DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2002-093

[redacted]

FINAL DECISION

[redacted]

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was docketed on April 11, 2002, upon the BCMR's receipt of the applicant's request for correction.

This final decision, dated April 30, 2003, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant asked the Board to upgrade his November 9, 19xx discharge for use of an illegal substance from general (under honorable conditions) to honorable; upgrade his reenlistment code to RE-1; expunge from his record all references related to allegations of his wrongful use of marijuana on or about May 12, 19xx; and reinstate him to active duty in his former rank with entitlement to back pay and allowances.

APPLICANT'S ALLEGATIONS

The applicant alleged that because he did not wrongfully use marijuana, he was unjustly awarded a general discharge for misconduct in connection with drug use. He alleged that he provided a urine sample as part of a random urinalysis conducted on May 12, 19xx. He stated that on June 22, 19xx, laboratory results for his sample "allegedly" returned positive for marijuana at the level of 23 nanograms per milliliter (ng/ml). He alleged that on June 30, 19xx, he allowed a private laboratory to take a hair sample in an effort to obtain alternate testing for illegal drugs. He alleged that his hair sample subsequently tested negative for marijuana. In support of his claim, he

provided a copy of the laboratory report, dated July 5, 19xx, from the private facility, which states that "cannabinoids (marijuana) [were] negative" for his hair sample.

The applicant alleged that on July 14, 19xx, he signed an administrative entry (page 7), which advised him that he was being placed on a two-month evaluation urinalysis testing program by his commanding officer (CO). He alleged that although the page 7 explains that he would be required to randomly provide sixteen samples, he was only required to provide two samples during his two-month evaluation and both, to his knowledge, tested negative for illegal drug use.

The applicant alleged that pursuant to his CO's request, a retest of his original sample collected on May 12, 19xx was conducted on July 26, 19xx. Although the results of the urinalysis retest were positive for marijuana at the level of 13 ng/ml, he alleged that that level is below the Coast Guard's cutoff for marijuana of 15 ng/ml.

The applicant alleged that on June 13, 19xx, he was charged with failure to obey an order or regulation concerning the Coast Guard's substance abuse policy and with wrongful use of marijuana. He stated that on the same date, he provided the following statement in explanation of the suspected offenses:

> I … took a urinalysis test on XXXXX, the day of departure from XXXXXX. The test came out positive and I know I had no first hand contact with the substance. Although I did come in contact with the substance while riding with a XXXXX [on liberty in XXXXX, XXXXXX]. It was a small compact vehicle and the smoke from the substance was lingering in the cab because there was a heavy stinch [sic]. I had no control over the situation and alcohol may have cause me not to use my better judgment to stop and get out of the cab. I didn't know the area and I was set on getting to my destination. [A] petty officer … was also in the cab with me at the time. It is unfortunate that this has happened because I have spent four years dedicated to the Coast Guard without a single glimps[1] on my record. Thank you for your time and understanding.

The applicant alleged that he also provided supporting statements from (1) a petty officer, who confirmed his presence in the cab with the applicant and the lingering smoke; (2) a chief warrant officer, who confirmed that both the applicant and the petty officer commented on their "previous encounter with the marijuana smoking cab driver" to her; and (3) a petty officer, who stated that he was told by the petty officer (who was present in the cab), that the cab driver was smoking marijuana.

The applicant stated that on September 25, 19xx, he was taken to Captain's mast, where his CO dismissed the charges of misconduct with a warning. He alleged that despite his CO's determination that the charges were "unfounded as indicated by his dismissal of the charges at mast," the CO requested that the applicant be discharged upon his conclusion that a drug incident had occurred. Moreover, the applicant

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[1] The Board interprets the applicant to mean a "blemish" or "imperfection."

questioned the request for his discharge based on drug abuse, particularly in light of his CO's request that such discharge occur after November 4, 19xx, by which time the applicant would have trained other personnel.

The applicant alleged that he was dismayed when he received the recommendation for his discharge on September 29, 19xx because he "fully and reasonably believed" that no further action would be taken against him after his CO dismissed the charges against him. He alleged that when he was presented with the First Endorsement on his CO's request for his discharge, he signed the document under pressure from his executive officer (XO) and the engineering officer (EO), and without fully understanding its implications in the absence of legal representation. He alleged that the XO and the EO stated that "if [the applicant] pushed this and did not go along with what they were planning to do, they would take [his] case to a court martial, where [he] would face a federal conviction, could go to jail and could get a bad conduct discharge."

