guard, in finding a DI and denying reenlistment, had improperly relied on a urinalysis result that was part of his self-referred alcohol treatment records, in violation of federal privacy laws. He also contended that he was denied due process by not being provided an Administrative Separation Board (ASB). In addition, he argued that he was wrongfully denied a medical retirement or referral to PDES for his posttraumatic stress disorder (PTSD).

The applicant explained that the issues raised in his application stemmed from an incident that occurred on November 3, 2020, which can be summarized as follows. After a self-referred, month-long inpatient stay for alcohol abuse treatment, the applicant informed his wife that the next phase of his treatment would be away from home, instead of local, as originally planned. This led to an argument in which the applicant was assaulted by his wife. The police and Child Protective Services (CPS) were called, and the applicant's wife was arrested and removed from the home. The applicant was advised to stay at the home. During his recent inpatient treatment, the applicant had been prescribed Zoloft, Valerian

[2] 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.

root, and Trazodone, which the applicant contends interact to cause confusion and other issues. After he had spoken with CPS and the police, he began to develop a severe migraine and vomited. He was unable to walk properly, and crawled to the bathroom to look for a pain reliever. He was not familiar with the home since his wife had moved there during his recent deployments which he had just returned from. In the dark, he found a pill bottle he thought contained over-the-counter pain relievers such as Tylenol or Advil, and took a pill or pills, causing the pain to subside and allowing him to sleep. The applicant proceeded to the next phase of his treatment, at a private outpatient facility contracted by the Coast Guard, the next day. There, he was administered a urinalysis test. Several days later, on November 9, 2020, he was informed that the test had been positive for opioids. He denied taking any, but on further conversation with the treatment counselor, concluded that he must have inadvertently taken a medication containing opiates that had been prescribed to his wife or mother-in-law.

With the applicant's consent, the results were released to his command. Command requested that the Coast Guard Investigative Service ("CGIS") conduct an investigation. The applicant was interviewed by CGIS investigators on February 10, 2021. Ultimately, charges were declined by the prosecution despite the CGIS Report of Investigation ("ROI") stating that the applicant had admitted during his interview to knowingly taking a prohibited drug. The applicant's Commanding Officer ("CO") subsequently issued two negative Administrative Remarks on form CG-3307s ("Page 7s") in March 2021. In the first Page 7, issued on March 15, 2021, the CO determined that based on the applicant's admission documented in the ROI, a DI had occurred. The second Page 7, dated March 18, 2021, documented the CO's notification to the applicant that he would recommend that the applicant be denied reenlistment on the basis of the DI. The CO further informed the applicant that despite having more than eight years of service, the finding of a DI, combined with the lack of a positive recommendation from the CO, meant that the applicant was not entitled to a reenlistment board. The applicant exercised his right to submit a lengthy personal statement and other evidence on April 23, 2021, for consideration by the command authority, but was subsequently discharged following the end of his period of service on September 31, 2021. He was credited with approximately 16 years of active service and given a General-Under Honorable Conditions discharge characterization. He was also assigned a RE-4 reenlistment code, rendering him ineligible to reenlist. A rating decision from the Department of Veterans Affairs ("VA") show that following his discharge, the applicant was granted a 50 percent disability rating by the VA for "adjustment disorder, unspecified with alcohol use disorder, in early remission (also claimed as PTSD, anxiety, and depression)" effective October 1, 2021.

In his submission to the Board, the applicant argued that his treatment by the Coast Guard was improper for a number of reasons. First, he argued that federal law prohibits the use of substance use disorder (SUD) treatment records in civil, administrative, or criminal proceedings against patients. *See* 42 U.S.C. § 290dd-2; 42 C.F.R. Part 2. Second, he argued that contrary to the CGIS ROI, he had never admitted to knowingly taking an opiate, but

instead had only been speculating that he "must have" taken an opiate by mistake. He contended that any miscommunication during the CGIS interview was caused, in part, by his cognitive impairment resulting from negative interactions between medications he had been prescribed. Third, he argued that the levels of the drugs in question found on his urinalysis fall below those required for a positive result by Department of Defense (DoD) policy. Fourth, he argued that the Coast Guard's own policies provide that upon the finding of a DI, administrative separation proceedings must be initiated, which would have entitled him to an ASB, where he could have disproven the charges against him. Fifth, he argued that his initial admission to taking "Norco", despite a pharmacology report later concluding he could not have taken this particular drug, is evidence that he made no admission to CGIS. Sixth, the applicant argued that he suffered from PTSD during his active-duty service, which caused his alcohol abuse and subsequent self-referral into a treatment facility. He contended that based on his PTSD symptoms, he should have been processed through PDES for medical retirement. Related to this contention, the applicant also claimed he was not provided a required physical examination prior to separation.

VIEWS OF THE COAST GUARD

On October 12, 2022, a Judge Advocate (JA) for the Coast Guard submitted an advisory opinion in which he adopted the findings and analysis provided in a memorandum prepared by the Coast Guard Personnel Service Center (PSC) and recommended that the Board deny relief in this case. With his submission, the JA included an advisory medical opinion that had been obtained from a Coast Guard clinical psychologist in August 2022 in which the psychologist acknowledged the applicant's mental health diagnoses and asserted that they should be considered a factor that is relevant to the conduct that the applicant was separated for. Regarding this opinion, however, the JA argued that the applicant's PTSD-related claims should not be given "liberal consideration" by the Board because his command was aware of any mitigating factors, including mental health symptoms, at the time of discharge.

Regarding the applicant's claim that the Coast Guard improperly used his treatment records to issue a DI, the JA argued that the scope of the relevant regulations at 42 C.F.R. § 2.12 was specific to the nature of the treatment sought and thus, because the applicant was admitted to an alcohol treatment program, his records relating to a separate drug, codeine, were not protected.

Regarding the allegation that the applicant's CO was required to initiate separation proceedings upon the finding of a DI, the JA argued that the relevant policy uses discretionary language. Specifically, that Article 5.E.3 of the Military Drug and Alcohol Policy Manual, COMDTINST M1000.10A, states that if a DI occurs, "[t]he Command must process the military member for separation by reason of misconduct per [the Military Separations Manual, COMDTINST M1000.4], as appropriate." According to the JA, based

on this discretionary language, there was no firm requirement that the applicant's CO initiate a misconduct discharge.

Regarding the applicant's claim that he was wrongly denied PDES processing, the JA argued that the applicant's VA rating is not determinative because it was not based on the same standards as military disability standards. The sole standard for the latter in the Coast Guard, the JA explained, is unfitness to perform one's duties based on a permanent, stable medical condition following referral to a Medical Evaluation Board (MEB) by a competent authority. The JA proceeded to note that there were no records suggesting the applicant should have been recommended for indefinite treatment, despite his mental health treatment during service.

The JA also contended that the applicant was not denied a pre-separation physical. On this point, the JA asserted that the applicant had acknowledged, on a Career Intentions Worksheet dated August 31, 2021, that he had been given a physical less than one year prior. The JA stated that an examination within a year before discharge met the requirements of the relevant Coast Guard manuals.

APPLICANT'S RESPONSE TO VIEWS OF THE COAST GUARD

The Board received the applicant's response to the Coast Guard's views on December 26, 2022. The applicant first emphasized that he had never admitted to CGIS investigators that he had taken a prohibited drug and had only speculated based on his knowledge that opiates were present in his wife's house. The applicant then argued that the clinical psychologist's opinion submitted with the JA's arguments supported his contention that he had suffered from PTSD during service, which contributed to his alleged misconduct. The applicant also refuted the JA's arguments with respect to 42 C.F.R. § Part 2, arguing that his records were protected under the law. Regarding the JA's argument that initiating separation proceedings for a DI is discretionary, the applicant cited language from the Coast Guard Separations Manual, COMDTINST M1000.4, which states that any member involved in a drug incident "[w]ill be processed for separation." The applicant also argued that his urinalysis results did not meet the "positive" requirements per DoD guidance.

With his response, the applicant submitted a report dated July 21, 2021, by an individual who is both a licensed pharmacist and an attorney (referred to hereinafter as "Dr. R"). Dr. R assessed three issues in her report. First, she addressed whether use of the applicant's alcohol treatment records had violated 42 C.F.R. Part 2. Second, she provided a pharmacological perspective on the applicant's November 2020 urinalysis results. Third, she discussed the known drug interactions between Zoloft and Valerian root. The Board finds the report's discussion on the drug interactions to be the most relevant for purposes its decision. Lengthy portions from throughout the report are pasted in the Board's previous decision and may be reviewed there. *See* Docket No. 2022-025. In sum, regarding the third issue, Dr. R cited medical literature to support her conclusion that the applicant's

description of symptoms experienced during the relevant period were consistent with a known significant drug interaction between Zoloft and Valerian root that may affect an individual's judgment, cognition, and behavior. Specifically, Dr. R posited that the applicant's symptoms on the evening of November 3, 2020, which included a debilitating headache, pain, blurred vision, inability to walk, and vomiting, suggested that stress and anxiety had exacerbated adverse effects linked to the combination of Zoloft and Valerian root. Dr. R also posited that the significant stress of the February 2021 CGIS interview may have combined with the drug interactions to cause the applicant to become confused and make statements that were misinterpreted as an admission to intentional drug use. Overall, Dr. R posited that during the relevant period, the Zoloft and Valerian root interaction more than likely clouded the applicant's judgment and cognition, particularly when experiencing elevated stress or anxiety such as on the evening of November 3, 2020, and during his February 2021 interview with CGIS.[3]

RECORD BEFORE THE BOARD AT TIME OF PRIOR DECISION

To contextualize the new evidence submitted by the applicant with his request for reconsideration in a subsequent section, the Board will summarize the record that was before it at the time of its prior decision. The following is drawn from service records and other documentary evidence submitted by the applicant and the Coast Guard.

The applicant enlisted in the Coast Guard on August 5, 2003. He temporarily separated on August 3, 2013, but returned to active duty on September 1, 2015.

On September 18, 2020, the applicant began self-referred inpatient treatment for alcohol abuse. He completed the program on October 26, 2020. In a Psychiatric Discharge Summary, a nurse practitioner listed discharge diagnoses as alcohol abuse, posttraumatic stress syndrome (PTSS), and adjustment disorder, and noted the applicant had been prescribed Zoloft, Valerian root, and Melatonin.

On November 3, 2020, a CGIS report documented the arrest of the applicant's wife for domestic violence at their home, consistent with the applicant's summary of events above.

On November 5, 2020, the applicant reported to an outpatient alcohol treatment program, where he provided a urine sample upon entering the facility. On November 9, 2020, a program counselor informed the applicant that his sample was positive for opiates. The report from a private laboratory shows the applicant's urine tested positive for codeine (1,051 ng/ml), morphine (261 ng/ml), normorphine (64 ng/ml), and norcodeine (81 ng/ml).

