DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2006-134

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FINAL DECISION

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 Chair docketed the case on June 16, 2006, upon receipt of the completed application.

This final decision, dated April 26, 2007, is signed by the three duly appointed members who were designated to serve as the Board in this case.

SUMMARY OF THE APPLICANT'S REQUEST AND ALLEGATIONS

The applicant received a general discharge for "unacceptable conduct" on August 31, 2005, after admitting on February 10, 2004, that he had used marijuana four times while serving on [redacted] in 2000 and 2001. He asked the Board to correct his record by removing his discharge, reinstating him on active duty, and awarding him back pay and allowances. In the alternative, he asked the Board to upgrade his discharge to honorable and to upgrade his narrative reason for separation, his separation code, and his reentry code of RE-4 (ineligible).

The applicant stated that in February 2004, he faced a "moral and ethical conundrum" because he had to complete an SF-86 Security Background Information Form to accept transfer orders to become the Operations Officer of a cutter. "[T]o truthfully answer the question concerning drug use, he would be required to disclose past recreational marijuana use" while he was an officer serving on [redacted] Therefore, he informed his commanding officer (CO) that he "had on occasion taken recreational 'hits' of marijuana" while assigned to [redacted] in 2000 and 2001. Following the applicant's admission, his CO determined that the applicant had been involved in a "drug incident," and the applicant was required to "show cause" why he should be retained as an officer before a Board of Inquiry (BOI) convened pursuant to 14 U.S.C. § 322. In addition, the applicant's command prepared a special Officer Evaluation Report (OER) to document his past drug use in his performance record.

The applicant alleged that during the BOI from January 12 through 14, 2005, he proved by overwhelming evidence that he should be retained on active duty, in accordance with Article 12.A.15.h.1. of the Personnel Manual, because of his excellent performance while on [redacted] and in other billets and because of the Service's need for his skills as an engineer. The Government's Recorder presented no witnesses to rebut his evidence and argued only that he should be discharged because of the Service's alleged "zero-tolerance" policy concerning drug abuse. Although the Recorder was unable to prove that no member had ever been retained following a "drug incident," the BOI ignored the preponderance of the evidence and arbitrarily and capriciously recommended that he be discharged. The applicant also alleged that because the Coast Guard rarely conducts BOIs, many mistakes were made that denied him due process and the fair and impartial hearing to which he was entitled under 14 U.S.C. §§ 321 *et seq*.

(1) First, the applicant alleged, the BOI misunderstood its purpose and the burden of proof because in its report, the BOI wrote that "[t]he question is whether [the applicant] knew that his actions were illegal and against Coast Guard policy," whereas under Article 12.A.15. of the Personnel Manual, the only question before the BOI was supposed to be whether the applicant had established by a preponderance of the evidence that the Service should retain him. He alleged that the BOI considered his professional performance to be irrelevant and therefore clearly misunderstood the issue. Instead, the BOI incorrectly focused on whether he had complied with the Coast Guard's "core values"—honor, respect, and devotion to duty—which was "patently ridiculous" since the only reason an officer would be subject to a BOI is if his behavior had not complied with those values. The applicant argued that the purpose of a BOI is to allow an officer whose behavior has not been consistent with the core values to show by a preponderance of the evidence why he should be retained as an officer anyway. The applicant complained that the BOI failed to explain why the overwhelming evidence he presented was inadequate to rebut the charge of professional dereliction against him and instead mocked his attempt to show why he should be retained by saying that he had "paraded a series of witnesses" before the board.

The applicant stated that the BOI incorrectly focused on whether his drug use could be considered mitigated or excused. The applicant argued that "these were issues of no relevance once the burden shifted" to himself to show why he should be retained despite his drug use. He stated that the BOI's focus on the facts of his drug use, which he had admitted, rather than on the evidence showing that he should be retained despite his drug use, meant that the BOI merely reinvestigated and rehashed a punitive matter that preceded the BOI. He argued that he would not even have had a BOI had there been mitigating factors or a legal excuse. He argued that the lack of mitigating factors or an excuse was determined by his CO when the CO decided that there had been a drug incident and should not have been the focus of the BOI.

The applicant stated that the "argument that 'zero tolerance' dictates discharge is logically insupportable in that a policy that demands or predetermines discharge would completely obviate the need for a BOI or any other Board. It also contradicts the plain language of [Article] 12.A.15 of the Personnel Manual" and would negate an officer's statutory right to a fair and impartial hearing. He argued that by mentioning the zero-tolerance policy, the BOI showed that it failed to comprehend that it had the discretion to recommend his retention despite that policy because the policy in Article 20 of the Personnel Manual requiring initiation of separation proce-

dures applies only at the local, command level when a "drug incident" is discovered and is not supposed to predetermine the outcome of a BOI convened under 14 U.S.C. § 322.

(2) Second, the applicant complained that, without authority, the BOI found that he had incurred four separate drug incidents rather than just one. Under Article 20 of the Personnel Manual, only his CO had authority to determine how many drug incidents he had incurred.

(3) Third, the applicant alleged that, contrary to regulation, the BOI's Legal Advisor met with the BOI in secret before the close of the proceedings. He argued that under Article 12.A.15.h.5.i., the Legal Advisor may only provide advice "in open session in the presence of the officer concerned and his or her counsel." The applicant stated that when his counsel came upon the secret, illegal meeting, he objected and stopped it, but the Coast Guard ignored this violation of due process by disingenuously arguing that his counsel did not object "on the record." The applicant argued that this "due process violation alone should be sufficient to reverse the Coast Guard's determination to discharge [him]."

(4) Fourth, the applicant argued that CGPC also denied him due process when it attached to the BOI report two endorsements before forwarding the report to the Board of Review (BOR) for review. He argued that Article 12.A.15.i.3. provides that only the report of the BOI itself should be reviewed by the BOR and that the attached endorsements were highly prejudicial. The applicant stated that the officers who endorsed the BOI report were not subject to his cross-examination and simply tried to bolster the case against his retention by stating that the BOI's report was "in accordance with law and regulation."

(5) Fifth, the applicant alleged that the BOI's report shows that the board members were biased against him in that they derided his evidence as a "parade" of witnesses and did not discuss any of the evidence he presented. Whereas the Government's exhibits were individually tabbed in the report, his own were lumped together under a single tab. He also complained that the report erroneously indicates that three of his own exhibits were not accepted for consideration, whereas in fact the three were Government exhibits and were excluded due to his own sustained objections. During the hearing, the applicant alleged, the BOI asked "bizarre and inappropriate questions" of his witnesses. In the case of a female, married petty officer who wrote a letter on the applicant's behalf, the BOI questioned the nature of their relationship in a "prurient and degrading" digression from the issues. The applicant also stated that following the hearing, the president of the BOI "gave a weird little speech about suicide—going yet again 'off the record.' … The speech made it clear that the members had tried to 'psychoanalyze' [the applicant]."

(6) Sixth, the applicant alleged that the Recorder continued to argue about what had occurred in other cases even though the Legal Advisor had ruled that such evidence was irrelevant and that he was not allowed to present significant evidence to the BOI. Although the Recorder had tried to prove that no one was ever retained after a drug incident, the Legal Advisor later prevented the applicant from trying to prove the contrary by ruling that information about prior administrative actions against other officers who had committed misconduct was irrelevant.

(7) Seventh, the applicant alleged that the Recorder made erroneous and inappropriate arguments to the BOI. The applicant complained that the Recorder speculated during the hearing that the applicant would never be selected for promotion with a drug incident in his record. The applicant argued that such speculation was irrelevant to the question of whether he should be retained. He alleged that many officers on active duty "do not have a fantastic shot—or any shot—at making the next grade" and so his likelihood of promotion should not have been raised as an issue by the Records. Moreover, he stated, because there "is nothing in [Article 12 of the Personnel Manual] about future likelihood of selection for promotion, … arguing this violated [the applicant's] due process rights."

(8) Eighth, the applicant argued that he was not provided full and timely access to relevant records as required under Article 12.A.15.g.4. He was given access to the Government's documentary evidence only the day before the hearing because the Government did not have it ready until that day—not because his attorney did not ask for it earlier. The applicant also complained that he did not receive a copy of the precept until the BOI hearing convened. In addition, a FOIA request that he had made on August 31, 2004, was ignored until January 4, 2005, at which point the Coast Guard gave him only 15 redacted pages out of a total of 55 that were responsive to his request.

(9) Ninth, the Coast Guard failed to produce some of the applicant's requested witnesses in person, claiming that the in-person testimony would be duplicative and expensive, and so the applicant had to have them testify by telephone. The applicant stated that in the most egregious case, LT M testified that he knew the applicant socially and knew that the applicant did not use drugs, but in closing arguments the Recorder ignored his testimony and told the BOI that the applicant's witnesses knew him only professionally rather than socially.

(10) Tenth, the applicant argued that the Coast Guard violated Article 12.A.15.d. of the Personnel Manual by responding to his admission of drug use with separation in lieu of disciplinary action under the Uniform Code of Military Justice (UCMJ). He alleged that the Coast Guard did so only because disciplinary action under Article 15 had failed since more than two years had passed and because he could not be convicted by court-martial based on his own uncorroborated admissions.

(11) Eleventh, applicant alleged that the Coast Guard Personnel Command (CGPC) conducted *ex parte* communications with the BOI. He submitted a copy of an email message dated January 17, 2005, from CGPC to the BOI. The applicant alleged that the email wrongly accuses him of causing the hearing to last more than two days by increasing the number of his witnesses at the last moment, whereas in fact he had submitted his witness list a month before the hearing. He alleged that the email also indicates that CGPC would approve a recommendation for discharge and would reward the Board members with future opportunities, such as serving on promotion boards.

(12) Twelfth, regarding the Board of Review (BOR), the applicant stated that he submitted a rebuttal statement regarding the BOI's bias, misunderstanding of its task, and inadequate findings; the improper secret meeting with the legal advisor; the unauthorized endorsements by CGPC; the Recorder's improper and irrelevant arguments; the Coast Guard's failure to provide

the applicant access to necessary records in advance of the BOI hearing; the Coast Guard's failure to produce all of the military witnesses to appear at the hearing in person; and the Coast Guard's "illegal use of separation in lieu of punishment" in response to the applicant's admission. In rebuttal, the Recorder argued that the Administrative Separation Boards Manual, COMDTINST M1910.2, which did not even apply, allowed such secret meetings, and made several other "specious arguments." Yet the BOR also recommended separation even though it met for only 80 minutes and so could not possibly have reviewed all of the documents in the case file in order to determine accurately whether the applicant had established that he should be retained. The applicant alleged that the BOR clearly failed in its duty to give him a separate and independent decision under 14 U.S.C. § 323.

The applicant concluded the Coast Guard had failed to grant him the full and fair hearing required under 14 U.S.C. § 322 and Article 12 of the Personnel Manual and that as a law enforcement agency, when

> the Coast Guard decides to separate an officer, it must operate according to rules grounded in fair play and substantial justice. It must convene proceedings that comply with U.S. statutory law, as well as the process it has outlined for itself in the Personnel Manual. It cannot be allowed to conjure new standards, meet in secret, make unsupported findings, disingenuously argue against the evidence, ignore the PERSMAN, use separation to achieve punishment, deprive a member of records and witnesses vital to his case, engage in unfounded speculation, and other contretemps in violation of the officer's rights. In short, it cannot be above the law it seeks to enforce.

The applicant noted that the Coast Guard continues to employ him as a civilian engineer under contract[1] because given his performance "no actual reason to separate [him] from the Coast Guard existed." In light of his continued employment by the Coast Guard, he alleged, "[a]ny argument by the Government that keeping [him] at [redacted]t) sets a bad example is disingenuous and hypocritical at best." The applicant argued that the Coast Guard should not be able to take advantage of his abilities while burdening him with a General Discharge.

SUMMARY OF THE RECORD

Upon graduating from the U.S. Coast Guard Academy, the applicant was commissioned an ensign on [redacted] For two years, he served aboard a cutter as a deck watch officer. On his OERs, he received high marks and his commanding officer's recommendation for promotion. [redacted]

From [redacted]

In June 2002 through May 2003, the applicant served as a [redacted] The applicant received

[1] An affidavit by the applicant in the proceedings indicates that the applicant is an employee of [redacted]

high marks for this work and his Reporting Officer's recommendation for promotion. [redacted]

In June 2003, the applicant began serving as an aide to the [redacted], a rear admiral, [redacted]

Admission and Investigation

On February 10, 2004, the applicant, who was expecting orders to a cutter that would require him to get a top secret security clearance, informed CAPT D, the Deputy Commander at [redacted] that he had used marijuana on four occasions while assigned to [redacted] in 2000 and 2001. CAPT D ordered an investigation.

On February 20, 2004, LCDR B, the investigator, issued his report. He had informed the applicant of his rights before interviewing him. The applicant told LCDR B that he had used marijuana on four occasions: (1) at a party in [redacted] with his brother on December 31, 2000, he "aceepted a 'hit' off of a 'blunt' as a single marijuana cigarette was passed around a circle of partygoers"; (2) at a party in [redacted] with his cousin in 2001, he had "2 to 3 'hits' off of a 'bong'"; (3) at a gathering in [redacted] in 2001, he "accepted one 'hit' off of a 'pipe'"; and (4) at a gathering in [redacted] in 2001, he accepted one 'hit' off of a 'cigarette-like pipe'."