The applicant alleged that he later discovered that the document he signed was a waiver of both his right to legal representation and his right to contest the separation action. He alleged that on September 30, 19xx, when he was again taken to mast, he was advised that he would be discharged from the Coast Guard and that due to his signing of the First Endorsement, the separation action could not be challenged. He stated that he believed that the Coast Guard intentionally treated him in an unfair manner.

SUMMARY OF THE APPLICANT'S RECORD

On July 30, 19xx, the applicant enlisted in the regular component of the Coast Guard for four years, through July 29, 19xx. On the same day, he signed a form acknowledging that he would be subject to urinalysis testing and that a positive test result would make him subject to an immediate general discharge for misconduct.

On May 12, 19xx, the applicant gave a urine sample during routine random urinalysis testing. On XXXXX, the XXXXX XXXXXX Medical Center XXXXXXXX conducted a screening test for the applicant's sample and a verification screening test on June 2, 19xx. The screening test was positive for marijuana metabolites. On June 5, 19xx, the screening tests were confirmed by gas chromatography/mass spectrometry (GC/MS), which revealed that the applicant's sample tested positive for marijuana metabolites[2] at 23 nanograms per milliliter (ng/ml).

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[2] The laboratory report stated that "[t]he metabolite identified by GC/MS, 11-nor-Δ-9-tetrahydrocannabinol-9-carboxylic acid, is produced by the metabolism of [t]etrahydrocannabinol [THC], the major psychoactive component of [m]arijuana, … a controlled substance."

On June 13, 19xx, the applicant was placed on report for the suspected violation of Articles 92 (failure to obey an order or regulation issued by the Commandant on substance abuse) and 112a (wrongful use of marijuana) of the Uniform Code of Military Justice (UCMJ). The applicant was notified that an investigation had been initiated into the suspected violations. His record contains a Miranda/Tempia Warning form indicating that he was advised of the charges against him, of his right to remain silent, and of his right to a lawyer. The applicant indicated on this form that he wished to consult with a lawyer and that he desired to make a statement. In that statement, the applicant asserted that he "had no first hand contact with [marijuana]" … but "[came] in contact with the substance while riding with a cab driver."

The applicant also submitted three signed statements in support of his contentions. Those statements are summarized, as follows:

> On XXXXXXXXX, Petty Officer J wrote that he recalled riding in a cab with the applicant and "coming into contact with smoke from an illegal substance." He stated that in light of the circumstances, he did not use his better judgment to seek alternate transportation due to the late hour and his focus on returning to the cutter. He stated that he had known the applicant for more than a year and therefore, because of their close association, he could state with certainty that the applicant was not involved with any illegal drugs.
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> On XXXXXXXX, Chief Warrant Officer T wrote that while sharing a taxicab on XXXXXXXXX with Petty Officer J and the applicant, Petty Officer J expressed concern about whether the driver was "smoking a joint" like the driver he and the applicant encountered on the previous evening. She stated that both explained their desire to avoid being stranded in an unfamiliar location, so "they continued on to their hotel." She asserted that had she known that the applicant was selected for a random urinalysis, she would have relayed this information to the command.
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> On XXXXXXXX, Petty Officer C wrote that on XXXXXXXXX, Petty Officer J advised him that during a taxicab ride shared by he and the applicant, the driver was smoking marijuana. He contended that Petty Officer J stated that the applicant fell asleep but inhaled the smoke from the driver during the ride. He stated that he had no reason to doubt the applicant's character because, to his knowledge, the applicant had not previously been in trouble with drugs or otherwise. Petty Officer C stated in closing that he regretted not providing this information sooner.

On June 30, 19xx, the applicant had a hair sample taken by a private facility to test for the presence of illegal drugs. On July 1, 19xx, the applicant's sample was received at the laboratory and screened for five different illegal drugs. The laboratory report, dated July 5, 19xx, stated that his hair sample tested negative for the five screened drugs, including cannabinoids (marijuana). The laboratory report notes that

"[i]f a drug was reported negative, it means that either no drug was detected, or if a drug was detected, it was present at a concentration less than the laboratory's established cutoff level." The laboratory's screening and confirmation cutoff levels for marijuana metabolites are both 5 picograms per milligram (pg/mg).

