DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2004-169

Xxxxxxxxxxxxxxxx
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FINAL DECISION

[redacted]

This proceeding was conducted under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The case was docketed on August 17, 2004.[1]

This final decision, dated April 21, 2005, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant, a former seaman apprentice (SA; pay grade E-2) in the Coast Guard, received a general discharge on November 15, 2002, after completing just one year, two months, and eighteen days of military service. He was administratively discharged for misconduct after he was found guilty at mast of wrongfully possessing a controlled substance (marijuana) aboard a Coast Guard cutter. The applicant asked the Board to vacate his discharge and reinstate him on active duty in his previous pay grade, E-3; to remove all records of the general discharge, RE-4 reenlistment code (ineligible for reenlistment), and criminal charges from his record; and to restore to him "all rights, privileges, pay, allowances, and benefits which were denied him as a result of the non-judicial punishment imposed [at mast] on September 20, 2002."

[1] When the application was received on May 3, 2004, the applicant's military records were ordered from the National Personnel Record Center, which reported that no records could be found. The Coast Guard was also unable to locate the applicant's military records. On August 17, 2004, the Chair determined that although no official records could be found, the application could be docketed based upon the records supplied by the applicant.

In the alternative, the applicant stated, he asks that his discharge be upgraded to honorable, that his reenlistment code be upgraded to RE-1 (eligible to reenlist), and that he be awarded "any pay, allowances and benefits which were denied as a result of the wrongful conviction by non-judicial punishment on September 20, 2002, and subsequent administrative separation."

APPLICANT'S ALLEGATIONS

The applicant alleged that at about 3:00 a.m., on July 21, 2002, a seaman on his cutter making the rounds as mid-watch messenger of the watch noticed a ceiling tile ajar in the Deck Department "head area" and found a package wrapped in duct tape above it. The seaman squeezed it and decided that it smelled like marijuana. He completed his rounds and then returned, removed the package, and gave it to the quarterdeck watchstander, who gave it to the Officer of the Deck, who took it to the stateroom of the executive officer (XO) of the cutter. The XO opened the package and found approximately 14.2 grams of marijuana wrapped inside a plastic "baggy" with a paper flyer advertising a [redacted] music festival. The commanding officer (CO) and Coast Guard Investigative Services (CGIS) were informed.

The applicant stated that on July 23, 2002, another seaman on the cutter, SN H, told a chief petty officer that "during the second day of a 3-day port call in [redacted] [the applicant] showed her a package containing what she believed to be marijuana." SN H reported that after the applicant woke her early in the morning so that she could relieve him of duty as messenger of the watch, she went to the Deck Lounge "where the watch is normally turned over." After she took the watch, she stated, the applicant left the lounge but returned shortly and threw a black plastic bag in her lap. When she opened the bag, she reported, she saw "at least two small clear plastic bags containing what she believed to be marijuana." She handed him back the bag, and he told her he had bought the marijuana in [redacted] and that another crewmate, BM3 E, was going to help him hide it on the cutter. She stated that the applicant then fell asleep in the lounge. Later, when she returned from rounds, the applicant was gone, and she did not see the black bag.

The applicant alleged that he did not buy marijuana in [redacted] He stated that on the first day of their three-day port call in [redacted] he and a shipmate, SN G, went into town on liberty and bought various souvenirs and other items. At one point they were separated in a shop. However, he stated, neither of them bought any marijuana. After shopping, they joined up with several other crewmates at a hotel and spent the rest of the day and evening on the beach and in several clubs and restaurants before returning to the cutter for duty the next morning.

The applicant stated that he spent the morning on duty, slept during the afternoon, and rose to stand the "2000-2400 [10:00 p.m. to midnight] watch, as well as the

next two watches, the 0000-0200 and the 0200-0400" at which point he woke his relief, SN H. "[A]s a practical joke," the applicant alleged, on his way back to the Deck Lounge after waking SN H, he stopped by the galley and put some oregano in a bag. In the lounge, he tossed the bag to SN H and told her it was marijuana.

When the cutter docked in [redacted] on July 29, 2002, the applicant stated, CGIS agents came aboard and questioned him and other crewmembers. SN H told the CGIS agents the same story she had told the chief petty officer. He was fingerprinted and his urine was tested for drug use that day. However, the urinalysis was negative for drug use,[2] and no fingerprints were found on the packaging of the marijuana.

On September 12, 2002, the applicant stated, he was charged with violating Article 112a of the Uniform Code of Military Justice (UCMJ) by wrongfully possessing marijuana. On September 20, 2002, he was taken to mast by the CO, found guilty, and awarded non-judicial punishment (NJP). The applicant alleged that he accepted the NJP upon the advice of his leading chief petty officer, and did not appeal it, only because he believed he had no chance of vindication. He was removed from the cutter and sent to a shore unit.

The applicant stated that on September 27, 2002, the CO initiated his administrative discharge and informed him of the proposed discharge, which he acknowledged on September 29, 2002. The applicant stated that he waived his right to consult counsel "because of the hopeless outcome presented by his superiors." However, he submitted a written statement because he hoped to convince his command "of his sincere desire to remain in the Coast Guard."

On November 4, 2002, the Coast Guard Personnel Command (CGPC) approved the CO's recommendation and ordered that the applicant receive a general discharge.

