DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

[redacted]

BCMR Docket No. 2014-179

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. After receiving the applicant's completed application on July 17, 2014, the Chair docketed the application and assigned it to [redacted] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated June 19, 2015, 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 upgrade his discharge from "General, Under Honorable Conditions" to "Honorable." The applicant alleged that the urinalysis test conducted by the Coast Guard, which yielded positive results for cocaine on December 1, 2011, was an "incomplete and inadequate" screening, and therefore insufficient to use as evidence and justification for his discharge. Specifically, the applicant stated that he took a hair follicle test and that the analysis proves that there was a mistake in the administration of the urinalysis. The applicant alleged that the results and analysis "holds true to GC/MS test levels in state and Federal courts of law." In support of his application, the applicant provided the following:

a) The Final Report of a blood test conducted at Nason Medical Center on December 1, 2011, which shows the levels of various components of his blood and urine. The report states that a "urine drug screen" gave a positive test result for "cocaine metabolite."

b) A toxicology report (drug test), dated February 1, 2012, two months after the urinalysis, shows all negative results for a hair test with a minimum cutoff level of 500 pg/mg. The applicant's photograph and social security number are on the report. The report states, "The length of hair analyzed represents the most recent approximately three months, unless otherwise indicated." A comment on the report notes, "This test represents a time period of approximately six months prior to Date of Test."

c) An affidavit from Dr. [B], the forensic toxicologist who signed the hair test report, dated February 1, 2012. Dr. B claimed that he called the Nason laboratory that conducted the urinalysis and was told that the laboratory "uses only non-instrumented devices, also known as an instant test, rapid test, quick test, or dipstick test. These are *drug screening* methods and not a complete *drug test.* No analytical laboratory instrument device is used at Nason." Dr. B claimed that Nason uses the Biosite TRIAGE brand device, whose test results, according to the rules of the Federal Drug Administration, must be accompanied by this statement:

> This test provides only a preliminary test result. A more specific alternate testing method must be used in order to obtain a confirmed analytic result. Gas chromatography/mass spectrometry (GC/MS) is the preferred confirmatory method. Clinical consideration and professional judgment should be applied to any drug of abuse test results, particularly when the preliminary positive results are observed.

Dr. B stated that a Nason staff member advised him that "no confirmatory testing is performed on urine drug screening performed at Nason Medical Center, except for the finding of marijuana" and that no confirmatory testing was done on the applicant's urine sample. Dr. B noted that Nason normally conducts for medical reasons, rather than legal reasons; that the device used by Nason is normally used by emergency room personnel to get preliminary indications, and that in his opinion, "the urine drug testing of [the applicant] from [Nason] performed on urine specimen on December 1, 2011, is a preliminary screen only, is incomplete, and is inadequate to draw any meaningful conclusions." Dr. B also stated that in a published study, "An Evaluation of Non-Instrumented Drug Test Devices," the most accurate device tested had an overall positive result accuracy rate of just 71.7% upon confirmation testing.

Dr. B also stated that another limitation of the type of device used by the Coast Guard is the cross-reactivity that the device has with other substances that a person may have consumed:

> For example, the prescription drug Fenfluramine, a component of Fen-Phen cross reacts with a quick test device for methamphetamine. Another is the prescription drug Isoproterenol, used to treat cardiac conditions, which cross-reacts with a quick test device for methamphetamine. Phenylethylamine, a component chocolate, cross reacts with a quick test device for amphetamine. Tyramine, found in high concentrations of red wine, cross-reacts with a quick test device for amphetamine.

The applicant alleged that the toxicology report and Dr. B's affidavit prove that the results of the urinalysis conducted on December 1, 2011, are erroneous and prove that he had not ingested any cocaine or crack during the six months leading up to his hair follicle test on February 1, 2012.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on February 26, 2007. As part of his enlistment, the applicant signed and acknowledged a Page 7 on February 20, 2007, regarding the illegal use or possession of drugs. Specifically, the Page 7 states the following:

> I have been advised that the illegal use or possession of drugs constitutes a serious breach of discipline which will not be tolerated in the United States Coast Guard. Also illegal drug use or possession is counter to esprit de corps & mission performance and jeopardizes safety. I understand that I am not to use possess or distribute illegal drug drug paraphernalia or hemp oil

> products. I also understand that upon reporting to recruit training I will be tested by urinalysis for the presence of illegal drugs. If my urine test detects the presence of illegal drugs I may be subject to discharge and receive a general discharge. I hereby affirm that I am drug free and ready for recruit training.