[3] Dr. R also addressed the applicant's contention that the levels of opiates on his urinalysis did not meet the requirements for a positive drug test result. For reasons discussed in the Findings and Conclusions section, below, the Board does not find this issue to be an important one. Accordingly, that aspect of Dr. R's report is not re-stated here.

The program counselor noted that the applicant initially denied any drug use, but after further conversation, stated, "I did take some of my wife's pills that were in an Advil bottle. She does use opiates, so I guess that is what I took." The counselor noted that the applicant did not deny taking the pills, but maintained he was unaware that he was taking opiates.

With the applicant's consent, the results were provided to the applicant's command on November 11, 2020, via facsimile with a cover page that stated, in part: "The federal rules restrict the use of the information to investigate or prosecute with regards to a crime any patient with a substance use disorder, except as provided in §§ 2.12(c)(5) and 2.65."

According to a Temporary Light Duty (TLD) memorandum authored by a Coast Guard physician assistant on December 7, 2020, the applicant had been diagnosed with depressed mood while under care for alcohol abuse and had subsequently tested positive for opiates, telling his provider he had taken Ibuprofen for a migraine but thinks opiates must have been in the pill bottle. The applicant's plan was to begin outpatient psychology near family. The physician assistant stated that prognosis was "fair," and recommended 6 months of TLD to further develop the applicant's mental health diagnoses and stability on medication. Recommended limitations included no sea or boat duty, non-deployable status until cleared, and physical training as tolerated.

Sometime after receiving the positive urinalysis result, the applicant's command requested that CGIS conduct an investigation. The CGIS records indicate the investigation was criminal in nature and based on a potential violation of Article 112a of the Uniform Code of Military Justice (UCMJ) – Wrongful use, possession, etc., of controlled substances. CGIS agents interviewed the applicant on February 10, 2021, and according to the interview summary, the applicant "admitted to taking Norco (a prescription combination of acetaminophen and hydrocodone)." The summary stated that the applicant said it was a "stupid decision" and a "major lapse in judgment" and that he was aware he was not supposed to take prescription medication without a prescription. According to the ROI dated March 15, 2021, the applicant "admitted to taking one of . . . [the] pills, knowing it was a controlled substance and he did not have a prescription." The ROI also noted that prosecution was ultimately declined.

On March 15, 2021, the applicant received a negative Page 7, wherein he was counseled for his illegal use of prescription narcotics. The applicant's CO noted that the CGIS ROI showed that on February 10, 2021, the applicant admitted to having taken a prescription drug containing acetaminophen and hydrocodone while knowing that it was a controlled substance and that he did not have a prescription for it.

On March 18, 2021, the applicant underwent a reenlistment interview pursuant to Article 1.B.4.b. of the Military Separations Manual, COMDTINST M1000.4. According to the Page 7 documenting the interview, the applicant was notified that his CO had found that he did not meet reenlistment eligibility criteria, as required under Article 1.E.2. of the

Coast Guard Enlistments, Evaluations, and Advancements manual, COMDTINST M1000.2. The CO noted that the applicant had also failed to receive his recommendation for reenlistment because of a violation of UCMJ Article 112a—Wrongful Use of a Controlled Substance. The CO explained that the applicant had admitted to taking a controlled substance without a prescription, as documented by the CGIS investigation. The applicant's CO also explained that because the applicant had both failed to meet the reenlistment eligibility criteria (because of the DI) and failed to obtain a positive recommendation for reenlistment, he was not entitled to a reenlistment board. Finally, the applicant was informed that his CO would submit a memorandum to the PSC Enlisted Personnel Management division (EPM) to discharge the applicant upon the expiration of his enlistment.

In a separate form also dated March 18, 2021, the applicant acknowledged receipt of the proposed discharge and his right to consult with an attorney. The applicant objected to his discharge and requested 15 days to prepare a statement on his behalf.

In a primary care outpatient noted dated March 26, 2021, a physician assistant noted the Assessment/Plan for the applicant as "adjustment disorder with mixed anxiety and depressed mood, history of adjustment disorder with depression/anxiety." The applicant was prescribed Trazadone, one to two tabs as needed for sleep. It was also noted that the applicant had a history of being prescribed Valerian root and Zoloft, which aided in sleep but "may contribute to confusion/cause excess sedation and/or decreased cognitive function." The treatment record also included a notation of "Light Duty Status (AFLD) for a period of 30 days from today." Limitations included no deployments, boat duties, or law enforcement duties.

On April 23, 2021, the applicant submitted a memorandum titled "Statement on My Behalf Objecting to Discharge." The statement is pasted in the Board's prior decision in its entirety. *See* Docket No. 2022-025. The applicant contended that the CO's decision was based on personal bias. He again recalled the events of November 3, 2020, and emphasized that his ingestion of a controlled substance had been accidental, and that the CO had concluded that he admitted to intentional drug use based on CGIS's misinterpretation of his statements. The applicant also asserted that the CO had refused to accept additional evidence or to meet with him. He further noted that during his more than 16 years of service he had no prior incidents of unsatisfactory conduct or misconduct. Moreover, the applicant argued, he had improperly been denied the due process that comes with an ASB or reenlistment board.

In a letter to the applicant dated June 28, 2021, the private outpatient facility that administered the applicant's positive urinalysis test stated, in part, that "[t]he Addiction Medicine Services program uses urine drug screens solely for clinical purposes. They are not forensic and are not intended to be used for any other purpose." It also stated that "[42 C.F.R. Part 2] prohibits re-disclosure of confidential patient records. The face cover sheet

that accompanied the incident report we sent to your designated contact at the Coast Guard, and with your signed consent, includes the following language: 'The federal rules restrict the use of the information to investigate or prosecute with regards to a crime any patient with a substance use disorder, except as provided in §§ 2.12(c)(5) and 2.65.'"

On September 30, 2021, the applicant was separated from the Coast Guard with a narrative reason of "Completion of Required Service." He received a characterization of service of General: Under Honorable Conditions, and a reenlistment code of RE-4.

In a disability rating letter dated December 14, 2021, the VA assigned a 50 percent rating for the applicant's psychiatric condition(s) effective October 1, 2021.

Following the applicant's original application to the Board in March 2022, the Coast Guard obtained a medical advisory opinion from a clinical psychologist on August 22, 2022, which addressed the applicant's allegations regarding his mental health condition. The opinion states, in part:

> *3. Does the Applicant have Post-Traumatic Stress Disorder/Traumatic Brain Injury/Other Mental Health Conditions, or experience a Sexual Assault or Sexual Harassment as documented in their medical/service record?*
>
> Yes.
>
> *a. Was the diagnosis correct? If yes, what conditions/disorders/etc... does the Applicant have?*
>
> Yes; Adjustment Disorder with Mixed Anxiety and Depressed Mood; Alcohol Use Disorder, Mild.
>
> *4. Did the Applicant have the above conditions/disorders/etc. while in military service (i.e.: during the misconduct or circumstances leading to separation)?*
>
> Yes.
>
> *a. Please describe where in the record evidence of this condition while on active duty can be found (page#, form #, photocopy, or other description of location in files).*
>
> Documentation of Adjustment Disorder with Mixed Anxiety and Depressed Mood was reflected on medical officer visits dated 27 February 2017 and 21 March 2017 (location of the medical facility was not indicated). The member was diagnosed with Adjustment Disorder/Family Stress by LT [redacted], [redacted] USCG on 19 June 2018 at Base [redacted] Clinic. The member was diagnosed with Alcohol Use Disorder, Mild by LT [redacted], [redacted] 23 July 2019 at Base [redacted] Clinic. Psychological assessment dated 4 September 2019 at Base [redacted] Clinic by [redacted], PsyD indicates a provisional diagnosis of Adjustment Disorder with Depression/Anxiety (marital conflict). A psychiatric discharge summary from a civilian treatment facility (The [redacted]) dated 26 November 2020 by [redacted], PNHNP-Board Certified identified the member's discharge diagnoses as "Alcohol Abuse, Post-Traumatic Stress Syndrome, and Adjustment Disorder." Of note, post-traumatic stress syndrome is not necessarily the same as post-traumatic stress disorder (PTSD). The use of the former term is uncommon, and may have been an oversight on the part of the provider who intended to render the formal Diagnostic and Statistical Manual of Mental Disorders (DSM-5) diagnosis of PTSD. However, the use of this specific verbiage may also have been intentional, to reflect that the member was demonstrating some symptoms of posttraumatic stress, but at that time

did not meet full diagnostic criteria for PTSD. Regardless, the available medical record is clear that the member had a history of clinically significant distress and/or functional impairment in relation to his marital situation.

5. Could the conduct (or circumstances) that led to Applicant's [separation, discipline, discharge, etc.] be symptomatic of, or otherwise related to, their condition(s) identified above?

a. Yes, the circumstances could be related to the condition(s) identified above.

6. In your medical opinion, does the mental health condition or experience of sexual assault or sexual harassment excuse the conduct or poor performance that adversely affected the discharge?

a. The case summary indicates that the member reports accidental consumption of a controlled substance in an attempt to control headache symptoms. It is not within the purview of the undersigned to opine if this consumption was accidental or intentional. However, at the time of the conduct, the member had just completed residential alcohol treatment and was in process of transitioning to a partial hospitalization step-down program. A patient in this transitional period would be considered to be at higher risk than baseline for relapse or difficulty in managing symptoms successfully, as this is a particularly vulnerable place in a patient's course of care. The presence of any significant stressor, such as the one the member experienced on the day of the conduct, could be reasonably expected to overwhelm an individual's fragile coping resources, even in the absence of any other comorbid mental health conditions. Accordingly, it is the opinion of the undersigned that the mental health condition should be regarded as a relevant factor in the conduct that adversely affected the discharge.

THE BOARD'S FEBRUARY 2023 DECISION

In its February 2023 decision, the Board directed that the Coast Guard upgrade the applicant's discharge characterization from General-Under Honorable Conditions to Honorable. But the Board denied all other requested relief.

Regarding the applicant's argument that the Coast Guard had violated 42 C.F.R. Part 2 by using his urinalysis results to initiate an investigation, the Board concurred with the Coast Guard's reading of the law's distinction between "alcohol abuse information" and "drug abuse information," and found that use of the applicant's positive drug screen from an alcohol treatment facility was not prohibited.

Regarding the applicant's contention that he did not admit to knowingly taking a prohibited drug, the Board cited to portions of the CGIS interview summary that contradicted the applicant's claims. Ultimately, the Board found the applicant had not met his burden to overcome the presumption of regularity on this point.

Regarding the opinion from Dr. R summarized above, the Board found the opinion unpersuasive on the basis that there was no evidence that the applicant experienced negative drug interactions before or after the night in November 2020 when he ingested the controlled substance.

In terms of the Coast Guard's failure to initiate discharge procedures, including an ASB, the Board concluded that the applicant's command was free to utilize the procedures for denying reenlistment as an alternative to separation proceedings.

