

**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-162

XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX

FINAL DECISION

This is a proceeding 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 after receiving the applicant's completed application on May 21, 2009, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated February 25, 2010, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, an active duty member of the Coast Guard, asked the Board to correct his record by removing a form CG-3307 ("Page 7") stating that his urine tested positive for metabolites of cocaine ingestion following a random urinalysis conducted at his unit on April 14, 2003. The applicant alleged that in accordance with Article 20.C.5. of the Personnel Manual, there should be no documentation of the incident in his record because his commanding officer did not find that he was involved in a drug incident. He further alleged that the Page 7 will hinder his chances for advancement.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on December 19, 2000, and has continued to serve on active duty while advancing from seaman recruit (E-1) to [REDACTED] (E-6). In the spring of 2003, the applicant was an [REDACTED] /E-4 stationed aboard [REDACTED] based in XXXXXXXXXXXXXXXX. On his semiannual performance evaluation dated March 31, 2003, the applicant received nine average marks of 4, nine above-average marks of 5, and four excellent marks of 6 in the various performance categories, a satisfactory conduct mark, and a recommendation for advancement.

The disputed Page 7, dated May 13, 2003, is the only negative Page 7 in the applicant's military record. It is titled a "Performance & Discipline" entry. The applicant's record contains

no other documentation of the urinalysis, the subsequent mast, or non-judicial punishment (NJP).¹ The Page 7 is signed by the applicant and by the commanding officer (CO) of [REDACTED] and states the following:

This documents NJP held in the case of [the applicant] in violation of Article 112a (UCMJ) [Uniform Code of Military Justice] in that on or about 14 April 2003 after a random urinalysis found the member had tested positive for cocaine [sic]. The case was dismissed with a warning with the following stipulations:

1. The member attend command sanctioned screening for drug and alcohol abuse.
2. That the member be randomly tested for drug use per paragraph 20.C.5. to the reference.
3. That the command will make a final assessment of continued Coast Guard service on or about 15 August 2003.

The applicant's record contains no performance evaluation documenting NJP on May 13, 2003. On his regular, semiannual performance evaluation dated September 30, 2003, the applicant received two below-average marks of 3 for "Responsibility" and "Setting an Example," eight marks of 4, seven marks of 5, and five marks of 6 in the various performance categories, a satisfactory conduct mark, and his CO's recommendation for advancement. He advanced to [REDACTED] soon thereafter.

The applicant's record contains several Page 7s and letters documenting superior performance throughout his service. Since 2003, he has received primarily marks of 6 on his performance evaluations, with some marks of 5 and 7, and he has always been recommended for advancement. He advanced to [REDACTED] two years ago.

VIEWS OF THE COAST GUARD

On October 30, 2009, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the applicant's request.

The JAG alleged that the applicant has failed to prove by a preponderance of the evidence that his CO committed an error or injustice regarding the random urinalysis, the NJP, or the subsequent documentation of the urinalysis result and NJP on the Page 7. The JAG noted that the applicant "did not challenge the validity of the positive urinalysis test results" and "provided no evidence to refute the validity of the CG-3307 (Page 7) documenting the mast proceedings and the CO's actions. Therefore, the assumption can be made that the Page 7 entry into Applicant's record is valid."

¹ "Mast" is a proceeding at which non-judicial punishment (NJP) may be imposed by a CO under Article 15 of the UCMJ. NJP "is a disciplinary measure more serious than the administrative corrective measures ... but less serious than trial by court-martial," which "provides commanders with an essential and prompt means of maintaining good order and discipline and also promotes positive behavior changes in servicemembers without the stigma of a court-martial conviction." Manual for Courts-Martial (MCM), Part V-1. The Military Rules of Evidence do not apply during the proceedings, and the standard of proof is the preponderance of the evidence. Military Justice Manual, Chap. 1.D.1.f. and g.

The JAG argued that Article 20.C.5. of the Personnel Manual does not apply to the applicant's case because there is no evidence that the CO "made a final conclusion of 'No Drug Incident'" in accordance with that article. The JAG alleged that the Page 7 shows that the CO conducted a mast following the applicant's positive urinalysis result and dismissed the case with a warning and a stipulation that "the command will make a final assessment of continued Coast Guard service on or about 15 August 2003."