On November 12, 2002, the applicant alleged, three days before his discharge, a crewmate, SA S, signed a statement indicating that on November 8, 2002, he heard another crewmate, SN P, admit that "the marijuana in which [the applicant] was convicted and punished for processing, was his, but [SN P] could not remember where he placed it on board the [cutter] because of his intoxication." The applicant alleged that another seaman corroborated SA S's statement.

On November 13, 2002, the applicant alleged, he voluntarily underwent a polygraph test. The examiner found that he was truthful in claiming that he had never brought marijuana onto the cutter, that the marijuana found did not belong to him, and that he never showed SN H a bag of marijuana and told her it belonged to him.

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[2] The applicant submitted a copy of the urinalysis report showing that the test was negative for metabolites of marijuana.

The applicant alleged that his military career was destroyed "based solely upon the word of one person over another." He "was accused and convicted of such misconduct without any direct, or circumstantial, evidence." Moreover, the applicant stated, SN H was not his friend and was not someone he would have trusted with information of criminal misconduct. He pointed out that she waited two days to make her accusation. He alleged that one month earlier, he had confronted her "about an inappropriate relationship she had with one of the engineers." He alleged that he had no contact with her from the time of the confrontation until he woke her to assume the watch.

The applicant argued that "possession" means that you exercise control over something either constructively or by direct physical custody. He alleged that the package of marijuana was found in a place that was accessible to and used by "numerous personnel who could have exercised control over the marijuana."

Regarding the oregano in the bag he tossed to SN H, the applicant noted that she "did not open the [small, clear] plastic bags [which she alleged she saw in the black plastic bag], she did not smell or actually touch the material in the plastic bags." Moreover, he argued, the package found above the ceiling tile did "not even look like the same package that [he] jokingly showed to [SN H]." The applicant argued that his command erred in assuming that the substance in the bag he tossed to SN H was marijuana:

> Although the identity of an illicit substance can be established by circumstantial evidence, the burden is on the Government to prove the identity of the substance. [*United States v. Nicholson*, 49 M.J. 478 (CAAF 1998).] In *Nicholson*, a witness observed the accused talking with another sailor about some "partying." The witness also saw the accused return a plastic bag containing a brown leafy substance to his pocket. The evidence supporting the charge of wrongful possession consisted solely of the witness's testimony. The Court of Appeals for the Armed Forces reversed the conviction, set aside the finding of guilty and dismissed that charge. The facts in *Nicholson* have many similarities to the facts [in this case]. While several United States Courts of Appeal have … determined that the identity of an illicit substance can be established by circumstantial evidence, NONE OF THE CIRCUITS HAVE HELD THAT MERELY A BRIEF VIEWING OF THE SUBSTANCE CONSTITUTED THE REQUIRED LEVEL OF PROOF. [*Id.* at 480]

The applicant further argued that in deciding whether an untested substance is illicit, federal courts consider the totality of the circumstances. He pointed out that in *United States v. Wright*, 16 F.3d 1429 (6th Cir. 1994), the court found that the prosecution had proved that the substance was illicit because of its physical appearance; its physical effect on people; the fact that it was used in the same manner as an illicit substance; the fact that high prices were paid for it in cash and covertly; and the fact that the substance was called by the name of an illicit narcotic. In his case, however, the only one of these factors present is the fact that he told SN H that the substance was marijuana, which was a joke. He alleged that the evidence of record just as easily supports his jest as it supports his command's conclusion that the bag he tossed to SN H actually contained

marijuana. He noted that the court in *Nicholson* concluded that "mere speculation as to the identity of a substance by one non-expert witness—and nothing more—does not rise to the level of legally sufficient evidence for conviction."

The applicant alleged that the criminal charge rested only on the fact that he had showed SN H "two round, golf-ball sized baggies" and told her they contained marijuana. "Even assuming *arguendo* that the substance was marijuana (which is not conceded), the Government's evidence is wholly inadequate to find him guilty of possession of marijuana." He argued that the fact that a baggy or baggies of marijuana were found on the cutter does not prove that his baggies contained real marijuana.

SUMMARY OF THE RECORD

Reports of the CGIS Investigation

The applicant submitted a copy of a CGIS report, which shows that on July 29, 2002, the investigating agent received two items from the cutter. The first contained 14.2 grams of marijuana and a paper flyer advertising a [redacted] music festival. The packaging included a white box, duct tape with "parts of a plastic bag," and a small zip-lock bag. The second consisted of a small plastic bag with 5.4 grams of marijuana and a yellow latex rubber glove. No fingerprints were found on the packaging material.

The applicant also submitted a copy of the CGIS final report, dated August 30, 2002. It indicates that two stashes of marijuana were found hidden above ceiling tiles in different common spaces on the cutter. The first stash was found in the Deck Department berthing area on July 21, 2002, the third day of a three-day port call in [redacted] The few crewmembers who knew of the discovery were instructed not to speak of it. SN H came forward on July 23, 2002, and reported that the applicant had shown her marijuana and said he would hide it on the cutter. When the cutter reached [redacted] on July 29, 2002, a dog found a second stash of 5.4 grams of marijuana hidden in a rubber glove above a ceiling tile in the berthing area of the Engineering Department. On July 30, 2002, another witness came forward and said that on July 28, 2002, SN G had said that he had bought marijuana in [redacted] but threw it overboard because he had heard dogs would be brought aboard to search the cutter in [redacted] The report includes statements written by CGIS agents after interviewing the crew, including the following:

- The seaman who found the first stash at about 3:00 a.m. on July 21, 2002, stated that no one was around when he found it.

