DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

[redacted]

BCMR Docket No. 2014-167

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 complete application on June 27, 2014, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated April 9, 2015, is approved and 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, a former [redacted] asked the Board to correct his record to show that he was retired from the Coast Guard on September 15, 2013,[1] with twenty years of service with an honorable characterization of service, instead of receiving a general discharge, under honorable conditions, on May 30, 2013. The applicant alleged that his general discharge for "Unacceptable Conduct," in lieu of an honorable retirement, is erroneous and unjust.

The applicant explained that on March 20, 2012, he was selected to participate in a random urinalysis at his unit. The laboratory detected THC (a metabolite of marijuana) in his urine, and the command began an investigation. A retest of his urine sample produced the same result. During an interview with the investigator on March 30, 2012, the applicant "denied ingesting, knowingly or unknowingly, THC." He told the investigator that he had nineteen years of faithful service with a spotless record toward a twenty-year retirement and would never have jeopardized his career and retirement or that of his wife, who was also on active duty. During a second interview on April 9, 2012, when asked how he could have unknowingly ingested marijuana, the applicant noted that he and his wife had gone to New Hampshire on a skiing trip on February 24, 2012, had met some other vacationers, and had had dinner and drinks with them. The applicant

[1] The Coast Guard noted that the applicant would have attained twenty years of service on October 15, 2013, not September 15, 2013.

stated that he could have unknowingly ingested something containing marijuana during this skiing trip.

The applicant stated that his commanding officer (CO) removed him from his position on April 27, 2012, because of the positive urinalysis. The CO found that the applicant had been involved in a "drug incident"[2] because he concluded that there was no "reasonable corroborating evidence to support a finding of innocent ingestion" and that the applicant's assertions were "insufficient to overcome the evidence that is more likely than not that he knowingly ingested marijuana." Therefore, the CO initiated his separation processing.

The applicant stated that on August 15, 2012, he submitted a request to retire on November 1, 2013, which was the date he would have attained 20 years of active duty and been eligible to retire. On August 30, 2012, he submitted a statement to the ASB maintaining his innocence. The ASB convened on February 5, 2013, and recommended that his appointment as a warrant officer be terminated, which would result in his discharge. On April 17, 2013, he was notified that he would be separated with a general discharge no later than May 31, 2013. When he was discharged on that date, he had accumulated 19 years, 7 months, and 16 days of active duty and was just 4 months and 14 days shy of retirement eligibility.

The applicant stated that he had accumulated a stellar record of service before his career was derailed by the urinalysis. He pointed out that he had received high marks on his officer evaluation reports (OERs) after being appointed a warrant officer on June 1, 2010; that he had accumulated many laudatory Page 7s as an enlisted member; that he had completed numerous trainings and qualifications to further his career; and that he had received the following Coast Guard medals and awards during his career: Commendation Medal; Achievement Medal with a Gold Star (denoting a second award of the medal); Commandant's Letter of Commendation Ribbon with a Gold Star; four Good Conduct Awards; "E" Ribbon with a Gold Star; Presidential Unit Citation; Unit Commendation Ribbon; Meritorious Team Commendation Ribbons with two Gold Stars; Rifle Marksmanship Ribbon; Pistol Sharpshooter Ribbon; Sea Service Ribbon; Global War on Terrorism Service Medal; and a National Defense Service Medal.

The applicant stated that even after the urinalysis, he continued to work very hard and received another excellent OER covering his service. In addition, he had been taking college classes and received an Associate's Degree in Applied Science on June 13, 2013, less than two weeks after his general discharge. Finally, the applicant noted that he volunteers as a Big Brother for a 14-year-old boy. He submitted a letter from an employee of Big Brothers/Big Sisters stating that the applicant had been a volunteer since March 5, 2007, and that his "commitment and time has been immeasurable."

The applicant asked the Board to consider that throughout his career, "he selflessly and honorably served, but for one unfortunate incident in 201[2]. To this day, [he] fervently denies ever intentionally or knowingly ingesting THC" and "has maintained his innocence throughout

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[2] COMDTINST M1000.10, Article 1.A.2.k. defines a "drug incident" as including the intentional use, wrongful possession, or trafficking of illegal drugs "as determined by the commanding officer." It notes 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."

this entire process." Moreover, "he is not the type of man or Sailor who would jeopardize his entire career so thoughtlessly." Therefore, the Board asked him to correct his record to show that instead of receiving a general discharge on May 30, 2013, he was honorably retired on September 15, 2013, the first day he was eligible to retire, and to award him back pay and allowances.

