DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 1998-091

FINAL DECISION

[redacted] Deputy Chairman:

This is a proceeding under section 1552 of title 10 and section 425 of title 14, United States Code. It was commenced on July 6, 1998, upon the Board's receipt of the applicant's application for correction.

This final decision, dated May 6, 1999, is signed by three duly appointed members who were designated to serve as the Board in this case.

The applicant, a [redacted] pay grade E-5), asked that the following actions be taken to correct his military record:

"a. Removal of all references to the Non Judicial Punishment [NJP] held on 4 August 1997.

"b. Removal of all references to the positive urinalysis.

"c. Restoration of [the applicant's] rank to [redacted] (E-6).

"d. Award [the applicant] back pay from the date of reduction.

"e. Such other relief as is just and equitable."

SUMMARY OF RECORD AND SUBMISSIONS

On March 1, 1998, the applicant was transferred to the retired Reserve without pay (RET-2). (He had twenty years of federal service.)

The applicant was a Reservist who reported for two weeks of active duty training on May 5, 1997. On May 9, 1997, he was involved in a urinalysis testing to detect the use of drugs. The applicant's urine specimen was found to be positive for THC (tetrahydrocannabinol). (THC is the psychoactive or intoxicating ingredient in marijuana. See United States v. Harper, 22 M.J. 157, 160, (C.M.A. 1986).

On May 29, 1997, the applicant was placed on report for use of marijuana. On August 4, 1997, he was taken to NJP and reduced in rate to [redacted] (E-5).

The applicant presented three issues for the Board's consideration:

"a. Whether the Commander Coast Guard Group [redacted] [CO] had jurisdiction to administer [NJP] under Article 15 of the UCMJ [Uniform Code of Military Justice].

"b. Whether a preponderance of the evidence indicates that [the applicant] innocently ingested marijuana fumes.

"c. Whether [the applicant's] good military character coupled with the evidence of innocent ingestion, is sufficient to defeat the allegation of marijuana use."

1. With respect to the first issue, the applicant argued that to impose NJP on him, the CO must have personal jurisdiction over him as well as subject matter jurisdiction over the offense. The applicant stated that for the Coast Guard to have subject matter jurisdiction over him for the alleged offense, he would have had to have been on active duty, active duty for training, or inactive duty when he allegedly violated Article 112a. (use of marijuana) of the UCMJ.

The applicant admitted that since he was on inactive duty training at the time of the NJP, the CO had personal jurisdiction. The applicant argued, however, there was no subject matter jurisdiction over the offense. The applicant stated that jurisdiction, in this case, did not commence until May 5, 1997, when he began a two-week period of active duty. He asserted that he could not be charged with use of marijuana unless "it was demonstrated that the alleged ingestion occurred while he was on active duty or inactive duty training." The applicant stated that nothing in the record indicated when he allegedly ingested the marijuana.

The applicant argued that the presence of THC metabolites is sufficient to prove ingestion for a member on continuous active duty. United States v. Thompson, 34 M.J. 287 (C.M.A. 1992). However, in the case of a Reservist, like the applicant, United States v. Chodara, 29 M.J. 943 (A.C.M.R. 1990) is more on point. The applicant stated that in Chodara, the Army Court of Military Review (now Army Court of Criminal Appeals), "held that a reservist tested 36 hours after reporting for duty could not be convicted of cocaine ingestion absent proof that the cocaine was ingested while he was on active duty." Id at 945.

The applicant argued for a servicemember, not on continuous active duty, subject matter cannot be presumed. According to the applicant this position is consistent with Paragraph 19-B-3-a(2) of the Reserve Manual. This provision states that

"[d]isciplinary action under the UCMJ shall only be taken against inactive duty reservists for incidents which occur while they are in a duty status."

2. The applicant contended that the evidence indicated that he innocently ingested marijuana fumes. The applicant stated that he was a self-employed [redacted] in [redacted] where he usually worked in an open field with heavy vegetation, including marijuana. He stated that much of the marijuana is planted among other vegetation in unused fields, such as the area he used to do his welding. The applicant submitted several photographs showing these open fields.