The JAG alleged that the Page 7 shows that the CO "decided at NJP to exercise his discretion [in accordance with] PERSMAN Chapt. 20.C.3.c.[²] (Determining a Drug Incident) and decided to delay final determination in order to pursue various options deemed appropriate. The Page 7 stipulations are examples of the options deemed appropriate as per PERSMAN 20.C.3.c." The JAG argued that although the CO's final determination is not in the record, "the Page 7 at issue is documented evidence that reflects Applicant's NJP for violating Article 112a of the UCMJ. The command's failure to document the final results does not invalidate or vitiate the Page 7 at issue." The JAG argued that the Page 7 is evidence that the CO probably wanted the applicant to have the Page 7 in his record to document his NJP and that the "Page 7's validity should not depend on the final assessment or the command's lack thereof." The JAG alleged that the applicant "was given a huge 'benefit of the doubt' by his CO for not initially processing the applicant for discharge based on the positive urinalysis" and is not entitled to relief.

The JAG included with the advisory opinion a memorandum by the Commander of the Coast Guard Personnel Service Center (CGPSC), which the JAG adopted only in part because CGPSC recommended that the Board grant relief. CGPSC stated that Article 20.C.5. of the Personnel Manual does not apply to the applicant's case because his CO never made a "Finding of No Drug Incident." CGPSC stated that the disputed Page 7 "documents dismissal with a warning of UCMJ Article 112a charges against the applicant. Dismissal with a warning is not tantamount to a 'Finding of No Drug Incident'" under Article 20.C.5.

CGPSC stated that although the applicant has failed to substantiate an error, CGPSC has identified an error "significant enough in that it has the potential to cause severe injustice." First, CGPSC stated, the Page 7 mandated drug screening, and there is no evidence that such screening was ever provided. Second, the Page 7 mandated random urinalyses, and there is no record of any follow-up or the results thereof. Finally, the Page 7 promises a final assessment in August 2003, and there is no documentation of one. CGPSC stated that all that can be deduced is that a favorable determination was made at some point because otherwise the applicant would have been discharged, but he was not.

CGPSC stated that the lack of follow-through by the command has created a "significant injustice for the applicant," which may be unwarranted. CGPSC stated that it cannot now be positively ascertained³ whether "the incident was or was not later determined to be a 'Finding of No Drug Incident'" under Article 20.C.5. Therefore, "the Page 7 in question has the potential to

² Article 20.C.3.c. of the Personnel Manual concerns a member's legal rights during the investigation of a "drug incident." It appears that the JAG intended to cite Article 20.C.3.d. of the Personnel Manual, which is entitled "Determining a Drug Incident."

³ The applicant's CO, CWO xxxxxxxxxx, retired from the active duty Coast Guard on xxxxxxxxxx, 2004. See <www.uscg.mil/PPC/retnews/2004/October2004News.pdf>.

be wrongly construed. The Coast Guard is deemed at fault for not properly documenting the final outcome of this incident. The presumption of guilt should therefore not be borne by the applicant for the remainder of [his] professional Coast Guard career.” Commander, CGPSC therefore recommended that the Board grant relief.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 3, 2009, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to submit a response within 30 days. No response was received.

APPLICABLE REGULATIONS

Regulations About Illegal Drug Use

Article 20 of the Personnel Manual in effect in 2003 (COMDTINST M1000.6A (Change 37)) contains most of the regulations regarding suspected illegal drug use by members. Article 20.A.1.c. states that the Coast Guard attempts to “[d]etect and separate from the Coast Guard those members who abuse, traffic in, or unlawfully possess drugs.” Article 20.C.1.a. states that “Coast Guard members are expected not only to comply with the law and not use illegal drugs, but also, as members of a law enforcement agency, to maintain a life-style which neither condones substance abuse by others nor exposes the service member to accidental intake of illegal drugs. Units shall conduct random urinalysis tests throughout the fiscal year on a consistent basis.”

Article 20.C.1.d. states that a unit CO should “investigate all incidents or circumstances in which the use or possession of drugs appears to be a factor, and take appropriate administrative and disciplinary action.” Article 20.C.3.a. states that “Commanding 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.”