Regarding DoD and Coast Guard policies detailing urinalysis procedures and levels of drugs considered to be a "positive" test, the Board noted that those regulations did not apply to non-Coast Guard facilities, such as the private treatment center where the applicant was a patient. The Board also noted that an admission alone may be a sufficient basis to establish a drug incident.

Finally, with respect to the applicant's request for a medical discharge or PDES processing, the Board concluded that the evidence indicated the applicant was fit for service at the time of his discharge. The Board pointed specifically to the applicant's April 2021 statement submitted in opposition to his discharge, in which he claimed to be physically qualified.

But based on the extenuating circumstances – including the applicant's difficult family situation during the relevant period and his approximately 16 years of service without prior incident – the Board determined that upgrading the applicant's character of service from General to Honorable would be in the interest of justice.

THE APPLICATION FOR RECONSIDERATION

The Board received the applicant's request for reconsideration on November 23, 2023. Therein, the applicant requested the following:

> Removal of the two March 2021 Page 7s referencing a DI;
>
> Reinstatement to active duty effective October 1, 2021, with retroactive service credit;
>
> A medical retirement or processing through PDES; and/or
>
> Updating his reenlistment code to RE-2 (the code applicable to medical retirements).

The applicant contended that reconsideration was warranted because new evidence had come to light since the Board's original decision was rendered, and because factual errors were made during the initial review process.

Much of the material submitted consists with the applicant's request consists of evidence and arguments that are duplicative of those addressed in the Board's February

2023 decision. The applicant did, however, submit new, relevant items, which included the following:

1. A September 2023 email from a staff member at The Center of Excellence for Protected Health Information (CoE-PHI) interpreting federal privacy laws with respect to the applicant's substance abuse treatment records.

2. A declaration from the applicant's wife, along with a partial transcript she had prepared of the applicant's February 2021 CGIS interview.

3. August 2023 communications from an employee of the treatment center where the applicant received treatment for alcohol abuse in November 2020

4. Photographs of a prescription bottle for "Tylenol with codeine."

5. An October 2020 psychiatric progress note.

Although the applicant submitted additional evidence, the Board finds these five items most relevant and will summarize each below.

CoE-PHI Analysis

In an email dated September 14, 2023, an individual who identified herself as both Deputy Director of Health Privacy at the Legal Action Center (LAC) and Health Privacy Lead for CoE-PHI provided "technical assistance" to the applicant and his wife as follow-up from a telephone call. The email stated as follows:

> Dear [applicant's wife and applicant],
>
> Following up on our phone call just now about the scope of the federal privacy protections for substance use disorder treatment records, here is the information you requested about all the different offices and entities and organizations I was referencing:
>
> > The Center of Excellence for Protected Health Information (CoE-PHI) is funded by the Substance Abuse and Mental Health Services Administration (SAMHSA) which is a division of the U.S. Department of Health & Human Services (HHS). SAMHSA has authority to promulgate and interpret the federal privacy regulations, 42 CFR Part 2. This authority is currently transitioning to be shared between SAMHSA and the Office for Civil Rights (OCR), also part of HHS.
> >
> > The CoE-PHI does not represent SAMHSA's opinions, and the information we provide does not constitute legal advice the CoE-PHI is administered by CAI, in collaboration with my org, Legal Action Center. In order to get legal advice, you should contact a local attorney.
>
> Below is information about the federal law and regulations that we discussed with some links that may be helpful –
>
> The regulations at 42 CFR Part 2 are authorized by a statute, 42 USC 290dd-2, https://www.law.cornell.edu/uscode/text/42/290dd-2. The statute controls the regulations; if there is a

conflict between the statute and the regulations, the statute governs. Together, the statute and regulations protect any information that explicitly or implicitly identifies someone as seeking or receiving substance use disorder treatment or diagnosis from a Part 2-covered substance use disorder treatment program.

The statute defines the scope of the privacy protections to include any information that identifies someone as seeking or receiving "substance use disorder" treatment; the current version of the statute does not distinguish between alcohol and other drug use.

> **42 USC 290dd-2**
> **(a) Requirement**
> Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance use disorder education, prevention, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e), be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b).

The statute prohibits unauthorized *disclosure* of records and also prohibits the unauthorized *use* of protected records in any criminal prosecution, law enforcement purpose, law enforcement investigation, or application for a warrant. 42 USC 290dd-2(e).

Previously, there were two different statutes – one for "alcohol abuse" treatment records, and one for "drug abuse" treatment records. The two statutes were always implemented by the same set of regulations, 42 CFR Part 2. For more information about the statutory and regulatory history, see this recent discussion by SAMHSA and OCR in the Federal Register. https://www.federalregister.gov/d/2022-25784/p-209.

In 2017, SAMHSA updated the regulations at 42 CFR Part 2. It explained that it was replacing the outdated terms "alcohol abuse" and "drug abuse" with the umbrella term "substance use disorder," except when referring to the original statutes that distinguished the two: https://www.federalregister.gov/d/2017-00719/p-258.

Section 2.12(a) of 42 CFR part 2 continues to use the old statutory language and distinguish between "drug abuse" and "alcohol abuse" programs, but uses terms defined elsewhere in the regulations, including in Section 2.11:

> ***Disclose*** means to communicate any information identifying a patient as being or having been diagnosed with a substance use disorder, having or having had a substance use disorder, or being or having been referred for treatment of a substance use disorder either directly, by reference to publicly available information, or through verification of such identification by another person.
>
> ***Patient*** means any individual who has applied for or been given diagnosis, treatment, or referral for treatment for a substance use disorder at a Part 2 program. Patient includes any individual who, after arrest on a criminal charge, is identified as an individual with a substance use disorder in order to determine that individual's eligibility to participate in a Part 2 program. This definition includes both current and former patients.
>
> ***Records*** means any information, whether recorded or not, created by, received, or required by a part 2 program relating to a patient (*e.g.*, diagnosis, treatment and referral for treatment information, billing information, emails, voicemails, and texts), provided, however, that information conveyed orally by a part 2 program to a non-part 2 provider for treatment purposes with the consent of the patient does not become a record subject to this part in the possession of the non-part 2 provider merely because that information is reduced to writing by that non-part 2 provider. Records otherwise transmitted by a part 2 program to a non-part 2 provider retain their characteristic as records in the hands of the non-part 2 provider, but may be segregated by that provider. For the purpose of the regulations in this part, records include both paper and electronic records.

> To my knowledge, there is no support for the interpretation that the federal law and regulations do not apply to drug use information collected by a program that exclusively treats alcohol use disorder. For one, disclosing drug use information collected by an alcohol use disorder treatment program would impermissibly identify the individual as receiving treatment from a substance use disorder treatment program (see 42 USC 290dd-2(a)). Moreover, alcohol is a type of drug; for example, see SAMHSA's page on "Alcohol, Tobacco, and *Other Drugs*," (emphasis added), here: https://www.samhsa.gov/find-help/atod.
>
> We hope this information is useful to you. If you have any additional questions, or would like to refer anyone else to request technical assistance from us, please do not hesitate to contact the center of excellence for protected health information again.
>
> Sincerely,
> [Health Privacy Lead] and the CoE-PHI team

Applicant's Wife's Submission

In a declaration dated September 20, 2023, the applicant's wife corroborated the applicant's account of the evening of November 3, 2020, including her arrest and the applicant's having told her about the migraine that caused him to crawl to the bathroom, barely able to see and vomiting on the floor. She stated that following the applicant's positive urinalysis, he had asked her to check the medicine cabinet and at the time, she found Norco, a prescription painkiller. Later, however, she looked again and found a bottle of prescription Tylenol with codeine dated in 2019. She also stated that she had been in a relationship with the applicant for 12 years and to her knowledge, he had only ever taken prescription medication that belonged to him after surgeries. She asserted that the applicant does not use drugs, as he knows it is against Coast Guard policy and his career meant everything to him.

The applicant's wife also stated that after repeated refusals by the Coast Guard to provide access to the video recording of the applicant's February 2021 interview with CGIS agents, she had obtained the recording via a Freedom of Information Act (FOIA) appeal.[4] After reviewing it, she concluded, the applicant had not admitted to intentionally taking a controlled substance. To support her declaration, she and the applicant created a partial transcript of the interview based on their review of the tape. The transcript was submitted by the applicant. It reads, in pertinent part, as follows:

> 19:00 - - When describing the events of 04 Nov 20, "She had some of her mother's Norco that were down there and *I ended up taking one*."
>
> **…**
>
> 21:44 –
> Q: Were you aware that that contained controlled substances?

[4] The Board notes there is a letter dated March 31, 2021 of record which denies a request for the CGIS interview tape and other materials after consideration under FOIA and the Privacy Act. It is unclear when the recording was provided to the applicant and his wife.

A: "At the time, I had a pounding headache, I was throwing up, I just wanted it to go away, In hindsight, 20/20, yeah, it was a stupid decision [to take any medicine in the dark from an unfamiliar medicine cabinet in the state I was in]. At the moment, I just wanted to take pills and go to bed."

…

22:30 - Describing the drug test reported from [the treatment center], "It indicated that I had morphine in my system. I was like 'what?' Then it dawned on me, oh f**k, *that must have been* and then so I let them know that yes I took that and they put it in their report."

…

23:00 –
Q: What were you thinking ***AFTER*** you tested positive for it, and did you think about whether or not you were supposed to take it and what the ramifications might be?
A: [After I tested positive] I knew I wasn't supposed to take it. We had therapy sessions about it and what it meant for my sobriety. It was incorporated into part of my treatment program to do research on it, understand it.

…

24:00- (Interviewer tells the story as he sees it. John doesn't object.) *See military rules of evidence.*

…

24:20- "It was a major lapse in judgment at the time [to take any medicine in the dark from an unfamiliar medicine cabinet in the state I was in]. It was something available to help alleviate the pain. I don't believe in taking drugs."

…

26:00- (The interviewer tells his story again. John still doesn't object.) *See military rules of evidence*.

…

29:00- Can you describe the bottle for me? There's like three of them. Two of them are regular pill bottles and one is white. [Labels] are for [Barbara].[5]

August 2023 Treatment Center Employee Communications

The applicant also submitted communications dated in August 2023 from J.T., the Director of Clinical Operations at the treatment center where the applicant's urine tested positive for opiates in November 2020. In an email dated August 2, 2023, J.T. stated that

[5] The Board has reviewed the interview recording, as discussed in sections below. The applicant refers to the transcript provided as "verbatim." The Board has no doubt the applicant's transcription is intended to be fully accurate and that there is no deceptive intent. But the Board has reviewed the interview recording (as further discussed in sections below) and for the sake of clarity, notes that some portions of the transcript appear to represent editorializing and/or commentary from the applicant's perspective. For example, the portions that are italicized or that appear in brackets.