Coast Guard Investigative Service (CGIS) Report

On December 1, 2011, in response to a request by the Commander of the applicant's Sector, CGIS initiated an investigation into the alleged cocaine use by the applicant because his urine had tested positive for cocaine use.

On December 2, 2011, CGIS informed the applicant of his rights and that he was suspected of illicit use of narcotics. Prior to commencing the interview, the applicant acknowledged his rights both verbally and in writing. He waived his right to remain silent and elected to answer questions without consulting an attorney. According to the investigation, the interview took place at the CGIS office.

The report of the investigation states that according to the applicant, about a month earlier, he had suffered a shoulder injury as a result of an automobile accident and was prescribed Vicodin. Although he typically took the Vicodin at night, on December 1, 2011, he took it in the morning, prior to driving to work, because of pain. When he arrived at the Sector, a coworker noticed that the applicant did not look well and suggested that he go to medical. During his visit to the medical center, a blood and urine sample was collected. The applicant stated that prior to being discharged from the medical center, he was notified that he had tested positive for cocaine. According to the report, the applicant stated the following when asked why the results showed a presence of cocaine:

> On the evening of 29 November 2011, and into the early morning of 30 November 2011, [the applicant] was drinking heavily with his roommates and some of their friends at his apartment. … He estimated he consumed approximately 16 Bacardi and Cokes and was "barely able to walk." At some point he was outside on the balcony of his apartment with the others when one of his roommate's friends snorted a small amount of cocaine off if his hand. [The applicant] was curious as to the effects of the cocaine and asked his roommate's friend what it felt like. He responded by telling [the applicant] that it gave him a "rush."
>
> Approximately one hour later, [the applicant] was back out on the balcony and still curious about the effects of cocaine. [The applicant] snorted a small amount off of a coffee table that was on the balcony that was offered to him by his roommate's friend. [The applicant] indicated by drawing and writing on a piece of paper the approximate size of the "line" of cocaine he snorted. Using a drinking straw, he used his left nostril to snort the powdered cocaine up into his nose while keeping the right nostril closed with this hand. [The applicant] did not feel and type of "rush" or any other euphoric feeling, but thought that could have been due to his level of intoxication.

The applicant also wrote and signed an account of a small party at his apartment during which he had 16 to 18 drinks. An acquaintance "brought the substance" and "[a]fter being drunk for a while, I did get curious about the substance." When told it was cocaine, he asked a few questions and was offered some. The applicant wrote, "I thought about it, but being drunk really does not give you the wisest decisions. I mustered up the courage and did a small amount and decided that was definitely not the stuff for me." When told the screening results, the applicant wrote, he panicked because he knew the consequences. He was taken to another hospital for a

urinalysis and was told the results would come back within couple of weeks. According to the applicant's written statement, the location of the interview was a CGIS office.

Separation Processing

On December 10, 2011, the applicant received a Page 7 from his commanding officer (CO) stating that he had arrived at work on December 1, 2011, appearing unwell and went to the medical clinic, which sent him to Nason Medical Center, where his urine tested positive for cocaine use. The Page 7 further states that on December 2, 2011, the applicant had provided a sworn written statement admitting to having recently ingested cocaine at his apartment, and that that a second urine test conducted at a Naval Medical Center on December 9, 2011, also revealed the presence of cocaine in his system. Based on the two test results and the applicant's written admission, the CO found that the applicant had incurred a "drug incident" and would be processed for separation. The applicant acknowledged receiving the Page 7 on January 5, 2012, by initialing it with the added notation "a.m.w." (against my will).

On December 14, 2011, the applicant received a Page 7 acknowledging that he had been diagnosed as meeting the criteria for Alcohol Abuse/Opioid Abuse. As a result of the diagnosis, the applicant was recommended for Level II Intensive Outpatient Treatment. The applicant acknowledged receiving this Page 7 on January 5, 2012, by initialing it with the notation "a.m.w."