Regarding his reasons for using marijuana, the applicant told LCDR B that while a cadet at the Academy, he had begun "to be depressed and apathetic … and performed self-mutilation … by cutting his wrists and forearms (showed scars upon his left arm)." He felt that the "first class cadets formed an allegiance to overlook transgressions by failing to be present when they occurred." The applicant stated that his "depression and general apathy toward the Service abated during his first year in the cutter, however, returned in his second year when there was a change in the Executive Officer, stressful response to the [redacted] crash, and increased workload." The applicant told LCDR B that by the end of his tour on the cutter, he intended to complete only his obligated service, and so he declined a postgraduate program when he was accepted. However, then the assignment officer told him he would be assigned to [redacted], when he wanted to stay in the [redacted] area, so he asked to get back into the graduate school program even though that would increase his service obligation. The applicant told LCDR B that he initially saw his assignment to [redacted] "as negative" and he had "absolutely no service pride," but it was "marginally better than service in [redacted]." When he first used marijuana at the New Year's Eve party, he was curious about it and feeling apathetic and depressed. He also "had not expectation of ever getting caught, and no care at the time if he did get caught." Later, he began feeling camaraderie with other officers at his school, which "renewed his sense of optimism, spirit de corps, and pride in the Service" so he did not use marijuana again. The applicant stated that "he did not want to be discharged, but had to make the choice to tell the truth."

LCDR B opined that the applicant's "use of marijuana constitutes a drug incident." He noted that since the two-year statute of limitations for non-judicial punishment had passed, the applicant's misconduct could only be addressed at court-martial or "some lesser administrative action." He also noted that the [redacted] does not perform random drug testing

on Coast Guard personnel. LCDR B recommended that the command issue an administrative letter of censure and initiate separation under Article 12.A.15.c.2.i.

On March 29, 2004, Commander, [redacted] gave the applicant an administrative letter of censure "for wrongfully using marijuana on 31 December 2000 and at three other times in 2001." The letter was apparently the result of a mast or non-judicial punishment (NJP) proceeding under Article 15 of the UCMJ, which was later removed from the applicant's record as void because his misconduct had occurred more than two years before the mast.

On April 2, 2004, Commander, [redacted] reported to CGPC that the applicant had been involved in a "drug incident." She "request[ed] administrative action for separation by reason of misconduct under Article 12.A.15. of [the Personnel Manual]." However, she also recommended that the applicant be retained "as an exception to the policies contained in [the Personnel Manual]." She stated that the applicant's "voluntary action to come forward and confess to a transgression that would not otherwise have been discovered is indicative of a sincere desire to adhere to the Coast Guard's core values. This incident runs counter to the present information that I have on [the applicant's] performance and character. I firmly believe he can continue to serve the Coast Guard."

On April 22, 2004, Command, PAC issued the applicant a letter of caution indicating that his secret security clearance would not be revoked but that receipt of further derogatory information would be cause for reconsideration of the decision.

On May 11, 2004, CGPC entered a special OER in the applicant's record for the period December 31, 2000, through June 30, 2001, pursuant to Article 10.A.3.c.(1)(d) of the Personnel Manual. The special OER, which had been prepared by his rating chain at [redacted] was created "to document significant behavior of substance and consequence which was unknown when [the] regular OER was prepared." Most of the performance categories are marked "not observed." However, the applicant received a low mark of 2 for "Judgment," a low mark of 3 for "Responsibility," and a mark of 4 on the Comparison Scale. The [redacted] Commander wrote the following to support these marks:

> In updating documentation for a security clearance, [the applicant] self reported his use of marijuana while a CG officer during his tenure at [redacted] Use of marijuana occurred on 31 DEC 2000 and three separate occasions prior to 30 June 2001. [His] explanation for self reporting the use was that he did not want to lie about past illegal drug use on his security clearance forms. [The applicant] indicated that he wanted to continue his CG career but did not want to continue the deceit. [He] indicated he had never used illegal drugs before nor since and has no intentions of ever doing so again. An investigation was conducted. The investigation revealed [he] admitted to wrongful use of marijuana, a controlled substance.
>
> [The applicant] has been an excellent performer at this command. His sense of honor and integrity compelled him to self report his use. However, his choice to knowingly engage in illegal activity is not in keeping with the CG's core values. I am convinced that [he] has not engaged in this activity since nor is he likely to do so. I do not recommend him at this time for command cadre assignments, however, I firmly believe he still has valued to the CG and can make a contribution. [The applicant] should be retained in the Coast Guard.

On the applicant's regular OER for the period June 1, 2003, through May 31, 2004, he received primarily marks of 5 in the various performance categories, a mark in the fifth spot on the comparison scale, and the [redacted] Commander's recommendation for promotion.

On September 14, 2004, the applicant submitted a letter to the Determination Board in which he stated that he regretted his errors in judgment, accepted responsibility for his actions, and hoped to be able to retain his commission. He argued that, because Article 12.A.15.c.(2)(i) states that a drug incident, among other types of misconduct "may require removing an officer," the Coast Guard was not bound by any law, policy, or precedent to discharge him. "Surely an incident involving an officer who hurts no one, and who is simply unwilling to lie, qualifies as the type of drug incident the drafters had in mind when they included this discretionary language." He stated that when told that he could resign if he accepted a general discharge, he decided to go through the Board process because "on the whole my six years of service have been 'Honorable,'" and because he believes he is still able to serve in the Coast Guard. He noted that a general discharge might hinder his ability to serve his country as a civilian federal employee. He argued that even if retained he would be severely punished for his misconduct because he would be separated after two failures of selection for promotion. The applicant asked the board to "show compassion for my circumstance and acknowledge that, when posed with a moral dilemma, I made the right choice, even though the result wreaked havoc on my career. Please determine that I should not be required to 'show cause,' as my heart and moral sense have always been in the right place despite my extremely poor judgment in the past."

On September 22, 2004, CGPC notified the applicant that on September 16, 2004, the Determination Board convened and found that he should be required to show cause for retention on active duty and that therefore a Board of Inquiry would be convened under Article 12.A.15. of the Personnel Manual. CGPC also informed the applicant that in lieu of further board processing, he could ask to resign, in which case he would receive a general discharge in accordance with Article 12.A.15.f.6.e.

On December 20, 2004, the applicant's attorney submitted a "preliminary witness list" to the Coast Guard with the names of twelve military members or employees and the applicant's parents. She noted that she expected to name another three to seven witnesses before the BOI hearing. She asked to receive the Government's witness list and evidence at least a week before the hearing, as well as the names of the board members. In addition, she noted that she was having a problem getting a response to the FOIA request.

On January 4, 2005, CGPC issued a precept for the BOI to three officers. The precept stated that the BOI hearing would convene on January 12, 2005, "for the purpose of receiving evidence, making findings and recommendations whether [the applicant] should be retained in the Service."

On January 5, 2005, CGPC responded to the applicant's FOIA request dated August 31, 2004, "for a complete copy of all headquarters and unit files pertaining to [the applicant], including but not limited to all files retained by OPM and the officer boards section." CGPC noted that the applicant had amended his request on November 5, 2004, by narrowing it "to all inter- and intra- office e-mails, digests, memoranda, letters, notes nad other documents sent, cre-

ated, made or retained by OPM regarding [the applicant] and/or his processing for separation from the Coast Guard." CGPC stated that it had found 55 pages that were responsive to the request but was withholding 38 of them in their entirety and was releasing 15 with redactions. CGPC stated that "[s]ome records being withheld contain intra-agency and attorney client information" and so are exempt from disclosure. CGPC noted that the names of private citizens, junior military personnel, social security numbers, home addresses and phone numbers, etc., had been redacted to prevent unwarranted invasions of privacy. The Coast Guard's response included a copy of the BOI precept, but the names of the board members were redacted.

Also on January 5, 2005, the BOI Recorder sent the applicant's attorney the following email message:

> Concerning who I plan to call, I plan to call [CAPT D, CDR H, LCDR B and LCDR H] at [telephone number omitted]. [LCDR H] is the current force manager for [the applicant's] specialty and is expected to testify that the EE field is currently at strength. I have not spoken to [CAPT D or CDR H] at this time, but I plan to simply obtain testimony from them concerning the background and circumstances of this matter. [LCDR B] will also testify to the background of this matter and his investigation. I will update this list as soon as possible with any additions.
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> Concerning documentary evidence, as discussed, at this time, I am only planning on submitting the Determination Board file, to include [the applicant's military record] and I believe it may have been lost in our least conversation, but you can come by anytime to review what I currently have. I think there may have been a little confusion about that and I will try to produce any other materials (which I do not have at the moment) as soon as they become available, if at all.

Proceedings of the Board of Inquiry

On January 12, 2005, the BOI convened to hear the applicant's case. Present were the board members, consisting of three Coast Guard commanders; the BOI's Legal Advisor; the Recorder for the Government; a court reporter; and the applicant with his attorneys. The Recorder reported that the BOI was convened to require the applicant to "show cause for retention on active duty in the Coast Guard by reason of professional dereliction for involvement in a drug incident." The Legal Advisor noted that her purpose was to instruct the board on procedural rules and to rule on procedural and evidentiary questions, and challenges for cause. She also noted that her advice to the board "must only be given in open session and will be made a part of the record" but that the board could invite her to a closed session to assist the members in drafting their final report "after the board has announced its recommendations in open session." The Legal Advisor informed the BOI that its purpose was

> to afford [the applicant] a fair and impartial hearing at which he has an opportunity to establish that his retention in the Coast Guard is warranted. [He] may present evidence through his counsel to refute matters of record offered against him or otherwise establish that he should be retained. The board of inquiry will consider all relevant evidence presented at the hearing and make findings and a recommendation based on a preponderance of the evidence. … On the basis of its findings, the board determines whether the Coast Guard should or should not retain [the applicant].

The Legal Advisor also stated that the applicant could not offset an allegation "involving a defect in character or integrity by a rebuttal that attempts to emphasize other qualities in his or her favor." The Legal Advisor informed the applicant of his rights, including his right to have

full access to copies of all relevant records, and stated that a "failure to invoke any of your rights of which you have been apprised cannot be considered as a bar to the board's proceedings, findings, and recommendations."

After the BOI members were sworn in, the applicant's attorney questioned them about any prior contacts with the applicant, prior knowledge of the allegations against him, any belief that voting to retain the applicant could be detrimental to their careers, any belief that it was their duty to recommend the applicant's discharge, any belief that they had been directly or implicitly ordered to recommend his discharge, any belief that the Personnel Manual required the discharge in cases of marijuana use, any belief that policy or precedent required the applicant's discharge, and any inability to exercise the absolute discretion granted to the BOI. The attorney did not challenge any member of the BOI for cause.

The applicant's attorney submitted the following objections regarding pre-hearing matters: not all of the requested witnesses had been invited to appear in person **(argument (9))**; the Government did not allow access to or furnish copies of all relevant records "at all stages of the proceedings" because the applicant did not receive an unredacted copy of the precept for the BOI, the Recorder did not allow access to certain documents until the day before the hearing, and the Coast Guard made an incomplete response to the applicant's FOIA request of August 31, 2004 **(argument (8))**; and the proceeding was improper under Article 12.A.15.d. of the Personnel Manual since it was being conducted in lieu of disciplinary action as it was not commenced until after the mast had been rejected due to lack of jurisdiction **(argument (10))**.

Regarding the invitation of witnesses, the Recorder stated that the Government had invited almost all of the applicant's requested witnesses to appear in person, but did not invite one, LT M, who would have to be flown in from the East Coast, because his testimony would be cumulative in nature and in the interests of judicial economy and the cost to the Coast Guard. The Recorder noted that LT M would be available to testify by telephone. Regarding argument (10), the Legal Advisor ruled that it was outside the purview of the BOI to decide.

When the Government submitted its documentary evidence, the applicant's attorney objected to the admission of Exhibit 12, a part of the Personnel Manual that concerns different kinds of military discharges, on the grounds that what kind of discharge the applicant could receive was not within the purview of the BOI. Exhibit 12 was excluded. Exhibit 13, two redacted decisions of the BCMR, was excluded because the Legal Advisor agreed with the applicant's counsel that how the BCMR had interpreted the regulations in those cases was not germaine. The Recorder voluntarily excluded Exhibit 19, which also concerned different kinds of discharges.

The only witness called by the Recorder was the investigator, CDR B, who stated that the applicant admitted to him that he had used marijuana on four occasions and that he knew that the [redacted] did not conduct random testing except on Navy and Marine Corps personnel. CDR B testified that he had handled between 80 and 100 drug cases during his career and had never known an officer with a drug offense to be retained in the Coast Guard. He stated that the Coast Guard's "second chance program" did not apply to drug users. CDR B stated that the second chance program and the Service's zero-tolerance policy were discussed in official

Coast Guard publications but were not expressly mentioned in the Personnel Manual. He stated that the applicant had said he was unhappy with his career in the Coast Guard at the time of his drug use and that the only reason the drug use was discovered was that the applicant had too much integrity to lie on the security clearance form.

The applicant testified that although he was very unhappy when he started [redacted] and used marijuana, his attitude gradually changed and by the end of [redacted] he had regained his Service pride. He testified that his marijuana use had not interfered with his performance of duty. He stated that since [redacted], he had become more mature. He noted that even if the BOI decided to retain him, he would not be assigned to a cutter or a supervisory position and was unlikely to be promoted with the special OER in his record. Under cross-examination, the applicant stated that he knew the Coast Guard's drug policy, knew he was violating the UCMJ and the Coast Guard's core values, and "fully and knowingly did what I did. I used marijuana. There wasn't an excuse for it." He also stated that when he used the marijuana, he was attending parties with civilians who knew he was a Coast Guard officer. When asked what he would do in the future if a subordinate confessed drug use to him, the applicant stated that he would process the member for discharge but might, depending upon the circumstances and the member's character and value to the Service, add a recommendation as to whether the member should be retained.

