

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

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Application for the Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2012-230**

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**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 upon receipt of the applicant's completed application on September 14, 2012, and assigned it to staff member ██████████ to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated June 28, 2013, 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 asked the Board to void his discharge, reinstate him on active duty, and award him back pay and allowances. He alleged that his general discharge for drug abuse was erroneous and unjust because he was innocent of the alleged offense.

The applicant explained that on April 25, 2011, he participated in a random urinalysis. On May 19, 2011, he was advised that his urine had tested positive for cocaine use. The applicant was shocked and "anxiously sought means to prove [his] innocence." Therefore, he went to a drug testing facility and paid for two hair follicle tests—one that tests for five different drug types and another that tests for cocaine and cocaine metabolites using gas chromatography and mass spectrometry (GC/MS)—and the results of those tests were negative for drug use. The applicant alleged that the hair follicle tests are more accurate than urinalysis and prove that he did not use cocaine or other drugs.

The applicant also alleged that the random urinalysis was not conducted in accordance with procedure. He alleged that instead of leaving his ID in the slot where his sample bottle had come from, he was advised to keep it with him to help wedge the tamper tape in place after he filled the bottle. Then, after he filled his sample bottle, the observer took the bottle from him to help him put the tamper tape in place, using his ID to wedge it in. However, the applicant alleged, only the member or the urinalysis coordinator is supposed to seal the bottle.

The applicant alleged that when his commanding officer (CO) took him to mast, the CO excluded his hair test results even though under Article 20.C.3.c. of the Personnel Manual, a CO is supposed to consider all available evidence in determining whether a drug incident has occurred. The CO found that he had been involved in a “drug incident”<sup>1</sup> and awarded him non-judicial punishment (NJP) including a reduction in rate from E-3 to E-2 and 45 days of restriction with extra duties. The applicant alleged that he appealed the NJP because his CO had excluded the evidence of his hair follicle tests, but the Vice Admiral denied his appeal, finding that the CO’s “proper exclusion of the Omega Laboratories hair follicle test does not constitute a ‘denial of a substantial right.’” Therefore, he was unjustly discharged on August 1, 2011.

The applicant alleged that after his discharge, pursuant to a FOIA request, he discovered that the Preliminary Inquiry Officer (PIO) who had conducted the inquiry into the applicant’s alleged drug use had found that there was insufficient evidence to prove that the applicant had used cocaine. In addition, in recommending his discharge, his CO had falsely claimed that no one in the applicant’s chain of command had anything positive to say about him, whereas in fact, the applicant’s supervisor had said many positive things about him as had the applicant’s psychiatrist, a Coast Guard captain. The applicant noted that the CO was relieved of command due to “loss of confidence” about three months after the applicant himself was discharged.

In support of his request and allegations, the applicant submitted documents from his military records and his command’s investigation following the urinalysis, which are included in the Summary of the Record below. He also submitted the following:

- A Public Health Service psychiatrist wrote a statement on behalf of the applicant dated March 30, 2012. The psychiatrist wrote that he first saw the applicant in April 2011, when the applicant sought help for work-related stress. He judged the applicant to be honest and forthright. When, a few days later, the applicant learned that his urine tested positive for drug use, the applicant’s denial of drug use was “significantly different in tone and tenor of authenticity and for me had veracity.” The applicant appeared to experience “the shock of disbelief. His preceding and subsequent actions were atypical of individuals involved in drug abuse. ... After recovering from his shock about a positive test he quickly moved into a stance of righteous anger and indignation.” The psychiatrist wrote that the fact that the hair tests results were negative, contrary to the urinalysis results, raises questions about the data. The psychiatrist stated that based on his experience “as a physician trained in mental health and in addition and [his] personal knowledge [of the applicant], I would submit to the Board that I do not believe [the applicant] is an abuser of drugs.”
- A Coast Guard press release dated November 17, 2011, states that the CO of the applicant’s cutter was relieved of command due to “a loss of confidence in his ability to command.”

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<sup>1</sup> Article 20.A.2.k. of the Personnel Manual states that a “drug incident” is determined by a member’s CO and defines a “drug incident” to include the intentional use of drugs. Article 20.A.2.k.3. states, “If the conduct occurs without the member’s knowledge, awareness, or reasonable suspicion or is medically authorized, it does not constitute a drug incident.” Members involved in a drug incident are processed for separation. Personnel Manual, Article 12.B.18.b.4.a.