"[the treatment center] provides substance use disorder treatment, and treats both alcohol and other drug addictions. We do not distinguish our program as either an 'alcohol abuse program' or a 'drug abuse program.' Our Behavioral Health Outpatient Center treats all kinds of substance use disorders and may administer drug tests in our assessment and treatment of both drug and alcohol addictions. We adhere to all legal requirements related to patient privacy and confidentiality of medical information and records, including 42 CFR Part 2, when applicable." In a separate letter to the applicant dated August 25, 2023, T.R. stated that "[a]s a part of [the treatment center]'s intake procedure for [the applicant]'s alcohol treatment program, a urinalysis was collected to obtain substance abuse information as part of the treatment process for his reported alcohol abuse."

Pill Bottle Photographs

With his submission, the applicant included photographs of the pill bottle referenced by his wife in the declaration summarized above. The first photograph appears to capture roughly what an individual would see looking directly at the bottle from a 90-degree angle. The visible text includes the following:

> [APPLICANT'S MOTHER-IN-LAW'S NAME]
> ACETAMINOPHEN 300
> GENERIC FOR: Tylenol
> Take 1 tablet by mouth

A second photograph is of the same bottle after having been rotated approximately 90 degrees. This photograph reveals additional text. In combining the text from both photographs, it is clear that the full text on the white label wrapped around the orange bottle includes the following:

> [APPLICANT'S MOTHER-IN-LAW'S NAME]
> ACEMAMINOPHEN 300 MG-CODEINE 30 TABLET
> GENERIC FOR: Tylenol With Codeine #3
> Take 1 tablet by mouth every 6 hours as need for

Also included are images from a public website of two round tablets, one being Acetaminophen 325 mg, the other being Acetaminophen with Codeine (300 mg/30mg). Both are white, 10 mm in diameter, with a white indented line across the diameter. They appear otherwise identical aside from the specific indented text on each ("44/148" on Acetaminophen and "2064/√" on the codeine version).

October 2020 Psychiatric Progress Note

The applicant submitted a psychiatric progress note completed by a nurse practitioner on October 10, 2020, during his inpatient treatment for alcohol abuse, which spanned from September 18, 2020 to October 16, 2020. The provider noted that the applicant felt "okay" but had increased anxiety following phone calls with his wife. He

reported low level depression and that he had "cried a lot, released a lot" during "Survivors Week." The applicant's diagnoses were PTSD, alcohol use disorder, obsessive compulsive disorder (OCD), and adjustment disorder with anxiety and depressed mood. The applicant's treatment plan included psychological testing, individual and group therapy, an increased dose of Zoloft for depressed mood and anxiety, and Valerian root for insomnia.

VIEWS OF THE COAST GUARD

On December 31, 2024, a Coast Guard JA submitted an advisory opinion in which he recommended the Board deny relief in this case. Regarding the privacy laws covering SUD treatment records, the JA pointed out that neither CoE-PHI nor LAC were government entities and thus, those organizations' interpretation of the law was not binding on the Board. The JA further argued that whether a facility treats both alcohol and substance abuse disorders is irrelevant because the applicant "should not get a free pass on illicit drug use while enrolled to treat his alcohol abuse." In addition, the JA observed that the record showed the applicant had, himself, consented to the disclosure of his positive urinalysis result to the Coast Guard.

Regarding the partial transcript of the CGIS interview submitted by the applicant, the JA argued that rather than a transcript provided by a biased witness, the Board should rely on the CGIS ROI, which is the official record upon which command based its decisions. The JA also stated that the applicant's failure to submit the actual tape of the interview he had obtained undermined his arguments. But even assuming it was accurate, the JA argued, it showed that at 19:00, the applicant admitted to taking a prescription opioid without a prescription.

The JA noted that the applicant had submitted new evidence regarding his in-service PTSD diagnosis, but the JA argued that the applicant's condition had not contributed to, excused, or outweighed his misconduct. In this regard, the JA noted that the application's own recollection attributed his drug use to a migraine headache, not a mental health condition.

APPLICANT'S REPLY TO THE VIEWS OF THE COAST GUARD

In his response, the applicant contended that the JA's opinion had not substantively addressed the new evidence and legal arguments that had been submitted. The applicant reiterated numerous arguments included in prior submissions to the effect that his discharge stemmed from inadvertently ingesting a tablet of Tylenol with codeine during a period of cognitive impairment brought on by PTSD and contraindicated medications. The applicant also included an outline of various arguments that appears to have been created by an artificial intelligence application. Finally, the applicant submitted two additional items.

First, the applicant submitted an email dated August 25, 2023, to his wife from M.G., the Director of the Office of Legislative Affairs for the Substance Abuse and Mental Health Services Administration (SAMHSA), a component of the U.S. Department of Health and Human Services (HHS). M.G. stated that CoE-PHI is "funded by SAMHSA to help people (physicians, patients, entities, etc.) in understanding and applying the federal health privacy laws and regulations on the job, specific to their task or role, and/or to help patients and families know what their rights are when seeking and receiving treatment for SUDs and/or mental health. The CoE is administered by CAI Global in partnership with SAMHSA and the Legal Action Center. The CoE's staff are attorneys who can help you interpret the law and apply it to your situation."

The applicant also included a link to a recording of his 35-minute interview with CGIS agents on February 10, 2021.[6] The Board has reviewed the recording and created a transcript of the portions of the interview it finds most relevant:

18:47 -

Applicant (following a lengthy account of the events of November 3, 2020): I came back and was just trying to calm down. I ended up getting probably one of the worst headaches and migraines I've ever had in my life just from the stress of everything. I looked in the cabinets for something. She had some of her mother's Norco that were down there and I ended up taking one.

…

21:20 -

Investigator: Okay, just take me through your thought process at the time of, you know, goin' for that Norco. I mean, were you aware that that contained controlled substances?

Applicant: At the time, I had a pounding headache, I was throwing up, I just wanted it to go away. In hindsight, 20/20, yeah, it was a stupid decision. Um, at the moment, no, I just wanted to take a pill and go to bed, wake up, and drive back here.

Investigator: Okay, so walk me through the test, how that transpired, what type of test they gave you.

Applicant: So, I showed up at [the treatment facility]. On the first day, they gave me a urinalysis. I gave them the urinalysis that day. A couple days back it came, um, indicated I had morphine in my system and I was like *what*? Then it dawned on me like oh fuck, that must have been… so I let them know that yes, I took that, and they put it in their report, and I guess they sent it as part of their weekly updates.

Investigator: And what were you thinking after you tested positive for it? Did you think about, you know, whether or not you were supposed to take it? What the ramifications might be or any of those kinds of things?

Applicant: Well, I knew I wasn't supposed to take it and, at the end of the day, we had therapy sessions on it, we talked about it, what it meant for my sobriety, and it was incorporated into part of my treatment

[6] The recording was posted on a public YouTube page. The Board has reviewed the recording, and consistent with privacy laws, will not include a link to the video herein.

program to kind of do research on it, understand it, and they tested me every day, or every week for the rest of the program.

Investigator: And you're aware that per policy for the Coast Guard that you can't take prescription medications without prescription?

Applicant: Yes, I am aware of that.

Investigator: So again, I know you took us through the whole story as far as what you were going through at the time. I know that can be a really stressful situation, I'm sure, but I mean what's your thoughts as far as communicating to the command and the Coast Guard the fact that you knew you were taking a controlled substance but you ended up taking it anyway and now you're in a situation where you tested positive, the Coast Guard has learned about that positive urinalysis, and it was something you didn't have a prescription for, so moving forward, what would you say to the command decision makers?

Applicant: I would say it was a major lapse in judgment at the time. It's not something that I do. It was something available to alleviate the pain. I don't believe in taking drugs. I've been in the Coast Guard 17 years . . . I made a mistake and it's comin' back to bite me in the ass.

…

25:17 -

Investigator: I really appreciate you being honest. With what happened, I mean you know we interview a lot of people and I truly do appreciate that being honest and just owning up to what you did and the fact that you knew it was wrong and you knew the Norco contained the controlled substance and despite the circumstances ended up taking it anyway and now you're in that situation.

APPLICABLE LAW AND POLICY

Board Proceedings

The Board may correct errors or remove injustices in a service member's records pursuant to 10 U.S.C. § 1552(a). "Error" means a mistake of a significant fact or law and includes a violation by the Coast Guard of its own regulations. *See Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976) ("'Error' means legal or factual error."); *Ft. Stewart Schools v. Federal Labor Relations Authority*, 495 U.S. 641, 654 (1990) ("It is a familiar rule of administrative law that an agency must abide by its own regulations."). Injustice, when not also error, is treatment by the military authorities that "shocks the sense of justice." *Sawyer v. United States*, 18 Cl. Ct. 860, 868 (1989) citing *Reale v. United States*, 208 Ct. Cl. 1010, 1011, cert. denied, 429 U.S. 854, 50 L. Ed. 2d 129, 97 S. Ct. 148 (1976). The Board has authority to determine whether an injustice exists on a "case-by-case basis." Docket No. 2002-040 (DOT BCMR, Decision of the Deputy General Counsel, Dec. 4, 2002).

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

Federal Statutes

The Health Insurance Portability and Accountability Act (HIPAA) of 1996 establishes federal standards for protecting health information from disclosure without patients' consent. The regulations implementing HIPAA include a "Military Command Exception" whereby protected health information of Armed Forces personnel may be disclosed for activities deemed necessary by appropriate command authorities to assure the proper execution of the military mission. See 45 C.F.R. § 164.512(k).

Congress has enacted restrictions specific to the disclosure of substance use disorder (SUD) treatment records at 42 U.S.C. § 290dd-2, which provides the following:

> (a) Requirement
> Records of . . . any patient . . . maintained in connection with the performance of any program or activity relating to substance use disorder education, prevention, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e), be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b).
>
> (b) Permitted Disclosure
> (1) Consent
> The following shall apply with respect to the contents of any record referred to in subsection (a):
> (A) Such contents may be used or disclosed in accordance with the prior written consent of the patient with respect to whom such record is maintained.
>
> …
>
> (c) Use of Records in Criminal, Civil, or Administrative Contexts
> Except as otherwise authorized by a court order under subsection (b)(2)(C) or by the consent of the patient, a record referred to in subsection (a), or testimony relaying the information contained therein, may not be disclosed or used in any civil, criminal, administrative, or legislative proceedings conducted by any Federal, State, or local authority, against a patient, including with respect to the following activities:
> (1) Such record or testimony shall not be entered into evidence in any criminal prosecution or civil action before a Federal or State court.
> (2) Such record or testimony shall not form part of the record for decision or otherwise be taken into account in any proceeding before a Federal, State, or local agency.
> (3) Such record or testimony shall not be used by any Federal, State, or local agency for a law enforcement purpose or to conduct any law enforcement investigation.
> (4) Such record or testimony shall not be used in any application for a warrant.
>
> …
>
> (e) Nonapplicability
> The prohibitions of this section do not apply to any interchange of records—

(1) within the Uniformed Services or within those components of the Department of Veterans Affairs furnishing health care to veterans; or
(2) between such components and the Uniformed Services.