Upon redirect examination, the applicant testified that he had been told that he could get severance pay if he resigned but did not resign. In response to a question from a board member, the applicant stated that when he realized he would have to answer questions about drug use to get a top secret security clearance and accept the expected orders, he also realized that there would be questions if he suddenly tried to avoid orders he had been enthusiastically pursuing and did not want to lie about that either. The applicant also explained that when, in a letter to the Determination Board, he stated that his drug use had hurt no one, he meant that it had hurt no one but himself in comparison to other crimes such as fraternization, which hurts crew morale, and that the harm to the Service was subtle.

Regarding his request for resignation, the applicant testified that when he received a letter from CGPC stating that the Determination Board would be convened within 30 days unless he resigned, he submitted a letter asking to resign because he thought that he was expected to do so and the [redacted] Commander told him she thought it would be in his best interest to resign. Therefore, he submitted a "qualified" request, meaning that he was asking for an honorable discharge. In response, CGPC advised him that he would only be allowed to resign if he submitted an "unqualified" request, and his discharge would be general rather than honorable. The applicant testified that he did not believe he deserved a general discharge because his service had been honorable even though he had made mistakes.

Witnesses for the Applicant

Twelve witnesses testified orally on behalf of the applicant—three of them by telephone. All twelve highly praised his honesty, skills, and job performance and recommended his retention as an officer. More specific testimony is summarized below:

MCPO T, who had been working with the applicant for about three years and played volleyball with him for two seasons, testified that he knew the applicant pretty well as they had spent a lot of time together and had a lot of conversations. He stated that he thought there was no "second chance" policy but "from [his] understanding of some of the information [he had] heard here is that for officers there may be." However, he had never heard of an officer being retained after a drug offense.

The [redacted] Deputy Commander, CAPT D, stated that when the applicant first told him he could not sign a form indicating that he had not used drugs, CAPT D tried to stop him and then read him his rights because the applicant was confessing to a violation of the UCMJ. CAPT D stated that instead of confessing or lying, the applicant could have just called the detailer and asked not to receive the orders to the cutter because someone else would have wanted the orders. The applicant, however, told him that he had spoken to an attorney and felt compelled to confess and so told CAPT D about smoking marijuana while on [redacted] CAPT D stated that he had handled from 40 to 60 enlisted members with drug incidents during his 28 years of service and that a small minority had been retained—some of them because their commanding officers believed that there had been innocent ingestion or a false positive urinalysis. Therefore, CAPT D stated, retaining the applicant would not create a "double standard" for officers and enlisted members. He had heard of only one officer with a drug incident and that officer had been separated. CAPT D testified that the applicant's career as an officer was over as he would never be promoted, given more responsibility, or assigned to a cutter, but that he could return the Coast Guard's investment in his education by working on electronics projects.

CDR B, who had previously been chief of the electronics section in which the applicant worked, stated that he knew the applicant very well and that the applicant was an excellent officer who had made a mistake. He described how the applicant's work researching his thesis while on [redacted] and afterwards had helped the Coast Guard significantly. CDR B stated that he knew of no exceptions wherein enlisted members or officers with drug incidents had been retained. He stated that even though he understood that officers should be held to a higher standard than enlisted members were, he thought that an exception should be made in the applicant's case because of his commendable honesty.

CDR H, a retired officer and attorney whom the applicant consulted and chose to represent him at mast, stated that he knew a man who had smoked marijuana while enlisted in the Air Force in the 1970s and was later commissioned and retired as an officer in the Navy Reserve even though he admitted his marijuana use on all of his security clearance forms. CDR H testified that the applicant should be retained despite policy because he had voluntarily told the truth and had been in a severe depression at the time he used marijuana. He stated that because of the applicant's depression while on [redacted] his use of marijuana should not even be classified as a "drug incident." CDR H stated that he felt partially to blame when CAPT D told him about the applicant's confession because CDR H had previously advised the applicant—when the applicant posed him a hypothetical question without mentioning drug use—not to lie on a security clearance form because if the lie was discovered, the hypothetical officer would be "done."

LT M, who served as the PAC Commander's aide while the applicant was the [redacted] Commander's aide, stated that he had known the applicant for a little more than two years, both

professionally and socially, as LT M would sometimes give the applicant a ride in his truck and on several occasions they met at the applicant's house before going out to dinner together. LT M stated that he had met the applicant's housemates and girlfriend and that he could tell they were not drug users. LT M stated that he had never seen the applicant use drugs and that the applicant should be retained as his case was an exception and that the applicant's honesty in coming forward should be considered a mitigating factor.

LT K stated that he had gotten to know the applicant fairly well both professionally and socially during the previous two and one-half years. He stated that he had never known the applicant to use drugs and that the applicant had told him that he had used marijuana during [redacted] because he was "having difficult times."

Mr. W, [redacted] at [redacted] stated that the applicant was a "very brilliant young engineer" who had done fine work for the Coast Guard while still in [redacted]. He stated that he had had no indication that the applicant was depressed or troubled during [redacted] He stated that he knew of one storekeeper who had been retained after testing positive for marijuana use because she claimed it was second-hand smoke, but she later tested positive again and was discharged. He stated that he thought the applicant should be retained because "being honest is more important than past deeds."

[redacted], who supervised the applicant's [redacted] and socialized with him as well, stated that the applicant was a very good, conscientious [redacted] who often stayed late at [redacted]. He further stated that the applicant had not confided in him about any personal or professional problems.

LCDR K, who was the applicant's supervisor from 2002 to 2003 (after the drug use) and played [redacted] with him, praised the applicant's skills and noted that the Coast Guard had recently offered a retention bonus to officers with those skills.

Mr. B, a branch chief in the [redacted] and the supervisor of the applicant's supervisor, stated that it was in the Coast Guard's interest to retain the applicant because he was a highly capable engineer and highly motivated young officer. The Legal Advisor stopped Mr. B from answering a question from the Recorder about whether Coast Guard officers should be able to use marijuana on an occasional basis.

Following Mr. B's testimony, the Legal Advisor stated that he was "curbing some of the testimony" because a civilian's opinion of the Coast Guard's drug policy was not relevant to the proceedings. He stated that what was relevant was the applicant's "performance and any mitigating factors." He stated that the applicant's counsel could elicit testimony as to whether witnesses agreed with the drug policy but still thought that the applicant should be retained as an exception to that policy, but that the applicant's counsel could not argue about whether the policy in the Personnel Manual was correct. He stated that the BOI should not be focusing on witnesses' opinions of the policy or how it should be changed.

CDR S of the Readiness Management Division stated that there was a very critical shortage of officers with the applicant's engineering skills; that the Coast Guard had commissioned

many senior enlisted members and chief warrant officers with such skills to fill lieutenant billets; and that as a result 74 percent of the lieutenants with such skills were already eligible for retirement. CDR S further stated that the [redacted] were very stressful and that many [redacted]. She stated that after one struggling [redacted] confessed to her that he had become addicted to on-line pornography, she ensured that he got help and he ultimately managed to [redacted]. She herself occasionally drank too much alcohol during her two years at the [redacted] because of the stress. CDR S described the applicant as an exceptional [redacted] and a creative, "out-of-the-box" thinker, who was "the one in a hundred or one in a thousand that I would do this for with these circumstances." CDR S further stated that while the applicant was on [redacted] she "knew something was going on with [him]" and that "he was having trouble." She also said, "I think that there was something going on, and I missed it." She noted that after the applicant was selected to attend [redacted] he was slow to make decisions and seemed to be questioning whether he should go to [redacted]

CAPT J, Chief of the Electronic Systems Division, stated that he had interacted with the applicant both professionally and socially. He stated that he had handled about 20 drug incidents during his career and had never known an officer to be retained after a drug incident. He called the applicant's case constituted a "close call" as his confession showed "a lot of moral fiber, moral character." CAPT J stated that in 1974 an admission that you had ever smoked marijuana would keep you out of the Academy, and therefore many people lied on their applications and security clearance forms to get into the Coast Guard. He stated that he supported the Coast Guard's drug policy but that the applicant should be retained because he was a "stellar officer" and his case is "the exception that validates the rule." CAPT J stated that the BOI had the discretion to make any recommendation it wanted regarding the applicant even though his case involved drugs. However, he testified that the low marks and comment about drug use in the special OER would "kill him" before a promotion board.

In rebuttal, the Recorder called LCDR H, the Officer Work Force Team Leader for Systems and Engineering, who stated that for the applicant's specialty, ENG-58 (electrical engineering), the Coast Guard currently had 94 officers with the designation and only 83 such billets. However, not everyone with the ENG-58 designator had a [redacted], which was preferred for some ENG-58 billets. LCDR H could not state the number of ENG-58 billets that were empty or filled by officers without the ENG-58 designation. He stated that with only a couple years of work in the field, the applicant was still a "journeyman" rather than an "expert" in terms of experience and that the "loss is less by severing ties now as opposed to … 2 to 5 years from now, after we've invested more into this individual."

Following this testimony and a short recess, the President of the BOI and the Legal Advisor (Counsel for Board (CB)) stated the following on the record:

> PO: Procedurally, I just would like to get on the record I did ask the Legal Advisor a question off record. I'd like to re-ask for the record to get the response present. I'd ask the Legal Advisor, when is it appropriate to request to redirect some questions to witnesses that had previously testified, knowing that the respondent's counsel had some evidence they wanted to present? Is it appropriate to ask to recall witnesses now, before the respondent introduces additional evidence? So could you restate your response, please.

CB: Sure. Actually, the board at any time can request witnesses or evidence be brought forward to them. If you'd like, we can just get the – this is documentary evidence I'm assuming you're bringing in? If it's documentary evidence, we can just bring in the documents. And then at that point, you'd ask the Recorder to either – you know, can we get whichever witness it is, or if it's respondent's counsel's witness, and you want to ask them a question ---

PO: And if there's—additional procedural question—if there's potential evidence out there that has not yet been submitted by either side, can the board request that?

CB: Yes.

The applicant's attorney then submitted documentary evidence, including a letter from YN1 M, who wrote that that applicant was an "excellent mentor and a great leader" and that "[i]f anyone deserves a second chance I feel that he does." Another document (Exhibit 24) showed that special boards had retained one officer after an "alcohol incident" and another officer who had an inappropriate personal relationship. The Recorder objected on the grounds that what another type of board had done with officers who had committed non-drug-related misconduct was irrelevant. The Legal Advisor stated that what other boards had done was not relevant to whether the applicant should be retained. The applicant's attorney stated that he was introducing it to rebut all of the testimony elicited from the witnesses by the Recorder about whether the Coast Guard ever retained people who violated the "so-called zero-tolerance policy laid out in Chapter 20." He stated that Article 20 of the Personnel Manual "says substance abuse and alcohol abuse are not tolerated. Our position is going to be 'not tolerating' is processing someone for separation, but not necessarily separating. This is to rebut the idea that we have to separate." The Recorder argued that Exhibit 24 should be excluded for the same reason that the Government's Exhibit 13 (prior BCMR decisions) was excluded. The Legal Advisor stated that the applicant was free to argue that the BOI had discretion to retain him despite the zero-tolerance policy, but that none of the seven cases in Exhibit 24 concerned drug use and that although the document would be admitted as an exhibit, the BOI should not consider it because it was not relevant to the applicant's "current situation of a self-reported use of marijuana."

At the request of the BOI, the applicant answered more questions. He testified that [redacted] had not been the most stressful time in his life; that he had self-mutilated while he was at the [redacted] and had silently suffered shame from that; that his stress during [redacted] … internal conflict stress." He stated that he did not seek any professional help but having read a pamphlet about depression, he believes that he exhibited some of the signs of depression while in [redacted]. However, no specific thing happened to cloud his judgment but he was not happy and felt like he "just wasn't cutting it with the Coast Guard." He stated that the first time he used marijuana during [redacted], he was "trying to look cool" but recognized that he "had done the wrong thing" and used again later because he "felt like [he'd] already screwed up" and no longer had the pride of "never having done drugs." The applicant stated that he stopped smoking marijuana after the fourth time because he felt like a fraud among his fellow [redacted] after having violated his own values. He stated that getting to know the other military personnel at that [redacted] was like "moral therapy" and so he did not use marijuana again. The applicant stated that if in the future a subordinate came to him and admitted to having used drugs, he would follow CAPT D's example by initiat-

ing an investigation and reporting the admission. He stated that he now has a better support system and knows to get help if he ever falls into depression again.