Article 20.A.2.k. defines a “drug incident” as the intentional use of drugs, the wrongful possession of drugs, or the trafficking of drugs. It further states that “[t]he 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” and that “[i]f the conduct occurs without the member’s knowledge, awareness, or reasonable suspicion or is medically authorized, it does not constitute a drug incident.”

Article 20.C.3.e. states that in determining whether a drug incident has occurred, the CO shall use “the preponderance of the evidence standard” and that a positive confirmed urinalysis result may by itself be “sufficient to establish intentional use and thus suffice to meet this burden of proof.” Article 20.C.3.d. states that

a commanding officer should consider all the available evidence, including positive confirmed urinalysis test results, any documentation of prescriptions, medical and dental records, service record (PDR), and chain of command recommendations. Evidence relating to the member’s performance of duty, conduct, and attitude should be considered only in measuring the credibility of a member’s statement(s). If the evidence of a possible drug incident includes a positive urinalysis result, the command should also determine whether the urinalysis was conducted in accordance with this article and whether the collection and chain of custody procedures were properly

followed. The commanding officer may delay final determination to pursue any of these options deemed appropriate:

1. Ask the member to consent to a urinalysis test as outlined in Article 20.C.2.a.
2. Direct the member to participate in a urinalysis evaluation program for a maximum of six months as outlined in Article 20.C.2.a.
3. Request the laboratory reexamine the original documentation for error.
4. Request the laboratory retest the original specimen. ...

Article 20.C.4. states that if a CO determines that a drug incident did occur, the CO will do the following:

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.
3. Eligibility for Medical Treatment. Members who have been identified as drug-dependent will be offered treatment prior to discharge. ...

Article 12.B.18.b.4. states that “[a]ny member involved in a drug incident ... will be processed for separation from the Coast Guard with no higher than a general discharge.” Article 12.B.2.f.2.a. states that a general discharge will be awarded when a member “has been identified as a user, possessor, or distributor of illegal drugs or paraphernalia.”

Article 20.C.5. states the following:

1. In cases in which the commanding officer determines the urinalysis result attributed to a particular member resulted from administrative error; faulty chain of custody, evidence of tampering, or that drug use was not wrongful; e.g., prescribed medication or unknowing ingestion, the commanding officer will make a finding of no drug incident and close the investigation. In addition, these actions shall be taken:
 - a. Screening and/or Counseling. A determination shall be made whether psychiatric, medical, or drug dependency screening ... is warranted. At a minimum, the member’s commanding officer shall review with the member the previous training they received on the subject of drug abuse. ... If retraining is considered necessary in these areas, arrangements will be made for the member’s participation in awareness training.
 - b. Letter Report. Commanding officers shall notify Commandant ... by letter of all cases involving positive urinalysis test results in which they make a finding of no drug incident. This letter shall indicate the drug(s) identified in the specimen and the reason for the no drug incident determination. The member should not be identified by name, social security number, or any other means since the information will be used for statistical purposes only.

Article 20.C.2.a.5. states that when a member receives a positive urinalysis result but the CO “remains doubtful whether the member has used drugs wrongfully,” the CO may order evaluation testing for a period of two to six months, during which time up to 16 urine specimens may be taken at irregular intervals. In such situations, however,

the original positive urinalysis result may still be used as a basis for disciplinary action under the UCMJ, administrative separation, and characterization of discharge depending on the basis for ordering the original test; e.g., probable cause, administrative inspection, consent or competence-for-duty test ([see] Article 20.C.2.a.8.). The results of the evaluation testing may be used as a

basis for administrative separation. Positive test results from evaluation testing may not be used for disciplinary action under the UCMJ, nor may such results be used to characterize a discharge in separation proceedings.

Regulations About Mast and NJP

Article 1.D.9. of the Military Justice Manual (MJM) states that if at a mast convened under Article 15 of the UCMJ, the CO finds none of the allegations against a member to be supported, the CO dismisses all of the charges. “A mast ending in dismissal of all offenses is not punishment and no Court Memorandum (Form CG-3304) entry shall be made in the member's service record.” Article 1.D.17. of the MJM, entitled “Dismissal with a Warning,” states that the CO “may decide not to punish a member by dismissing the matter with a warning. Such a decision may be based on either a lack of proof or a determination that punishment is not appropriate even though the member committed an offense(s). That decision is not considered NJP, and no Court Memorandum (Form CG-3304) entry shall be made in the member's service record.” Under Article 1.D.19. of the MJM,