- A pre-employment hair test report dated September 12, 2011, states that the applicant's hair tested negative for amphetamine, cocaine, marijuana, opiate, and phencyclidine (PCP) use.
- A pre-employment test report dated December 7, 2011, states that the applicant's test results were negative for use of PCP, opiates, methadone, benzodiazepines, cocaine, barbituates, methaqualone, marijuana, amphetamines, and propoxyphene.

### SUMMARY OF THE RECORD

The applicant enlisted as a fireman (pay grade E-3) in the Coast Guard on December 19, 2006. Upon enlisting, he denied ever having tried, used, possessed, sold, or supplied any narcotic except as prescribed by a physician. He was advised of the Coast Guard's drug policy and acknowledged that he would be subject to urinalysis and that if his urine tested positive for drug use, he would be subject to a general discharge.

During the applicant's first tour of duty at a shore unit, he was repeatedly counseled for disobeying orders and being disrespectful. He also incurred his first alcohol incident for drinking alcohol while underage. On May 22, 2009, he was placed on performance probation for six months. However, in the spring of 2010, he earned the storekeeper (SK) rating and was placed on a list of E-3s awaiting advancement to SK3/E-4.

On July 1, 2010, the applicant was transferred to a cutter. On December 1, 2010, after receiving two Page 7s documenting poor performance, he was again placed on performance probation due to chronic lateness, disrespect, not completing assigned tasks, lack of attention to detail, and lack of ownership of assigned duties. A Page 7 in his record lists numerous incidents of poor performance. He was advised that he would be discharged if his performance did not improve within six months.

On January 13, 2011, when the applicant's first 30-day probationary performance review was not favorable, he became aggressive toward a chief petty officer and was sent for psychological counseling. In accordance with the doctor's recommendation, the applicant remained ashore while the cutter went on an XXXXXXXXXXXX patrol. On March 21, 2011, the applicant was diagnosed with an adjustment disorder, and on April 12, 2011, he was diagnosed with depression.

The cutter returned to homeport on April 13, 2011, and on April 25, 2011, the applicant underwent a random urinalysis.

On May 17, 2011, the applicant's probationary period was extended until October 1, 2011, because his performance had not been observed by the command while the cutter was underway in the XXXXXXXXXXXX. However, later the same day, his command received the results of a urinalysis from the Federal Drug and Toxicology Laboratory at Tripler Army Medical Center showing that the applicant's urine tested positive for cocaine at a level of 169 ng/ml, above the cut-off level of 100 ng/ml.

On June 1, 2011, the cutter got underway with the applicant on board. Also on June 1, 2011, a preliminary investigation officer (PIO) submitted a report of his investigation to the CO of the cutter. The PIO noted that although the applicant had disputed the urine specimen collection procedure, all of the specimens had been “collected, packaged and shipped” to the laboratory in accordance with procedure and so there was no possibility of a mix-up of specimen bottles or a break in the chain of custody. However, the PIO wrote that in his opinion, although the applicant had had cocaine in his system, he had not knowingly ingested cocaine. The PIO based this opinion on the applicant’s own denial, the statements of character witnesses who reported that the applicant did not demonstrate any behavior indicative of drug use, and the fact that the applicant had socialized in two different bars during the week before the urinalysis. The PIO stated that it is possible that the applicant accidentally ingested cocaine at the bars.<sup>2</sup> Therefore, the PIO recommended that the applicant be placed on probationary status in urinalysis evaluation program and that the CO delay his determination of whether a “drug incident” had occurred. The PIO included with his report the following statements:

- A counselor with a Master’s in social work wrote a statement on behalf of the applicant dated May 25, 2011. She stated that she was very surprised when the applicant told her his urinalysis results because the applicant, who had been receiving counseling for stress and anxiety, had spoken with disdain about drug use and claimed he would not even take an aspirin. The applicant had tried to convince a sibling not to use drugs, and that sibling was then incarcerated for drug use. The counselor stated that the applicant was strongly committed to upholding high standards and that she did not believe that he used cocaine.
- Another counselor who is licensed and certified in social work stated that during his initial contact with the applicant the applicant had stated that he did not want to be like his family members who were addicted to drugs and that the Coast Guard was all he had. Therefore, when the counselor heard about the urinalysis results, his “first response [was] that must have been an error because we have been making progress with a positive path of healing and continuation of care.” The counselor believes that the applicant “has a strong sense of character and the alleged use of illicit drugs would be a bad choice.”
- An SK2 who had been working in the same office as the applicant since July 2010 stated that he knew the applicant on both a professional and personal level and that he never had any suspicion that the applicant would consume any illegal substance. The applicant “was against any type of drug use and more specifically the drug culture.” The SK2 stated that he thought that drug use was “beyond” the applicant’s character.
- A doctor who had been treating the applicant for abdominal pain and liver function since February 2011 stated that the applicant was very concerned about his health and about remaining healthy. He stated that the applicant was very open about his medical history and “is someone who does not like taking medication unless absolutely necessary.”

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<sup>2</sup> Article 20.C.1.a. of the Personnel Manual 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.”

Based on his interactions with the applicant, the doctor stated that “it is very unlikely that he intentionally ingested any drugs.”

- An Omega Laboratories report dated June 3, 2011, noted that a hair sample received that day from Advanced Drug Testing of San Francisco had tested negative for amphetamines, metabolites of cocaine, opiates, phencyclidine, and metabolites of THC (marijuana) in a five drug panel test in that “none of the drugs listed above were detected at a concentration greater than their listed cutoff levels.” In addition, a GC/MS test on the hair sample for cocaine and three metabolites of cocaine also had negative results. The lab stated that the hair tests covered an “approximately 12 month time frame.”
- The officer who had served as the observer for the urinalysis stated that he had not handled the applicant’s urine bottle but “may have handled the tamper seal.”

At a captain’s mast on June 3, 2011, the applicant’s CO found that the applicant had violated Article 112a of the Uniform Code of Military Justice (UCMJ) by using an illegal drug and awarded him NJP of 45 days of restriction with extra duties and reduction in rate to pay grade E-2. The CO also advised the applicant on a Page 7 that he had determined that the applicant had been involved in a “drug incident” and so he would be processed for separation. The applicant was returned to shore.

On June 10, 2011, the applicant submitted an appeal of his NJP. He alleged that the NJP was unjust because he had never possessed or used an illegal substance. He alleged that his innocence was proved by the hair follicle testing but that he was unjustly not allowed to present this evidence at mast.

On June 13, 2011, the applicant’s CO forwarded the NJP appeal to the Area Commander. He recommended that the appeal be denied. The CO stated that the investigation had shown that urinalysis procedures and testing had been done correctly and so the preponderance of the evidence showed that the applicant had committed the offense by using cocaine. He noted that the PIO had gathered some very positive statements from “people who play a supporting role in [the applicant’s] life” but that the applicant’s record showed persistent performance problems. The CO claimed that at mast no one in the applicant’s chain of command, from an SK1 to the Executive Officer of the cutter, “had a single positive comment to say regarding his character or performance.” The CO did not explain why he chose to exclude the hair follicle test.

On June 20, 2011, the Area Commander denied the applicant’s appeal. He found that the NJP was not unjust because there was no illegality in the proceedings or punishment. Regarding the applicant’s hair follicle testing, he noted that hair testing “is not an approved medium of specimen retesting under section 20.C.2.m.5. of [the Personnel Manual]” and that Omega Laboratories had not been certified by either the Department of Defense or SAMHSA, as required by the Personnel Manual. The Area Commander also noted that cocaine levels are only detectable in the body from one to three days following ingestion and that the applicant’s hair testing was done more than a month after the urinalysis occurred. Therefore, he concluded that the applicant’s hair tests were “not sufficient to negate a positive test obtained in accordance with Coast Guard urinalysis testing procedures.” He also concluded that the CO’s “proper exclusion of the

Omega Laboratories hair follicle test result does not constitute a ‘denial of a substantial right’” and that the NJP was not unjust.

On June 24, 2011, the applicant’s CO informed him that he was initiating the applicant’s discharge based on the urinalysis result showing his involvement in a “drug incident.” The CO advised him that he had a right to object to the discharge, to submit a statement on his own behalf, and to consult a lawyer. The applicant acknowledged this notification on July 1, 2011. He objected to the discharge and submitted a statement claiming that he had never used cocaine in his entire life. He noted that to prove his innocence, he had spent \$450.00 on hair follicle tests, and the results were negative, showing that he had not used any illegal drugs during the prior year. The applicant complained that he had not been notified quickly about the urinalysis results so that he could pursue other testing.