The applicant stated that he used a [redacted] mask, which restricted his field of vision. The applicant and another witness stated that small fires are a common hazard in open fields. He stated that since he had never been exposed to marijuana, he was unable to recognize its smell when burning.

3. The applicant alleged that his good military character, coupled with the evidence of innocent ingestion, is sufficient to defeat the allegation of marijuana use. The applicant stated that for many years he had been the mainstay of his ship and was called upon to perform difficult jobs on short notice and on his own time. He stated that in 1996 and 1997 he received commendatory page 7s (administrative remarks) entries. He has also been the recipient of the Coast Guard Achievement Medal. The applicant stated that he would not risk his impeccable reputation and Coast Guard career by knowingly ingesting marijuana. The applicant stated that good military character, itself, is a defense that must be considered. See United States v. Vandelinder, 20 M.J. 41, 44 (C. M.A. 1985)

NJP Appeal

On August 7, 1997, the applicant appealed his NJP asserting that he was not guilty of the offense. He stated his specimen might have tested positive because of faulty laboratory procedures or he could have unknowingly ingested marijuana smoke as a result of his work environment, i.e., working as a [redacted] in open fields where collateral fires were common.

On September 4, 1997, the Commander, Eighth Coast Guard District, denied the applicant's non-judicial punishment appeal. He found the punishment imposed neither unjust nor disproportionate to the misconduct committed.

The Commander further stated that the over the counter medicines that the applicant took around the time he gave the urine specimen would not have produced THC metabolites. The Commander also stated that the concentration of THC was too high to have resulted from the possible passive inhalation from the applicant's work environment.

The applicant attempted to file a supplemental appeal on or about September 9, 1997, asserting a lack of subject matter jurisdiction. On behalf of the Commander, Eighth Coast Guard District, the legal officer answered the applicant's supplemental appeal request. The legal officer informed the applicant that there was no authority for a supplemental appeal process. He informed the applicant that if he disagreed with the NJP he could seek a correction to his record through the Board for Correction of Military Records.

Statements Submitted by the Applicant

The applicant submitted four sworn statements and 2 un-sworn statements. They are summarized below.

1. The applicant submitted a sworn statement from a master chief petty officer (MCPO) who was the office-in- charge aboard a Coast Guard cutter where the applicant worked. The MCPO stated that he and the crew of the cutter were surprised and shocked when they were informed that the applicant's urine specimen tested positive for marijuana.

The MCPO stated that drug use would be out of character for the applicant. He stated that the applicant was shocked upon learning that his specimen had tested positive for marijuana. The MCPO stated that the applicant told him that "he had been [redacted] in open fields and that he might have set fire to some wild marijuana along with other vegetation, without realizing it." The MCPO stated that there has been discussion about the prolific growth of marijuana throughout the local area where the applicant worked as a [redacted] He stated that he has never had a reason to question the applicant's honesty. The MCPO stated that even with the knowledge of the applicant's positive test, he still desired to serve with the applicant.

2. The applicant submitted a sworn statement from a boatswain's mate first class (BM1) who was the urinalysis coordinator on the day that the applicant gave a urine specimen. He stated that the applicant did not appear to be nervous or apprehensive during the urinalysis collection.

This BM1 stated that he was surprised by the applicant's positive specimen, that drug use would be out of character for the applicant, and that he still desired to serve with the applicant. The BM1 stated that the applicant explained that he might have unknowingly inhaled marijuana fumes from burning vegetation in his work environment. The BM1 stated that he has never had a reason to question the applicant's honesty.

3. The applicant submitted two other sworn statements. One statement was from a machinery mate first class (MK1) who was one of the applicant's immediate supervisor, and one statement was from a food service specialist first class (FS1). Each of these individuals stated that the applicant was an excellent worker, that drug use

would be out of character for the applicant, and that each of them still desired to serve with the applicant. They also stated that the applicant explained that he might have unknowingly inhaled marijuana fumes from burning vegetation in his work environment.

4. The applicant also submitted two un-sworn statements. One of the statements was from a lieutenant commander (LCDR) who wrote that the applicant had previously worked for him. He stated that the applicant was responsible, dependable, friendly, willing to volunteer for emergency operations, and an overall excellent member of the unit. The LCDR stated that he was surprised to learn that the applicant's urine specimen had tested positive for marijuana. He stated that marijuana use was not consistent with the applicant's behavior.