SUMMARY OF THE RECORD

The applicant first completed an enlistment in the Navy before enlisting in the Coast Guard in 1997. Upon enlisting, he was advised in writing that if his urine tested positive for illegal drugs, he would be subject to an immediate general discharge.

When the applicant was [redacted] he had served for almost seventeen years on active duty as an enlisted member and had received several laudatory Page 7s, high marks on his performance evaluations, and the medals and awards listed by him in his application. His first assignment as a [redacted] was to serve as a contracting officer's technical representative (COTR) and facilities manager at a large shore unit. On his first annual OER for this service, dated June 30, 2011, the applicant received primarily marks of 6[3] in the eighteen performance categories; a mark in the sixth spot on the comparison scale, denoting an "exceptional officer"; and a strong recommendation for promotion with "best of peers."

The applicant participated in a random urinalysis[4] on March 20, 2012. On March 28, 2012, an Army laboratory reported that his urine tested positive for THC, a metabolite of marijuana.[5] On March 29, 2012, his CO appointed a commander to conduct an administrative investigation[6] of the circumstances surrounding the positive urinalysis result, including the propriety of the collection procedures and whether the possibility of adulteration existed.

On March 30, 2012, the investigator informed the applicant of his Miranda/Tempia rights in writing and of the fact that he was suspected of intentionally using a controlled substance in violation of the Uniform Code of Military Justice (UCMJ). The applicant waived his right to consult a lawyer and agreed to answer questions. The investigator's summary of the interview states that he advised the applicant that his urine had tested positive for THC "at twice the detection threshold in terms of ng/ml, and asked him if he had any explanation for how that could have happened." The applicant stated that he had no idea and had not ingested THC. In addition, the applicant stated that he had personally capped and sealed his urinalysis sample and that there were no irregularities during the urinalysis except that the observer had stood behind him, instead of to the side, so he did not think that the observer had actually watched his urine enter the sample bottle.

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[3] On an OER form (CG-5310A), Coast Guard officers are rated in eighteen different performance categories, such as "Adaptability," "Professional Competence," "Teamwork," and "Judgment" on a scale of 1 (worst) to 7 (best).

[4] COMDTINST M1000.10, Art. 4.A.1., states that "units shall conduct random urinalysis tests throughout the fiscal year on a consistent basis."

[5] COMDTINST M1000.10, Art. 4.B.9., states that urine samples that test positive during "screening" will undergo "confirmatory tests" using gas chromatography-mass spectrometry (GC/MS). Exhibit 4.B.4. provides that the cut-off level for THC is 15 ng/ml.

[6] COMDTINST M1000.10, Art. 3.A.2., requires COs to initiate an investigation into a possible drug incident following receipt of a positive confirmed urinalysis result or other evidence of drug abuse.

Also on March 30, 2012, the investigator interviewed the chief yeoman who had conducted the urinalysis on March 20. She explained the urinalysis procedures she had followed and, when asked about the applicant, stated that the applicant had arrived on time for the urinalysis at 9:00 a.m., but said he had to "use the head" and was allowed to leave to make use of a different bathroom for that purpose. When he returned, he "stated that he did not have to urinate, and that he didn't feel well – stomach problems/diarrhea. He requested and was granted permission to go back to work until he was ready to provide a sample."[7] He returned before the end of the collection period and "provided a urine sample without incident."

On April 2, 2012, at the applicant's request, the command asked the Army laboratory to retest his sample. The CO noted that the applicant "has nearly 19 years of service, and I want to afford every benefit of the doubt prior to making a drug incident determination."

Also on April 2, 2012, the applicant voluntarily submitted the following statement for the investigation:

> I knowingly or not knowingly have not ingested thc. I have 19 yrs of faithful service with a spotless record, and would not in any way jeopardize my career, my retirement, or even worse a discharge that would most likely bring some prejudice in the outside community. I have been married for the past 6 years to an active duty Coast Guard member and would in no way jeopardize her career either. I have spent the last 19 years faithfully and diligently carrying out my daily duties performing above and beyond, always drug free. I've lived and breathed the Coast Guard and have given everything I possibly could to the Coast Guard and the outlying communities, I have always done right to myself and those around me. I will continue to do right to those around me, I will continue to be an outstanding [redacted] and I will continue to carry out my duties as seen fit by the command until this matter is resolved. I am fully confident that those around me will do the right thing by me as well.