The applicant argued in his statement that the results of the hair follicle testing should be accepted because hair testing is more accurate than urinalysis. He noted that Omega Laboratories is not certified as a testing center by the Substance Abuse and Mental Health Services Administration (SAMHSA) but explained that SAMHSA only certifies urinalysis testing and does not certify hair follicle testing for any federal agency. However, he alleged, Omega Laboratories uses the same procedures to safeguard the chain of custody that SAMHSA uses.

On July 18, 2011, the CO recommended to Commander, Personnel Service Center (PSC) that the applicant be discharged for drug abuse. The CO noted that the applicant’s urine had tested positive for cocaine use, that he was found to have violated Article 112a of the UCMJ at mast, and that his appeal of the mast had been denied by the Commander of the Pacific Area. The CO forwarded the applicant’s statement, military records, urinalysis results, and chain of custody documentation to the PSC.

On July 28, 2011, the PSC issued orders for the applicant to receive a general discharge for misconduct due to his involvement with drugs.

### **VIEWS OF THE COAST GUARD**

On March 14, 2013, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the applicant’s requests.

The JAG stated that the applicant was properly processed for discharge after his urine tested positive for cocaine use and his CO found that he had been involved in a drug incident. The JAG stated that the applicant’s hair follicle test results were not obtained in accordance with Coast Guard policy and so have no probative value. The JAG argued that the character references in the record are insufficient to overcome the presumption of regularity accorded the urinalysis results showing that the applicant had used cocaine. The JAG noted that the case involves a significant issue of Coast Guard policy pursuant to 33 C.F.R. § 52.64.

The JAG also adopted the findings and analysis of the case provided in a memorandum prepared by the PSC. The PSC stated that the CO’s decision to disregard the hair follicle testing was proper since the facility was not certified by the Department of Defense and was performed

more than a month after the urinalysis. The PSC stated that the regulations specifically require retesting to be performed at a DOD or SAMSHA certified laboratory.

### **APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD**

On March 18, 2013, the Chair sent a copy of the views of the Coast Guard to the applicant and invited him to respond within 30 days. No response was received.

### **APPLICABLE REGULATIONS**

#### ***Urinalysis Regulations***

Article 20.C.2.a.1. of the Coast Guard Personnel Manual, COMDTINST M1000.6A (Change 42), authorizes random urinalyses of unit members. Article 20.C.2.c. provides the following procedure for a urinalysis:

1. Have the member report to the coordinator with his/her ID card on hand. If the member does not have his/her military ID card, a current driver's license or other picture ID may be used.
2. The coordinator initiates the Unit Urinalysis Ledger and will record the member's name, rank, test basis, social security number and enters the document/batch and specimen number.
3. Advise the member to note all prescription and over-the-counter drugs they are currently taking.  
...
4. The coordinator will initiate the bottle label. Record the date and the member's social security number on the bottle label.
5. The member will verify to the coordinator that the information on the ledger and bottle label is correct.
6. The member will sign the ledger and initial the bottle label documenting his/her name, social security number, batch/document number, rank, and date are correct on the ledger and his/her social security number and date are correct on the label. This will be accomplished prior to the label being affixed to the specimen bottle.
7. The coordinator will remove an empty bottle from the box in front of the member. The coordinator will remove the cap, verify with member and observer that the bottle is clean and that there is no foreign matter in the bottle, and recap the bottle in full view of the member and observer.
8. The coordinator will place the member's ID card in the same slot from which the bottle was removed in step 7.
9. The coordinator then will attach the label to the specimen bottle in full view of the member and observer.
10. The coordinator will give the specimen bottle to the member in the presence of the observer.
11. The observer ensures that he/she has full view of the specimen bottle at all times. The member will maintain custody of the specimen bottle from the time the coordinator gives him/her the bottle until it is filled and capped. If the custody is broken, the member/observer will inform the coordi-

nator and the process will be terminated. The coordinator will void the specimen and destroy the specimen bottle. The member will begin the process again.