Federal Regulations

The U.S. Department of Health and Human Services has promulgated regulations to implement 42 U.S.C. § 290dd-2 and related laws. These regulations are located in Title 42 of the Code of Federal Regulations, Part 2. They apply to treatment providers and facilities that receive any form of federal assistance. Such persons and programs may be referred to as "Part 2 providers" or "Part 2 programs." The regulations were updated in 2022 and 2024, after the applicant's discharge from the Coast Guard. The following relevant provisions derive from the version of the regulations applicable during the applicant's service:

42 C.F.R. § 2.2—Purpose and effect

(a) Purpose. Pursuant to 42 U.S.C. 290dd–2(g), the regulations in this part impose restrictions upon the disclosure and use of substance use disorder patient records which are maintained in connection with the performance of any part 2 program.

…

(b) Effect.

(1) The regulations in this part prohibit the disclosure and use of patient records unless certain circumstances exist. If any circumstance exists under which disclosure is permitted, that circumstance acts to remove the prohibition on disclosure but it does not compel disclosure. Thus, the regulations do not require disclosure under any circumstances.

(2) The regulations in this part are not intended to direct the manner in which substantive functions such as research, treatment, and evaluation are carried out. They are intended to ensure that a patient receiving treatment for a substance use disorder in a part 2 program is not made more vulnerable by reason of the availability of their patient record than an individual with a substance use disorder who does not seek treatment.

(3) Because there is a criminal penalty for violating the regulations, they are to be construed strictly in favor of the potential violator in the same manner as a criminal statute.

42 C.F.R. § 2.12—Applicability

(a) General—

(1) Restrictions on disclosure. The restrictions on disclosure in the regulations in this part apply to any records which:

(i) Would identify a patient as having or having had a substance use disorder either directly, by reference to publicly available information, or through verification of such identification by another person; and

(ii) - Contain drug abuse information obtained by a federally assisted drug abuse program after March 20, 1972 (part 2 program), or contain alcohol abuse information obtained by a federally assisted alcohol abuse program after May 13, 1974 (part 2 program); or if obtained before the pertinent date, is maintained by a part 2 program after that date as part

of an ongoing treatment episode which extends past that date; for the purpose of treating a substance use disorder, making a diagnosis for that treatment, or making a referral for that treatment.

(2) Restriction on use. The restriction on use of information to initiate or substantiate any criminal charges against a patient or to conduct any criminal investigation of a patient (42 U.S.C. 290dd–2(c)) applies to any information, whether or not recorded, which is drug abuse information obtained by a federally assisted drug abuse program after March 20, 1972 (part 2 program), or is alcohol abuse information obtained by a federally assisted alcohol abuse program after May 13, 1974 (part 2 program); or if obtained before the pertinent date, is maintained by a part 2 program after that date as part of an ongoing treatment episode which extends past that date; for the purpose of treating a substance use disorder, making a diagnosis for the treatment, or making a referral for the treatment.

…

(c) Exceptions—

(1) Department of Veterans Affairs. These regulations do not apply to information on substance use disorder patients maintained in connection with the Department of Veterans Affairs' provision of hospital care, nursing home care, domiciliary care, and medical services under Title 38, U.S.C. Those records are governed by 38 U.S.C. 7332 and regulations issued under that authority by the Secretary of Veterans Affairs**.**

(2) Armed Forces. The regulations in this part apply to any information described in paragraph (a) of this section which was obtained by any component of the Armed Forces during a period when the patient was subject to the Uniform Code of Military Justice except:

(i) Any interchange of that information within the Armed Forces; and

(ii) Any interchange of that information between the Armed Forces and those components of the Department of Veterans Affairs furnishing health care to veterans.

…

(e) Explanation of applicability—

(1) Coverage. These regulations cover any information (including information on referral and intake) about patients receiving diagnosis, treatment, or referral for treatment for a substance use disorder created by a part 2 program. Coverage includes, but is not limited to, those treatment or rehabilitation programs, employee assistance programs, programs within general hospitals, school-based programs, and private practitioners who hold themselves out as providing, and provide substance use disorder diagnosis, treatment, or referral for treatment.

…

(3) Information to which restrictions are applicable. Whether a restriction applies to the use or disclosure of a record affects the type of records which may be disclosed. The restrictions on disclosure apply to any part 2–covered records which would identify a specified patient as having or having had a substance use disorder. The restriction on use of part 2 records to bring criminal charges against a patient for a crime applies to any records obtained by the part 2 program for the purpose of diagnosis, treatment, or referral for treatment of patients with substance use disorders. (Restrictions on use and disclosure apply to recipients of part 2 records under paragraph (d) of this section.)

(4) How type of diagnosis affects coverage. These regulations cover any record reflecting a diagnosis identifying a patient as having or having had a substance use disorder which is initially

prepared by a part 2 provider in connection with the treatment or referral for treatment of a patient with a substance use disorder. A diagnosis prepared by a part 2 provider for the purpose of treatment or referral for treatment, but which is not so used, is covered by the regulations in this part.

Coast Guard Manuals & Instructions

Military Separations

The Military Separations Manual, COMDTINST Ml000.4 (August 2018), covers discharging a service member with eight or more years of active service. In relevant part:

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

a. The member either:

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

…

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

…

1.B.4.b. Initial Interview
(1) Based on the member's record and the guidelines in Article 1.B.4.a. of this Manual, the commanding officer shall advise each member approximately six months before his or her enlistment expires whether he or she is eligible to reenlist. The commanding officer shall fully inform a member not eligible to reenlist of the reasons, assign him or her the proper code and, except for members ineligible for physical disqualification, process the member under Article 1.B.5. of this Manual. This approximate time frame for the initial predischarge interview is not a performance probationary period for members considered ineligible to reenlist but rather allows enough time to properly process a member for separation, extension, or reenlistment. Under Article 1.B.5.a. of this Manual, the commanding officer may conduct this interview in less than six months' time before the member's enlistment expires.

…

1.B.2.g. Reenlistment Codes

Each member discharged from the Service is assigned one of the following reenlistment codes,

as appropriate, per Reference (k), Certificate of Release or Discharge from Active Duty, DD Form 214, COMDTINST M1900.4 (series).

(1) RE-1 Eligible for reenlistment.

(2) RE-2 Ineligible for reenlistment due to retirement.

(3) RE-3 Eligible for reenlistment except for a disqualifying factor.

(4) RE-4 Not eligible for reenlistment.

1.B.6. Physical Examination before Separation
Applicability

Before retirement, involuntary separation, or release from active duty (RELAD) into the Ready Reserve (SELRES or IRR), every enlisted member, except those discharged or retired for physical or mental disability, shall be given a complete physical examination in accordance with Reference (d), Coast Guard Medical Manual, COMDTINST M6000.1 (series). Other members separating from the Coast Guard; e.g., discharge or transfer to standby reserve (non-drilling) may request a medical and dental screening. The examination results shall be recorded on Standard Form 88. To allow additional time to process enlisted members being discharged for enlistment expiration or being released from active duty, the physical examination shall be given at least six months before separation from active duty. All physical examinations for separations are good for 12 months. If the member is discharged for immediate reenlistment, the physical examination is not required. However, before discharge for immediate reenlistment, the commanding officer shall review the member's health record and require him or her to undergo a physical examination if evidence in the record or personal knowledge indicates a potential health problem.

Enlistments, Evaluations, and Advancements

The Coast Guard Enlistments, Evaluations, and Advancements Manual, COMDTINST M1000.2C (January 2020), provides guidance on reenlistment eligibility. In relevant part:

1.A.5. <u>Eligibility for Reenlistment and/or Extension</u>. 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.E.1. of this Manual, and meet the eligibility criteria listed in Article 1.E.2. of this Manual. In addition, SELRES members, and IRR members on active duty, or approved to drill for points, must also meet the eligibility criteria listed in Article 1.E.3. 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.E.4. of this Manual shall be followed for members who do not meet the eligibility criteria.

1. Commanding Officer Recommendation.
    a. Each active duty, SELRES, and IRR member on active duty or approved to drill for points must be recommended by the officer effecting discharge to reenlist or extend. In making such recommendation, the officer effecting discharge should consider the member's overall

performance, potential for continued service, and conduct during the current period of enlistment. If a member has received an unsatisfactory conduct mark, court-martial conviction(s), or NJP punishment(s), the officer effecting discharge should also consider how the severity and nature of the offense(s) impact the member's overall record of service during the current period of enlistment

…

I.E.2. 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):

e. 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.

(1) This criteria 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.

(2) 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.

…

1.E.4. Members Not Eligible to Reenlistment.

b. Commands must 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.)

c. Members who are discharged from the active or reserve component because they do not meet the eligibility criteria will be issued an RE-3 or RE-4 reentry code.

Drug and Alcohol Policy

The Military Drug and Alcohol Policy Manual, COMDTINST M1000.10A (June 2018), was applicable at the time of the applicant's relevant conduct and discharge. It provides guidance on the preponderance of the evidence standard used when determining if a drug incident has occurred and the illegal use of prescription drugs. The relevant sections are as follows:

3.B.2. Preponderance of the Evidence Standard. 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.

…

5.A.3. Prescription Drugs.

…

b. Unauthorized Use. No current prescription (within six months) or verified medical explanation for a drug) that would account for the positive urinalysis result. Unauthorized use results in a drug incident finding.

…

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.

5.D.2. Initiating an Investigation. Upon receiving a positive, confirmed urinalysis result or other evidence of misuse, trafficking, or unlawful controlled substance possession within a command, COs/OICs must promptly notify and consult with the regional Coast Guard Investigative Service (CGIS) office regarding the specific incident circumstances. In the vast majority of incidents, COs/OICs will be able to resolve the matter without further CGIS involvement beyond initial consultation. However, in some cases, additional CGIS investigative efforts may be needed to protect broader government criminal enforcement interests. This includes, but is not limited to, identifying and dismantling controlled substance distribution networks, potential misuse of Coast Guard authorities to obtain controlled substances, or government property theft, including seized contraband.

5.E. Determining a Drug Incident.