On the final morning of the BOI, the board's presiding officer (PO) asked the applicant if he was willing to testify a third time. The applicant's attorney (counsel for the respondent (CR)) and the presiding officer then engaged in the following exchange:

> CR: Yes, Commander. For the record, can we just clarify that the board had a discussion—I—I don't know what happened and what the Legal Advisor did, but –
>
> PO: Yeah. for the record, before we came on the record this morning, the board met in private to discuss whether or not, as a group, we felt it would be—assist us in our deliberations to call [the applicant] to the witness stand a third time to address some questions that the board—that I as president of the board still have in my mind that I don't feel have been adequately answered to my satisfaction. We called in the Legal Advisor to find out, the questions that I am contemplating, whether or not they would be even considered relevant to this proceedings [sic], and generally got the advice that, yes, the line of questioning we're considering would be considered relevant in regards to this case, but we would have to, again, on the record, just state that we are considering calling [the applicant]. This time—that was the summary of our discussions. Legal Advisor, is that generally what we discussed?
>
> CB: Yeah, it was more of a—again, like a procedural matter. Can we call—you know, the board is authorized to ask for additional evidence, if needed. Of course, the evidence they're seeking is from the respondent, so that always creates a touchy situation. So they wanted to just get that reality check. I said, yes, because the questions in the president's mind, the evidence that he seeks to gather concerns the four different times that [the applicant] was smoking. So it's not something that's out of the bounds of the purview of the board. If it was, I'd still come on the record and say, you know, this was the question, and I would deem it to be irrelevant. But the questions concern the times that he did smoke marijuana, and so, therefore, I said, well, those would be relevant, whatever those questions may be. But again, you have to ask respondent and respondent's counsel and allow them the opportunity either to submit to questioning or not.
>
> CR: [The applicant] is fine with being called.
>
> PO: Okay. Very well. Before we do that, though, is there any other procedural matter we need to take care of?
>
> REC: No, sir.
>
> CR: No, commander.

Thereafter, the applicant testified that the first time he used marijuana, December 31, 2000, he was visiting his brother and "tagging along" with him and his friend to a New Year's Eve party where he knew no one else besides his brother and the friend. The second time was at a party at this cousin's house in San Diego, where he was visiting. At that party, he knew a few people because he had visited his cousin before. The third time, in San Francisco, he was at a party with a friend and a few other people he knew. The fourth time, he had just met some people at a bar in Oxnard and they invited him to "hang out" with them someplace near the beach. He stated that the only time he felt any sort of "peer pressure" was at his cousin's house because there had been bad relationships in the family and he had "a desire to try to keep the family close" and to be accepted by the cousin despite the bad feelings between their parents. He stated

that although he had been drinking alcohol on the occasions when he used marijuana, he did not believe it was a causative factor.

In response to the letter from YN1 M, the BOI asked the applicant to "state for the record, what's your relationship, and how do you know this officer candidate?" The applicant stated that the yeoman worked in the [redacted] Commander's front officer with him and that he had a "typical officer/enlisted relationship" with her in that she helped him with administrative work. After she filled out the "booking sheet" for his case, he realized she knew about his situation and so he explained it further to her.

In closing arguments on January 14, 2005, the Recorder stated that the applicant had admitted that his drug use was not caused by depression, academic stress, peer pressure, or any specific event. He stated that it's imperative for the Coast Guard to consistently apply policies between officers and enlisted members and that as a law enforcement agency, the Coast Guard must be "above reproach" with regards to illegal drugs. The Recorder stated that the applicant's commanding officer had determined that there was a "drug incident" and that the Coast Guard did not have a second chance policy for drug users. Concerning the applicant's engineering skills, the Recorder asked the BOI to consider whether it is more important for the Coast Guard to get a return on its investment in the applicant or to uphold its core values and consistently apply its policies regardless of rank. He also reminded the BOI of LCDR H's statement that there were then 94 ENG-58s and only 83 ENG-58 billets and that the applicant's loss would have a greater impact if he remained an officer and gained more years of experience. The Recorder also pointed out that the witnesses had indicated that the applicant would never get promoted with a drug incident and special OER in his record. The Recorder stated that the Government's position was that the BOI should recommend the applicant's discharge.

In her closing arguments, the applicant's attorney stated that the BOI was not bound by the decision of any other board or in any other case and that the BOI's decision would not set any precedent. She reminded the Board that CAPT D had testified that he was aware of enlisted members being retained after drug incidents. She reminded the board that the [redacted] Commander had determined that the applicant's four uses of marijuana constituted just one drug incident and that the "lapse in judgment is years behind him." The attorney argued that whether or not the applicant had an excuse was not at issue because if he had a legal excuse there would not have been a BOI. She argued that, under Article 12.A.15.h.3.a. of the Personnel Manual, "the issue before this board is whether [the applicant] meets the minimum level of performance of duty or integrity acceptable of Coast Guard officers" and that the burden of proof borne by the applicant was the preponderance of the evidence. She pointed out that the BOI members did not really know the applicant but that thirteen officers and civilians who do really know him had testified that the applicant should be retained and that none had testified that he should be discharged. She reminded the BOI about the email in which CAPT B stated that there was "considerable dissention" within the Office of Personnel Management over whether the applicant's case should go to a Determination Board. She pointed out that the [redacted] Commander, who under Article 20 had no discretion as to whether to initiate procedures for separation, had recommended his retention in the special OER and in her letter to CGPC.

The applicant's attorney argued that although there was no discretion about initiating discharge procedures under Article 20, the BOI had the discretion to retain the applicant under Article 12.A.15., which states only that a drug incident "may" require removal of an officer. She pointed out that the words "zero tolerance" do not appear in Article 20 or Article 12. She stated that the BOI's job was to decide whether the applicant had integrity and devotion to duty and so met the minimum standards for retention. She argued that the applicant had "met the preponderance burden by a mile" in that so many high-ranking witnesses had stated that though they strongly support the Coast Guard's drug policy, they thought that the applicant should be retained as an exception to the policy because of his honesty, integrity, skills, and brilliance. She reminded the Board that MCPO T, who has been a Command Enlisted Advisor, and YN1 M had testified that retaining the applicant would not send a bad or mixed message to the enlisted community or create an impression of a double standard.

The applicant's attorney argued that the BOI should not concern itself with whether the applicant would get passed over for promotion in a few years. She concluded that the extensive testimony about his technical skills and high-level performance show that his "fitness to serve goes well beyond the minimum standard required for lieutenants."

In rebuttal, the Recorder stated that the BOI should concern itself with the best interests of the Coast Guard and "what officers are supposed to do, not only professionally, but also socially." He stated that the thirteen witnesses "basically know [the applicant] in a professional sense. They weren't with him during the 2000/2001 period. …[T]he really don't know him socially. But … when we put on this blue uniform, we're officers 24 hours, 7 days a week." Moreover, the Recorder argued, "the sheer number of witnesses doesn't go to the quality of the evidence. It's not a quantity issue." The Recorder reminded the BOI that none of the witnesses had heard of an officer being retained following a drug incident. The Recorder stated that the applicant "has not provided you a reason to excuse what he did on four occasions in 2000/2001. Simply coming in 3 years after the fact and self-reporting is not enough."

Following the closing arguments, the Legal Advisor reminded the BOI to review it precept, guidance, and all of the evidence before deciding whether he had refuted the evidence offered against him or otherwise established that he should be retained. The BOI met in private for several hours and then reconvened and informed the applicant that it was recommending that he be separated.

On January 17, 2005, the chief of the Officer Boards Section at CGPC sent the BOI members an email thanking them for participating. He also wrote that "[u]p until days before, the witness list was fairly small and appeared manageable for a two day board, so I apologize for this going over. This was the second Board of Inquiry in the past 12 years (the other held in November '04), making this was [sic] truly a significant event. I will keep you all in mind for future promotion boards held at CGPC."

Report of the BOI

In an undated report, the BOI issued its findings and opinions and recommended that the applicant "be separated from the service due to his involvement in four separate drug incidents in

2000-2001." The report lists the exhibits and shows that Exhibits 12, 13, 19, and 24 were removed. It also erroneously indicates that the removed exhibits all came from the applicant.

In opinion #4 of its report, the BOI stated that the applicant's drug use was not in dispute as both he and his counsel admitted it. Therefore, the BOI stated, the "question is whether [the applicant] knew that his actions were illegal and against Coast Guard policy." The BOI found that the applicant did know that his actions were illegal and against policy. The BOI also found that the applicant's ingestion of the drug was not inadvertent or involuntary. The BOI stated that the applicant was faced with a moral dilemma each time he was offered drugs, "had ample opportunity to reflect on his previous actions [and] yet repeatedly chose to again engage in conduct in violation of United States law and Coast Guard policy." The BOI stated that although the applicant's commanding officer documented the four admitted incidents of drug use as a single drug incident, "each incident of drug use was an independent act" at a different time and location and among different people. Therefore, the BOI stated that in its "opinion, [the applicant] committed four drug incidents." The BOI further stated that the applicant

> attempted to mitigate his drug use by putting forth a strong case centered on [his] sustained superior performance both before and after the period of drug use. [His] performance is not in question; however, his off duty conduct is in question. The Board commends [his] professional accomplishments. However, Coast Guard core values and zero tolerance policy regarding drug use apply to all Coast Guard members, whether they are superior or sub-par performers, at all times. … The Board opined that knowingly engaging in illegal narcotics use after hours is not offset by stellar performance and the standard of conduct bar is no lower for a superior performer.
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> 7. … [N]umerous witnesses opined that [the applicant] should be commended for his honesty in coming forth and self-admitting his drug use. The Board looked differently on [his] self-admission. [His] honesty is no different than the same standard all Coast Guard officers should follow. Honesty is expected from every Coast Guard officer. The Board felt that … doing the right thing in NOT lying on the SF-86 regarding past drug use does not offset or trump past periods of misconduct. An officer is always expected to be honest just as an officer is always expected to follow the Coast Guard's zero tolerance policy on drug use. To place undue positive emphasis on [the applicant's] difficult but morally correct decision in coming forward doesn't lessen [his] previous misconduct. …
>
> 8. [The applicant] and retained counsel paraded a series of witnesses (peers, co-workers, and supervisors) that praised [his] performance since his period of drug use activity. Through his own action of maintaining his silence for 3+ years after his drug use, [the applicant] was able to place himself in a more favorable position. His silence on his illegal and improper conduct afforded him the time to build up a successful professional resume as a Coast Guard officer to include duties as an Admiral's Aide. Had [he] broken his silence earlier or were his actions otherwise known soon after the illegal conduct took place, he likely would never have been selected as an Aide or afforded the opportunity to create a professional resume. Supervisors would have had no reason to "go to bat" for [him]. …
>
> 9. The Board determined that [the applicant] failed to meet the minimum standards required of all Coast Guard officers. [He] failed to articulate or produce mitigating evidence that he either unknowingly used an illegal substance on more than one occasion or [that] his faculties and decision-making abilities were impaired through documented medical treatment for stress, depression, or some other type of physical or psychological disorder. …
>
> 10. There was a failure by [the applicant] to clearly adhere to the Coast Guard's core values of Honor, Respect, and Devotion to Duty in that he knowingly used an illegal substance on four occasions while undergoing a post graduate education program at a joint military institution. …

> 11. [The applicant's] positive performance and ultimate decision to confess to his illegal drug use while at [redacted] do not outweigh the Board's concerns regarding [his] judgment or his lack of adherence to the Coast Guard's core values.

On April 5, 2005, the chief of the Officer Personnel Management Division forwarded the report of the BOI to Commander, CGPC, stating that the "report of the Board has been reviewed and found to be in accordance with law and regulation" and that he recommended that Commander, CGPC approve the applicant's separation. Commander, CGPC returned the proceedings to the Officer Personnel Management Division and stated that he approved the recommendation.

Rebuttal to the BOI

On April 28, 2005, the applicant submitted a rebuttal to the BOI's report. The rebuttal contained the same arguments and allegations that the applicant made in his application to the BCMR, including **(1)** that the BOI misunderstood its task and the burden of proof; **(2)** that the BOI had no authority to overrule the determination by Commander, [redacted] that the applicant had just one drug incident; **(3)** that the BOI met in secret with the Legal Advisor before the close of the proceedings contrary to regulation; **(4)** that the two endorsements by which the report of the BOI was forwarded to the BOR were irrelevant, unauthorized, and highly prejudicial; **(5)** that the BOI's report showed bias against the applicant; **(6)** that the Recorder continued to argue about what had occurred in other cases even though the Legal Advisor had ruled that such evidence was irrelevant, and that the Legal Advisor improperly excluded the applicant's evidence rebutting that contention; **(7)** that the BOI's speculation about whether the applicant could be promoted was improper and irrelevant; **(8)** that the applicant was not provided full access to all relevant records as required by Article 12.A.15.g.4.; **(9)** that he was required to interview several key witnesses by telephone because the Government refused to invite them; and **(10)** that the separation proceedings violated Article 12.A.15.d. by using separation in lieu of disciplinary action under the UCMJ.

The applicant included with his rebuttal an affidavit from his attorney stating that when she arrived for the final day of the BOI hearing on January 14, 2005, she observed the BOI members in a meeting with the Legal Advisor. When she asked what they were doing, they said "something about how they were trying to figure out whether they could ask for additional evidence. I told them they were violating the rules for the BOI's proceedings by meeting with each other and with the Legal Advisor off the record and in secret." The attorney further stated that after the proceedings had adjourned, the Presiding Officer told the applicant that he hoped that the applicant knew he "had support through his family in case he felt like 'doing something' as a result of the separation recommendation."

On May 5, 2005, the Recorder submitted a rebuttal to the applicant's rebuttal. The Recorder stated that the applicant's procedural rights under 10 U.S.C. § 322 were to have 30 days notice of the BOI hearing; to have a reasonable time to prepare his case; to appear in person and by counsel before the BOI; and to have "full access to, and furnished copies of, records relevant to the case at all stages of the proceeding" except any records withheld in the interest of national security. The Recorder argued that the applicant received these rights in that the applicant received notice of the BOI on September 22, 2004, and he was afforded a reasonable time to

prepare his case and his attorney did not request a continuance. Regarding **(8)** the alleged failure to provide timely access to the Government's exhibits, the Recorder stated that he invited the applicant's attorney to inspect the documentary evidence on January 5, 2005—a week before the BOI convened—and she agreed to inspect it the day before the hearing. The Recorder further argued that the fact that the applicant's attorney objected to some of the Government's exhibits shows that his case was not prejudiced by the timing of the inspection.