12. The observer shall escort the member from the coordinator's table to the head or collection point. Male observers should ensure that male members use only the urinal, and female observers should ensure that the stall door is kept open for female members. The observer must stand in a position to clearly view the urine actually entering the sample bottle. If wide-mouth containers are used for females, the observer shall view the individual pouring the sample from the widemouth container into the urine specimen bottle. The individual must provide at least 30 milliliters (just over quarter of a bottle) of urine and then cap the bottle.

- a. If a member claims to be unable to submit a specimen, ...
- b. If a member refuses to provide a specimen, ...

13. The observer shall then accompany the member back to the coordinator's table. Members delivering specimens to coordinators will not be expected to stand in line with urine specimens in public view (in view of personnel other than the observer and coordinator). Members' personal privacy will be maintained to the maximum extent practical.

14. The observer shall not handle the urine specimen bottle unless he or she is also the unit coordinator. This procedure is not recommended unless the unit coordinator maintains positive custody of all specimens while observing (e.g., small unit). The observer will sign the urinalysis ledger, certifying that the urine specimen bottle contains urine provided by the member and was not contaminated or altered in any way.

15. The coordinator shall receive the urine specimen bottle from the member and ensure that it contains a minimum volume of 30 milliliters and is not reopened. The urine specimen bottle holds a maximum of 100 milliliters. Submitting less than the minimum quantity may result in the inability to confirm the preliminary test or preclude retesting.

16. The coordinator will initial the urine specimen bottle label in the member's presence and transcribe the information to DD Form 2624, Urine Specimen Custody Document (USCD). Exhibit 20.C.3 is an example of a completed USCD. Coordinators may prepare USCD forms and bottle labels in advance; if so, they must verify that the information on the label and the USCD match. Using word processing equipment with the merge feature is encouraged to reduce the possibility of incorrect transcription of numbers. On collecting all specimens, the coordinator shall sign and date block 12(b) of the USCD(s).

17. Tamper-resistant tape is required on all specimens collected. Any substitute tape must be the same width and length as the stock tape. Apply the tape by fixing one end of it near the label; pull the tape directly across the widest part of the cap and down the opposite side of the urine specimen bottle. Either the coordinator or the member in the presence of the coordinator may seal the bottle.

Article 20.C.2.m. states that Tripler Army Laboratory performs drug testing for the Coast Guard by first screening the sample to detect various drugs and, if the screening test is positive, conducting a confirmatory test by GC/MS technology. The laboratory will only report a positive test report to the command if the test result is above an established cutoff level. According to Exhibit 20.C.6., the cutoff for the screening test for cocaine is 150 ng/ml, and the cutoff for the GC/MS test is 100.

Article 20.C.2.m.5. allows members to pay for re-testing of the original urine sample, if enough of it remains, by a different laboratory as long as the selected laboratory is certified by DoD or SAMSHA and the member pays \$15 for the retest. However, the article notes that "drug metabolites in urine degrade over time and certain shipping conditions accelerate this degrada-



tion. Lower levels of drug metabolites should be expected when these specimens are retested. Therefore, a negative result from another lab does not necessarily mean that a finding of no drug incident will be made. Results of retest must include a quantitation level report.”

### ***Investigation and Drug Incident Determination***

Article 20.C.3.a. states that a CO “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. states that a “drug incident” is determined by a member’s CO and defines a “drug incident” to include the intentional use of drugs. Article 20.A.2.k.3. states, “If the conduct occurs without the member’s knowledge, awareness, or reasonable suspicion or is medically authorized, it does not constitute a drug incident.” However, “[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.”

Article 20.C.3.e. states that “findings of a drug incident shall be determined by the commanding officer ... using the preponderance of evidence standard. That is, when all evidence is fairly considered, including its reliability and credibility, it is more likely than not the member intentionally ingested drugs. 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.3.d. provides the following additional guidance about how a CO should decide whether a drug incident has occurred:

In determining whether a drug incident occurred, a commanding officer should consider all the available evidence, including positive confirmed urinalysis test results, any documentation of prescriptions, medical and dental records, service record (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 the CO finds that a “drug incident” occurred, he or she will take the following 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.