- SN H reported the applicant's conduct in the lounge when, after she relieved him as messenger of the watch, he left the lounge but returned a few minutes later and tossed her a black plastic bag with at least two "baggies" in it, told her it was marijuana, and said that BM3 E would help him hide it.

- BM3 E denied any knowledge of the matter and said he had never discussed drugs with the applicant. He stated that he could not remember being with the applicant in the lounge before SN H was awakened to take the watch.

- The applicant—who was advised that he was suspected of possessing an illicit drug and advised of his rights prior to questioning—denied possessing marijuana. When asked about his activity during the port call in [redacted] he recounted the first morning of shopping with SN G and apparently made no mention of marijuana. He stated that while serving as messenger of the watch the next night, he had watched movies in the lounge between rounds with BM3 E, who left at about 3:00 a.m. After waking SN H at 3:30 a.m. to relieve him as messenger of the watch, he stated, he "spent about 2 more hours in the deck lounge, sleeping," before going to bed. He stated that he did not say any thing to SN H about marijuana. He made no mention of the alleged joke he played with oregano.

- SN G, who spent the first day of the port call on liberty with the applicant, was also under suspicion and advised of his rights. He stated that when he and the applicant were shopping, people in the shops were smoking marijuana and tried to sell it to them. He stated that he "saw no one purchase any [marijuana]." However, after leaving the first shop, where he himself bought nothing, the applicant carried a black plastic bag with a small knife in it.

Report of the Administrative Investigation

On September 15, 2002, the XO designated an ensign to conduct an inquiry into the criminal charge against the applicant. The applicant was again advised of his rights. He chose to answer questions and submit a statement, but he waived his right to consult an attorney. In his report, dated September 19, 2002, the ensign opined that the applicant's statement about the jest with oregano should be discounted because he made no mention of it to the CGIS agent. The ensign recommended that the applicant be charged with making a false official statement as well as wrongful possession because the two statements he had made to the investigators differed. He also recommended that SN H be charged with obstructing justice because she waited to report the incident in the lounge. He recommended that the charges be handled at mast.

The applicant's statement for the administrative investigation is dated September 19, 2002. In it, he described the first day of the port call without mentioning any purchase of a knife or anything else. He stated that he returned to the cutter at 0700 (7:00 a.m.) the next day because he had duty. That morning on duty, he, SN H, and another member of the Deck Department scrubbed one of the small boats. After he got off duty at lunch time, he ate and went to bed because he had to be on watch by 10:00 that evening. Because he was not sleepy, he stayed on watch (taking others' shifts), watching movies in the lounge between rounds. At 0330, he woke SN H because she had the next watch. He described his next actions as follows:

> On my way back towards the lounge, I went in the galley and put some oregano in a bag as a joke, and proceeded back to the lounge. When [SN H] arrived in the lounge, I passed down to [her] any information I needed to. I then tossed the bag at her as a joke, not thinking that she'd take it that seriously, and at the time, I didn't think she did. I went back to watching TV, and about 10 or 15 minutes later, I fell asleep in the lounge. I woke up around 0530, to an empty lounge. I then got up, and made my way to my rack.

Report of Offense

This report, dated September 12, 2002, indicates that the applicant was charged with wrongfully possessing marijuana in July 2002, informed of the charge, and assigned a chief petty officer to represent him at mast. It also shows that, at mast on September 20, 2002, the CO awarded the applicant NJP of 45 days of restriction with extra duties, reduction from E-3 to E-2, and forfeiture of $500 pay per month for two months. The applicant was informed of his right to appeal the NJP but did not do so.

Discharge Proceedings

On September 27, 2002, the CO notified the applicant that he was initiating procedures to discharge him because of his "purchase and possession of illegal drugs and failing to adhere to the Coast Guard's Core Values of Honor, Respect and Devotion to

Duty." The CO stated that CGPC would determine the type of discharge he received and that, if he received a general discharge, he might "encounter prejudice in civilian life." The CO notified him of his right to consult counsel and to submit a written statement that would be forwarded with the CO's recommendation to CGPC.

On September 29, 2002, the applicant acknowledged the CO's notification in writing. He stated that he waived his right to submit a statement and to consult an attorney and that he did not object to being discharged.

On October 3, 2002, the CO sent CGPC his recommendation that the applicant be discharged. He described SN H's account of the incident with the applicant in the Deck Lounge and noted that a baggy of marijuana had been found above a ceiling tile on the cutter on July 21, 2000. He noted that the applicant's "problems with drug use directly relate to a lack of maturity and a blatant disrespect to any and all authority."

On October 11, 2002, the applicant submitted a written statement. He wrote that during his interview with the ensign who conducted the administrative investigation, he realized that his statement to the CGIS agent had been "changed around and twisted." He stated that the ensign had already made up his mind that the applicant was guilty because after their interview, when the applicant offered to submit another statement to clarify what was in the CGIS report, the ensign told him he could not. After his chief intervened, the ensign accepted the second statement. The applicant also stated that he believed the CO had made up his mind about the applicant's guilt before the mast because the CO refused to respond to his greetings between the day he was charged and the day of his mast. The applicant stated that at mast, when he said he did not admit to the charges, the CO shook his head, "giving me the impression that anything I had to say in my defense during that mast was going to be useless." By the end of the mast, he had lost hope and so decided not to appeal. He argued that he had been made a scapegoat because of one person's word.