1. Evidence Collection. In determining whether a drug incident occurred, a CO/OIC must consider all the available evidence, including: positive confirmed urinalysis/blood test results; any prescription documentation; medical and dental records; service record (PDR); and, chain of command recommendations. Evidence relating to the military member's performance of duty, conduct, and attitude should be considered only to measure the credibility of a member's

> statement(s). If the possible drug incident evidence includes a positive urinalysis result, the command must also verify that the urinalysis was conducted in accordance with policy, including properly followed collection and chain of custody procedures. The CO/OIC may delay final determination to pursue any of the following options.
>
> 2. Preponderance of Evidence Standard. Findings of a drug incident must be determined by the CO/OIC 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 military 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 drug use admission or a positive confirmed test result, standing alone, may be sufficient to establish intentional use and thus suffice to meet this burden of proof.
>
> 3. Drug Incident Finding. If after the investigation is complete, as described in Paragraph 5.C. of this Manual, the CO/OIC determines that a drug incident occurred, the following actions must be taken.
>
> > a. Administrative Action. The command must process the military member for separation by reason of misconduct per Reference (b), 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 eight or more total years, must also be processed per Military Separations, COMDTINST M1000.4 (series), as appropriate.

Substance Abuse and Behavioral Addiction Program

Notably, COMDTINST M1000.10A (June 2018), referenced directly above, was superseded approximately one year after the applicant's discharge by the Military Substance Abuse and Behavioral Addiction Program Manual, COMDTINST 1000.10B (October 2022). This manual included the following relevant provisions (the Board has bolded the language added in the October 2022 update):

> **5.G.1.a.** *Initiating an Investigation*. Upon receiving a positive, confirmed drug-test result or other evidence of misuse, trafficking, or unlawful possession of a controlled or prohibited substance, COs/OICs must promptly, after a consultation with the servicing legal office, notify CGIS pursuant to Reference (p). **This requirement does not apply to drug tests conducted during the course of a substance abuse treatment program, as indicated in Paragraph 6.D.4.b, *Limits on Use of Patient Records*, of this Instruction**. **If CGIS declines to investigate, the command must convene an investigation in accordance with Reference (i). If CGIS and the servicing legal office predicates an investigation upon notification by the command, the CO/OIC will not convene a separate administrative investigation until CGIS and the servicing legal office determines that a separate administrative investigation is needed. In many cases, a separate administrative investigation may not be necessary.**
>
> **…**
>
> **5.H.2.** Preponderance of the Evidence Standard. The standard of proof for an administrative DI finding is the preponderance of the evidence standard, thus CO/OICs making these findings must use the preponderance of evidence standard. Preponderance of the evidence means that after all evidence is fairly considered, including its reliability and credibility, it is more likely than not that the military member intentionally committed the acts that constitute a DI. A preponderance of the evidence refers to its quality and persuasiveness, not the number of witnesses or documentation. A member's drug-use admission or a positive-confirmed test result(s), standing alone, may be sufficient to establish intentional use and thus generally

suffices to meet this standard. **The command should consult with the servicing legal office prior to making a finding of DI or no-DI.**

…

6.D.4.b. ***Limits on Use of Patient Records*****. A positive biometric test (e.g. urinalysis, blood, OFT), or other record generated in the course of a substance abuse treatment program may not be disclosed or used in any administrative or criminal proceeding, consistent with 42 C.F.R. § 2.12 and § 2.13. These protections begin at the time the member self-refers or is command directed to a substance abuse treatment program. This provision does not prohibit commands from documenting a Drug Incident if, in the course of follow-up or evaluation testing, the member tests positive for a banned substance. Information obtained as part of follow-up or evaluation testing may be used as the basis for a DI, even though the testing is consistent with a medical treatment plan.**

Medical Manual

The Coast Guard's Medical Manual, COMDTINST M6000.1F (June 2018) in effect in 2020 states the following about anxiety disorders, including PTSD:

5.B.11.b. These disorders are disqualifying for appointment, enlistment, or induction under Chapter 3-D of this Manual or if identified on active duty shall be processed in accordance with Physical Disability Evaluation System, COMDTINST M1850.2 (series), except as noted on (5) below. These disorders may be disqualifying for retention under Chapter 3-F of this Manual.

Chapter 3.F. of the Medical Manual lists the medical conditions that are disqualifying for retention on active duty. It includes the following:

3.F.1.c. Fitness for Duty. Members are ordinarily considered fit for duty unless they have a physical impairment (or impairments) that interferes with the performance of the duties of their grade or rating. A determination of fitness or unfitness depends upon the individual's ability to reasonably perform those duties. Active duty or selected reserves on extended active duty considered permanently unfit for duty shall be referred to an Initial Medical Board for appropriate disposition [through the PDES].

Chapter 3.F.16. lists the psychiatric conditions that may be disqualifying for retention on active duty and result in a referral to the PDES. Paragraph (b) states that, to be disqualifying, anxiety disorders and PTSD must show "[p]ersistence or recurrence of symptoms sufficient to require treatment (medication, counseling, psychological or psychiatric therapy) for greater than twelve (12) months."

Additional relevant sections from the Medical Manual include the following:

2.A.1.d.(4).(a). The separation and retirement examination consists of the Report of medical History, Form DD-280-1 and Report of Medical Examination, Form DD-2808.

…

2.A.1.e.(8). Protected Health Information (PHI). Some of the purposes for which the PHI may be used or disclosed relate to the execution of a member's military mission. These include disclosures needed when determining the member's fitness for duty, determining the member's fitness to perform any particular mission, and to report on casualties. The PHI that is released to a command authority is on a need to know basis. Appropriate military command authorities include all commanders who exercise authority over an

individual who is a member of the Armed Forces, or other person designated by such a Commander to receive PHI in order to carry out an activity under the authority of the Commander. They can only be provided information that is necessary to assess the AD or Reserve member's ability to carry out a specific duty.

…

2.A.12.b. HIPAA Considerations. The Health Insurance Portability and Accountability Act (HIPAA) contains . . . a "military exception" which allows health care entities, under certain circumstances, to disclose protected health information of military members without prior approval. The CG is subject to HIPAA regulations in its role as a health care program for active duty military personnel.

…

2.A.12.e.(3). A [healthcare provider] may also disclose protected health information as required by Law. This includes court orders, subpoenas or summons (issued by a court, government Inspector General, or other authorized administrative body), authorized investigative demand (e.g., CGIS), or other statute or regulatory demand. The disclosure should be limited in scope to the purpose for which the information is sought.

…

4.A.3.d. Disclosure of information. The protected health information necessary for fitness for-duty determinations; status for deployment and special operational duty; separations from duty; convalescent leave recommendations; inpatient admission and casualty notifications; and other routine disclosures for the military mission; is subject to inspection by the Commanding Officer; their delegate designated in writing; duly appointed counsel in the case of formal hearings; or duly appointed CG officials who are conducting authorized investigations. Such inspections will be conducted in the presence of a health services department representative to aid in the interpretation of health information.

…

5.A.5.b.(1). Alcohol dependence (alcoholism) is disqualifying for appointment, enlistment, or induction . . . or if identified on active duty shall be addressed in accordance with Substance Abuse Manual, COMDTINST 1000.10 (series).

…

5.B.8.b.(2). Healthcare providers shall notify the commander concerned when a Service member meets the criteria for one of the following mental health and/or substance misuse conditions or related circumstances:

(a) Inpatient Care. The Service member is admitted or discharged from any inpatient mental health or substance abuse treatment facility as these are considered critical points in treatment and support nationally recognized patient safety standards.

…

13.G.4.a. Patient authorization is generally required for any use or disclosure of protected health information that falls outside the definition of TPO, otherwise permitted by the HIPAA Privacy Rule.

…

PDES Manual

The Physical Disability Evaluation System (PDES) Manual, COMDTINST M1850.2D (May 2006), Article 2.A.38. defines "physical disability" as "[a]ny manifest or

latent physical impairment or impairments due to disease, injury, or aggravation by service of an existing condition, regardless of the degree, that separately makes or in combination make a member unfit for continued duty." Article 2.C.2. states the following:

> **Fit for Duty/Unfit for Continued Duty. The following policies relate to fitness for duty:**
>
> a. The sole standard in making determinations of physical disability as a basis for retirement or separation shall be unfitness to perform the duties of office, grade, rank or rating because of disease or injury incurred or aggravated through military service. Each case is to be considered by relating the nature and degree of physical disability of the evaluee concerned to the requirements and duties that a member may reasonably be expected to perform in his or her office, grade, rank or rating. In addition, before separation or permanent retirement may be ordered:
>
> (1) There must be findings that the disability:
> (a) is of a permanent nature and stable, and
> (b) was not the result of intentional misconduct or willful neglect and was not incurred during a period of unauthorized absence.
>
> **…**
>
> b. The law that provides for disability retirement or separation (10 U.S.C. 61) is designed to compensate a member whose military service is terminated due to a physical disability that has rendered him or her unfit for continued duty. That law and this disability evaluation system are not to be misused to bestow compensation benefits on those who are voluntarily or mandatorily retiring or separating and have theretofore drawn pay and allowances, received promotions, and continued on unlimited active-duty status while tolerating physical impairments that have not actually precluded Coast Guard service. The following policies apply:
>
> (1) Continued performance of duty until a member is scheduled for separation or retirement for reasons other than physical disability creates a presumption of fitness for duty. This presumption may be overcome if it is established by a preponderance of the evidence that:
>
> (a) the member, because of disability, was physically unable to perform adequately in his or her assigned duties; or
>
> (b) acute, grave illness or injury, or other significant deterioration of the member's physical condition occurred immediately prior to or coincident with processing for separation or retirement for reasons other than physical disability which rendered him or her unfit for further duty.
>
> (2) A member being processed for separation or retirement for reasons other than physical disability shall not be referred for disability evaluation unless the conditions in articles 2.C.2.b.(1)(a) or (b) are met.
>
> (3) The determination of a grave or serious condition or significant deterioration must be made by a competent Coast Guard medical officer. Such medical authority will consult with the CGPC senior medical officer, as necessary, to ensure proper execution of this policy in light of the member's condition. The member's command may concurrently submit comment to the CGPC senior medical officer.
>
> c. If a member being processed for separation or retirement for reasons other than physical disability adequately performed the duties of his or her office, grade, rank or rating, the member is deemed fit for duty even though medical evidence indicates he or she has impairments.
>
> …

> i. The existence of a physical defect or condition that is ratable under the standard schedule for rating disabilities in use by the Department of Veterans Affairs (DVA) does not of itself provide justification for, or entitlement to, separation or retirement from military service because of physical disability. Although a member may have physical impairments ratable in accordance with the VASRD, such impairments do not necessarily render him or her unfit for military duty. A member may have physical impairments that are not unfitting at the time of separation, but which could affect potential civilian employment. The effect on some civilian pursuits may be significant. Such a member should apply to the DVA for disability compensation after release from active duty.

FINDINGS AND CONCLUSIONS

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

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

2. The request for reconsideration is timely because it was submitted on November 23, 2024, and thus within two years of the Board's February 3, 2023 decision.[7]

3. 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.[8]

4. The applicant's request for reconsideration is supported by materials not previously presented to the Board. While some of these materials arguably could have been obtained and submitted prior to the Board's February 2023 decision, others likely could not have been. For example, the applicant explained that he did not consider corresponding with CoE-PHI and SAMHSA until the Board denied his application. It is also not clear when the applicant gained access to the CGIS interview recording, or to his psychiatric treatment records dated October 10, 2020. After careful consideration, the Board finds that the new evidence and other material satisfies the criteria warranting reconsideration of the case by the Board.[9]

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[7] *See* 33 C.F.R. § 52.67(e).