### 3. Eligibility for Medical Treatment. ...

Article 12.B.18.b.4.a. of the Personnel Manual states that “[a]ny member involved in a drug incident or the illegal, wrongful, or improper sale, transfer, manufacture, or introduction onto a military installation of any drug, as defined in Article 20.A.2.k., will be processed for separation from the Coast Guard with no higher than a general discharge.”

Article 12.B.18.e. states that a member with less than eight years of service shall be informed in writing of the reason for the proposed discharge, afforded the opportunity to submit a written statement, and, if a general discharge is contemplated, afforded an opportunity to consult a lawyer.

### *Military Justice Manual*

Article 1.D.1.f. of the Military Justice Manual, COMDTINST M5810.1E, states that at mast, “[t]he burden of proof required in order to award punishment at NJP is a preponderance of evidence. This standard means that before NJP may be awarded, the commanding officer must determine it is ‘more likely than not’ that the member committed an offense(s) defined by the UCMJ.”

Article 1.D.1.g. states that, aside from the right against self-incrimination and privileges arising from communications to spouses, attorneys, etc., the “rules of evidence applicable to courts-martial do not apply at mast. The commanding officer may consider hearsay, or statements made outside the mast proceeding, such as police reports and oral or written statements made to an investigator, whether or not the person who made the statement appears in person at the mast. When deciding whether a hearsay statement is credible and the weight it should be given, the commanding officer should carefully evaluate the circumstances under which the statement was made. Judicial exclusionary rules involving rights warnings and search and seizure do not apply at mast, and the commanding officer may consider evidence that would be inadmissible at court-martial. The commanding officer should apply a rule of fundamental fairness: under all of the circumstances, is it fair to the member to consider this evidence? The commanding officer should consult his or her servicing legal office with any questions about whether or not to consider specific evidence.”

## **FINDINGS AND CONCLUSIONS**

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely filed within three years of the applicant’s discharge.<sup>3</sup>

2. The applicant alleged that his general discharge for drug abuse was erroneous and unjust. When considering allegations of error and injustice, the Board begins its analysis in every case by “presuming administrative regularity on the part of Coast Guard and other Gov-

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<sup>3</sup> 10 U.S.C. § 1552(b).

ernment officials.”<sup>4</sup> The applicant bears the burden of proving the existence of an error or injustice by a preponderance of the evidence.<sup>5</sup> 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.”<sup>6</sup>

3. The applicant alleged that his discharge was erroneous because the urinalysis coordinator and observer failed to follow the procedures in Article 20.C.2.c. of the Personnel Manual. However, the applicant submitted no evidence that would support a finding that his urine specimen was tampered with or that the chain of custody was broken, and the record shows that the PIO investigated the applicant’s claim and found that the urinalysis procedures were followed correctly. Therefore, the Board finds that the applicant has failed to prove by a preponderance of the evidence that there was any irregularity in the urinalysis procedures.

4. The applicant alleged that negative hair test results dated June 3, 2011, prove that the positive April 25, 2011, urinalysis results were false. The hair test report from Omega Laboratories, an uncertified drug testing company,<sup>7</sup> shows that it tested a sample of body hair received from Advanced Drug Testing of San Francisco, another uncertified company,<sup>8</sup> which the latter identified as belonging to the applicant. The sample tested negative (lower than the cutoff level of 500 pg/mg). However, the Coast Guard and the federal government as a whole rely on urine testing and have not established guidelines or cutoffs for hair testing,<sup>9</sup> and nothing in the record shows that the cocaine use detected by urinalysis on April 25, 2011, would necessarily result in a positive hair test result according to Omega Laboratories’ cutoff on May 31, 2011.<sup>10</sup> Therefore and because there is no proven chain of custody for the hair sample, the Board finds that the hair test results do not cast significant doubt on the urinalysis results.

5. The applicant alleged that he was denied due process because at mast on June 3, 2011, his CO refused to consider his hair test results even though Article 20.C.3.d of the Personnel Manual states that a CO will consider all available evidence in determining whether a drug

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<sup>4</sup> 33 C.F.R. § 52.24(b).

<sup>5</sup> *Id.*

<sup>6</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

<sup>7</sup> Current List of Laboratories and Instrumented Initial Testing Facilities Which Meet Minimum Standards To Engage in Urine Drug Testing for Federal Agencies, 76 Fed. Reg. 24,501 (Dep’t of Health and Human Services notice, May 2, 2011).