On July 14, 19xx, a page 7 was entered into the applicant's record, stating that he was counseled on being placed on a two-month evaluation urinalysis testing program, as a result of his positive urinalysis in June 19xx. He was advised that he would be required to provide up to sixteen urine samples at random times. He was also advised that "the original positive urinalysis result may still be used as a basis for disciplinary action under the UCMJ, administrative separation, and characterization of discharge depending on the basis for ordering the original test." He acknowledged receipt of this document by signature on the same date.

On July 17, 19xx, the CO requested a retest of the applicant's original sample and a listing of secondary Department of Defense (DoD) facilities, where the applicant could solicit alternate testing at his own expense. On July 26, 19xx, XXXX FTDTL retested the applicant's sample and reported that it was positive for marijuana at a level of 13 ng/ml. Tripler FTDTL certification paperwork noted that the DoD established cutoff for the marijuana metabolite identified by GC/MS is 15 ng/ml.

By memorandum dated August 14, 19xx, the Commandant forwarded the results of the retest to the applicant's CO. The CO was advised that a sufficient quantity of the applicant's specimen remained for the applicant to have alternate testing completed, should he so desire. The memorandum also noted two laboratories that the applicant might consider to conduct such testing.

On September 25, 19xx, the applicant was taken to mast, where he was represented by a petty officer whom he had selected. In disposing of the matter at mast, the CO dismissed the charges against the applicant with a warning.

On September 26, 19xx, the applicant was formally notified that, pursuant to Article 12.B.18. of the Personnel Manual, his CO was recommending that he be administratively discharged from the Coast Guard. The applicant was advised of his right to submit a rebuttal statement, which would be forwarded to the Commander of Coast Guard Personnel Command (CGPC) along with the CO's recommendation for consideration.

On September 28, 19xx, the applicant signed a First Endorsement on his CO's recommendation, indicating that he (1) acknowledged notification of his proposed discharge; (2) waived his right to attach a statement on his own behalf; (3) understood that if he received a general discharge under honorable conditions, he could expect to

encounter prejudice in civilian life; (4) waived his right to consult an attorney; and (5) did not object to being discharged. The applicant's signature was witnessed by his EO.

On September 29, 19xx, the CO forwarded his recommendation for the applicant's discharge due to illegal drug use to the Commander of CGPC. The CO stated that a random urinalysis revealed the presence of marijuana metabolites initially at a level of 23 ng/ml in the applicant's sample and upon later retesting at a level of 13 ng/ml. He asserted that after officials at the testing facility informed him that the decrease in marijuana metabolites was consistent with its breakdown in urine samples over time, he found that a drug incident had occurred. He further requested, should his recommendation be approved, that the applicant be discharged after November 3, 19xx due to personnel shortages in the applicant's rating. The CO attached to the recommendation a copy of his September 26, 19xx memorandum to the applicant and a copy of the applicant's September 28, 19xx endorsement.

On November 9, 19xx, the applicant received a general discharge under honorable conditions by reason of misconduct, with an RE-4 reenlistment code (ineligible) and a JKK separation code, which denotes an involuntary discharge due to drug abuse. By the date of his separation, the applicant had served for four years, three months, and ten days on active duty.

VIEWS OF THE COAST GUARD

On November 19, 2002, the Chief Counsel provided the Coast Guard's comments to the Board. He attached to his advisory opinion a memorandum on the case prepared by CGPC and recommended that the Board deny relief.

The Chief Counsel argued that the Board should dismiss this case without prejudice because the applicant has failed to exhaust his administrative remedies. He stated that pursuant to 33 C.F.R. §§ 51.3 and 51.4, the Discharge Review Board (DRB) is authorized to upgrade a discharge or change a reason for discharge for up to 15 years from the date of discharge. He argued that the applicant has failed to demonstrate that he has applied for review by the DRB and therefore, exhausted all reasonable administrative remedies prior to applying to the Board.

With respect to the merits of the case, the Chief Counsel argued that a service member "has no absolute right to remain in the service" and "may be appropriately and administratively discharged" prior to the end of his or her enlistment. Giglio v. United States, 17 Cl. Ct. 160, 166 (1989); Keef v. United States, 185 Ct. Cl. 454, 463 (1963); McAuley v. United States, 158 Ct. Cl. 359, 364 (1962); Rowe v. United States, 167 Ct. Cl. 468, 472 (1964), *cert. denied*, 380 U.S. 961 (1965).