Statements Concerning SN P

On November 12, 2002, the applicant submitted another statement indicating that he had heard a rumor that the marijuana found above a ceiling tile on the cutter belonged to another seaman, SN P. Therefore, on November 8, 2002, in the presence of three other seaman, he asked SN P if the marijuana was his. SN P replied, "I don't know. I was too drunk when I hid mine to remember where it was. I'm not sure if that was mine that they found or not. I'm going to have to look around for it." Moreover, the applicant alleged, in a recent telephone call with another crewmate, SN D, he was told that on the morning before the mast, SN D informed their chief that the marijuana belonged to SN P, not to the applicant. However, the chief, who served as his mast representative, never informed him of this discussion, which he could have raised at mast. The applicant further stated that he had also learned that another seaman who was

taken to mast told the CO that SN H had smoked marijuana, so she should not have been considered a credible witness against the applicant.

The applicant attached to this statement two others signed by crewmembers of the cutter. One signed by SA R indicated that on November 8, 2002, he heard SN P admit to having had marijuana on the cutter. SA R stated that SN P said, "I was too messed up to remember where I had put it" and "I need to search around and see if it was mine." Another statement, signed by SNGM P, indicates that on November 8, 2002, "when asked if drugs on the boat were his, [SN P] said, quote, 'I was too messed up to remember where I put it.'"

Polygraph Test

On November 13, 2002, a licensed polygraph examiner sent the applicant's attorney a letter stating that the applicant had answered the following four questions truthfully and that no deception was indicated:

- "Do you intend to truthfully answer my questions about the marijuana found aboard [the cutter]?" Response: "Yes."
- "Have you ever brought marijuana aboard [the cutter]?" Response: "No."
- "Did the marijuana found aboard [the cutter] belong to you?" Response: "No."
- "Did you ever show a bag of marijuana to [SN H] and tell her it belonged to you?" Response: "No."

On November 15, 2002, the applicant received a general discharge, pursuant to Article 12.B.18. of the Personnel Manual. His DD 214 bears an RE-4 reenlistment code, a JKK separation code, and "Misconduct" as his narrative reason for separation.

On December 30, 2002, the applicant wrote to the Commandant. He wrote that he had been made a scapegoat because CGIS could not determine who had stashed the marijuana on board. He alleged that SN H had a grudge against him and had not spoken to him for one month because he had confronted her about an inappropriate relationship he thought she was having with someone in the Engineering Department. He stated that the CGIS report "completely and deliberately misinterpreted everything" he had said under questioning. He alleged that the CGIS agents had "put their 'spin' on to make me look like the guilty party in the matter." He complained that the ensign who conducted the administrative investigation balked at allowing him to submit a written statement because, the ensign told him, he had already signed statements prepared by the CGIS. However, the applicant pointed out, he had never signed any statements for

the CGIS. Moreover, the applicant alleged, at his mast, SN H said he showed her an amount of marijuana "roughly the size of a golf ball" and described the plastic bags, but the Officer of the Day said that the amount of marijuana found was "roughly the size of a hotdog, possibly a little bigger," and it was found wrapped in paper and duct tape. However, he complained, the CO ignored the difference in the amounts and the packaging. The applicant also sent the Commandant copies of the statements indicating that SN P had admitted to hiding marijuana on the cutter at some point, and he alleged that SN D had told the chief who represented him at mast that the marijuana belonged to SN P. He alleged that the chief and SN P were very "close." In addition, he alleged that another seaman, who went to mast for drug use on the same day he did, stated at mast that he had seen SN H smoke marijuana.

VIEWS OF THE COAST GUARD

On January 3, 2005, the Judge Advocate General (JAG) of the Coast Guard recommended that the Board deny relief in this case.

The JAG argued that the applicant has failed to prove that any error or injustice was committed with respect to his NJP. The applicant's CO was authorized by statute and regulation to impose NJP and in doing so had "the opportunity to view the evidence, including the demeanor of Applicant and the witnesses against him. His decisions are therefore entitled to some deference." The JAG argued that absent proof that the CO's determinations were clearly erroneous or that a substantial right of the applicant's was materially prejudiced, the Board should uphold the CO's decision.

The JAG argued that under Article 15 of the UCMJ, which provides for masts and NJP, Congress authorized COs to deal with minor violations "as an essential part of their responsibility to preserve discipline and maintain an effective armed force." Article 15 allows COs to maintain good order and discipline without the members incurring the stigma of a criminal conviction by court-martial. The JAG argued that Article 15 endows the CO with the "authority to determine whether an offense occurred and, if so, the appropriate punishment." He argued that the applicant has not overcome the "strong presumption that the military officials involved performed 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).