Regarding the allegation **(1)** that the BOI did not understand its task or the burden of proof, the Recorder stated that under Article 12.A.15.h.6.b.3., the applicant was required to "refute the Government's evidence and present evidence affirming his or her contention he or she is qualified to retain his or her current status." The Recorder claimed that the BOI "reasonably weighed the evidence … and found that under the fact and circumstances, the officer's performance record and character testimony did not refute the gravity of the knowing use of a controlled substance on repeated occasions." Regarding **(2)** the BOI's opinion about the number of drug incidents, the Recorder stated that the rules do not limit the opinions a BOI's report may include, and that the BOR could weigh those opinions itself. Regarding **(3)** the alleged secret meeting, the Recorder stated that the rules allow the BOI to seek counsel "whenever necessary" but that the content of such counseling should be put in the record. The Recorder alleged that the BOI did not violate the rule by asking the Legal Advisor off the record about recalling the applicant to the stand and having the Legal Advisor later repeat his advice on the record. He noted that the applicant's counsel did not object at the time. The Recorder noted that Article 6-C of the Administrative Separation Boards Manual states that "whenever legal advice is required, the legal advisor to the Board may be consulted … Such consultation, by telephone or other means as necessary, may be in open or closed session or any other manner approved by the Senior Member." Regarding **(4)** the two attached endorsements to the BOI's report, the Recorder recommended that the BOR consult its own counsel about this complaint. Regarding **(5)** the allegation of bias, the Recorder noted that the applicant had a chance to challenge the members of the BOI for cause but did not do so. He alleged that the allegation is unfounded and that there is no evidence that the members were not impartial.

Regarding **(6)** the testimony about prior drug cases, the Recorder stated he asked about retention of officers only; that no witness testified about an officer being retained after having used illegal drugs as an officer; that a BOI does not follow strict rules of evidence; and that the Recorder's "cross-examination line of questioning … was appropriate in light of the direct examination of witnesses" by the applicant's attorney. Moreover, the Recorder argued, the Legal Advisor did not rule out questions about retention but only about a civilian witness's personal opinion about whether officers should be able to use marijuana on an occasional basis.

Regarding **(7)** the testimony about whether the applicant could be promoted, the Recorder argued that the testimony was relevant in response to testimony elicited by the applicant's counsel about whether the applicant had value to the Coast Guard and whether the Coast Guard had a lot invested in the applicant. "If the respondent presents an argument based on the respondent's value to the Coast Guard and money invested in the member, the Board should be allowed to consider all factors that may effect that particular member's long-term career potential, which would factor into how much value the Coast Guard might actually receive in return for the member's continued service."

Regarding **(9)** the fact that some witnesses testified by telephone, the Recorder stated that no law requires the in-person appearance of every witness. The Recorder is required to invite to appear in person only those witnesses if they are reasonably available and if their testimony can contribute materially to the case. Under Rule for Courts-Martial 703(b)(1), he argued, they must only be invited if their testimony would be relevant and necessary, and "relevant testimony is necessary when it is not cumulative." The Recorder further argued that under Article 4-C.1. of the Administrative Separations Board Manual, a "board is never required to hear the testimony of a witness that is unreasonably cumulative with other evidence before the board." The Recorder stated that LT M was primarily a character witness and so his testimony was cumulative in nature. The Recorder argued that the applicant's case was not prejudiced by having some of the witnesses testify by telephone.

The applicant was granted an opportunity to respond to the Recorder's rebuttal. In his further rebuttal, dated May 16, 2005, he pointed out that the Administrative Separation Boards Manual cited by the Recorder applies only to boards for enlisted members and is therefore inapplicable to **(3)** the secret meeting between the BOI and the Legal Advisor and **(9)** whether all of the applicant's witnesses should have been invited to appear in person. The applicant argued that only the Personnel Manual applied to the BOI and that Article 12.A.15.h.5.g. clearly prohibits off-the-record meetings between the Legal Advisor and the BOI. The applicant stated, moreover, that his counsel did immediately object to and stop the secret meeting and that the Recorder's position that his counsel had to re-object to the secret meeting on the record "is patently silly and not worthy of serious comment."

Regarding **(8)** his access to documents, the applicant stated that Article 12.A.15.f.6.a. & j. of the Personnel Manual mandated that he be sent all pertinent documents following the Determination Board. However, the Coast Guard failed to do so and he had to try to get them through a FOIA request, the response to which withheld many responsive documents. Moreover, the applicant argued that one week before the BOI his counsel was told that only the report of the Determination Board and the applicant's personal data record were available to review. Yet a week later, the Recorder submitted nineteen documentary exhibits, "some of which had not been disclosed previously and were not provided until after the BOI had commenced." The applicant alleged that the Coast Guard "sandbagged" him by not disclosing documents earlier and giving him a reasonable time to prepare his case. The applicant also alleged that he could not reasonably have requested a continuance because a dozen friendly witnesses, some of whom were coming from out of town, were scheduled to testify for him. He argued that the alleged option of asking for a continuance was a "ludicrous 'Hobson's choice'—that is, an apparently free choice that offers no real alternative—that was clearly not in [his own] best interests at the time or in the best interests of the Service."

Regarding **(1)** the purpose of the BOI, the applicant argued that it is not true that he was required to refute the Government's evidence of a drug incident during the BOI. He had conceded the incident and "set about the task of establishing that he should otherwise be retained, as was his option" under Article 12.A.15.h.1. The applicant argued that the "statutes and PERSMAN are clear that he does not have to refute the drug incident," which he reported himself, "if he can 'otherwise establish that he should be retained.'"

Regarding **(6)** the Legal Advisor's ruling about the admissibility of evidence about prior cases, the applicant pointed out that in a discussion of whether applicant's exhibit number 24 should be admitted on page 397 of the transcript, the Legal Advisor stated that what other types of boards had done "is not relevant to what they [the BOI] should be doing with [the applicant]." Regarding **(7)** the testimony about whether the applicant could be promoted, the applicant argued that only his then current value to the Coast Guard as testified to by his supervisors was relevant.

Board of Review

On May 18, 2005, CGPC issued a precept appointing three captains to serve as a Board of Review (BOR) for the applicant's case. The precept stated that the BOR was to review "the records, documented evidence, and any additional information the officer concerned or the Recorder submitted under Article 12.A.15.h. of [the Personnel Manual] that were considered and made a part of the Board of Inquiry's proceedings. … The Board shall determine whether [the applicant] has or has not established that he should be retained in the Service."

On May 24, 2005, the BOR convened for 35 minutes. The BOR members received their own precept; the applicant's rebuttal to the BOI dated April 28, 2005; the Recorder's rebuttal dated May 5, 2005; the applicant's further rebuttal dated May 16, 2005; and the report of the BOI with the enclosed evidence, including the proceedings of the Determination Board. The BOR's report did not mention the page of endorsements by which the report of the BOI was forwarded. On May 31, 2005, the BOR reconvened for 45 minutes and then issued a unanimous opinion that the applicant should be separated:

> [The applicant] demonstrated a blatant disregard of the Coast Guard's core values by his admitted use of marijuana. His egregious lapse of judgment was a direct assault on the good order and discipline of the Coast Guard and an affront to the integrity and authority of the Service. Despite [his] apparent above-average performance as a junior officer since his assignment to the [redacted] he irreparably damaged his ability to serve as an officer in good standing.

Commander, CGPC, forwarded the proceedings of the BOR to the Commandant with the statement that the "report of the Board has been reviewed and found to be in accordance with law and regulations" and with a recommendation that the BOR's recommendation be approved. On July 8, 2005, the Commandant approved the recommendation of the BOR and ordered that the applicant be separated on the first day of the second month following the date of his endorsement. On July 14, 2005, CGPC notified the applicant that he would receive a general discharge no later than September 1, 2005.

On August 31, 2005, the applicant received a general discharge under honorable conditions from the Coast Guard due to "Unacceptable Conduct," under Article 12.A.15. of the Personnel Manual, with a GNC separation code (which denotes an involuntary discharge for "moral and/or professional dereliction") and an RE-4 reenlistment code (ineligible to reenlist).

VIEWS OF THE COAST GUARD

On October 30, 2006, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the requested relief.

Regarding the allegation **(1)** that the BOI misunderstood its task and the burden of proof, the JAG stated that the purpose of the BOI was provided in its precept and explained to the BOI by the Legal Advisor at the beginning and end of the hearing. He pointed out that the BOI report lists all of the evidence and states that the board carefully considered it all, including the witnesses' testimony. The JAG pointed out that the report indicates that the BOI weighed that testimony but found that it did not outweigh its concerns about the applicant's lack of judgment and lack of adherence to the Coast Guard's core values. He concluded that the "BOI record clearly demonstrates the Board understood its purpose, responsibilities, and the burden of proof."

Regarding the allegation **(2)** that the BOI had no authority to overrule the determination by Commander, [redacted] that the applicant had just one drug incident, the JAG agreed that the BOI was without authority to officially find a drug incident pursuant to Article 20 of the Personnel Manual. However, the JAG argued, the BOI's opinion about the applicant having four separate drug incidents did not create new drug incidents in his record. The JAG stated that the BOI's opinion, which is consistent with the applicant's own admission, was simply "factual justification for its recommendation," as required under Article 12.A.15.h.7.b.

Regarding the allegation **(3)** that the BOI met in secret with the Legal Advisor before the close of the proceedings contrary to regulation, the JAG argued that the BOI proceedings did not violate the provisions in Article 12.A.15. of the Personnel Manual because the off-the-record conversation between the BOI members and the Legal Advisor about procedural matters "was stated and explained on the record, thereby satisfying the requirement that the advice be given in open session and become part of the record. The Legal Advisor gave no advice to the members that the applicant was not given the opportunity to challenge, and all advice was made part of the record." The JAG also pointed out that the applicant's attorney did not object on the record to either the fact that the Legal Advisor had advised the BOI off the record or to the substance of that advice.

Regarding the allegation **(4)** that the two endorsements by which the report of the BOI was forwarded to the BOR were irrelevant, unauthorized, and highly prejudicial, the JAG argued that such endorsements "are standard procedure in the Coast Guard, used in forwarding correspondence and documents," under the Correspondence Manual, COMDTINST M5216.4C. "Many endorsements simply forward memos without comment to the next addressee. But other possibilities exist, and there is no prohibition on using such endorsements in a variety of contexts. … [T]here is no evidence presented that suggest the BOR was influenced by the endorsements in an inappropriate way."

Regarding the allegation **(5)** that the BOI's report showed bias against the applicant, the JAG pointed out that the applicant had a chance to voire dire and challenge the board members for cause but did not object to their participation. The JAG alleged that the Government's exhibits were already tabbed when the Recorder gave them to the BOI, but the applicant's were

not. He stated that the BOI did not independently tab the Government's exhibits. The JAG stated that the applicant's allegation about a "weird little speech about suicide" was "baseless and irrelevant." Regarding the questions about the applicant's relationship with YN1 M, the JAG stated that there "is no support for the allegation that this line of questioning raises any implication of an inappropriate relationship."

Regarding the allegation **(6)** that the Recorder continued to argue about what had occurred in other cases even though the Legal Advisor had ruled that such evidence was irrelevant, and that the Legal Advisor improperly excluded the applicant's evidence rebutting that contention, the JAG argued that the report of the BOI shows that the board members understood that they were not bound by precedent to separate the applicant.

Regarding the allegation **(7)** that the BOI's speculation about whether the applicant could be promoted was improper and irrelevant, the JAG admitted that nothing in the Personnel Manual suggests that the likelihood of selection for promotion should have bearing on the proceedings of a BOI. However, he pointed out, there is no mention of the applicant's lack of potential for promotion in the BOI report or any other evidence that the BOI actually considered the applicant's potential for promotion in reaching its decision.

Regarding the allegation **(8)** that the applicant was not provided full access to all relevant records as required by Article 12.A.15.g.4., the JAG stated that "[a]lthough the applicant did not receive many documents until the day before the proceedings, the Applicant's counsel mutually agreed with the recorder on the date on which the applicant would be allowed to inspect the Government's exhibits."

Regarding the allegation **(9)** that he was required to interview key witnesses by telephone because the Government refused to invite them, the JAG stated that Article 12.A.15.h.5.j. of the Personnel Manual requires the Recorder to invite the applicant's witnesses only if "their testimony can contribute materially to the case" and that under Rule 703 of the Rules for Courts-Martial, testimony is only relevant and necessary if it is not cumulative. Moreover, the JAG argued, "[t]here was no prejudice created by having LT M or any other witness testifying by phone."

Regarding the allegation **(10)** that the separation proceedings violated Article 12.A.15.d. by using separation in lieu of disciplinary action under the UCMJ, the JAG pointed out that Article 12.A.15.d., read in its entirety, expressly allows a commanding officer to initiate separation proceedings without taking action under the UCMJ "if he or she believes the Service's and officer's interests will be served better by separation proceedings rather than disciplinary action."

Regarding the allegation **(11)** that the BOI was improperly influenced by CGPC's email, the JAG noted that the email was sent after the BOI had already announced its decision. The JAG also alleged that the applicant mischaracterized the email as it was merely thanking the BOI members for their participation.