On April 4, 2012, the investigator interviewed a petty officer who had served as the observer for the applicant's sample. The observer reported no irregularities, agreed that he usually stood directly behind whomever he was observing, and agreed that the applicant had not initially provided a sample but had returned before they stopped the collection "sometime after 11:00."

On April 9, 2012, the investigator re-interviewed the applicant to inform him that the retest[8] of his urine had also been positive for THC and to ask whether he had any more information to present. The investigator first reminded the applicant of his Miranda/Tempia rights. The applicant stated that because there were no irregularities in the testing, he must have unknowingly ingested THC. According to the investigator, the applicant stated that

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[7] COMDTINST M1000.10, Art. 4.A.6.l(1), states that if a member claims to be unable to submit a specimen, the urinalysis coordinator may require them to remain in the area under observation and drink fluids until they are able to do so, but in any case, "[a] member will not be released from duty until a specimen has been properly provided or as directed by command authority." Paragraph (2) states that a member may be tried by court-martial for failing to obey a direct order if the member refuses to provide a specimen.

[8] COMDTINST M1000.10, Art. 3.B.1.d., allows the command to ask the laboratory to retest the original sample for additional confirmation. Article 4.B.9.e. provides that the member may also request such a retest.

> he was hesitant to describe his only likely opportunity for unknowing ingestion for fear of appearing to be 'reaching'. … [He] described that he had gone on vacation to New Hampshire with his wife for a week starting on 24 February 2012. He stated that while there they met some people (professional types – doctors, lawyers) skiing on the mountain and had dinner with them – that there was a lot of food and that he had also been drinking beer. [He] stated that this was the only time he could think of that it was possible for him to have unknowingly ingested THC since he did not usually socialize much [at home], typically barbecuing or going out with a few select individuals.

According to the investigator, the applicant then asked why the command was not asking him to consent to urinalysis as policy allowed in case of doubt. The investigator replied that that provision was usually exercised when the original evidence for illegal drug use was *not* a positive urinalysis.

On April 10, 2012, the investigator sent an email to a doctor at the Army laboratory. He noted that the applicant had tested positive with a THC level of 35 ng/ml on March 20, 2012, and had "cited a window of opportunity for 'unknowing' ORAL ingestion during the week of 24 February – 04 March 2012 (basically two weeks prior to the urinalysis date)." The investigator asked if the applicant's claim was plausible. He stated that his own research suggested that the 35 ng/ml result would only result from a more recent one-time ingestion or habitual heavy ingestion, but the applicant had "18.5 years of service so we want to be 100% confident in our recommendation." The doctor replied the same day, agreeing with the investigator's assessment. She stated that "THC is detectable in the urine for 2 to 4 days on the average by smoking. By ingestion it may be a little longer. There is a marijuana brownie paper that shows an example of nanograms and detection time." The doctor sent him this paper by email on April 13, 2012. She stated, "The most important parts are the graphs of the individuals' GCMS results over time and the large table at the end. You have to look under GCMS, but also keeping in mind their cutoff is at 5 ng/ml and ours is 15 ng/ml so the duration of positive is probably about a day longer for their study."

The paper the doctor sent to the investigator is "Marijuana-Laced Brownies: Behavioral Effects, Physiologic Effects, and Urinalysis in Humans Following Ingestion, by Edward J. Cone and Rolley E. Johnson of the National Institute on Drug Abuse, Addiction Research Center, and Buddha d. Paul, Leroy D. Mell, and John Mitchell of the Navy Drug Screening Laboratory, published in the July/August 1988 edition of the Journal of Analytical Toxicology. The final table in the paper shows that after the five male test subjects ate marijuana-laced brownies with a dose equivalent to that of one marijuana cigarette, the mean number of hours until their last positive urinalysis, with a cutoff of just 5 ng/ml, was 149 hours (6.2 days) with a standard error of plus or minus 36.2 hours (1.5 days), and the longest was 223.5 hours (9.3 days). When the test subjects ate marijuana-laced brownies with a dose equivalent to that of two marijuana cigarettes, the mean number of hours until their last positive urinalysis, with a cutoff of 5 ng/ml, was 156.3 hours (6.5 days) with a standard error of plus or minus 49 hours (2 days), and the longest was 346.8 hours (14.5 days).