The Chief Counsel stated that as a member with less than 8 years of service, under Article 12.B.18.e. of the Personnel Manual, the applicant was entitled only to (1) notice of the reason for discharge, (2) an opportunity to make a written statement, and (3) an opportunity to consult with legal counsel. He alleged that other than the applicant's own assertion, the record fails to show that he was coerced into signing a waiver of his rights associated with his general discharge. He argued that because the applicant acknowledged his rights, declined to make a statement, and signed the first endorsement on his CO's recommendation for his discharge, the applicant was not denied any due process regarding his discharge.

The Chief Counsel argued that absent strong evidence to the contrary, government officials are presumed to 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). He argued that the applicant's CO exercised his discretion under proper authority when he concluded that the applicant was involved in a drug incident and recommended the applicant's discharge.

The Chief Counsel argued that the applicant was given a full opportunity to support his contention that he was subjected to second-hand marijuana smoke; however, the clinical evidence does not corroborate his passive inhalation explanation. He relied on ALCOAST 081/93, COMDTNOTE 5355 dated August 20, 1993, which states that the positive reporting level for THC was decreased from 50 ng/ml to 15 ng/ml because clinical studies had shown that passive inhalation resulted in levels below 15 ng/ml. He asserted that because the applicant has not proven that the Coast Guard committed any error in administering, collecting, or processing his urine sample, the applicant has failed to produce substantial evidence to rebut the presumption. Therefore, the Chief Counsel concluded, the Board should find that the Coast Guard committed no error.

The Chief Counsel argued that there is no injustice or legal prohibition or policy "in discharging the applicant from the Coast Guard after taking [him to mast] and dismissing the case." He argued that in fact, the applicant's discharge furthers the "Coast Guard['s] policy and the compelling need for armed forces personnel to remain free of illegal substances." He argued that "there is no evidence that the Coast Guard treated the applicant unjustly," and therefore, his discharge does not rise to the level of an injustice that shocks the conscience. *See* Sawyer v. United States, 18 Cl. Ct. 860, 868 (1989), *rev'd on other grounds*, 930 F.2d 1577 (*citing* Reale v. United States, 208 Ct. Cl. 1010, 1011 (1976)).

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 25, 2002, the Chair sent a copy of the views of the Coast Guard to the applicant and invited him to respond within 15 days. He was granted an extension of time to respond and on January 7, 2003, forwarded his response to the Board.

The applicant alleged that the Coast Guard is incorrect in its assertion that he failed to exhaust all administrative remedies by not first seeking resolution at the DRB. He argued that because the DRB has adjudicative powers limited to changing the nature of discharges and upgrading reenlistment codes, "[j]udicial economy requires that [his] petition be heard in the only forum that can offer [the] complete relief" he is seeking.

The applicant alleged that contrary to the Coast Guard's opinion, the evidence in record circumstantially demonstrates that due to pressure from his command, he was not provided proper notification of his right to seek counsel. The applicant stated that upon receiving notification of his pending discharge, he was threatened with possible court-martial if he disputed the discharge. He argued that his contentions of being coerced are supported by the fact that (1) he signed the first endorsement of his CO's recommendation on the same date that he was notified of that recommendation for his discharge; (2) the waiver was witnessed by the EO; and (3) the form of the waiver is substantially similar to the CO's recommendation for discharge. He contended that the limiting terms of the waiver prevented him from acknowledging the notification of his proposed discharge without waiving his right to make a statement or to consult with an attorney. He argued that the use of such restrictive terms in the waiver shows that it was drafted before he met with the XO and EO and that he was not properly advised of his rights prior to being pressured into signing the waiver.

The applicant stated that under the Personnel Manual, the standard of proof for finding that a drug incident has occurred during a Captain's mast is the preponderance of the evidence. He alleged that there was "no logical reason" for the CO to dismiss his case at mast but decide that a drug incident had occurred, requiring the applicant's administrative separation. He contended that the "irregularity" with which the CO handled the charges against him likely resulted in his command applying "unusual pressure [for him]… to waive his right to counsel and [right to] rebut the [separation] decision …." The applicant stated that the Coast Guard's action of dismissing the charges against him is "tantamount to a finding that the evidence was insufficient to support the allegations."