Furthermore, the JAG argued, even if the applicant could prove an administrative or procedural error, "he would not be entitled to relief on that basis alone. Under regulations established by the President, non-compliance with any of the procedural provisions for imposing [NJP] does not invalidate a punishment unless the error materially prejudiced a substantial right of the Applicant. Manual for Courts-Martial, Part V, Para. 1h. In addition, the JAG stated that the constitutional rights applicable to criminal trials, such as those provided under the Fifth and Sixth Amendments, do not

apply to NJP proceedings. The JAG concluded that "to establish a claim of error or injustice regarding the imposition of NJP, the Applicant must prove a clear legal or factual error, or a clear abuse of the broad discretion accorded to these authorities, and material prejudice to the Applicant's substantial rights as a result of such error." *Cochran v. United States*, 1 Cl. Ct. 759 (1983), *reh. denied*, 3 Cl. Ct. 3 (1983), *aff'd*, 732 F.2d 168 (Fed. Cir. 1984), *cert. denied*, 469 U.S. 853 (1984).

Moreover, the JAG pointed out, the applicant failed to take advantage of his right under statute and regulation to appeal the NJP. Had the applicant appealed his NJP, the CO's determinations and sentence would have been reviewed by a "flag officer acting with the advice of his staff judge advocate." Therefore, he argued, "absent proof of compelling circumstances," the Board should consider the matter waived.

The JAG stated that the applicant's argument that his CO was precluded from finding that he had violated Article 112a of the UCMJ is "misplaced." At mast, the standard applied by a CO is the preponderance of the evidence. The JAG pointed out that the Board does not know everything that was said at the mast, but that in light of the following evidence, the Board must conclude that it was "entirely reasonable for Applicant's commanding officer to have concluded that Applicant possessed marijuana in violation of Article 112a., UCMJ": (1) marijuana was found on the cutter in an area to which the entire crew had access; (2) a crewmember, SN H, informed her chain of command that the applicant showed her a bag containing at least two bags of marijuana and told her he would hide it on the cutter; (3) after being advised of his rights by the CGIS, the applicant "asserted that he never said anything about marijuana" to SN H; and (4) three weeks later, he contradicted his statement to the CGIS by stating that he had told her that he had marijuana in the bag but that it actually contained oregano. The JAG argued that the applicant's admission that he lied to the CGIS agent about the substance of his conversation with SN H "greatly undercuts [his] credibility and would have given any reasonable person pause in accepting [his] later story in which he attempted to explain away his conduct as a practical joke." He noted that the applicant could have been charged with making a false official statement to the CGIS.

Regarding the stashes of marijuana, the JAG argued that "a change in packaging is inconclusive that it is not the same marijuana, but is to a large degree irrelevant. Even if Applicant were not linked to that *particular* marijuana, the evidence before the commanding officer would still support a finding that Applicant possessed *some* quantity of marijuana aboard the cutter when he showed it to [SN H]." The JAG alleged that marijuana is "readily distinguishable from oregano by any but the most naïve."

The JAG argued that the applicant's arguments about whether the evidence was sufficient for a criminal conviction are irrelevant because the applicant was not convicted by court-martial, where the standard is "beyond a reasonable doubt" rather than "preponderance of the evidence." He argued that there was sufficient evidence for the

CO "to reasonably conclude that Applicant possessed marijuana aboard the cutter. … This is so even if Applicant did not possess the particular marijuana recovered. All that was necessary is that he possessed *some* quantity of marijuana, a fact supported by both the witness's observations and Applicant's own words."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 28, 2005, the applicant responded to the views of the Coast Guard. He argued that his failure to appeal his NJP should not be held against him because he did so based on the advice of superiors, who told him an appeal would be futile. He stated that his failure to appeal "does not make him less believable or less creditable." He also argued that it is unfair for the JAG to allege that he made a false official statement since he provided no signed statement to the CGIS, whose report includes merely a summary of what he allegedly said during his interviews.

The applicant stated that he "never possessed a controlled substance on board the [cutter]." He stated that SN H "could only speculate as to what she saw." He argued that nothing connects him to the marijuana found on July 21, 2002. He reminded the Board that his urinalysis was negative and that no fingerprints were found on the bags of marijuana, which he is accused of having handled in the lounge with SN H.

APPLICABLE LAW

Article 20.C.1.b. states that "[c]ommanding officers 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.3.a. provides that COs "shall initiate an investigation into a possible drug incident, as defined in Article 20.A.2, following receipt of a positive confirmed urinalysis result or any other evidence of drug abuse." Article 20.C.3.b. provides that "[b]efore being questioned in relation to a drug incident, members are entitled to be advised of their Article 31, UCMJ rights. This applies whether or not disciplinary action under the UCMJ is contemplated."

Article 20.A.2.k. defines a "drug incident" as "[i]ntentional drug abuse, wrongful possession of, or trafficking in drugs. … 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.3.c. states that "[i]n determining whether a drug incident occurred, a commanding officer should consider all the available evidence, including positive confirmed urinalysis test results, any documentation of prescriptions, medical and dental records, service record, and chain of command recommendations. Evidence relating to the member's performance of duty, conduct, and attitude should be considered only in measuring the credibility of a member's statement(s)." Article 20.C.3.d. provides that "[f]indings of a drug incident shall be determined by the commanding officer … using a preponderance of the evidence standard."

Article 20.C.4. provides that if, after completing the investigation described in Article 20.C.3, the CO determines that a drug incident did occur, he or she must take administrative action by processing the member for separation by reason of misconduct and may take disciplinary action pursuant to the UCMJ.