According to a toxicology report dated December 19, 2011, the applicant's urine sample collected on December 1, 2011, and labeled with his social security number was forwarded to Tripler Army Medical Center, which conducts gas chromatography/mass spectrometry testing. The applicant's sample tested positive for cocaine.

The applicant was provided inpatient rehabilitation treatment. According to a medical test conducted on January 4, 2012, the applicant's urine again tested positive for cocaine, although the "results are for medical treatment only."

As a result of the [applicant's] confession to having used cocaine, he was processed for administrative discharge for violation of the Coast Guard's Drug Policy. On February 21, 2012, the applicant received a general discharge under honorable conditions for misconduct as a result of involvement with drugs. Block 24 of his discharge form DD 214 incorrectly states that his Character of Service was "General," instead of "under honorable conditions."

In May 2012, the applicant applied to the Discharge Review Board (DRB) and requested an honorable discharge. He alleged that when he made the statements to the investigator, he was hospitalized and under heavy medication due to his major depressive disorder. He alleged that he had signed the documents against his will. The DRB granted no relief except to correct block 24 of the applicant's DD 214 to "under honorable conditions," which is the correct character of service for a general discharge.

VIEWS OF THE COAST GUARD

On December 11, 2014, the Judge Advocate General (JAG) submitted an advisory opinion recommending that the Board deny relief in this case in accordance with the findings and analysis provided in a memorandum submitted by the Commanding Officer, Coast Guard Personnel Service Center (PSC).

PSC contended that the applicant is not entitled to any relief since he not only submitted a sworn statement affirming his use of cocaine, but also tested positive for cocaine on two separate occasions. PSC stated that based on these facts, the preponderance of the evidence standard is met and is sufficient to constitute a drug incident. PSC also argued that the applicant's belief that the screening process during the first drug test was "inadequate" is without merit since the positive test result was confirmed by subsequent testing.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On December 11, 2014, the Chair sent a copy of the views of the Coast Guard to the applicant and invited him to respond within thirty days. The applicant requested, and was granted, a 90-day extension to reply to the advisory opinion. The 90-day extension expired on May 30, 2015, and no response has been received.

APPLICABLE REGULATIONS

COMDTINST M1000.10, Coast Guard Drug and Alcohol Abuse Program Manual

Article 1.A.2.k.(1) states that a "drug incident" is determined by a member's CO and defines a "drug incident" to include:

> (a) Intentional use of drugs;
> (b) Wrongful possession of drugs;
> (c) Trafficking (distribution, importing, exporting, or introduction into a military facility) of drugs;
> (d) The intentional use of other substances, such as inhalants, glue, and cleaning agents, or over-the-counter (OTC), or prescription medications to obtain a "high," contrary to their intended use; or,
> (e) A civil or military conviction for wrongful use, possession, or trafficking of drugs, unless rebutted by other evidence.

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 1.A.2.k.(2) 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."

Article 3.A.2. states that "Commanding officers shall initiate an investigation into a possible drug incident, as defined in Article 1.A.2.k. of this Manual, following receipt of a positive confirmed urinalysis result or any other evidence of drug abuse. The absence of a positive confirmed urinalysis result does not preclude taking action based on other evidence. Situations which should be carefully evaluated to determine if drugs are an underlying factor

include: civil arrest, habitual association with persons who abuse or traffic in drugs, possession of drug paraphernalia, sudden decreases in job performance, repeated absenteeism or lateness for work, unexplained public or domestic disturbances, and accidents or unexplained circumstances requiring medical care."

Article 3.B.1. 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:
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> 1. Ask the member to consent to a urinalysis test as outlined in Article 4.A.4. of this Manual.
> 2. Direct the member to participate in a urinalysis evaluation program for a maximum of six months as outlined in Article 4.A.4. of this Manual.
> 3. Request the laboratory reexamine the original documentation for error.
> 4. Request the laboratory retest the original specimen….