On April 27, 2012, the CO took final action on the report of the investigation and found that the applicant had been involved in a drug incident.[9] He stated in his memorandum that the applicant's urine had tested positive for THC at a level of 34 ng/ml; that the retest on April 3, 2012, had resulted in a positive result of 36 ng/ml; that the applicant had hypothesized that he might have unknowingly ingested marijuana on or about February 24, 2012, but could not recall feeling any of the effects of marijuana; and that the applicant had denied using marijuana. The CO stated that the urinalysis had been conducted properly and there was no evidence of tampering. He stated that the result levels of 34 and 36 ng/ml significantly exceeded the cutoff of 15 ng/ml and indicate that the applicant "ingested marijuana within several days prior to providing his sample" and "would have noticed the effects of this ingestion." The CO stated that although the applicant's "service record lends some credibility to his assertions that he did not knowingly ingest marijuana, this consideration by itself, without any reasonable corroborating evidence to support a finding of innocent ingestion, is insufficient to overcome the evidence that it is more likely than not that he knowingly ingested marijuana." The CO noted that because of the drug incident, the applicant would be removed from his primary duties and processed for separation.[10] The CO also sent the applicant a memorandum informing him of the finding and of his removal from duties.

Because the applicant was removed from his primary duties, he received a Special OER dated April 27, 2012, as required by Article 5.A.3.2.e. of COMDTINST M1000.3. On this Special OER, he received primarily high marks of 6 in most of the performance categories but low marks of 3 for "Judgment," "Responsibility," "Professional Presence," and "Health and Well-Being," which were supported by comments about the drug incident; a mark in the second spot on the comparison scale, denoting a "qualified officer"; and a recommendation against promotion.

On May 2, 2012, the applicant submitted a request to retire on November 1, 2013, by which date he would have served twenty years on active duty.

On June 6, 2012, the applicant submitted an OER Reply, expressing deep regret that his actions had negatively impacted his colleagues and that he had disappointed those who trusted him. He acknowledged the test results but denied knowing how THC got in his system. He stated that he must not have "use[d] common sense in paying attention to my surroundings[.] I did accidentally ingest THC on one occasion." The applicant's rating chain forwarded his reply for inclusion in his record with the OER. In his endorsement forwarding the reply, his reporting officer stated that the applicant's claim of "accidental and unknowing ingestion is not plausible in light of the established detection window material provided to the Command by the Tripler Army Medical Center Forensic Toxicology Drug Testing Laboratory during the Administrative Investigation."

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[9] COMDTINST M1000.10, Art. 3.B.2., states that a CO will use the "preponderance of the evidence standard" when determining whether a drug incident has occurred and that 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."

[10] COMDTINST M1000.10, Art. 3.B.3.a., states that after finding that a drug incident has occurred, the command "will process the member for separation by reason of misconduct under Articles 1.A.10., 1.A.14., 1.A.20., or 1.B.17. of [the Military Separations Manual, COMDTINST M1000.4] as appropriate."

On August 15, 2012, PSC disapproved the applicant retirement request and advised him that PSC was convening a special board of officers pursuant to Article 1.A.19. of the Military Separations Manual[11] to recommend to the Commandant whether his appointment as a chief warrant officer should be terminated. He was advised that he could submit a statement for the board to consider. PSC also noted that the applicant had the option of submitting a request to resign his commission in lieu of further administrative action.

On August 24, 2012, the applicant acknowledged PSC's notification and indicated that he would submit a statement for the board to review. In his statement, dated August 30, 2012, the applicant asked the special board "to consider exercising any latitude that it may have in considering any further administrative actions that would terminate my [redacted] my retirement, or any other severance that I have worked for over the past 19 years. The applicant stated that his unknowing ingestion incurred approximately two weeks before the urinalysis and that charts showed that the drug could be detected more than 15 days after ingestion. He noted that he had previously passed numerous urinalyses throughout his career. The applicant stated that the only reason he did not immediately provide a sample on the morning of the urinalysis was that he had agreed to help the Command Drug and Alcohol Representative conduct a drug audit at the base pharmacy," and he returned to give his sample as soon as they completed the audit. The applicant further stated that he had always lived by the Coast Guard ethos, taken care of those around him and those who worked for him, and volunteered in the community.