5. The other un-sworn statement was from a chief machinery technician (MKC) who worked with the applicant at his then current assignment. The MKC stated that he has known the applicant for the past eight years and has found him to be honest and truthful. The MKC stated that he and the applicant gave a urine specimen on the same day. The MKC stated that he believed that the applicant's urine specimen could have been switched with another person's specimen because there were several people in the room giving urine specimens at the same time that the applicant gave his.

Views of the Coast Guard

On March 24, 1999, the Board received an advisory opinion from the Chief Counsel of the Coast Guard. He recommended that the Board deny relief for lack of proof or lack of merit. The Chief Counsel argued that there was no error or injustice when the CO found that the applicant had violated Article 112a. (use of marijuana) of the UCMJ.

The Chief Counsel stated the following with respect to the laboratory results:

> The urine specimen taken from the Applicant was analyzed by [redacted] Toxicology Laboratory on 14 May 97 . . . . The Kinetic Interaction of Microparticles in Solution (KIMS) test revealed that the specimen was positive for marijuana metabolites. On 15 May 1997, the KIMS test results were confirmed by a gas chromatography/mass spectrometry (CG/MA) test. The GC/MS test revealed that the specimen was positive for marijuana metabolite at a level of 42 nanograms per milliliter (ng/ml). This level is almost three times the minimal concentration required by the Department of Defense to call a specimen positive for active inhalation of marijuana. DOD INST 1010.1.

The Coast Guard argued that the applicant's CO had both personal and subject matter jurisdiction to administer NJP under article 15 of the UCMJ. The Chief Counsel stated that the fact that the applicant provided a urine specimen while on active duty

training that was found to contain a high level of marijuana (THC) metabolites is a prima facie violation of Article 112a. of the UCMJ. See United States v. Lopez, 37 M.J. 702 (ACMR 1993) (stating that a person continues to use a drug after its initial entry into a body so long as it remains within the body (detectable by urinalysis)). The Coast Guard further argued that it need not prove exactly when and where the ingestion of marijuana occurred, only that it did occur. United States v. Miller, 34 M.J. 598, (ACMR 1992).

The Chief Counsel stated that in Solorio v. United States, 483 U.S. 435, (1987), the Supreme Court held that the jurisdiction of the United States Armed Forces to prosecute a member under the UCMJ depends solely on the accused's status as a member of the Armed Forces. The Chief Counsel argued that there can be no doubt that the applicant's status at the time of the urinalysis was that of a member of the Armed Forces and, therefore, he was properly subject to the UCMJ for any violation of the Code flowing from the urinalysis examination which occurred while he was on active duty.

The Chief Counsel argued that the applicant's innocent ingestion defense was considered and rejected by both the CO and the appeal authority. In recommending that the Board also reject his defense, the Chief Counsel stated the following: (1) The laboratory report indicates that the applicant's level for the marijuana metabolite was 42 nanograms per milliliter, almost 3 times the minimum threshold necessary to prove active inhalation beyond a reasonable doubt. DOD INST 1010.1. (2) The CO could properly infer wrongfulness from a circumstantial showing of drug use based on urinalysis evidence alone. United States v. Harper, 22 M.J. 157, 161-162. (3) The applicant failed to present any evidence during his NJP and in this application that would rebut the evidence of the urinalysis examination beyond a reasonable doubt.

The Chief Counsel also stated that the applicant's innocent ingestion defense should fail because the applicant has not established that he was a free lance [redacted] in the [redacted] area, that he worked in a particular open field immediately prior to beginning his active duty period, that wild marijuana grew and was burned in this field, and that he performed [redacted] work for a particular customer doing the period in question.

The Coast Guard attached to its advisory opinion the laboratory report involving the applicant's specimen. It included an affidavit from the Laboratory Director, Workplace Drug Testing Division. Also attached to the Coast Guard advisory opinion, was the letter from the Commander, Eight Coast Guard District, denying the applicant's appeal.