If the commanding officer determines that, based on the evidence presented, that it is more likely than not that an offense was committed and that NJP is appropriate, he or she should announce punishment at this point. If the commanding officer decides to impose punishment, he or she should choose the punishment or combination of punishments that is most appropriate for the member, the offense(s), and the good order and discipline of the unit In determining the appropriate punishment, the commanding officer should consider the purposes of NJP ... and the general factors to be considered when awarding punishment The commanding officer shall indicate the disposition of the offense(s) by completing and signing the “Action of the Commanding Officer” section on the CG-4910.

Article 1.G.3.a. of the MJM concerns personnel record entries and states that

[t]he Court Memorandum provides input to the service records of officer and enlisted personnel for all masts resulting in the imposition of punishment. If mast was held, but no punishment as described under Article 15, UCMJ, was awarded, then Article 15 punishment (or NJP) was not awarded. No Court Memoranda shall be prepared if, instead of imposing punishment, the matter is dismissed, dismissed with a warning, dismissed with administrative action taken, referred to court-martial, or results in recommendation for general court-martial because these actions are not considered the imposition of punishment.

Under Article 10.B.5.b.3. of the Personnel Manual, the command must prepare and submit a special performance evaluation for any enlisted member awarded NJP. Under Articles 10.B.2.a. and 10.B.8., any NJP, termination of the eligibility period for a Good Conduct Award, or an unsatisfactory conduct mark, non-recommendation for advancement, or poor performance mark on an enlisted member's performance evaluation must be documented on a Page 7. Chapter 10.A.2. of the Personnel and Pay Procedures Manual provides instructions for preparing Page 7s “to document counseling, or to record any other information required by current directives, or considered to be of historical value.”

Paragraph 4 of COMDTINST 1000.14B, entitled “Preparation and Submission of Administrative Remarks (CG-3307),” states that “[u]nits are prohibited from using the CG-3307 [Page 7] to document events not listed in reference (a) [the Personnel and Pay Procedures Manual (PPPM), HRSICINST M1000.2A]. Unauthorized CG-3307's received at HQ or CGPC will be

destroyed.” Chapter 10-A-2 of the Personnel and Pay Procedures Manual states that “[t]he only authorized CG-3307 entries [Page 7s] are those listed in Enclosure (6) to this manual.” Enclosure (6) includes “Performance & Discipline” as one category of authorized Page 7. Chapter 10-B-2 states that following imposition of NJP, a unit should “complete the special performance evaluation and required CG-3307 entries and forward to HRSIC (ADV).”

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. Although the application was not filed within three years of the applicant's discovery of the alleged error or injustice, it is considered timely because the applicant has remained on continuous active duty since the disputed Page 7 was entered in his record.⁴

2. The applicant alleged that the Page 7 dated May 13, 2003, documenting NJP for a urinalysis positive for cocaine use and his CO's subsequent stipulations is both erroneous under the Personnel Manual and unjust because it will hinder his career advancement.⁵ The Board begins its analysis in every case by presuming that the disputed information in the applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.⁶ Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties “correctly, lawfully, and in good faith.”⁷ For the reasons stated below, the Board finds that the preponderance of the evidence shows that the disputed Page 7 is both erroneous and unjust.

3. The disputed Page 7 is misleading and erroneous. It begins, “This documents NJP held in the case of [the applicant in that on or about 14 April 2003 ... the member tested positive for cocaine. The case was dismissed with a warning with the following stipulations.” However, under Article 1.D.17. of the Military Justice Manual, when a charge under the UCMJ is dismissed with a warning, no NJP has occurred. Therefore, the Page 7 is obviously erroneous. While a mast was held, the applicant was not awarded NJP; *ipso facto*, no NJP should be documented in his record. The fact that the CO did not award the applicant NJP is supported not only

⁴ *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that, under § 205 of the Soldiers' and Sailors' Civil Relief Act of 1940, the BCMR's three-year limitations period under 10 U.S.C. § 1552(b) is tolled during a member's active duty service).