On February 5, 2013, a special board of officers convened to review the records and the applicant's statement and decide whether to recommend termination of the applicant's [redacted] The board reported that "notwithstanding [the applicant's] strong performance throughout his career, the incident documented in this officer's record establishes moral or professional dereliction under the causes for separation listed in the Military Separations Manual, Article 1.A.14.c.2."[12] The board stated that it "could not find any credible evidence that [the applicant] unknowingly ingested marijuana. Furthermore, information provided by Tripler Army Medical Center indicated that the concentration levels of THC in [his] positive urine sample exceeded that of a single, unknown ingestion event as he claimed." The board recommended that the applicant's [redacted] be terminated.

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[11] COMDTINST M1000.4, the Military Separations Manual, Article 1.A.19., states the following about terminating the appointment of a CWO:

> The Secretary may terminate the appointment of a chief warrant officer of the Regular Coast Guard at any time within three years after the date he or she accepted the original appointment as a chief warrant officer. A chief warrant officer whose appointment is terminated under this Article is not entitled to separation pay but may apply to the Commandant to reenlist (10 U.S.C. §1165). If approved, he or she reenlists in a grade the Commandant directs but not in one lower than the rate he or she held immediately before appointment as a chief warrant officer (10 U.S.C. §515). The procedures described in Article 1.A.10.b. [procedures for a special board of officers to revoke the commission of an officer pursuant to 14 U.S.C. § 321] of this Manual apply.

[12] COMDTINST M1000.4, Art. 1.A.14.c(2) includes misconduct, conduct unbecoming an officer, and alcohol or drug incidents on the list of reasons officers may be separated "for cause."

On March 14, 2013, the Commandant forwarded the report of the special board to the Secretary. He noted that under 10 U.S.C. § 1165,[13] the Secretary may terminate the [redacted] within three years of appointment and that the special board had recommended termination. He noted the facts of the applicant's drug incident and stated that the "concentration of THC in the sample provided by [the applicant] exceeded that of a single, innocent ingestion event that had supposedly occurred two weeks prior to the urinalysis." The Commandant recommended that the Secretary terminate the applicant's appointment. The Secretary signed a memorandum terminating the applicant's appointment on March 22, 2013.

On April 17, 2013, PSC notified the applicant that the Secretary had approved the special board's recommendation to terminate his appointment. PSC stated that he would be discharged pursuant to 10 U.S.C. § 1165 no later than May 31, 2013, with a general discharge[14] and no entitlement to separation pay.[15] The applicant acknowledged receipt of this notification.

On May 31, 2013, the applicant received a general discharge "under honorable conditions" for "unacceptable conduct." He had served 19 years, 7 months, and 16 days of active duty.

VIEWS OF THE COAST GUARD

On October 29, 2014, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the requested relief. In so doing, he adopted the findings and analysis provided in a memorandum on the case submitted by Commander, Personnel Service Center (PSC).

PSC stated that after the urinalysis on March 20, 2012, the applicant identified his skiing vacation from February 24 to March 4, 2012, as the period in which he could have unknowingly ingested marijuana. In response, the investigator asked a doctor at the Army laboratory if the applicant's scenario that an unknowing ingestion that during his vacation could have caused the positive test result was plausible, and the doctor stated that it was highly unlikely and submitted a scientific paper supporting this claim. Furthermore, PSC noted that COMDTINST M1000.10, Article 3.A.1. states, "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

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[13] 10 U.S.C. § 1165 ("The Secretary concerned may terminate the regular appointment of any permanent regular warrant officer at any time within three years after the date when the officer accepted his original permanent appointment as a warrant officer in that component. A warrant officer who is separated under this section is entitled, if eligible therefor, to separation pay under section 1174 [authorizing separation pay for officers separated for non-selection for promotion] or he may be enlisted under section 515 of this title. If such a warrant officer is enlisted under section 515 of this title, he is not entitled to separation pay.").

[14] COMDTINST M1000.4, Art. 1.A.2.c., states that an officer may receive a general discharge if separated for cause for one of the reasons listed in Article 1.A.14.c.(2), which includes a drug incident.