Article 12.B.18.b.4. provides that the Commander of the Military Personnel Command shall discharge an enlisted member involved in a "drug incident," as defined in Article 20, with no higher than a general discharge. Article 12.B.2.c.(2) states that a "general discharge" is a separation "under honorable conditions."

Article 12.B.18.e. states that members with less than eight years of service who are being recommended for a general discharge due to misconduct are not entitled to a hearing before an Administrative Discharge Board but must be (a) informed in writing of the reason they are being considered for discharge, (b) afforded an opportunity to make a statement in writing, and (c) afforded an opportunity to consult a lawyer.

The Separation Program Designator (SPD) Handbook states that when a member is involuntarily discharged for the "illegal, wrongful or improper use, possession, sale, transfer or introduction on a military installation of … marijuana when supported by evidence not attributed to urinalysis" with no entitlement to an Administrative Discharge Board, his DD 214 shall bear a JKK separation code, an RE-4 reenlistment code (ineligible to reenlist), and "Misconduct" as the narrative reason for separation.

Article 112a of the UCMJ provides that any member who wrongfully uses, possesses, manufactures, distributes, imports, exports or introduces onto the property of the Armed Forces any marijuana or other such controlled substance is punishable by court-martial. The elements of "wrongful possession" are that the accused possessed an amount of the substance and his possession was wrongful. "Possession" must be knowing and may be direct and physical or constructive, "as in the case of a person who hides an item in a locker or car to which that person may return to retrieve it." Manual for Courts-Martial (MCM), Part IV, p. 54. The maximum punishment by court-martial for wrongful possession of less than 30 grams of marijuana is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for two years. However, the maximum period of confinement is increased to five years when the offense is committed aboard a vessel of the Armed Forces. MCM, Part IV-56.

Part V-1 of the MCM states that NJP under Article 15 of the UCMJ "is a disciplinary measure more serious than the administrative corrective measures … but less serious than trial by court-martial," which "provides commanders with an essential and prompt means of maintaining good order and discipline and also promotes positive behavior changes in servicemembers without the stigma of a court-martial conviction." Each CO exercises personal discretion in considering cases for disposition under Article

15 and in determining sentences. NJP is normally reserved for minor offenses, but the "decision whether an offense is 'minor' is a matter of discretion for the commander." MCM, Part V-1; *see* Coast Guard Military Justice Manual (MJM), Chap. 1.A.5. Unless the accused is attached to or embarked on a vessel, he or she may refuse NJP and demand trial by court-martial, and this right to refuse may be granted by the CO to those attached to or embarked on a vessel. MCM, Part V-2; MJM, Chap. 1.B.5. At mast, the member is entitled to representation by a spokesperson and to present evidence and witnesses. MJM, Chap. 1.C. The Military Rules of Evidence do not apply during the proceedings, and the standard of proof is the preponderance of the evidence. MJM, Chap. 1.D.1.f. and g. The maximum NJP a CO may impose at mast includes correctional custody for not more than 30 days; forfeiture of not more than one-half of one month's pay per month for two months; reduction in grade; extra duties for not more than 45 consecutive days; and restriction to specified limits (geographical) for not more than 60 consecutive days. MCM, Part V-5; MJM, Chap. 1.E.1.c. Any member may appeal his NJP to a superior authority within five days of the mast, and the superior authority must refer the case to a judge advocate for consideration and advice before acting on the appeal. MCM, Part V-8; MJM, Chap. 1.F.

Military Rule of Evidence 707 provides that "the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence."

FINDINGS AND CONCLUSIONS

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

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

2. The applicant alleged that he was wrongfully awarded NJP and discharged from the Coast Guard. Among other requested relief, he asked the Board to remove the records of his NJP and to void his discharge and reinstate him or upgrade his discharge and reenlistment code. Article 12.B.18.b.4. of the Personnel Manual provides that an enlisted member involved in a "drug incident" shall be discharged with no better than a general discharge. Under Article 20.A.2.k., the definition of a "drug incident" includes the wrongful possession of marijuana, and 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." Therefore, the applicant could have been discharged, even if he had not been taken to mast, based upon his CO's finding that he was involved in a drug incident. Under Article 20.C.3.d., a CO uses a preponderance of the evidence standard to determine whether a drug incident has occurred. This is the same standard a CO uses at mast, pursuant to Chapter 1.D.1.f. of the Military Justice Manual.

3. The Board begins its consideration of each case presuming administrative regularity on the part of Coast Guard officials. 33 C.F.R. § 52.24(b). Therefore, the Board must determine whether the applicant has overcome this presumption and proved that his CO erred in determining that a preponderance of the evidence indicated that the applicant had been involved in a drug incident by wrongfully possessing marijuana. The applicant must prove this alleged error by his CO by a preponderance of the evidence. 33 C.F.R. § 52.24(b). The Board notes that the applicant has argued that the evidence against him was insufficient for a criminal conviction, for which the standard is "beyond a reasonable doubt." The Coast Guard's regulations, however, allow a member to receive an administrative general discharge under honorable conditions, without a criminal conviction, whenever a CO is persuaded that a drug incident has occurred by a preponderance of the evidence. The fact that the evidence against the applicant might have been insufficient to result in a criminal conviction by court-martial does not necessarily mean that the Coast Guard erred or committed an injustice by discharging him after his CO determined that a preponderance of the evidence indicated that he had been involved in a drug incident.