Regarding the allegation **(12)** that the BOR did not fulfill its duty by reviewing the entire record, the JAG pointed out that the BOR first convened a week before it rendered its decision and that the BOR members "had ample time to review and contemplate the record."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

The applicant was granted an extension of the time to respond to the Coast Guard's advisory opinion and submitted his response on December 29, 2006.

Citing *Golding v. United States*, 48 Fed. Cl. 697, 739 (Fed. Cl. 2001), the applicant argued that "[o]nce an applicant demonstrates a nexus between his discharge and violation of the regulation, the Government has the burden of demonstrating that the violation would not have changed the outcome, and thus was harmless." The applicant argued that he has substantially proved eleven specific errors committed by the Coast Guard in effecting his discharge and that the Coast Guard "did not even bother to argue that the errors were harmless." He stated that the JAG's advisory opinion was so conclusory in nature that it was difficult to respond to.

Regarding the JAG's arguments about allegation **(1)**—that the BOI misunderstood its task and the burden of proof—the applicant stated that they were circular and "head-scratching" because the JAG did not address his factual allegations about the BOI's report. The applicant alleged that opinion #6 in the BOI's report shows that the BOI thought that his "professional performance could never outweigh 'zero tolerance'. Thus, it is patent that the BOI did not evaluate the case for retention because it considered it merely a side issue—an issue tangential to the misbegotten fact that all drug users must be separated." The applicant stated that the BOI report repeatedly misstated the standard and failed to explain why the applicant's evidence was inadequate, contradicted, or not credible. The applicant argued that the "Coast Guard's position [that the BOI had been told its purpose and the burden of proof and therefore understood them] is ridiculous because if the BOI had actually understood what it was engaged to do, it would have retained [the applicant], because <u>there was no evidence before the BOI that he should be discharged, and no rebuttal to his case for retention.</u> … [T]he Government had no evidence before it that [the applicant] should be discharged."

Regarding the JAG's arguments about allegation **(2)**—that the BOI had no authority to overrule the determination by Commander, [redacted] that the applicant had just one drug incident—the applicant argued that because the purpose of the BOI was not to determine how many drug incidents he had incurred, the fact that the BOI discussed this issue "demonstrate[s] unequivocally that it had no idea what it was there to do."

Regarding the JAG's arguments about allegation **(3)**—that the BOI met in secret with the Legal Advisor before the close of the proceedings contrary to regulation—the applicant argued that there is no regulation allowing procedural matters to be discussed with the Legal Advisor off the record and that the BOI clearly failed to keep a *verbatim* record of its proceedings. The applicant argued that by breaking up the illegal meeting, his attorney clearly did object to it when he caught the BOI members and the Legal Advisor "red-handed meeting in secret in violation of the PERSMAN." The applicant stated that the "issue is that no one, including the applicant, really knows what advice or discussion was had at the secret meeting."

Regarding the JAG's arguments about allegation **(4)**—that the two endorsements by which the report of the BOI was forwarded to the BOR were irrelevant, unauthorized, and highly prejudicial—the applicant argued that Article 12.A.15.h.8. of the Personnel Manual lists the documents that the BOR can consider, and the list does not include opinions and recommendations by the Chief of OPM and Commander, CGPC. He argued that the JAG's comment that there was no evidence that the endorsements had influenced the BOR in an "inappropriate way" was ludicrous because there was no "appropriate way" for the endorsements to influence the BOR either. The applicant alleged that the endorsements

> were a blatant and shameful attempt to influence the BOR by offering outcome-directed opinions. … One can certainly infer from [Article 12 that] there is or should be a prohibition on the use of endorsements recommending action in the discharge process because it intrudes on the independent, fair and impartial jurisdiction of the BOR, and thus deprives the applicant of his due process laid out in the PERSMAN. … Perhaps the failure by the BOR to understand its task was directly affected by the illegal endorsements, perhaps not. But it is clear that the recommendations offered in the endorsements were both incorrect in their substance and as a procedural matter because they intruded on the jurisdiction of the BOR. There was no need for endorsements of this kind, and [the BCMR] has to assume that their inclusion operated to the prejudice of the applicant.

Regarding the JAG's arguments about allegation **(5)**—that the BOI's report showed bias against the applicant—the applicant argued that the Recorder could not have pre-tabbed his exhibits because some of them were excluded as irrelevant. In addition, the applicant submitted an email dated April 12, 2005, in which the Chief of the Officer Boards Section at OPM stated that the binder of the proceedings sent to the applicant "was a copy of what was assembled by the board members and sent to us." Therefore, he argued that the BOI's tabbing of the evidence does show prejudice. In addition, he argued that the Recorder's rebuttal to his rebuttal to the BOI report had been thoroughly discredited as it was riddled with errors and so the Government should not continue to rely on it. Furthermore, the applicant argued, he could not have challenged the BOI members for bias at the start of the hearing because he was not yet aware of their bias.

Regarding the JAG's arguments about allegation **(6)**—that the Recorder continued to argue about what had occurred in other cases even though the Legal Advisor had ruled that such evidence was irrelevant, and that the Legal Advisor improperly excluded the applicant's evidence rebutting that contention—the applicant stated that since the JAG did not respond to his allegation that the Legal Advisor unfairly excluded his rebuttal evidence to the zero-tolerance policy, the BCMR should presume that the Coast Guard has conceded that members have been retained following drug incidents.

Regarding the JAG's arguments about allegation **(7)**—that the BOI's speculation about whether the applicant could be promoted was improper and irrelevant—the applicant stated that the JAG's argument that the BOI did not consider his potential for promotion simply because they did not mention it in the report is rebutted by the fact that the BOI questioned CAPT J about this issue during the hearing. The applicant also alleged that in the advisory opinion, the JAG "impliedly concede[d] that this speculation was improper."

Regarding the JAG's arguments about allegation **(8)**—that the applicant was not provided full access to all relevant records as required by Article 12.A.15.g.4.—the applicant stated that there is no evidence that his inspection of the documents the day before the hearing was "mutually agreed upon." He further stated that the JAG ignored the fact that records that he had requested under FOIA were withheld without justification.

Regarding the JAG's arguments about allegation **(9)**—that he was required to interview several key witnesses by telephone because the Government refused to invite them—the applicant stated that the JAG ignored that fact that it was "dirty pool" for the Recorder not to invite the witness who knew him the most socially, LT M, to appear in person and then say in his closing argument that none of the witnesses really knew the applicant socially. Moreover, the Recorder argued this in rebuttal at the end of the hearing so that the applicant's attorney could not "correct the misconception." He argued that the Recorder's conduct in this regard was "questionably ethical and conscious shocking."

Regarding the JAG's arguments about allegation **(10)**—that the Coast Guard violated Article 12.A.15.d. of the Personnel Manual by responding to drug incident with separation in lieu of disciplinary action under the UCMJ—the applicant stated that his point is not that the Coast Guard cannot both punish and separate members but that the timing of the actions against him suggest that the Coast Guard only initiated his discharge because his mast and letter of censure had to be removed from his record. The applicant argued that the BCMR should infer from the timing that the discharge proceedings were "motivated by a failure to achieve Article 15 punishment."

Regarding the JAG's arguments about the BOR **(12)**—that it failed in its duty to perform a separate impartial review—the applicant stated that the BOR's report reveals that the BOR also used the wrong standard, which had nothing to do with the Coast Guard's core values, good order and discipline, or being an affront to the integrity and authority of the service. The applicant complained that the BOR provided no analysis of the evidence and failed to explain how it could overlook the testimony of thirteen witnesses and recommend the applicant's separation even though no witness argued that he should be separated. The applicant argued that the BCMR should not assume that the BOR members reviewed all the records between the day they first convened and the day they reconvened because the BOR report does not say that the members did so. Rather, the BCMR should consider the shortness of the BOR report and the lack of discussion of the evidence as proof that the BOR conducted "the most superficial and cursory review."

APPLICABLE LAW

Drug Abuse Regulations

Article 20.A.1.a. of the Personnel Manual states that "[s]ubstance and alcohol abuse undermine morale, mission performance, safety, and health. They will not be tolerated within the Coast Guard." Article 20.A.1.c.2. states that it is a goal of the Coast Guard to "[d]etect and separate from the Coast Guard those members who abuse, traffic in, or unlawfully possess drugs."

Article 20.A.2.k.1. states that the intentional use of drugs constitutes a "drug incident as determined by the commanding officer." Article 20.A.2.k.2. states that a "member need not be found guilty at court-martial, in a civilian court, or be awarded NJP for the conduct to be considered a drug incident."

Article 20.C.3.a. provides that "[c]ommanding officers 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. The absence of a positive confirmed urinalysis result does not preclude taking action based on other evidence." Article 20.C.3.c. states that "[b]efore being questioned in relation to a drug incident, members are entitled to be advised of their rights under Article 31, UCMJ. This applies whether or not disciplinary action under the UCMJ is contemplated."

Article 20.C.3.d. 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, … 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.e. states that "[t]he findings of a drug incident shall be determined by the commanding officer … using the preponderance of evidence standard. … A preponderance of the evidence refers to its quality and persuasiveness, not the number of witnesses or documentation. A member's admission of drug use or a positive confirmed test result, standing alone, may be sufficient to establish intentional use and thus suffice to meet this burden of proof."

Article 20.C.4. states that "[i]f after completing the investigation described in Article 20.C.3, the commanding officer determines that a drug incident did occur, he or she will take these actions:"

> 1. Administrative Action. Commands 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. …
> 2. Disciplinary Action. Members who commit drug offenses are subject to disciplinary action under the UCMJ in addition to any required administrative discharge action.

Officer Separation Statutes

Section 321 of title 14 U.S.C. states that the "Secretary may at any time convene a board of officers to review the record of any officer of the Regular Coast Guard to determine whether he shall be required to show cause for his retention on active duty-- … (2) because of moral dereliction, professional dereliction, or because his retention is not clearly consistent with the interests of national security." Section 322 states the following regarding Boards of Inquiry:

> (a) Boards of inquiry shall be convened at such places as the Secretary may prescribe to receive evidence and make findings and recommendations whether an officer who is required to show cause for retention under section 321 should be retained on active duty.
> (b) A fair and impartial hearing before a board of inquiry shall be given to each officer so required to show cause for retention.
> (c) If a board of inquiry determines that the officer has failed to establish that he should be retained, it shall send the record of its proceedings to a board of review.

> (d) If a board of inquiry determines that the officer has established that he should be retained, his case is closed. …

Section 323 of title 14 U.S.C. states that a Board of Review shall be convened "to review the records of cases of officers recommended by boards of inquiry for removal," and that "[i]f, after reviewing the record of the case, a board of review determines that the officer has failed to establish that he should be retained, it shall send its recommendation to the Secretary for his action." However, if the BOR "determines that the officer has established that he should be retained on active duty, his case is closed."

Section 325 of title 14 U.S.C. states that each officer under consideration for removal under § 322 shall be

> (1) notified in writing at least thirty days before the hearing of the case by a board of inquiry of the reasons for which the officer is being required to show cause for retention;
> (2) allowed reasonable time, as determined by the board of inquiry under regulations of the Secretary, to prepare his defense;
> (3) allowed to appear in person and by counsel at proceedings before a board of inquiry; and
> (4) allowed full access to, and furnished copies of, records relevant to the case at all stages of the proceeding, except that a board shall withhold any records that the Secretary determines should be withheld in the interests of national security. In any case where any records are withheld under this clause, the officer whose case is under consideration shall, to the extent that the national security permits, be furnished a summary of the records so withheld.

Section 326 of title 14 U.S.C. states that the "Secretary may remove an officer from active duty if his removal is recommended by a board of review under section 323 of this title. The Secretary's action in such a case is final and conclusive." The Secretary has delegated his authority under this chapter to the Commandant. *See* DHS Delegation Nos. 0160.1 and 0170.1.

Determination Board Regulations

Article 12.A.15. of the Personnel Manual provides the regulations for separating regular commissioned officers for cause under 14 U.S.C. §§ 321-327. Article 12.A.15.c.2.i. states that "[t]he existence of one or more of these or similar conditions may require removing an officer for moral or professional dereliction: … Involvement in a drug or alcohol incident as defined in Chapter 20 of this Manual."

Article 12.A.15.d. states that a "commanding officer shall not use separation in lieu of disciplinary action under the UCMJ, but if he or she believes the Service's and officer's interests will be served better by separation proceedings rather than disciplinary action, he or she may so refer any charges. The fact a court-martial has occurred shall not prohibit subsequent proceedings under this Article; however, separation proceedings may not be initiated until a prior UCMJ proceeding is complete."

Article 12.A.15.e. authorizes Commander, [redacted] to ask Commander, CGPC to review an officer's record to determine whether the officer should be considered for separation. "If Commander, (CGPC-opm) decides further processing is warranted, Commander, (CGPC-c) will refer the case to a determination board." Whenever an officer "has demonstrated moral or

professional dereliction," Article 12.A.15.f. authorizes Commander CGPC to convene a Determination Board of three senior officers to "impartially review" the officer's record and other relevant documents "to determine whether it should require the officer to show cause for retention" before a Board of Inquiry.