[15] 14 U.S.C. § 327 (providing that officers separated "for cause" shall be retired upon request if eligible for retirement, but if not, shall "be honorably discharged with separation benefits under section 286(c) of this title, unless under regulations promulgated by the Secretary, the condition under which the officer is discharged does not warrant an honorable discharge"); COMDTINST M1000.4, Art. 1.A.19., states that "[a] chief warrant officer whose appointment is terminated under this Article is not entitled to separation pay."

intake of illegal drugs." PSC stated that after the applicant's CO determined that he had incurred a drug incident, the Secretary approved the recommendation of a special board to terminate his appointment and the applicant received a general discharge in accordance with Articles 1.A.2.c. and 1.A.14.c(2)(h) of the Military Separations Manual. PSC argued that the Coast Guard had properly and fairly processed the applicant for a general discharge after he incurred a drug incident.

Regarding the applicant's request for an honorable discharge based on his years of honorable service, PSC stated that it "disagrees with this request but understands if the Board decides to upgrade to honorable characterization." However, PSC strongly disagreed with the applicant's request for retirement. PSC stated that the applicant would only have qualified for retirement if he had served on active duty through October 15, 2013, but he did not. PSC stated that the Coast Guard did *not* rush the applicant's separation to prevent him from qualifying for retirement, as it took well over a year to follow the separation procedures and to ensure a thorough review and equity.

PSC concluded that the applicant had clearly violated the Coast Guard drug policy, and his claim of unknowing ingestion is not supported in the record. PSC stated that those discharged due to a drug incident normally receive a general discharge, but in this case, "PSC would certainly understand if the Board decided to grant the Honorable due to the nature of the applicant's years of active service and uncertainty behind the knowing ingestion story." While the applicant had performed well, PSC argued that there are no grounds for awarding him retirement since he was discharged pursuant to policy before he attained twenty years of active duty. PSC stated that allowing the applicant to receive a retirement for which he had not qualified "could start a dangerous precedent of allowing those who possibly could have intentionally used illegal drugs a federally funded retirement."

PSC stated that it recommends that the BCMR grant *no* relief because the applicant's general discharge accords with Coast Guard drug abuse policy, but –

> [t]he Coast Guard also acknowledges that this policy does not give equal weight to a member's overall service record and/or the impact that this characterization will have on a member's future. However, the standards for performance and honorable service is made clear when entering the service and through each member's career.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On December 12, 2014, the applicant responded to the views of the Coast Guard. The applicant stated that PSC's memorandum "does not take into consideration the totality of the circumstances in this matter." Given his honorable career, he argued, it "is unwarranted that one positive urine screen would permanently tarnish [his] military record affecting the rest of his life, especially when the circumstances of the failed urinalysis were circumspect [sic], at best." He argued that his nineteen years of "honorable service coupled with his post-service accomplishments demonstrate why his separation from the Coast Guard was unduly harsh and a prima facie example of inequity."

The applicant noted that since his discharge, he has earned a Bachelor of Science degree and works for a nonprofit organization in [redacted], making a positive impact on his community with the values he learned in the Coast Guard. He argued, "His long and honorable military career, in combination with his post-service achievements, provide a clear picture of the applicant's integrity and true character."

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.

2. The applicant alleged that his CO's finding of a drug incident and his general discharge on May 31, 2013, are erroneous and unjust and that he should have been allowed to retire with an honorable character of service upon completing twenty years of service, instead. When considering allegations of error and injustice, the Board begins its analysis 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.[16] 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."[17]

3. The Board finds that the applicant has not proven by a preponderance of the evidence that his CO's finding that he had incurred a drug incident, as defined in Article 1.A.2.k. of COMDTINST M1000.10, is erroneous or unjust. Following a random urinalysis conducted on March 20, 2012, when the applicant left the testing area twice before providing a sample, the applicant's urine tested positive for THC, a metabolite of marijuana, at a level of 34 ng/ml and, upon retest, 36 ng/ml—well above the cutoff of 15 ng/ml. The applicant stated, however, that he could not recall having any symptoms and also that he might have unknowingly ingested marijuana in food while on a skiing vacation from February 24 to March 4, 2012, more than two weeks before the test. A doctor at the laboratory agreed with the investigator that, given the test result and timing, the applicant's claim that he must have unknowingly ingested marijuana during the vacation was implausible. The doctor provided a research paper indicating that the ingestion of a marijuana brownie is not detectable even with a 5 ng/ml cutoff after more than two weeks have passed. Although the record shows that the applicant served in the Coast Guard well and honorably for many years, in light of the circumstances of this case, the Board finds no grounds for concluding that his CO erred in finding that he had incurred a drug incident.