[8] *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).

[9] *See* 10 U.S.C. § 1552(a)(3)(D) (requiring the Board to reconsider applications supported by applications not previously presented); 33 C.F.R. § 52.67 (requiring reconsideration when newly submitted evidence or information could not have been presented to the Board before its original decision, had the applicant exercised reasonable diligence).

5. Upon reconsideration of the entire record, including the new evidence and information submitted by the applicant, the Board has determined that partial relief is warranted in this case. The Board's review suggests that the Coast Guard generally followed the law and policy in place during the relevant time period. However, it does not appear to the Board that the applicant was afforded the level of due process intended for long-serving members.

6. The Board begins by addressing the Coast Guard's use of the applicant's November 2020 treatment records, including the positive urinalysis result. As an initial step in addressing this issue, the Board will revisit its finding in the February 2023 decision that use of the applicant's treatment records was not restricted by 42 C.F.R. Part 2 (hereinafter "Part 2") because he was receiving treatment for alcohol abuse, and the record in question revealed drug use. The applicant submitted written guidance on this issue provided to him by a CoE-PHI staff member. In assessing this guidance, the Board is mindful that CoE-PHI is a nongovernmental organization, and its opinions are not binding on the Board or the Coast Guard. But public information suggests that HHS relies on CoE-PHI for its expertise in interpreting the Part 2 regulations and other privacy laws covering medical records. CoE-PHI was established by HHS, which funds it via annual public grant opportunities.[10] The organization's activities include providing information and resources about substance use disorders (SUDs) to healthcare practitioners, families, individuals, states, and communities.[11] CoE-PHI also works "collaboratively with SAMHSA and the HHS Office for Civil Rights and other federal and non-federal partners to *determine the correct interpretations of privacy statutes and regulations and their application*."[12]

7. Given its expertise and role supporting HHS, the Board assigns significant weight to the analysis provided by CoE-PHI, and upon review, the Board finds the analysis persuasive. In particular, CoE-PHI explained that while the version of 42 C.F.R. § 2.12(1)(ii) applicable during the applicant's service period continued to distinguish between "drug abuse" and "alcohol abuse," this appears to have been intended only to mirror two separate underlying statutes. But as CoE-PHI notes, other sections of the regulation use the term "substance use" in ways that clearly apply to both alcohol and drugs. Moreover, April 2024 updates to § 2.12, intended to track changes to the underlying statutes made years earlier, included replacing "drug abuse" with "substance use."

8. The applicant has supplemented CoE-PHI's analysis with August 2023 correspondence from a staff member at the facility where he was treated in November

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[10] *See* HHS SAMHSA FY 2023 CoE-PHI Notice of Funding Opportunity No. TI-23-013 (explaining that HHS established CoE-PHI under authority granted by the Cures Act (42 U.S.C. § 1320d-2 note), SUPPORT Act (42 U.S.C. § 1320-e note), and Public Health Service Act (42 U.S.C. § 290bb-2)).

[11] *Id*.

[12] *Id*. (Emphasis added); *see also* https://www.samhsa.gov/technical-assistance (SAMHSA government website linking to CoE-PHI's website and describing the organization as a SAMHSA-funded training and technical assistance center).

2020. In relevant part, the staff member made clear that the facility treats all kinds of addiction and does not identify as either an "alcohol abuse" or "drug abuse" program. He also emphasized that the urinalysis administered to the applicant had been part of the intake process for treatment of the applicant's alcohol abuse.

9. The Board has carefully considered the new information provided by the applicant and finds that a preponderance of the evidence supports that the Part 2 regulations do not exempt treatment records solely on the basis that they relate to drug abuse but were created during a patient's treatment for alcohol abuse, or vice versa.

10. But the Board's having reached a different conclusion than in its February 2023 decision with respect this issue does not end the analysis. The Board must turn next to an issue that was not addressed in its original decision. That is, whether the Part 2 regulations applied to the Coast Guard at all during the relevant period. The Board concludes that they did not.

11. The Board observes that the regulation, like the underlying statute, exempts from its restrictions entirely all "interchange[s] of . . . records (1) within the Uniformed Services or within those components of the Department of Veterans Affairs furnishing health care to veterans; or (2) between such components and the Uniformed Services."[13] Since it found the Part 2 regulations did not apply for separate reasons (the distinction between drug- and alcohol-related records), the Board likely considered it unnecessary to address this issue. It is an important one, however, because in this case, the record indicates that following receipt of the applicant's urinalysis result from an outside treatment facility with the applicant's consent, the applicant's command sent the result to CGIS.[14] If the transfer of records from command to CGIS is considered an "interchanges of records within the Uniformed Services," Part 2 does not apply.

12. To address this issue, the Board first notes that Part 2's Uniformed Services carve-out appears to be an analogue to HIPAA's "Military Command Exception."[15] HIPAA's exception permits military personnel's protected health information to be disclosed without consent when deemed necessary by command authorities to "assure the proper execution of the military mission."[16] The Coast Guard's Medical Manual tracks the HIPAA provision, and specifies that a member's protected health information may be

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[13] 42 U.S.C. § 290dd-2(e)(1); 42 C.F.R. § 2.12(c)(2)(1).

[14] CGIS records include an agent's statement that he received the applicant's treatment records from the private outpatient treatment facility where the positive urinalysis was administered. But an Official Request for Protected Health Care Information dated December 30, 2020, was submitted by the CGIS agent to a Coast Guard clinic administrator. As such, the Board infers that the investigative records refer to records that originally "from" the private facility, but that had been provided to CGIS from other Coast Guard personnel.

[15] It should be noted that the Part 2 regulations are separate from HIPAA and its implementing regulations. However, Congress has recently directed that HHS align certain aspects of Part 2 with HIPAA. *See* https://www.hhs.gov/hipaa/for-professionals/special-topics/hipaa-part-2/index.html.

[16] 45 C.F.R. § 164.512(k).

disclosed to command when needed to determine a member's fitness for duty or to perform a particular mission.[17] Specifically with regard to SUD treatment records, the Medical Manual also requires healthcare providers to notify a member's command when the member receives certain kinds of treatment, including when he or she is admitted to or discharged from any inpatient mental health or substance abuse treatment facility.[18]

13. Despite the broad exemption for the Uniformed Services, most branches have seen fit to voluntarily adopt rules modeled on Part 2.[19] As noted in the Applicable Law and Policy section, above, the Coast Guard has adopted provisions consistent with Part 2 in an updated version of its COMDTINST 1000.10 series.[20] These updates include a prohibition on using substance use disorder treatment records in any administrative or criminal proceeding.[21] In addition, the new provisions state that the requirement that COs notify CGIS of any positive drug test does not apply to drug tests conducted during the course of a substance abuse treatment program.[22]

14. Again, these policies were updated after the applicant had already left the Coast Guard. The policy applicable during the applicant's service not only contained no prohibition against using substance abuse records as part of investigations, it *required* COs to report any positive urinalysis result to CGIS "promptly." The Coast Guard has a significant interest in maintaining a zero-tolerance policy for drug use, given its national security and law enforcement missions. Evidently, prior to 2022, this interest was weighed more heavily by the Coast Guard than the interests protected by the Part 2 regulations.

15. The policy choices made by Coast Guard leadership in balancing these interests are beyond the Board's purview in this case. Instead, the Board must address whether the Coast Guard's conduct amounted to an error or injustice. In this case, the applicant consented to release of his substance use records to command. In fact, as noted above, the Coast Guard's Medical Manual required disclosure of the records to the applicant's CO regardless of his consent. Furthermore, under the policy in effect at the time, the applicant's CO was required to report the positive urinalysis to CGIS. Given that the Coast Guard had not adopted Part 2 at the time, any transfer and/or use of the applicant's substance abuse records within the Coast Guard, such as from command to CGIS, was not restricted by law.

16. On March 15, 2021, the applicant's CO issued the first of two Page 7s. The "Entry Type" was Performance and Discipline (P&D-13) – Drug Incident. Therein, the

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[17] Medical Manual §§ 2.A.1.e.(8).; 2.A.12.; 4.A.3.d.
[18] *Id*. § 5.B.8.b.(2).
[19] *See United States v. Yarbrough*, 55 M.J. 353, 354 (C.A.A.F. 2001) (explaining that although the laws in question exempt the interchange of records entirely within a military branch, the Air Force, in its Administration of Justice manual, had "adopted the standards as a matter of policy").
[20] COMDTINST 1000.10B (October 2022).
[21] *Id*. § 6.D.4.b.
[22] *Id*. § 5.G.1.a.

applicant was counseled that it had been determined that he was involved in a DI. The Page 7 stated that CGIS had found that "based on a probable cause standard determination" you "violated [UCMJ] Article 112a – Wrongful Use of a Controlled Substance." The CO further stated that the CGIS ROI stated that the applicant admitted to taking a medication, knowing it was a controlled substance he did not have a prescription for.

17. The Board notes that a CO is permitted wide latitude to determine a drug incident based on the preponderance of the evidence with or without the aid any administrative or punitive proceeding. Although the applicant's urinalysis results did not conform to the requirements cited by the applicant for a positive test, the Coast Guard's policy is clear that this does not prevent a CO from assigning some probative value to the results. In addition, in this case, the applicant has admitted to taking a controlled substance, albeit a different one than he named during his CGIS interview and in other statements. Accordingly, the Board finds that the requirements likely intended to ensure against false positives are of little import in this case. In addition, the manual is clear that an admission alone may constitute sufficient evidence to find a DI has occurred.

18. The Board reiterates that at the time of the conduct in question in this case, the applicant's CO's notification to CGIS of the positive urinalysis result was required by Coast Guard policy. The transfer of information from the applicant's CO to CGIS was also not restricted by federal law, given the carve-outs for the Uniformed Services and the Coast Guard's delay in imposing such restrictions internally. The decision by CGIS to exercise its discretion and investigate the case was also not prohibited by law or Coast Guard policy. Furthermore, the applicant's CO's issuance of the Page 7 on March 15, 2018, was a matter committed to his discretion based on Coast Guard policy. The Board finds the decision was reasonable, given the evidence before the CO at the time, which included the CGIS ROI stating that the applicant had admitted to knowing drug use. While the applicant has taken issue with CGIS's characterization of his statements, and the Board will address that issue in more detail below, the Board does not find it was unreasonable for the CO to rely upon the official ROI issued by CGIS. In addition, the March 15 Page 7, in effect, simply documented certain facts. Specifically, that CGIS had conducted an investigation and had issued an ROI summarizing its findings.