The Chief Counsel stated that an NJP is administrative remedy, and the constitutional rights applicable to criminal trials do not apply. The Chief Counsel noted that the applicant chose to accept NJP, with its limited administrative punishment

rather than risk a court-martial where he could have received a punitive discharge, thereby eliminating his military retirement.

Applicant's Response to the Views of the Coast Guard

On April 9, 1999, the Board received the applicant's response to the views of the Coast Guard. The applicant took strong exception to the Chief Counsel's characterization of his claim of innocent ingestion as the "stupid criminal" defense. He wanted the entire advisory opinion struck from the record.

The applicant stated that in this case, there is no evidence that he was subject to the Coast Guard's jurisdiction at the time of the offense. The applicant stated that he is a member of the Coast Guard Reserve, but that, in itself, is not enough to establish subject matter jurisdiction. The applicant argued that he must been subject to the UCMJ at the time he committed the offense. Murphy v. Dalton, 81 F. 3d. 343, 348 (3rd Cir. 1996). The applicant stated that subject matter jurisdiction does not attach until the Reservist begins a period of active duty or inactive duty training. The applicant stated that in this case jurisdiction did not commence until May 5, 1997, the day the applicant began his period of active duty. United States v. Cline, 29 M.J. 83, 86 (C.M.A. 1989) cert. denied 493 U.S. 1045 (1990). United States v. Spradley, 41 M.J. 827, 830-31 (Nav.Mar Corps Ct. Criminal Appeal. 1995).

The applicant stated that more recently the Court of Appeals of the Armed Forces noted that to be tried under the UCMJ, the accused must be subject to military jurisdiction at the time of the offense. Willenbring v. Neurauter, 48 M.J. 152 (C.A.A.F. 1998). According to the applicant, in United States v. Miller, 34 M.J. 598, 600 (A.C.M.R. 1992), the court stated that when time is the essence of the offense, the date becomes substantive. He argued that in his case, the date is critical to establishing subject matter jurisdiction, and it must be proven.

The applicant stated that the Board must consider his affirmative defenses of good military character and innocent ingestion. The applicant noted that although the Chief Counsel did not address his good military character defense, the Board must consider it. United States v. Vandelinder, 20 M.J. 41, 44 (C.M.A. 1985).

Attached to the applicant's response was an affidavit from his attorney. The attorney stated that he has been informed by the applicant that in the Spring 1997, he was a free lance [redacted] that the applicant showed the attorney a field adjacent to the applicant's home which appeared to be the same field shown in the pictures offered as evidence to show where the applicant did his [redacted] that the attorney saw signs that [redacted] was done in the field, and that the applicant stated to the attorney that he had done [redacted] in that field.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction of this case pursuant to section 1552 of title 10 United States Code. The application was timely.

2. The Chairman has recommended disposition of the case without a hearing. 33 CFR § 52.31 (1997). The Board concurs in that determination.

3. In United States v. Chodara, 29 M.J. 943, citing Solorio v. United States, 107 S. Ct. 2924, 2933, the court stated that "a court-martial has subject matter jurisdiction only over those violations of the code which are committed by persons who are subject to the code at the time of the offense." Reservists, like the applicant are subject to the code during periods of active duty and inactive duty training. Id.

4. The applicant claims, in effect, that his NJP was unjust because the Coast Guard did not have subject matter jurisdiction over the offense, i.e. there was no allegation or proof that the applicant ingested marijuana while he was on active duty or inactive duty training. The applicant admits that the Coast Guard had personal jurisdiction for a two week period of active duty, commencing May 5, 1997. The applicant was still on that two week period of active duty when he gave the urine specimen on May 9, 1997. The applicant also admits that he was serving a period of inactive duty training when he was taken to NJP, on August 4, 1997.

5. The Board finds that, in addition to personal jurisdiction over the applicant, the Coast Guard had subject matter jurisdiction over the offense of wrongful use of marijuana by the applicant. The applicant had been on active duty for approximately four to five days when, on May 9, 1997, he gave a urine specimen that tested positive for marijuana. The Board finds that between May 5 and May 9, 1997, the applicant had been on active duty for a sufficient period of time for the CO to conclude, considering all of the evidence, that the applicant had used marijuana while in an active duty status.