Board of Inquiry Regulations

Article 12.A.15.f.6. of the Personnel Manual states that if a Determination Board decides that an officer is required to show cause for retention on active duty, Commander, CGPC will

> a. Give the officer a copy of the determination board's findings and all documents pertinent to the case except those the Commandant determines should be withheld in the interest of national security;
> b. Notify the officer in writing of the reasons for which he or she is being required to show cause for retention … ;
> c. Notify the officer that Commander, (CGPC-c) will convene a board of inquiry to hear the case at least 30 days after the date of notification of the determination board's findings;
> d. Inform the officer his or her appearance before a board of inquiry is the only opportunity to appear in person on his or her own behalf before final action in the case;
> e. Notify the officer if separated from the Service after action by a board of review or at his or her own request after a determination board's finding he or she is required to show cause for his or her retention on active duty, the officer will receive an honorable discharge if the reason for separation is one contained in Article 12.A.15.c.1. and 5., and a general discharge if the reason is contained in Article 12.A.15.c.2. or 3;
> f. Notify the officer of his or her entitlement to severance or separation pay, as applicable;
> g. Notify the officer that if retired after action by a board of review or at his or her own request after a determination board's finding, the officer will be subject to evaluation under Article 12.C.15. provisions as to satisfactory service in a temporary grade;
> h. Allow the officer reasonable time, at least 30 days, to prepare his or her defense;
> i. Allow the officer to appear in person and to be represented by counsel at proceedings before a board of inquiry; and
> j. Allow the officer full access to and furnishes copies of records relevant to the case at all stages of the proceedings, except a board shall withhold any records the Commandant determines should be withheld in the interests of national security. If any records are withheld under this clause, the officer whose case is under consideration shall, to the extent national security permits, be given the actual records or copies of them with the classified portions deleted.

Article 12.A.15.f.8. states that an "officer who has been notified a determination board has found he or she should be required to show cause for retention on active duty may apply for voluntary retirement or request early discharge from the Service. If the officer takes neither action, he or she shall be ordered to appear before a board of inquiry."

Article 12.A.15.h.1. states that the purpose of a BOI to "afford[]officers a fair, impartial hearing at which they have an opportunity to establish their retention in the Coast Guard is warranted. The officers concerned may present evidence to refute matters of record offered against them or otherwise establish they should be retained. The board of inquiry will consider all relevant evidence presented at the hearing and make findings and a recommendation based on a preponderance of evidence."

Article 12.A.15.h.3. states that the Legal Advisor will initially instruct the BOI on the record as to the BOI's purpose and about the following matters:

a. By its action, the board establishes the minimum level of performance of duty or integrity acceptable of Coast Guard officers.
b. The board of inquiry is an administrative board not subject to the rules and procedures governing court or court-martial action. It does not judge the determination board's action.
c. As a result of the determination board's findings, the officer must show cause for retention on active duty. At the board of inquiry, the officer concerned has the opportunity to present evidence to refute matters of record offered against him or her or otherwise establish the Service should retain him or her. …
f. The board evaluates all evidence and information it receives or develops on the matter it is considering in the hearing and arrives at a clear, logical finding consistent with the information and evidence presented.
g. On the basis of its findings the board determines whether the Coast Guard should or should not retain the respondent. …
j. An officer cannot offset allegations involving a defect in character or integrity by a rebuttal which attempts to emphasize other qualities in his or her favor.
k. The board may consider these additional items to assist it in evaluating material submitted to it:
(1) A record of recently improved performance may result from an unusual effort on the officer's part after learning he or she was recommended for separation for cause. By itself it does not overcome a pattern of ineffectiveness. The board may consider improved performance together with other evidence in the record to determine whether the officer has overcome the pattern.
(2) Promotion or selection for promotion, while proper evidence on the officer's behalf, does not necessarily justify his or her retention. …
(5) The officer concerned often solicits letters of commendation or appreciation or letters stating the officer's value to the Service. … The board must evaluate the circumstances under which these letters are solicited in determining what weight it should give them. In so determining, it is proper for the board to consider the letter of solicitation if one exists, the period during which the writer knew or was closely acquainted with the officer, the writer's familiarity with the officer's habits and reputation, and the relationship between the writer and the officer, if any.

Article 12.A.15.h.4. states that the Legal Advisor shall explain to the officer that he has the right to be represented by military or private civilian counsel; the right to challenge for cause any member of the BOI; the right to present evidence and question witnesses; and the right to "request any witness whose testimony is pertinent to the case to appear as a witness before a board of inquiry hearing. The recorder of the board will invite those witnesses who meet Article 12.A.15.h.5.(j) requirements to appear." Article 12.A.15.h.5.j. states that "[o]n the board's behalf the recorder invites both the officer's and the Government's witnesses to appear if both are reasonably available and their testimony can contribute materially to the case. The procedures and policies in Rule 703, Rules for Courts-Martial, MCM, 1984, will be used as a general guide in determining what witnesses will be invited to appear. Article 49, UCMJ, will be used as a general guide in determining witnesses' availability." Article 12.A.15.h.5.k.(3) states that the Recorder "obtains factual information about requested and prospective witnesses' availability and then determines under Article 12.A.15.h.5.j. above which requested witnesses he or she will invite to appear on both the officer's and Government's behalf."

Rule 703(b)(1) of the Rules for Courts-Martial states that "[e]ach party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary." The discussion states that under Military Rule of Evidence 401, "[r]elevant testimony is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue."

Article 12.A.15.h.5.a. of the Personnel Manual states that a BOI "does not follow strict rules of evidence in its proceedings. The board should allow the officer concerned to present his or her case without undue interference; however, the officer should observe reasonable bounds of relevance. Decisions on the validity of these regulations and the constitutionality of the statutes authorizing this procedure are outside the board's responsibilities, and the board should not permit argument on these matters. The assigned legal adviser decides questions on the procedures prescribed by these regulations."

Articles 12.A.15.h.5.f. & g. state that the Legal Advisor "instructs the board and respondent as appropriate, rules on all questions of evidence and procedure, and may excuse a member on challenge for cause. … The president may seek the legal advisor's guidance whenever necessary, but the legal advisor will advise the board in open session in the presence of the officer concerned and his or her counsel and these proceedings become a part of the record." Subparagraph i states that the "board shall keep a verbatim record of its proceedings in open session."

Article 12.A.15.h.6.a. states that a BOI "must carefully consider the facts of each case and be specific with respect to the underlying facts which support its findings and recommendations." Article 12.A.15.h.6.b. states that "[b]efore the board determines its findings and recommendations, it should review the purpose for which it was constituted, its guidance, and the evidence present before it in considering the following:"

> (1) The determination board found the officer concerned should be required to show cause. …
> (2) The purpose of the board of inquiry is to afford the officer concerned an opportunity to present evidence to refute matters of record offered against him or her or to otherwise establish the Service should retain him or her. [Emphasis added.]
> (3) The officer concerned must refute the Government's evidence and present evidence affirming his or her contention he or she is qualified to retain his or her current status. [Emphasis added.]
> (4) The board must consider an officer's record as a whole and make its recommendation based on a preponderance of evidence. Refuting any single reason for removal does not necessarily refute other documented reasons the board considers.

Article 12.A.15.h.7. provides that the Board "determines its findings and recommendation by secret written ballot in closed session"; "prepares a brief statement of the reason(s) (including factual data if necessary for clarification) for its findings"; and then "makes an appropriate recommendation, limited to either retention or separation without qualifications." The president of the BOI advises the officer of the board's decision in open session.

Board of Review Regulations

Under Articles 12.A.15.h.8.b. & c. of the Personnel Manual, when a BOI decides that an officer should be separated, the case is forwarded to a Board of Review, and the applicant is allowed to file a rebuttal to the report of the BOI within 15 days after receiving a copy of the proceedings of the BOI. If the applicant files a rebuttal, the Recorder has 10 days to file a rebuttal to the applicant's rebuttal. Under Article 12.A.15.h.8.d., a "verbatim record of the board of inquiry proceedings shall be sent to Commander, CGPC."

Under Article 12.A.15.i.1., upon "receiving the proceedings record of the board of inquiry which recommends separating an officer for cause, Commander, (CGPC-c) convenes a

board of review." The BOR "reviews the records and documented evidence the board of inquiry considered and made a part of its proceedings and any additional information the officer concerned or the recorder submitted under Article 12.A.15.h.8., to determine whether the officer concerned has or has not established he or she should be retained in the Coast Guard." Art. 12.A.15.i.3. "After reviewing the case, the board of review determines without qualification whether to retain or separate the officer." Art. 12.A.15.i.5. "If the board of review determines to retain the officer, the case is closed." Art. 12.A.15.i.7. Under Articles 12.A.15.i.8. & 9., if the BOR decides to separate an officer, the BOR "proceedings and recommendation are sent to the Commandant, who has final decision authority," and "[i]f the Commandant concurs with the board of review recommendation, the officer shall be separated."

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 requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. The Board finds that the applicant's discharge should be upgraded to honorable because the record contains evidence of several procedural errors that create a perception of unfairness in the record of the proceedings.

4. The Board finds that the BOI's Legal Advisor erred by answering questions of the BOI off the record and in the absence of the applicant and his attorney. Although the Legal Advisor attempted to cure this error by paraphrasing the conversation on the record, his off-the-record advice to the BOI did not comply with Article 12.A.15.h.5.g. of the Personnel Manual, which states that "[t]he president may seek the legal advisor's guidance whenever necessary, but the legal advisor will advise the board in open session in the presence of the officer concerned and his or her counsel and these proceedings become a part of the record." In addition, since the BOI had not yet retired to deliberate its decision, the Legal Advisor's off-the-record conversation with the BOI appeared to violate Article 12.A.15.h.5.i., which required the BOI to "keep a verbatim record of its proceedings in open meeting." The Board notes that the Legal Advisor was aware of these rules as earlier in the proceedings another off-the-record conversation was paraphrased while on the record, although on that occasion the applicant's attorney was apparently present in the room while the off-the-record legal advice was given.

5. The Board finds that the BOI's report contributed to the perception of unfairness. The BOI was tasked simply with weighing the evidence in the record and deciding whether the applicant had proved that he should be retained by a preponderance of the evidence. In explaining its decision to recommend his separation, however, the Board stated that in its "opinion, [the applicant] committed four drug incidents." This opinion was in addition to a finding that "[a]ll

four of these offenses constitute a drug incident as defined by Article 20.A.2.k." Articles 20.A.3.k.1. and 20.C.3.e. of the Personnel Manual state that a drug incident is determined by the member's commanding officer, and the applicant's CO had determined that there was just one drug incident. Although the BOI's opinion did not actually create additional "drug incidents" in the applicant's record and so did not violate the Personnel Manual, the language in the report makes it appear that in balancing the evidence, the BOI weighed not the single drug incident that was actually in the record, but four drug incidents.

6. The statement in the BOI report that the "the question is whether [the applicant] knew that his actions were illegal and against Coast Guard policy" also contributes to the perception of unfairness. While the remainder of the report shows that the BOI considered other questions or issues in deciding whether to retain the applicant, "the question" articulated in opinion #4 appears to misstate the primary issue before the BOI, which was whether the applicant should be retained on active duty because he met the minimum level of performance of duty and integrity acceptable of Coast Guard officers.

7. Likewise, the endorsements by the Chief of OPM and Commander, CGPC recommending approval of the BOI's recommendation to separate the applicant contributed to the perception of unfairness. Article 12.A.15.i.3. of the Personnel Manual provides that the BOR shall "review[] the records and documented evidence the board of inquiry considered and made a part of its proceedings and any additional information the officer concerned or the recorder submitted under Article 12.A.15.h.8. [rebuttals], to determine whether the officer concerned has or has not established he or she should be retained in the Coast Guard." No part of Article 12.A.15. allows the Chief of OPM or Commander, CGPC to add their own recommendations about separation to the documents reviewed by the BOR. Although as the JAG argued, endorsements are "standard procedure" in the Coast Guard when forwarding documents such as the BOI proceedings, the Board finds that the Chief of OPM and Commander, CGPC erred in sending their own personal recommendations for separation with the proceedings delivered to the BOR. Although the impropriety of the endorsement page was brought to the BOR's attention in the applicant's rebuttal and the BOR report did not include the endorsement page in the list of documents it considered, the unwarranted addition of the substantive endorsements to the documents forwarded to the BOR adds to the perception of unfairness in this case.

8. The email of the Chief of the Officer Boards Section at CGPC to the members of the BOI on January 17, 2005, also contributed to the perception of unfairness. Although the BOI had already announced its decision not to retain the applicant in open session on January 14, 2005, and so the email could not have affected the outcome of the BOI, the apparent promise in the email to keep the BOI members "in mind for future promotion boards held at CGPC" can be interpreted as a suggestion of an inappropriate reward for their service on the BOI.