⁵ The Board notes that given the criteria for advancement under Article 5.C. of the Personnel Manual, the Page 7 is unlikely to hinder the applicant's advancement to chief or senior chief petty officer. However, because chief warrant officers are selected by boards that review the candidates' entire records, the Page 7 could prevent his selection for appointment to chief warrant officer.

⁶ 33 C.F.R. § 52.24(b); *see* Docket No. 2000-194, at 35-40 (DOT BCMR, Apr. 25, 2002, approved by the Deputy General Counsel, May 29, 2002) (rejecting the “clear and convincing” evidence standard recommended by the Coast Guard and adopting the “preponderance of the evidence” standard for all cases prior to the promulgation of the latter standard in 2003 in 33 C.F.R. § 52.24(b)).

⁷ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

by the Page 7 stating that the charge was dismissed with a warning but also by the lack of all of the record entries that accompany NJP, including the Court Memorandum, the special performance evaluation, and the Page 7s documenting the unsatisfactory conduct mark, the non-recommendation for advancement, and the termination of one's Good Conduct Award eligibility period.⁸ In addition, the Coast Guard admitted in the advisory opinion that the charge against the applicant was dismissed with a warning. The fact that the CO imposed the stipulations of drug screening and testing while he delayed his decision about whether the applicant had been involved in a drug incident does not alter the conclusion that no NJP was imposed.

4. The disputed Page 7 is also misleading and erroneous because the first sentence states that the applicant was "in violation of Article 112a (UCMJ)" because of the positive urinalysis result. However, the Coast Guard has admitted that the CO never made a "drug incident" determination, and without such a determination, the positive urinalysis result shows only that the applicant ingested cocaine, not that he had violated Article 112a of the UCMJ by intentionally ingesting cocaine. The first sentence of the Page 7 leaves the reader believing that the applicant was awarded NJP because he had violated Article 112a by intentionally ingesting cocaine. This impression is clearly misleading because the CO did not award NJP and dismissed the UCMJ charge. The Board finds that in the absence of NJP or at least an administrative finding of a drug incident by the CO, the statement in the disputed Page 7 that the applicant was in violation of Article 112a of the UCMJ is unsupported and unjust. Under Article 20.C.3.e. of the Personnel Manual, a CO may find that a drug incident has occurred based solely on a positive urinalysis result. However, the CO made no such finding, and so the applicant's positive urinalysis result does not equate to a violation of Article 112a.

5. Articles 20.C.3.e. and 20.C.4. of the Personnel Manual require a CO to determine whether a member has been involved in "drug incident," as defined in Article 20.A.2.k., based on the preponderance of the evidence and to initiate discharge proceedings against any member who has incurred a drug incident. The Coast Guard has admitted that the applicant's CO never made a finding of a drug incident and never initiated the applicant's discharge. The CO's inaction is strong evidence that, despite the positive urinalysis result, he was never persuaded that the applicant had incurred a drug incident by intentionally using illegal drugs. What other evidence the CO may have considered is not in the record before the Board.

6. Article 20.C.3.d. of the Personnel Manual allows a CO to postpone a drug incident determination for up to six months when the matter is in doubt. Doubt is the only permissible basis for postponing a drug incident determination. The Page 7 shows that the applicant's CO postponed his determination for three months. Whether the CO's doubt stemmed from awareness of circumstances in which the applicant might have unwittingly ingested cocaine or from distrust of the unit's urinalysis procedures is unknown. Therefore, the JAG's claim that the applicant "was given a huge 'benefit of the doubt' by his CO" is unsupported and speculative.

⁸ Articles 1.D.17. and 1.G.3.a. of the Military Justice Manual clearly state that because no NJP has been awarded when charges are dismissed with a warning at mast, no Court Memorandum should be entered in the record. Article 10.B.5.b.3. of the Personnel Manual requires that a command document NJP by entering a special performance evaluation in the member's record. Articles 10.B.2.a. and 10.B.8. require a command, following imposition of NJP, to prepare Page 7s documenting the member's unsatisfactory conduct mark, non-recommendation for advancement, and loss of eligibility for a Good Conduct Medal for the foregoing period.

The CO's postponement of the drug incident determination indicates that he was not persuaded by the preponderance of the evidence before him, including the positive urinalysis result, that the applicant had intentionally ingested cocaine but that, because of the *possibility* that the applicant had intentionally ingested cocaine, the CO decided to postpone his determination and require the applicant to undergo frequent testing for three months, pursuant to Article 20.C.3.d. of the Personnel Manual.