4. Because the applicant has not proven by a preponderance of the evidence that his CO's finding that he had incurred a drug incident is erroneous, the Board finds that his administrative discharge on May 31, 2013, without retirement, was correct under applicable statutes and

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[16] 33 C.F.R. § 52.24(b).

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

regulations.[18] In this regard, the Board notes that the applicant has not alleged that he was deprived of due process in his discharge proceedings, and the record shows that he received all due process. The record also shows that the Coast Guard acted with due caution and deliberation and so did not discharge the applicant until more than fourteen months after the urinalysis. On the date of his discharge, however, he was not eligible for retirement because he had not yet completed twenty years of active duty.[19] Nor was he eligible for separation pay because he had been a CWO for less than three years and was being discharged due to a drug incident.[20]

5. The applicant argued that his discharge in lieu of retirement is unjust because he was just a few months away from qualifying for retirement when he was discharged. The Board is authorized to correct injustices, as well as errors, in applicants' military records.[21] For the purposes of the Board, "injustice" is sometimes defined as "treatment by the military authorities that shocks the sense of justice but is not technically illegal."[22] The Board has authority to determine whether an injustice exists on a "case-by-case basis."[23] 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,"[24] and "[w]hen a board does not act to redress clear injustice, its decision is arbitrary and capricious."[25] In this case, the Board finds that the applicant's discharge is extremely unfortunate, but it is not unjust. Coast Guard policies requiring the expeditious separation of members involved in drug incidents, no matter how many years of honorable service they have, are fair and reasonable given that illegal drug interdiction is one of the primary missions of the Coast Guard.

6. The Coast Guard stated that it would not object if the Board granted alternative relief by upgrading the applicant's character of service on his DD 214 from general under honorable conditions to honorable given the more than eighteen years of honorable service he performed before the drug incident and the impact the general discharge will have on his future employment opportunities and entitlement to veteran's benefits. However, the Discharge Review Board (DRB) has primary jurisdiction[26] over the character of service on the applicant's DD 214 and, upon inquiry, the BCMR staff learned that the applicant has a DRB case pending. Therefore, the Board finds that the applicant has not exhausted his administrative remedies with

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[18] 10 U.S.C. § 1165; 14 U.S.C. § 327; COMDTINST M1000.10, Art. 3.B.3.a.; COMDTINST M1000.4, Arts. 1.A.10., 1.A.14.c(2).

[19] 10 U.S.C. § 1293 (authorizing the Secretary to retire warrant officers with at least 20 years of active service).

[20] 10 U.S.C. §§ 1165, 1174; 14 U.S.C. § 327 (authorizing the Secretary to prescribe regulations determining whether officers discharged "for cause" are entitled to separation pay); COMDTINST M1000.4, Art. 1.A.19. (denying separation pay to CWOs whose appointments are terminated within three years of appointment).

[21] 10 U.S.C. § 1552(a).

[22] *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976); *but see* 41 Op. Att'y Gen. 94 (1952), 1952 WL 2907 (finding that "[t]he words 'error' and 'injustice' as used in this section do not have a limited or technical meaning and, to be made the basis for remedial action, the 'error' or 'injustice' need not have been caused by the service involved.").

[23] Docket No. 2002-040 (DOT BCMR, Decision of the Deputy General Counsel, Dec. 4, 2002).

[24] *Roth v. United States*, 378 F.3d 1371, 1381 (Fed. Cir. 2004) (quoting *Yee v. United States*, 206 Ct. Cl. 388, 397 (1975)).

[25] *Boyer v. United States*, 81 Fed. Cl. 188, 194 (2008).

[26] 10 U.S.C. § 1551.

regard to this issue, and it should be dismissed without prejudice. If the DRB denies the applicant's request for an honorable discharge, he may re-apply to the BCMR regarding this issue.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of former [redacted] USCG, for correction of his military record is denied, but his complaint regarding his character of service on his DD 214 dated May 31, 2013, is dismissed without prejudice so that he may exhaust his administrative remedy at the Discharge Review Board.

April 9, 2015

[redacted]