6. The applicant contended that Chodara supports his position that the Coast Guard lacked subject matter jurisdiction over the offense of wrongful use of marijuana because the Coast Guard did not show that the offense occurred during a period of active duty or inactive duty training. The Board finds that Chodara is not controlling in this case.

First, Chodara, involved a general court-martial where the standard of proof is beyond a reasonable doubt. The case before this Board involves an NJP with a much

lower standard of proof. An NJP is a disciplinary proceeding. Part V, para. 1.b., Manual for Courts-Martial. The decision to impose NJP is discretionary with the CO. Part V, Para. 1.d.(2) of the Manual for Courts-Marital states that "a commander who is considering a case for disposition under Article 15 will exercise personal discretion in evaluating each case, both as to whether nonjudicial punishment is appropriate, and if so, as to the nature and amount of punishment appropriate."

Second, in Chodara, the Court determined that the government had failed to meet its burden of proof beyond a reasonable doubt that the appellant had used cocaine while on active duty. The appellant had been on active duty for less than 36 hours when he gave a urine specimen that tested positive for cocaine. The Court in that case found that the government had not shown that the accused had used cocaine while subject to the code. The Court stated that from the evidence of record, including the expert's testimony regarding metabolism and the reduction of cocaine into BZE (benzoylecgonine (a metabolite of cocaine)), there were two opposing permissible inferences. The two equally opposing permissible inferences were: "1) the appellant committed and completed the offense before entering active duty; or 2) the appellant committed the offense while on active duty." Id at 945. Thus, the conviction was reversed because the government failed to prove beyond a reasonable that the appellant committed the offense while subject to the UCMJ. The Court's ruling was not that the military loses subject matter jurisdiction over a member who gives a positive urine specimen within 36 hours of reporting to active duty, rather it ruled that the government failed to meet its burden of proof in that case.

7. In the instant case, the applicant had been on active duty from four to five days when he gave the urine specimen. The CO had a creditable laboratory report, which showed that the applicant's specimen tested positive for marijuana (THC) at a level almost 3 times the minimal level necessary to call a specimen positive. See DOD INST 1010.1 Based on a lower standard of proof, where the decision to punish is within the CO's discretion, the Board finds that the positive urine specimen was sufficient evidence to enable the CO to find that the applicant had used marijuana while on active duty.

8. Notwithstanding the Court's decision in Chodara, the Army Court of Military Review in United States v. Lopez, 37 M.J. 702, upheld a conviction for use of cocaine discovered through a urinalysis, even though no evidence had been presented establishing the amount of time cocaine remains in a person's system. The Court found that "an inference can be drawn from the evidence that appellant used cocaine just prior to the urinalysis." Lopez at 705-706. The CO could properly rely on the positive urinalysis specimen to support a finding that the applicant used marijuana while on active duty.

9. Since NJP is discretionary with the CO, the Board will not overturn the NJP unless there is a demonstration by the applicant that the NJP was unjust, involved a denial of a substantial right, or the punishment was disproportionate to the offense.

Part V, paras. 1.h. and 7.a., Manual for Courts-Martial. The Board finds that neither of these situations is present in this case. The Board notes that the applicant accepted NJP, with its limited rights and lower standard of proof, for the disposition of the marijuana offense.

10. The Board notes that the applicant set forth his innocent ingestion defense at the NJP hearing and in his appeal. The CO rejected this defense at the NJP, since he punished the applicant for use of marijuana. The appeal authority rejected this defense on appeal. It was within the authority of the CO, as the fact finder, to believe or not believe the applicant's innocent ingestion theory. The Board finds no reason to overrule the CO on this issue.

11. The applicant offered his good military character as a defense to the use of marijuana. The six statements submitted by the applicant are good character references, but do not convince the Board that the CO was in error when he punished the applicant for use marijuana while on active duty.

12. The Board notes the applicant's objection to the use of the term "stupid" in the advisory opinion. The Board notes that the use of that term by the Coast Guard did not impact its findings in this case.

13. The Board finds that the applicant has failed to establish an error or injustice in this case.

14. Accordingly, the applicant's request should be denied.

ORDER

The application of [redacted] USCGR (Ret.) for the correction of his military record is denied.