7. Under Articles 20.C.3. and 20.C.5. of the Personnel Manual, a CO must ultimately make and report either a finding that a drug incident occurred or a finding that no drug incident occurred. The applicant's CO never completed this task. The JAG argued that despite the CO's failure to make an official finding of no drug incident under Article 20.C.5., the disputed Page 7 is neither erroneous nor unjust and should not be removed from the applicant's record. The JAG did not acknowledge the errors in the Page 7 identified in findings 3 and 4 above and alleged that it was within the CO's discretion to enter this Page 7 in the record to document the positive urinalysis result despite the fact that he never imposed NJP or made a drug incident determination. However, a CO's authority to enter Page 7s in members' records is not unlimited. COMDTINST 1000.14B prohibits commands from using Page 7s to document events not listed in the Personnel and Pay Procedures Manual (HRSICINST M1000.2A) and states that unauthorized Page 7s will be destroyed by the Personnel Command. Chapter 10-A-2 of the Personnel and Pay Procedures Manual states that "[t]he only authorized CG-3307 entries [Page 7s] are those listed in Enclosure (6) to this manual." Enclosure (6) authorizes the entry of "Performance & Discipline" Page 7s to document poor performance or misconduct, but nothing that would mandate the prejudicial documentation of a positive urinalysis result in the absence of actual discipline (NJP) or a finding that the member had wrongfully ingested illegal drugs.

8. The applicant's CO did not follow the procedures set out in the Personnel Manual for handling members' positive urinalysis results. He failed to make an official drug incident determination and either initiate the applicant's discharge, pursuant to Article 20.C.4.1., or notify the Commandant that there was no drug incident, pursuant to Article 20.C.5.1.b. Instead, the CO documented the urinalysis result on a Page 7 in the applicant's record, which allows him to remain on active duty but impedes his career. However, the Coast Guard is required to follow its own regulations.⁹ Article 20.C. of the Personnel Manual does not permit the aborted due process afforded the applicant in 2003. Given the significant, prejudicial errors in the disputed Page 7 and the highly prejudicial nature of its content, the Board finds that the Page 7 should be removed from his record in its entirety because it is both erroneous and unjust. Leaving a Page 7 purporting to document NJP for intentional illegal drug use in violation of the UCMJ in a member's record when his CO never made a finding—even by a preponderance of the evidence standard—that the member had intentionally used illegal drugs would be significantly unjust.¹⁰

⁹ *Fort Stewart Schools v. Federal Labor Relations Auth.*, 495 U.S. 641, 654, 110 S. Ct. 2043, 2051, 109 L. Ed. 2d 659 (1990) ("It is a familiar rule of administrative law that an agency must abide by its own regulation."); see *Drumheller v. Dep't of Army*, 49 F.3d 1566, 1573 (Fed. Cir., 1995) (C.J. Newman, dissenting) ("It is black letter law that an agency must comply with its employee regulations.").

¹⁰ Under 10 U.S.C. § 1552, the Board is authorized not only to correct errors but to remove injustices from any Coast Guard military record. For the purposes of the BCMRs, "[i]njustice", when not also "error", is treatment by the military authorities, that shocks the sense of justice, but is not technically illegal." *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976). The Board has authority to determine whether an injustice exists on a "case-by-case basis." Docket No. 2002-040 (DOT BCMR, Decision of the Deputy General Counsel, Dec. 4, 2002).

9. Accordingly, relief should be granted by ordering the Coast Guard to remove the disputed Page 7 dated May 13, 2003, from the applicant's record.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

“Indeed, ‘when a correction board fails to correct an injustice clearly presented in the record before it, it is acting in violation of its mandate.’” *Roth v. United States*, 378 F.3d 1371, 1381 (Fed. Cir. 2004) (quoting *Yee v. United States*, 206 Ct. Cl. 388, 397 (1975)). And “[w]hen a board does not act to redress clear injustice, its decision is arbitrary and capricious.” *Boyer v. United States*, 81 Fed. Cl. 188, 194 (2008).

ORDER

The application of xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is granted. The Coast Guard shall remove from his military records all copies of the Page 7 (form CG-3307) dated May 13, 2003.