The applicant questioned the Coast Guard's explanation of the inconsistency in the laboratory results between June 5, 19xx and July 23, 19xx. He argued that because urine samples are frozen to prevent diminution of concentration and that the time period between the initial testing and re-testing of his sample was less than two months, it is "highly unlikely" and not "properly supported by scientific data" that the decrease in concentration upon re-testing would have occurred. He argued that

notwithstanding its inadequate explanation, the Coast Guard failed to address the applicant's hair sample testing evidence, which documented that he had not used marijuana. He asserted that under the hair analysis drug testing regimen, drugs could be detected in the hair for approximately 90 days after ingestion. He claimed that in light of the fact that he submitted to hair analysis—which revealed negative results for marijuana—only 48 days after the collection of his urine sample, the record shows that the evidence was insufficient to support the Coast Guard's allegation of misconduct against him.

APPLICABLE LAW

Personnel Manual (COMDTINST M1000.6A)

Article 20.A.2.k. of the Personnel Manual defines a "drug incident" as "[i]ntentional drug abuse, wrongful possession of, or trafficking in drugs. If the use occurs without the member's knowledge, awareness, or reasonable suspicion …, it does not constitute a drug incident. … The member need not be found guilty at court-martial, in a civilian court, or be awarded NJP for the behavior to be considered a drug incident."

Article 20.C. governs the procedures for processing members found to have been involved in a drug incident. Article 20.C.3.a. states that "following [the] receipt of a positive confirmed urinalysis result or any other evidence of drug abuse," COs are required to initiate an investigation into a possible drug incident. Article 20.C.3.b. provides that members are entitled to be advised of their Article 31, UCMJ rights prior to being questioned about a drug incident.

Article 20.C.1.b. provides that "COs are responsible for ensuring their unit's compliance with the Coast Guard's Drug Abuse Program" and "shall investigate all circumstances in which the use or possession of drugs appears to be a factor, and take appropriate administrative and disciplinary action." Article 20.C.1.c. states that the CO may obtain advice in processing administrative actions on drug abuse cases from the Commander of CGPC, while "[m]edical and chemical questions should be referred to the screening laboratory."

Article 20.C.3.c. provides that a CO should consider all the available evidence when determining whether a drug incident has occurred. Such evidence to be considered includes "positive confirmed urinalysis test results, any documentation of prescriptions, medical and dental records, service record, and chain of command recommendations." Article 20.C.3.d. provides that the CO shall determine the finding of a drug incident by a preponderance of the evidence standard. It states that "[a] preponderance of the evidence refers to its quality and persuasiveness, not the number

of witnesses or documentation. A … positive confirmed test result, standing alone, may be sufficient to establish intentional use and thus suffice to meet this burden of proof."

Article 20.C.4. states that, upon a CO's determination that a drug incident has occurred, he or she "will process the member for separation by reason of misconduct under Articles 12.a.11., 12.A.15. 12.A.21., or 12.B.18., as appropriate." It further states that "[m]embers who commit drug offenses are subject to disciplinary action under the UCMJ in addition to any required administrative discharge action."

Article 12.B.18.b.4. provides that "[a]ny member involved in a drug incident … will be processed for separation from the Coast Guard with no higher than a general discharge."

Article 12.B.18.e. states that members, who are being recommended for general discharge for misconduct, with less than eight years of service must be (1) informed of the reason(s) they are being considered for discharge; (2) afforded an opportunity to make a written statement; and (3) afforded an opportunity to consult with legal counsel, "if a general discharge is being contemplated."

The Separation Program Designator (SPD) Handbook states that persons involuntarily discharged for illegal drug use, without being tried by court-martial, shall be assigned a JKK separation code, an RE-4 reenlistment code, and "misconduct" as the narrative reason for separation shown on their DD 214s.

Under Chapter 1.D.17. of the Military Justice Manual, once a member is charged with a UCMJ offense and agrees to go to mast (thereby avoiding a potential court-martial), the CO may take the member to mast but "decide not to punish a member by dismissing the matter with a warning. Such a decision may be based on either a lack of proof or a determination that punishment is not appropriate even though the member committed an offense(s)." A dismissal with warning is not considered non-judicial punishment (NJP), and no entry is made in the member's record.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely.