4. The JAG argued that the Board should consider the matter waived because the applicant did not appeal his NJP. The Board's rules at 33 C.F.R. § 52.13 do require applicants to exhaust available administrative and legal remedies prior to applying. However, as the right to appeal NJP is limited to five days, the remedy is no longer available to the applicant. The Board's policy in such cases is to consider an applicant's failure to avail himself of a right to appeal as evidence of his state of mind with respect to the action taken against him at that time. The applicant alleged that he did not appeal the NJP because he was discouraged by his CO's attitude and thought an appeal would be useless. However, the Board is not persuaded that someone who has been wrongly accused of a crime and who is about to lose his chosen career as a result of the accusation would likely forgo an appeal to a higher authority.

5. The evidence against that applicant at the time of his mast included the following:

a) According to the CGIS report, SN G stated that while on liberty in [redacted] on the first day of the cutter's port call, he and the applicant spent time in a shop where people tried to sell them marijuana. They were separated. The applicant exited the shop carrying a black plastic bag with a knife. SN G also told the CGIS that he saw no one buy marijuana, but another crewmember told the CGIS that SN G had admitted to buying marijuana and to throwing it overboard the day before the cutter reached [redacted] because he had heard that it would be searched by dogs.

b) SN H stated that when she relieved the applicant of the watch early one morning during the port call, the applicant left the lounge and returned a few minutes later and tossed a black plastic bag in her lap. She looked inside it and saw *at least* two golf-ball sized "baggies" of marijuana inside. The applicant confirmed to her that it was marijuana that he had bought in [redacted] and stated that BM3 E, who had been with him in the lounge earlier, was going to help him hide it.

c) Two stashes of marijuana were later found on the cutter hidden in plastic bags and other packaging.

d) When interviewed by CGIS about a week later, the applicant was informed that he was under suspicion of possessing a controlled substance and he was asked to describe his interactions with SN H in the lounge. The CGIS agent's summary of the interview indicates that he never mentioned that he had shown her a bag and told her that it contained marijuana, which he was going to hide. His failure to mention the alleged joke with oregano at this point even though he knew he was under suspicion and was being questioned about what happened in the lounge strongly undercuts his credibility on this point.

e) Upon questioning by the administrative investigator several weeks later, the applicant admitted to the behavior in the lounge that SN H had reported but alleged that it was a joke and that the substance was oregano instead of marijuana. In addition, he stated that he picked up the oregano in the galley on his way back to the lounge after waking her, whereas she had reported that he had left the lounge after she relieved him of the watch and returned a few minutes later with "baggies" of marijuana in a black plastic bag.

6. The evidence in the applicant's favor at the time of the mast included the following:

a) The applicant apparently had not previously presented performance or conduct problems.

b) SN H was not an expert on marijuana. There is no evidence in the record that she handled or smelled the substance in the black plastic bag. She could not say how much of the substance was in the bag.

c) Neither of the two stashes of marijuana found on the cutter was in exactly the same packaging that SN H had seen in the lounge. Both stashes were found in places accessible to other crewmates.

d) The applicant's urinalysis was negative for marijuana use, and no fingerprints were found on the packaging of the two stashes of marijuana.

7. In addition to the evidence that was clearly known to the CO, the Board notes that there are other discrepancies in the applicant's version of events that he has not bothered to explain to the Board and that may have been noticed by the CO. For example, in the statement the applicant signed on September 19, 2002, he wrote that on his way between SN H's rack and the lounge, he stopped in the galley and filled a bag with oregano. However, SN H saw a black bag with at least two "baggies" in it. The applicant's description of his actions in the galley does not adequately explain the complex package (multiple "baggies" in a black plastic bag) that he tossed in SN H's lap in the lounge. In addition, he has not explained what he did with the oregano after his alleged jest. Nor has he explained why he apparently told no one about the alleged joke with marijuana until many weeks after the fact.

8. The CO had the advantage of speaking in person to the applicant and the witnesses at mast.[3] Moreover, the applicant's CO presumably knew the applicant and the witnesses and the nature of their relationships. The applicant's allegations about his relationship with SN H and his actions in the lounge are inconsistent. If his relationship with SN H was actually unfriendly, as he alleged, why would he attempt to joke with her about buying marijuana? The Board finds it highly unlikely that he would have played the alleged joke on her if their relationship were not friendly. In addition, the applicant alleged that he had no contact with SN H during the month before he woke her to assume the watch, but his written statement dated September 19, 2002, indicates that they had worked together on a project with one other member of the Deck Department on the morning before the incident in the lounge.

9. The applicant alleged that his case can be summarized as being his word against that of SN H. This is a mischaracterization of the evidence against him because he has admitted to the behavior she reported in the lounge and to identifying the substance as marijuana to her. The evidence against the applicant in this case comes largely from him: He told and showed SN H that he possessed marijuana; he failed to mention his conduct in the lounge under close questioning at more than one interview with the CGIS; and he waited more than a month before admitting to and trying to justify his behavior in the lounge with an inadequate, unsupported, and improbable explanation. Although the applicant alleged that the CGIS agent had "twisted" his words in the final report, he has not alleged or proved that anything in the CGIS summary of his interviews is false or misleading.

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[3] On his application form, DD 149, the applicant indicated that he did not wish to appear at a hearing before this Board.