<sup>8</sup> *Id.*

<sup>9</sup> Personnel Manual, Article 20.C.2.; Substance Abuse & Mental Health Services Administration, Drug Testing White Paper (April 2, 2011), available at [http://www.ncsacw.samhsa.gov/files/Drug\\_Testing\\_White\\_Paper\\_508.pdf](http://www.ncsacw.samhsa.gov/files/Drug_Testing_White_Paper_508.pdf), which states that “[c]urrently, urine is the only biological specimen for which federal guidelines are available” and that the “[a]dvantages of hair analysis include a long detection window up to several months, samples do not deteriorate, it is a non-invasive method and it can be used to measure chronic drug use. Several disadvantages include high cost and the inability to detect recent use (within the last 1-7 days) or single use. This method is not effective for monitoring regular compliance because it cannot differentiate between recent drug use and prior drug use and cannot detect alcohol. Differences in hair structure, porosity, use of hair color products and external contamination can affect the accuracy of results.”

<sup>10</sup> Substance Abuse & Mental Health Services Administration, Drug Testing White Paper (April 2, 2011), available at [http://www.ncsacw.samhsa.gov/files/Drug\\_Testing\\_White\\_Paper\\_508.pdf](http://www.ncsacw.samhsa.gov/files/Drug_Testing_White_Paper_508.pdf), (noting that a disadvantage of hair testing is “the inability to detect recent use (within the last 1-7 days) or *single use*” (emphasis added)).

incident occurred. However, the determination of a “drug incident” is an administrative action separate and distinct from the imposition of NJP at mast.<sup>11</sup> Although the burden of proof for both is a preponderance of the evidence,<sup>12</sup> different rules apply.

6. A CO can make an administrative finding of a “drug incident” only after “all evidence is fairly considered, including its reliability and credibility”<sup>13</sup> and “should consider all the available evidence, including positive confirmed urinalysis test results, ... whether the urinalysis was conducted in accordance with this article and whether the collection and chain of custody procedures were properly followed.”<sup>14</sup> Therefore, the Board agrees with the applicant that his CO was required to consider all of his evidence before determining that he had been involved in a “drug incident.” However, aside from the applicant’s allegation and the fact that, according to the Area Commander’s denial of the NJP appeal, the CO excluded the Omega Laboratories hair test report as evidence at mast, there is no evidence that the CO did not consider the hair test before making the administrative determination of whether the applicant had incurred a drug incident. The CO presumably reviewed or learned about the hair test report before deciding to exclude it at mast. The fact that the CO excluded the hair test as evidence at the mast does not overcome the presumption of regularity<sup>15</sup> accorded the CO’s administrative determination of a drug incident and does not prove that he failed to consider the hair test results before determining that the applicant had incurred a drug incident. Although the applicant may believe that the CO would have decided that he had not incurred a drug incident if the CO had considered his hair test results, the Board disagrees. The CO had to consider the lack of reliability and credibility of the evidence,<sup>16</sup> and as explained in finding 4, Omega Laboratories’ hair test results do not cast significant doubt on the urinalysis results.

7. A CO is permitted but not required to exclude evidence at mast.<sup>17</sup> A CO may consider evidence that would be inadmissible at court-martial and may accord the evidence whatever probative weight he believes it is due.<sup>18</sup> In deciding whether to consider or exclude hearsay evidence, such as the Omega Laboratories hair test report, a CO should carefully evaluate the circumstances under which the evidence was made and “apply a rule of fundamental fairness: under all of the circumstances, is it fair to the member to consider this evidence?”<sup>19</sup>

8. The Area Commander’s memorandum dated June 20, 2011, shows that the applicant’s CO excluded the Omega Laboratories report of the hair test at mast on June 3, 2011, because it was considered unreliable and unprobative of whether the urinalysis results were accu-

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<sup>11</sup> Personnel Manual, Articles 20.A.2 k. and 20.C.4.

<sup>12</sup> Military Justice Manual, Article 1.D.1 f.; Personnel Manual, 20.C.3.e.

<sup>13</sup> Personnel Manual, Article 20.C.3.e.

<sup>14</sup> Personnel Manual, Article 20.C.3.d.

<sup>15</sup> 33 C.F.R. § 52.24(b).