2. The Chief Counsel argued that under 33 C.F.R. § 52.13, the application should be dismissed for failure to exhaust administrative remedies because the

applicant has not yet sought relief from the DRB. Title 33 C.F.R. § 51.3 provides that veterans "may apply to the DRB for a change in character of, and/or the reason for, the discharge." However, in addition to a change in the character and reason for his discharge, the applicant has also requested reinstatement to active duty in his prior rank with entitlement to back pay and allowances—relief which the DRB cannot grant. Therefore, because a major part of the applicant's request falls outside the jurisdiction of the DRB, he need not have applied to the DRB before applying to this Board.

3. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.31, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

4. The record indicates that the applicant was counseled on the Coast Guard's drug policies on July 30, 19xx, the date he entered active duty. The record also indicates that as part of a random urinalysis conducted on May 12, 19xx, the applicant submitted a specimen, which tested positive for THC, the parent metabolite in marijuana. When his command received the positive results in June 19xx, the applicant was placed on report and, in accordance with Article 20.C.3.b., advised of his Miranda rights prior to being questioned by a Coast Guard investigator. Thereafter, the applicant's CO ordered an investigation into the allegations, requested a retest of the applicant's original sample, and concluded that a "drug incident" had occurred. Personnel Manual, Articles 20.C.3.a. and 20.A.2.k.

5. There is no evidence in the record to suggest, nor does the applicant allege, that the Coast Guard committed any errors or breaches concerning the integrity of the urinalysis testing procedures. Nevertheless, the applicant questioned the validity of the original results of his urinalysis. He argued that, in light of his negative hair analysis results and the fact that the retesting of his original sample revealed a THC concentration below the cutoff level for a positive result under Coast Guard and DoD standards, his CO improperly concluded that there was sufficient evidence to support the allegations of misconduct against him. Although hair analysis is now admitted in court as reliable and scientifically acceptable evidence of illegal drug use,[3] the applicant has failed to show by a preponderance of the evidence how the hair analysis evidence he submitted proves his case.

6. According to the laboratory report, the negative results of the applicant's hair analysis "means that either no drug was detected, or it was present at a concentration less than [5 picograms per milligram (pg/mg),] the laboratory's established cutoff level." However, the evidence fails to prove the applicant's non-use of marijuana during the weeks before May 12, 19xx, when his urine sample was taken.

[3] *See* United States v. Bush, 47 M.J. 305 (1997); United States v. Nimmer, 43 M.J. 252 (1995).

The applicant provided no specific scientific evidence to indicate that the negative hair test results definitely disproved the results of the two screening tests and GC/MS test of his urine. Furthermore, unlike urinalysis testing, there are no Coast Guard or DoD established cutoff levels for hair analysis, and, for civilian federal employees, hair analysis test cutoffs are set at substantially lower levels than the level used by the above private facility. Using hair analysis, the initial test cutoff concentration for THC is 1 pg/mg, while the confirmatory test cutoff concentration is set at 0.05 pg/mg. *See* Mandatory Guidelines for Federal Workplace Drug Testing.[4] Therefore, the applicant's hair analysis test does not persuade the Board that the urinalysis testing was inaccurate.

7. The record indicates that the Coast Guard committed no procedural or legal errors concerning the decreased level of THC reported upon retesting the applicant's urine specimen. Under Article 20.C.1.c. of the Personnel Manual, COs may obtain guidance on medical and chemical questions regarding drug abuse cases from the screening laboratory. Accordingly, with respect to the decrease in the applicant's sample of THC from 23 to 13 ng/ml, the applicant's CO conferred with experts at XXXX FTDTL, who explained that the stated decrease in THC was consistent with urine samples, as that metabolite breaks down in urine over time. Although the applicant alleged that the Coast Guard's explanation of the decrease in THC is "not scientifically supported" because urine samples are frozen to prevent such diminution, he has offered no evidence other than his bare assertion to support the accuracy of his contentions. Absent strong evidence to the contrary, government officials are presumed to have carried out their duties correctly, lawfully, and in good faith. Arens v. United States, 969 F.2d 1034, 1037 (Fed. Cir. 1992). The Board finds that the CO reasonably relied on the forensic laboratory's explanation of the decreased level of THC reported in the retest of the applicant's urine sample. Consequently, the applicant has failed to prove by a preponderance of the evidence that the results of either the original test or the retest of his urine constitute an error or injustice.