19. Under these circumstances, where Coast Guard members took actions in accordance with the law and policy in place at the time, the Board does not find that the applicant has met his burden to establish that the Coast Guard's use of his substance use disorder treatment records, or its issuance of the Page 7 on March 15, 2021, constituted an error or injustice.

20. The Board turns next to the dispute over whether the applicant was entitled to an Administrative Separation Board (ASB) and/or a reenlistment board. Upon review, Coast Guard policy provides that upon a finding of a DI, the command must process the

member for separation for misconduct.[23] The relevant Coast Guard policies, however, do not place a specific timeline on those proceedings. Thus, what is and is not required when a DI is found near the end of a member's enlistment period is unclear. Arguably, then, commands are free to choose between an administrative separation and allowing an enlistment period to simply end, as determined by the Board in its February 2023 decision. In practice, this is likely to be the course chosen in cases where command sees fit to allow a service member to complete their service without facing an administrative separation. This generally benefits the service member. In this case, however, the applicant has contended he was disadvantaged since he fully intended to remain in service and wished to appear before an ASB to fight the allegations of misconduct against him.

21. As noted in the Applicable Law and Policy section above, the Coast Guard makes a distinction between members with eight or more years of service and those with less than eight years of service. The former group, in recognition of their long service, is generally entitled to more due process than the latter, including with respect to provision of an ASB and/or reenlistment board.[24] In this case, the applicant was eligible for an ASB as part of administrative separation proceedings, had those proceedings been initiated. Although the applicant was permitted to submit a written statement to the separation authority, in the Board's view, the opportunity to submit a written statement does not rise to the level of due process afforded at an ASB or reenlistment board, where a service member may call and question witnesses.

22. The applicant served on active duty for approximately 16 years without incident prior to the CO's finding of a DI in March 2021. Based on the foregoing, the applicant would have been entitled to a reenlistment board had the DI not been issued, or an ASB had his command decided to initiate an administrative separation, as appears to be required by the relevant instruction. Given the applicant's long service and the overall circumstances of this case, the Board finds that the applicant's discharge without having been afforded an ASB amounted to an injustice.

23. In this regard, the Board turns to the Page 7 issued on March 18, 2021. In these negative remarks, the applicant was informed that he did not meet the eligibility requirements for reenlistment and did not receive his CO's recommendation because he had violated UCMJ Article 112a – Wrongful Use of a Controlled Substance, having admitted so during the CGIS investigation. Because his DI meant he did not meet the eligibility criteria for reenlistment, he was also denied a reenlistment board.

24. As noted above, given the timeline and ambiguity of Coast Guard policy where an ASB is required but the member is near the end of his or her enlistment, the applicant was deprived of any board in this case despite his 16 years of service without

[23] COMDTINST M1000.10A § 5.E.3.a. (June 2018).
[24] *See* COMDTINST M1000.4 § 1.B.17.d. (August 2018).

previous incident. On this basis, the Board has determined that the failure to afford the applicant an ASB was an injustice, and ran counter to the Coast Guard's apparent intent to afford significant due process to members with more than eight years of service.

25. The applicant was not afforded any opportunity to refute the CO's findings based on the ROI. The Board's concerns with the sequence of events here is heightened for several reasons. First, the applicant's case at an ASB likely would have focused on CGIS's determination that he had admitted to knowing drug use. In its review of the video recording provided by the applicant, the Board does find there is some level of ambiguity. For example, when the CGIS investigator asked the applicant whether he knew that the pill he took contained a controlled substance, the applicant answered as follows: "At the time, I had a pounding headache, I was throwing up, I just wanted it to go away. In hindsight, 20/20, yeah, it was a stupid decision. Um, at the moment, no, I just wanted to take a pill and go to bed, wake up, and drive back here." It appears from the Board's review of the entire interview that the CGIS investigators took this statement as an unambiguous admission that the applicant knew that the pill he took contained a controlled substance at the time he took it. That interpretation is not unreasonable. At the same time, it would also be reasonable to conclude that the word "no" in the final sentence of the applicant's response was the operative word, that is, the most responsive word to the question posed. The applicant went on to make several other statements expressing regret for his actions, and those statements add to the reasonableness of CGIS's conclusion that an admission occurred. But they can also be understood as expressing regret at having taken a pill without making sure it was not a controlled substance. These ambiguities do not make the ROI's conclusion, or the applicant's CO's, unreasonable. They do, however, heighten the Board's concern that the applicant was never afforded an ASB to present his case.

26. The Board's concerns about the failure to afford an ASB are also heightened by the July 2021 report authored by pharmacist (and attorney) Dr. R, who opined that the applicant may have been experiencing confusion as a result of contraindicated medications prescribed for his PTSD, both on the evening of November 3, 2020, and during his February 2021 interview. In addition, the Board is cognizant of the August 2022 clinical psychologist's opinion to the effect that the applicant's PTSD may have played a role in his having taken a controlled substance, though it unclear whether the psychologist was suggesting that PTSD symptoms would have caused the applicant to intentionally or unintentionally take the pill.

27. Finally, the possibility that the applicant's ingestion of codeine may have been accidental is bolstered somewhat by the photographs submitted of the medication bottle that the applicant now contends contained the pill(s) he took. Specifically, the photographs show that looking at the bottle from its "front," particularly in the dark, or in dim lighting, it may have appeared to be a prescription for generic Tylenol, without "codeine" being visible.

28. The Page 7 issued on March 18, 2021 essentially stood in for the ASB that, in the Board's view, should have been afforded to the applicant under the Coast Guard's policy. For this reason, the Board finds that as a downstream effect of the injustice of not having been afforded an ASB, the March 18 Page 7 should be expunged from the applicant's record.

29. By way of interim summary, the Board has determined that partial relief is warranted with respect to the Page 7s issued in March 2021. Specifically, the Board finds the Page 7 issued on March 15, 2021, was issued in accordance with Coast Guard policy at the time and does not amount to an injustice. It documented the occurrence and conclusion of a CGIS investigation, and the CO made a reasonable determination based on the information available to him. With respect to the March 18 Page 7, the Board has determined that the applicant should have been afforded an ASB based on the CO's finding of a DI. Instead, the applicant's CO declared him ineligible to reenlist, and failed to initiate an administrative separation, as required, which would have allowed the applicant appropriate due process in the form of an opportunity to present his case to a board. Accordingly, the Board will direct that the March 18 Page 7 be expunged from the applicant's records. Further, because the applicant was not afforded a full opportunity to present his case, the Board will direct that the RE-4 reenlistment code be changed to RE-1. While the applicant may not be permitted to reenlist given his history of alcohol abuse and the remaining Page 7, he will at least not remain outright ineligible.

30. The Board will next address the applicant's request for a medical retirement or PDES processing. The October 10, 2020 psychiatric progress record summarized in an earlier section was not previously presented to the Board. This record corroborates other medical evidence and confirms the applicant was diagnosed with PTSD during service. Per the Medical Manual, anxiety and PTSD are among the psychiatric conditions which, if identified on active duty, are generally to be processed through PDES.[25] In addition, a member has a disqualifying condition, a Medical Evaluation Board is required absent a waiver.[26] PTSD is disqualifying when there is a persistence or recurrence of symptoms sufficient to require treatment (medication, counseling, psychological or psychiatric therapy) for greater than 12 months.[27] In this case, the applicant was diagnosed with PTSD and anxiety by October 10, 2020, if not earlier, and prescribed medication. He was discharged at the end of September 2021, and there is no indication in the record that his diagnoses or medications had been discontinued. The Coast Guard has asserted that the applicant was afforded a separation examination within 12 months prior to his discharge, which may satisfy the separation examination requirement.[28] The examination report has not been made available to the Board. However, the Board infers from the record that any such examination would have likely taken place prior to the applicant's self-referred

[25] COMDTINST M6000.1F § 5.A.11.b. (June 2018).
[26] *Id*. § 3.F.1.c.
[27] *Id*. § 3.F.16.b.
[28] *See* COMDTINST M1000.4 § 1.B.6 (August 2018).

inpatient alcohol abuse treatment and his subsequent diagnosis with multiple psychiatric conditions and placement onto temporary light duty for several months, including exclusion from deployments and sea duty.

31. Under these circumstances, the Board finds a preponderance of the evidence supports that the applicant should have been processed through PDES, or at the very least, have undergone a full separation medical examination prior to his discharge to determine his fitness for duty, or lack thereof.

32. In conclusion, the Page 7 issued on March 15, 2021, did not amount to an error or injustice. The Page 7 issued on March 18, 2021 did, however. Under these circumstances, the Board will direct that the latter Page 7 be expunged from the applicant's personnel files and his RE-4 reenlistment code changed to RE-1. The evidence also shows the applicant was diagnosed with PTSD, anxiety, and other psychiatric conditions during service, and that he was treated with medication for approximately 12 months before his discharge. Based on this evidence and the relevant Coast Guard policies, the Board will direct that the applicant be processed through PDES.

33. For several reasons, however, the Board will not direct the Coast Guard to reenlist the applicant prospectively or retroactively. The applicant was permitted to complete the most recent enlistment contract entered into with him by the Coast Guard, and there is no legal right to reenlistment. The Coast Guard and individual commands retain broad discretion to deny enlistment or reenlistment based on an individual's entire record. Even assuming the applicant had been afforded an ASB or reenlistment board before his discharge, there is no guarantee a board would have recommended retaining him. If either board did so, there is no guarantee that the board's report, which is advisory in nature, would have been followed by the command.[29] The Board is authorized to correct military records. In this case, this authority does not extend to crafting a new enlistment contract and imposing it on the Coast Guard. Such a decision would require multiple levels of speculation and, again, is not within the Board's purview in this case. Should the applicant desire to reenlist in the Coast Guard, his updated reenlistment code will give him the chance to do so.

34. The Board will also not direct that the applicant be medically retired. Although the record shows the applicant was diagnosed with PTSD and other conditions in service, and underwent inpatient and outpatient psychiatric treatment, his personnel file is also populated with positive remarks and satisfactory performance reviews. The Board is not authorized to make medical findings, and the medical evidence of record is not such that the Board is in a position to determine whether the applicant is or was unfit for duty within the meaning of the relevant Coast Guard policies.

[29] See PSCINST M1910.1 § 1.J. (June 2014)

35. For the reasons outlined above, with respect to some issues presented by the applicant, he has 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.[30] Accordingly, the applicant's request for relief is partially granted, and partially denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

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

ORDER

The application of former EMC [redacted], USCG, for correction of his military record is granted in part, and denied in part. The Coast Guard shall expunge the Page 7 dated March 18, 2021 from the applicant's record. The Coast Guard shall also change the applicant's reenlistment code from RE-4 to RE-1. Finally, the Coast Guard shall refer the applicant through the PDES process.

February 20, 2025

[redacted]