<sup>16</sup> Personnel Manual, Article 20.C.3.e.

<sup>17</sup> Military Justice Manual, Article 1.D.1.g.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

rate.<sup>20</sup> Instead of excluding the hair test results, the CO could have admitted them into evidence and simply accorded them little to no weight in his decisionmaking based on their lack of reliability and probative weight. Excluding the applicant's evidence was thus unnecessary and left him feeling unheard and ignored. However, given the scant probative weight of the hair test results, their exclusion did not render the mast fundamentally unfair to the applicant and cannot be considered an abuse of the CO's discretion in deciding what evidence to consider. Therefore, there are no grounds for removing the NJP from the applicant's record.

9. Whether or not the applicant was awarded NJP, however, he was subject to an administrative general discharge because his CO determined that he had incurred a drug incident.<sup>21</sup> Although, as the applicant pointed out, the PIO found that the applicant's ingestion of cocaine might have been accidental, based primarily on the statements of the applicant's doctors and counselors, and recommended that the CO delay his determination of a drug incident, the PIO's report was a recommendation only and was not binding on the CO.<sup>22</sup> The CO had the authority to determine whether a drug incident had occurred based upon a preponderance of the evidence, including the PIO's report.<sup>23</sup> The applicant's positive urinalysis result was sufficient to meet this burden of proof regardless of the opinions of the PIO and the applicant's doctors and counselors.<sup>24</sup> The Board finds that the applicant has not proved by a preponderance of the evidence that his CO committed an error or injustice or abused his discretion in determining that the applicant had incurred a drug incident and so should be processed for separation.<sup>25</sup>

10. The record shows that the applicant received due process pursuant to Article 12.B.18.e. of the Personnel Manual after his CO determined that he had incurred a drug incident. The applicant was notified of the reason for the discharge, allowed to submit a statement on his own behalf to object to the discharge, and afforded an opportunity to consult an attorney.

11. The applicant made numerous allegations with respect to the actions and attitudes of other members of his unit. Those allegations not specifically addressed above are considered to be without merit and/or not dispositive of the case.<sup>26</sup>

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<sup>20</sup> The Board notes that the Area Commander's memorandum confusingly argues that the hair test was not probative because cocaine levels are only detectable "in the body" for at most three days. However, the three-day limit applies only to detection through urinalysis; substantial cocaine use may be detectable in hair for several months. U.S. Department of Justice, National Institute of Justice, "Testing Hair for Illicit Drug Use" (January 1993), available at [www.druglibrary.org/schaffer/GovPubs/hairt.txt](http://www.druglibrary.org/schaffer/GovPubs/hairt.txt); Substance Abuse & Mental Health Services Administration [www.oas.samhsa.gov/SROS/sros8027.htm](http://www.oas.samhsa.gov/SROS/sros8027.htm). Instead, the applicant's Omega Laboratories hair test was not probative because there are no federal guidelines or cutoffs for hair tests and because a single use of cocaine detectable by urinalysis is not necessarily detectable through hair testing. Substance Abuse & Mental Health Services Administration, Drug Testing White Paper (April 2, 2011), available at [http://www.ncsacw.samhsa.gov/files/Drug\\_Testing\\_White\\_Paper\\_508.pdf](http://www.ncsacw.samhsa.gov/files/Drug_Testing_White_Paper_508.pdf).

<sup>21</sup> Personnel Manual, Articles 20.C.4. and 12.B.18.b.4.a.

<sup>22</sup> Military Justice Manual, Article 1.B.4.a.(6).

<sup>23</sup> Personnel Manual, Article 20.C.3.e.

<sup>24</sup> *Id.*

<sup>25</sup> Personnel Manual, Article 20.C.4.

<sup>26</sup> See *Frizelle v. Slater*, 111 F.3d 172, 177 (D.C. Cir. 1997) (noting that the Board need not address arguments that "appear frivolous on their face and could [not] affect the Board's ultimate disposition").

12. The applicant has not proved by a preponderance of the evidence that his general discharge for drug abuse was erroneous or unjust. The Board finds insufficient grounds for granting the requested relief by voiding his discharge and reinstating him on active duty. Accordingly, the applicant's request for relief should be denied.

**[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]**

**ORDER**

The application of former [REDACTED] USCG, for correction of his military record is denied.