8. There is no indication in the record that the CO failed to consider all available evidence in determining that the applicant had been involved in a drug incident, as required by Article 20.C.3.c. of the Personnel Manual. Given the applicant's denial of wrongful use of marijuana and his explanation of passive inhalation with supporting statements, balanced against the results of the applicant's urinalysis, established drug cutoff levels, and clinical evidence of levels for passive inhalation, the Board concludes that the applicant's CO reasonably found by a preponderance of the evidence that the applicant did wrongfully use marijuana in accordance with Article 20.C.3.d. of the Personnel Manual. Moreover, the urinalysis of the applicant's specimen

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[4] According to the Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA), the Mandatory Guidelines for Federal Workplace Drug Testing Subpart C, § 3.3, the guidelines apply to the Uniformed Services, but exclude the Armed Forces, as defined in 5 U.S.C. § 2101 (2). The Coast Guard is included under the definition of Armed Services. Subpart A, § 1.1 of the guidelines.

is presumed to be legally and scientifically supportable to prove that he unlawfully used marijuana, and the applicant provided insufficient evidence to overcome that presumption. Consequently, under Articles 20.C.4. and 12.B.18.b.4., he was subject to an immediate general discharge.

9. The applicant argued that there was "no logical reason" for his CO to find that a drug incident had occurred one day after he dismissed the charges against the applicant at Captain's mast. He argued that the CO's dismissal with warning indicated that there was insufficient evidence to prove by a preponderance of the evidence that he committed the offenses. However, under Chapter 1.D.17. of the Military Justice Manual, a CO may, at his or her discretion, dismiss a charge "with warning" at mast even if the evidence presented proves that the member committed the offense. The applicant has not proved that his CO found insufficient evidence to prove that he committed the offenses with which he had been charged. The Board therefore finds that the applicant has failed to prove that his CO committed an error or injustice by finding that a drug incident occurred even though he dismissed the criminal charges against him.

10. The record indicates that the applicant's discharge proceedings were in accordance with applicable law and regulations with no indication of procedural errors, which would tend to jeopardize his due process rights. On July 14, 19xx, the applicant acknowledged that "the original positive urinalysis result may still be used as a basis for disciplinary action under the UCMJ, administrative separation, and characterization of discharge.…" Furthermore, he was entitled to and provided (1) notice of the reasons which he was being considered for discharge, (2) the opportunity to make a written statement, and (3) the opportunity to consult a lawyer, as required by Article 12.B.18.e. of the Personnel Manual. By signature dated September 28, 19xx, the applicant acknowledged the foregoing rights, certified that he received said notice, and chose not to make a statement or consult with counsel.

11. The applicant alleged that he was not provided with proper notice of his right to seek counsel and was coerced into being separated from the Coast Guard without protest on his part. In support of his contention that he was pressured into waiving his rights and accepting a general discharge, the applicant argued that the language of the first endorsement was drafted in such a manner that prevented him from acknowledging notification of his proposed discharge without waiving his rights to make a statement and to consult with an attorney. While the format of the first endorsement may or may not establish that the Coast Guard anticipated the applicant's execution of the document, it certainly does not establish coercion. The language of the first endorsement was clear and unambiguous, and not so heavily restrictive that he was precluded from striking language out or adding any desired changes to the text.

12. Moreover, the record contains insufficient evidence to find that the Coast Guard erred or committed an injustice because the EO witnessed the applicant's first endorsement. The applicant has presented no law or regulation which prohibits an EO from witnessing such an endorsement. Neither has the applicant submitted any statements to corroborate his allegation that he was coerced into waiving his right to counsel by his command. The record indicates that the applicant was informed on September 26, 19xx, that his CO was initiating action to effect his discharge from the Coast Guard, and that on September 28, 19xx, he signed the first endorsement of his CO's recommendation. In the absence of any persuasive evidence to the contrary, the Board finds that the applicant was informed of and afforded his due process rights prior to waiving his rights to submit a statement and consult counsel, and prior to being discharged.

13. The applicant has failed to prove by a preponderance of the evidence that the Coast Guard committed an error or injustice in awarding him a general discharge with a JKK separation code and an RE-4 reenlistment code for wrongful use of marijuana.

14. Accordingly, the application should be denied for lack of merit.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of , USCG, for the correction of his military record is denied.