9. The applicant made many allegations about denial of due process that are not supported in the record:

a. The applicant alleged that the BOI members were biased against him, but he offered no explanation as to why they would be biased. None of the things that the applicant alleged were signs of bias—such as how the evidence was tabbed in the BOI report and the mis-

attribution of the excluded evidence—lead this Board to believe that there was any bias against him. While the verb "paraded" is sometimes used derisively and in the context of the report could be interpreted as criticism of the number of the applicant's witnesses, it is not evidence of bias against the applicant. There was nothing prurient or degrading about the BOI's inquiry into the relationship between the applicant and YN1 M. Article 12.A.15.h.3. advises BOIs that, when officers submit letters of commendation or appreciation into evidence, they should "consider … the writer's familiarity with the officer's habits and reputation, and the relationship between the writer and the officer, if any." Almost every witness who appeared in person or by telephone was also asked to testify about how well he or she knew the applicant and about the nature of their relationship—i.e., whether it was social as well as professional. Nor does the BOI president's off-the-record expression of concern about the applicant's well-being after learning the BOI's decision convince this Board that the BOI members were biased against the applicant.

b. The applicant alleged that the Recorder continued to argue about what had occurred in other cases even though the Legal Advisor had ruled that such evidence was irrelevant and that the Legal Advisor improperly prevented him from presenting significant evidence by instructing the BOI to ignore Exhibit 24. The transcript of the BOI proceedings, however, clearly shows that the Legal Advisor ruled only that what happened in the prior cases documented in Exhibit 24 was irrelevant because none of those cases involved drug incidents and "show cause" boards. The Legal Advisor never ruled that whether officers and enlisted members with drug incidents had been retained or separated was irrelevant, so the Recorder was entitled to continue eliciting testimony as to whether officers with drug incidents had been retained. The applicant argued that Exhibit 24 was introduced to rebut the testimony elicited by the Recorder that no other officer had been retained following a drug incident because of the zero-tolerance policy. He argued that Exhibit 24 was relevant because it showed that an officer had been retained by a special board following an alcohol incident, and Article 20 states that neither alcohol abuse nor drug abuse are tolerated. The policies for drug abuse and alcohol abuse under Article 20 are significantly different, however. While any member with a single drug incident must always be processed for separation under Article 20, which is why the Coast Guard claims a zero-tolerance policy for drug abuse, Article 20 does not require an officer to be processed for separation until after his second alcohol incident and an enlisted member may be retained even after a second alcohol incident. In addition, while a "drug incident" always involves illegal conduct, the definition of an "alcohol incident" includes being too "hung over" to get to work on time or behavior that is merely embarrassing.[2] In light of these differences, the Board finds that the Legal Advisor committed no error or injustice by finding that Exhibit 24 was not relevant to whether the applicant should be retained or by instructing the BOI not to consider Exhibit 24. The Legal Advisor did not prevent the applicant from introducing any evidence about how prior illegal drug use had been handled to rebut the testimony elicited by the Recorder that, under the zero-tolerance policy, no officer had been retained following a drug incident.

c. The applicant alleged that the testimony elicited by the Recorder about the unlikelihood that the applicant would be promoted if retained by the BOI violated his due proc-

[2] Article 20.A.2.d.1. of the Personnel Manual defines an "alcohol incident" as "[a]ny behavior, in which alcohol is determined, by the commanding officer, to be a significant or causative factor, that results in the member's loss of ability to perform assigned duties, brings discredit upon the Uniformed Services, or is a violation of the Uniform Code of Military Justice, Federal, State, or local laws."

ess rights because his potential for future promotion was irrelevant to the question of whether he should be retained. The applicant's attorney, however, made the applicant's future value to the Coast Guard as an electrical engineer the crux of his argument for retention and elicited testimony from almost every witness about how valuable the applicant's engineering skills would be. By his own questions, the applicant's counsel put the issue of the applicant's future value to the Service as an officer with engineering skills on the table. Therefore, the Recorder was entitled to ask questions to rebut this claim, and as CAPT J testified, having a drug incident and a negative special OER in one's record will "kill" any officer's chance to be selected for promotion. The Recorder tried to rebut the applicant's claim to future value as an officer with engineering skills by eliciting testimony that the applicant's career as an officer could not be long.[3] Although the applicant argued that it was improper for the BOI to consider the potential length of his career, this Board finds that the potential length of an officer's career clearly factors into the calculation of his future value to the Service, which in turn factors into his present value to the Service. (A battery that will last twenty years is, all else being equal, more valuable today than a battery that will last only five years.) Therefore, the Board finds that the testimony about the applicant's promotion potential was relevant as rebuttal evidence to the applicant's claim of future value as an officer. The Recorder's solicitation and the BOI's consideration of such testimony did not violate the applicant's right to due process.

d. The applicant alleged that he was not provided full and timely access to relevant records as required under Article 12.A.15.g.4. of the Personnel Manual. With respect to the FOIA request, the applicant has not shown that he was entitled to see any of the documents withheld. The transcript of the hearing indicates that the applicant did receive a copy of the BOI precept prior to the hearing with only the names of the board members blacked out. The applicant was allowed to challenge the board members for cause at the beginning of the hearing, and he has not shown how he was harmed by not knowing their names before the hearing. The applicant's military records and the proceedings of the Determination Board were made available to the applicant at least a week before the BOI. In addition to these documents, the Government's exhibits included only (a) seven photocopied parts of the Personnel Manual from Articles 12 and 20; (b) two ALCOASTs (Exhibit 14); (c) a Coast Guard pamphlet for Command Drug and Alcohol Representatives, which states that one of the goals of the substance and alcohol abuse program is to "[d]etect and separate from the Coast Guard those members who abuse, traffic in, or unlawfully possess drugs" (Exhibit 15); and (d) three other documents that were removed from consideration. Therefore, the Board finds that the applicant's position and defense during the BOI cannot possibly have been harmed by the alleged violation of Article 12.A.15.g.4. It is absurd for the applicant to claim unfair surprise that the Recorder would ask the BOI to consider the provisions of the Personnel Manual that apply to separating members for drug use. The Personnel Manual is a public document available on-line. Regarding Exhibit 15, the language about it being a goal of the Coast Guard to separate drug users is taken directly from Article 20.A.1.c.2. of the Personnel Manual and so its introduction as an exhibit cannot be considered an unfair or harmful surprise to the applicant. Regarding Exhibit 14, the only perti-

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[3] Under 14 U.S.C. § 283, a lieutenant who is passed over for promotion by two successive selection boards is separated on the June 30th following the second failure of selection for promotion while in or above the zone for promotion. Since the applicant was promoted to lieutenant on October 29, 2002, under Article 5.A.4.a.1. of the Personnel Manual, he would have been eligible for selection—though not necessarily "in the zone"—for promotion beginning in 2006.

nent part of the ALCOASTs is that they mention the zero-tolerance policy. The applicant has not alleged that he was unaware that the Coast Guard has long claimed to have a zero-tolerance policy for illegal drug use. Moreover, the record shows that the applicant's attorney, although he objected to the introduction of the ALCOASTs based on their relevance, was perfectly prepared to argue and elicit testimony during the BOI hearing that some members have been retained despite the zero-tolerance policy and that the applicant should be retained as an exception to the policy. The Board finds that the applicant has not proved by a preponderance of the evidence that he was unfairly surprised or harmed as a result of the timing of his attorney's inspection of any of the Government's exhibits.

e. The applicant alleged that the Recorder unfairly failed to invite LT M, who knew him socially as well as professionally, to testify in person, but then in his closing argument, alleged that the applicant's witnesses knew him only professionally rather than socially. The Board finds that the Recorder committed no error or injustice in refusing to produce LT M in person so that he had to testify by telephone. Under Rule 703(b)(1) of the Rules for Courts-Martial and Rule 401 of the Military Rules of Evidence, the Recorder was not required to invite witnesses whose testimony would be cumulative. The Board agrees with the Recorder that LT M's testimony was essentially cumulative in nature. Many witnesses, some of whom indicated that they knew the applicant socially as well as professionally, testified on the same issues that LT M testified about. After the applicant's attorney stated in her closing argument that the witnesses who argued for retention really knew the applicant, whereas the board members did not, the Recorder argued in rebuttal that the witnesses "basically know [the applicant] in a professional sense. They weren't with him during the 2000/2001 period. … [T]hey really don't know him socially." The applicant argued that this argument was clearly wrong and unjust because some of his witnesses did know him socially. The Board finds that what renders a relationship primarily "social" rather than "professional" is sufficiently nebulous that the Recorder's argument cannot be considered clearly erroneous or unfair. The Board is not persuaded that the applicant was denied any due process or that the BOI's decision was rendered unfair because LT M testified by telephone rather than in person or because the Recorder argued that the witnesses' relationships with the applicant were basically professional rather than social.

f. The applicant alleged that the BOR did not give him a separate and independent decision, as required by 14 U.S.C. § 323. He alleged that this failure by the BOR is proved by the fact that the BOR met for only 80 minutes, which is not enough time to review the voluminous proceedings, and because the BOR reached the same conclusion as the BOI despite the arguments made in his rebuttal to the BOI and all of the evidence he had presented. The applicant's argument ignores the fact that the BOR first convened on May 24, 2005, and received their precept; the applicant's rebuttal to the BOI; the Recorder's rebuttal; the applicant's further rebuttal; and the report and proceedings of the BOI with the enclosed evidence, including the proceedings of the Determination Board. Then seven days later, the BOR reconvened for 45 minutes of deliberation in session before issuing a unanimous decision not to retain the applicant. Seven days was ample time for the BOR members to review all of the documents provided. The applicant argued that there is no proof that the BOR members actually reviewed the records during those seven days, but this Board will not assume that the members of the BOR completely ignored their duty to review the records based on how much time they spent deliberating the matter with each other and the brevity of their report. No regulation required the BOR to explain

when they reviewed the records or to write a longer report with a discussion of the facts and evidence. In addition, the mere fact that the BOR's decision was the same as the BOI's decision is not evidence that the BOR failed to fulfill its mandate under the precept and 14 U.S.C. § 323. The applicant has not proved that he was denied due process by the BOR.

g. The applicant alleged that the Coast Guard violated Article 12.A.15.d. of the Personnel Manual by responding to his admission of drug use with separation in lieu of disciplinary action under the UCMJ. However, that article states that a "commanding officer shall not use separation in lieu of disciplinary action under the UCMJ, but if he or she believes the Service's and officer's interests will be served better by separation proceedings rather than disciplinary action, he or she may so refer any charges." Since the applicant's commanding officer did not initiate court-martial proceedings, she presumably believed that the applicant's and the Service's interests were better served by not trying him by court-martial. The applicant's misconduct was too old to fall within the purview of Article 15 of the UCMJ, but even if it were not, Commander, [redacted] would still have been required to process the applicant for separation under Article 12.C.4. of the Personnel Manual. Article 20.a.2.k.2. clearly contemplates separation based on a drug incident without action under the UCMJ as it states that a "member need not be found guilty at court-martial, in a civilian court, or be awarded NJP for the conduct to be considered a drug incident." The applicant argued that if his CO could have effectively punished him with NJP under Article 15, the applicant would not have been processed for separation under Article 12.A.15 of the Personnel Manual. However, Article 12.C.4. requires a CO to process for separation a member with a drug incident, and no part of Article 20 states that, if a member is punished at mast for a drug incident, his CO need not process him for separation. The applicant has not proved that the Coast Guard violated any provision of the Personnel Manual by separating him under Article 12.A.15. without first punishing him under the UCMJ.

10. Although the applicant argued that he is entitled to reinstatement on active duty, the Board finds that he has not proved by a preponderance of the evidence that the BOI, the BOR, or the Commandant committed error or injustice[4] in not retaining him on active duty. The applicant was able to point out several errors made over the course of the proceedings, and those errors cumulatively created a perception of injustice, but the Board is not persuaded that the errors actually prejudiced the outcome of the proceedings. The applicant's admission that he used marijuana four times while serving on active duty was overwhelming evidence that he did not meet the minimum level of performance of duty and integrity acceptable of Coast Guard officers. Although the applicant argued that under Article 12.A.15.h.6.b.(2), the BOI should not have focused on his admitted drug use because he opted not to "refute matters of record offered against him" but to "otherwise establish the Service should retain him," this argument ignores the very next sentence in the Personnel Manual, Article 12.A.15.h.6.b.(3), which states that the "officer concerned must refute the Government's evidence and present evidence affirming his or her contention he or she is qualified to retain his or her current status." By the applicant's logic, if an officer admits to every negative fact or allegation against him, no matter how bad, he must be retained if he can show that there are also some very good things in his record. Nowhere in Article 12.A.15. is there any indication that a BOI cannot consider the uncontested acts of mis-

[4] For purposes of the BCMRs under 10 U.S.C. § 1552, "injustice" is "treatment by military authorities that shocks the sense of justice but is not technically illegal." *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)).

conduct that brought the officer to the BOI when deciding whether to retain the officer. Therefore, the Board rejects the applicant's argument that the BOI did not understand the burden of proof he bore or failed to weigh the evidence of record reasonably. The BOI report's focus on the applicant's drug use and related circumstances, including the Coast Guard's zero-tolerance policy, proves only that the BOI decided not to retain the applicant because of his drug use, the related circumstances, and Coast Guard policy; it does not prove that the BOI did not also consider and weigh all the positive evidence in the record and exercise its discretion accordingly.

11. The applicant argued that the Coast Guard has acted disingenuously and hypocritically by arguing against his retention and reinstatement as an officer while continuing to employ him as a civilian engineer under contract. The applicant argued that the Coast Guard should not be able to take advantage of his abilities while burdening him with a general discharge. The Board finds nothing offensive or hypocritical in the Coast Guard's unwillingness to retain the applicant as a uniformed officer deployable on any number of missions but willingness to pay a private company for his skills as an electrical engineer, [redacted]

12. The Board finds that the applicant's discharge for unacceptable conduct was not erroneous or unjust. However, because several errors in the proceedings created a perception of injustice, the Board will order the Coast Guard to upgrade the applicant's discharge to honorable, which is the best possible discharge he could have received. Given the evidence of the applicant's unacceptable conduct, the Board finds no reason to disturb the narrative reason for separation, separation code, or reentry code on his DD214.

13. Accordingly, the applicant's request for an honorable discharge should be granted but all other relief should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of former LT xxxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is granted in part. His character of discharge shall be upgraded to honorable. This correction shall be made on a new DD214 issued to him, rather than on a DD215.

No other relief is granted.