10. In light of the findings above and all matters of record, the Board finds that the applicant has not proved by a preponderance of the evidence that his CO erred or committed an injustice in awarding him NJP for violation of Article 112a of the UCMJ, in determining that he had been involved in a drug incident, or in recommending that he receive a general discharge for misconduct.

11. The applicant argued that there is no evidence that either stash of marijuana found on the cutter was ever in his possession. He argued that the marijuana found in the berthing area of the Deck Department, which he alleged was attributed to him,[4] belonged to someone else. The Board notes that the CGIS report indicates that the applicant's friend, SN G, told someone that he bought marijuana in [redacted] but threw it overboard when he heard that the cutter would be searched by dogs in [redacted] the next day. It is highly likely that if SN G did this, he would also have informed the applicant of the pending canine search. Moreover, the record indicates that the packaging of both stashes included small plastic bags, or "baggies," such as SN H reported seeing in the black plastic bag, and the CO was in a position to and presumably questioned SN H about what she saw and to compare it to the packaging of the stashes found and to what was available in the galley. The differences in packaging and the uncertain ownership of the discovered stashes do not persuade the Board that the CO erred in finding by a preponderance of the evidence that the applicant had possessed marijuana on the cutter based upon the applicant's own admitted words and conduct.

12. The applicant argued that the amount of marijuana in the stash attributed to him was described as being the size of a hotdog, whereas SN H stated that she saw a golf-ball sized bag. However, as pointed out by the JAG, SN H stated that she saw *at least* two golf-ball sized "baggies" of marijuana in the black plastic bag that the applicant threw on her lap. The Board notes that the applicant was convicted at mast of possessing "an unknown amount" of marijuana. Furthermore, because the applicant was charged with illegal possession of marijuana rather than use, the negative results of his urinalysis do not disprove the charge.

13. The applicant alleged that prior to his mast, SN D told his spokesperson that the marijuana that had been found belonged to another crewmate, SN P, and that his spokesperson failed to inform him of this evidence. He presented no evidence to support this allegation. Absent evidence to the contrary, the Board presumes that Coast Guard officials, such as the applicant's spokesperson, have acted correctly, lawfully, and in good faith. *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v.*

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[4] The Board notes that neither the CGIS report nor the report of the administrative investigation contains an opinion as to whether either of the two discovered stashes of marijuana belonged to the applicant. In addition, at mast, he was convicted of possessing an "unknown amount" of marijuana, rather than the exact amount of one of the two stashes found on the cutter. In his letter to CGPC dated October 3, 2002, the CO mentioned the stash found in the berthing of the Deck Department, but he did not state outright that he believed that stash belonged to the applicant.

United States, 594 F.2d 804, 813 (Ct. Cl. 1979). Moreover, the Board notes that the truth of SN D's alleged statement to the spokesperson is undercut by SN P's own statements on November 8, 2002, when according to the applicant, SN P stated something like the following when asked by the applicant if one of the discovered stashes of marijuana was his: "I don't know. I was too drunk when I hid mine to remember where it was. I'm not sure if that was mine that they found or not. I'm going to have to look around for it." Two other witnesses alleged that SN P admitted having had marijuana on the cutter and saying that he "was too messed up to remember where [he] put it." It is highly unlikely that SN D could know for a fact that one of the discovered stashes of marijuana belonged to SN P, when SN P himself did not know. These statements indicate only that SN P admitted to having had marijuana on the cutter at some point in time; they are not evidence that the applicant did not possess marijuana on the cutter.

14. The applicant alleged that the results of his polygraph test on November 13, 2002, prove that he never possessed marijuana on the cutter. Although the report of the polygraph was prepared by a licensed examiner, there is no indication of what technique he used; what other questions were asked and answered and how truthfully; or how he assessed the alleged truth of the applicant's answers to the four cited questions. The scientific reliability of the applicant's polygraph test is very unclear given the manner in which the results were submitted to the Board. Moreover, the reliability of polygraph evidence, even when the technique used is known, is considered so doubtful that it cannot be presented at a court-martial or in many federal courts. In *United States v. Scheffer*, 523 U.S. 303 (1998), the Supreme Court held that at court-martial, the accused had correctly been barred from presenting the results of a polygraph test as part of his defense. The Court stated that "there is simply no consensus that polygraph evidence is reliable. To this day, the scientific community remains extremely polarized about the reliability of polygraph techniques. [Citation omitted.] Some studies have concluded that polygraph tests overall are accurate and reliable. [Citation omitted.] Others have found that polygraph tests assess truthfulness significantly less accurately -- that scientific field studies suggest the accuracy rate of the 'control question technique' polygraph is 'little better than could be obtained by the toss of a coin,' that is, 50 percent. [Citation omitted.]" *Id.* at 309-10. The Court also noted that there were known countermeasures for subverting polygraph evidence. *Id.* at 310 n.6. Given the inadequacies of the polygraph report and in light of the Court's conclusions in *Scheffer*, the Board finds that the results of the applicant's polygraph test do not prove that his CO's determination that he had possessed marijuana on board the cutter was erroneous or unjust.

15. The record indicates that the applicant received all due process with respect to the investigations, the mast, and his general discharge. He has not proved by a preponderance of the evidence that his military record contains any error or injustice.

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

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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