Article 3.B.2. 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 3.B.3. 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 1.A.10., 1.A.14., 1.A.20., or 1.B.17. of … Military Separations, COMDTINST M1000.4, as appropriate.
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> 2. Disciplinary Action. Members who commit drug offenses are subject to disciplinary action under the UCMJ in addition to any required administrative discharge action.
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> 3. Eligibility for Medical Treatment. Members who have been identified as drug-dependent will be offered treatment prior to discharge. If accepted, immediately on completing this treatment, the member will be discharged from the Service. Treatment will be coordinated through the applicable Coast Guard medical facility and may be either in-patient or out-patient treatment. A diagnosis of drug/chemical dependency must be made by a qualified physician/physician assistant having a background in substance abuse and chemical dependency or a certified substance abuse screening facility, i.e. a U. S. Navy Counseling and Assistant Center (CAAC). The member may undergo treatment at either a Veterans Administration or civilian facility closer to his or her home. However, the applicable Health, Safety, Work-Life Service Center working in concert with medical and screening authorities will determine the treatment type and location. Members

> diagnosed as drug/chemical dependent who refuse treatment will be required to sign an Administrative Remarks, Form CG-3307, entry acknowledging that they waive their right to benefits under the Department of Veterans Affairs for treatment for chemical dependency.

Exhibit 4.B.4. provides that the drug cut-off level for cocaine is 150 ng/mL for the initial screening and 100 ng/mL for the GC/MS test.

COMDTINST M1000.4, Military Separations

Article 1.B.17.b.(4) of the Military Separations Manual, COMDTINST M1000.4, 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 1.A.2.k. of … COMDTINST M1000.10 (series), will be processed for separation from the Coast Guard with no higher than a general discharge."

Article 1.B.17.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.

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.[1]

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.[2]

3. The applicant alleged that his general discharge for a drug incident after having tested positive for cocaine was erroneous and unjust and asked that his general discharge be upgraded to an honorable discharge. The applicant alleged that the urinalysis conducted on December 1, 2011, was an "incomplete and inadequate" screening and therefore insufficient to use as evidence and justification for his discharge. 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 Government officials."[3] The applicant bears the burden of proving the existence of an error or injustice by a preponderance of the evidence.[4] Absent

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[1] 10 U.S.C. § 1552(b).

[2] *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

[3] 33 C.F.R. § 52.24(b).

[4] *Id.*

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."[5]

4. On December 2, 2011, as part of the investigation completed by CGIS, the applicant admitted in a sworn, detailed statement, that he had in fact recently used cocaine during a party at his apartment. At the time of his admission, he had been informed of his rights, including his right to remain silent and to consult an attorney, and he waived those rights. In addition, the record shows that after the applicant's urine sample screened positive for cocaine use at Nason Medical Center on December 1, 2011, the sample was forwarded to Tripler for gas chromatography/mass spectrometry testing and tested positive for cocaine. In addition, while the applicant was hospitalized for inpatient rehabilitation treatment on January 4, 2012, his urine again screened positive for cocaine. Although the applicant submitted an affidavit from Dr. B, a forensic toxicologist, who claimed that the initial screening at Nason was inconclusive, the affidavit fails to account for the fact that the same urine sample was forwarded to Tripler, where it tested positive for cocaine under chromatography/mass spectrometry testing. Nor does Dr. B's affidavit negate the applicant's sworn, detailed statement to the investigators. The Board finds that Dr. B's report of a hair test conducted on February 1, 2012, and his affidavit do not cast doubt on the validity of the Tripler report or the applicant's admission.

5. Pursuant to COMDTINST M1000.10, Chapter 3.B, when making a determination of whether a drug incident occurred, commanding officers should consider all the available evidence including any urinalysis test, a reexamination of the original documentation of error, and a retest of the original specimen. When determining whether a drug incident occurred, the CO shall determine the finding using the preponderance of evidence standard – when all evidence is fairly considered, including its reliability and credibility, it is more likely than not that the member intentionally ingested drugs. If the CO determines that a drug incident occurred, the CO must process the member for separation by reason of misconduct under Article 1.B.17 of the Military Separations Manual, COMDTINST M1000.4. And under Article 1.B.17., a member discharged for misconduct due to drug abuse may receive no better than a general discharge under honorable conditions.

6. The applicant has not proven by a preponderance of the evidence that his general discharge, which he received as a result of his drug abuse, was erroneous or unjust. The Board finds insufficient grounds for upgrading his character of service. Accordingly, the applicant's request for relief should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

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

ORDER

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

June 25, 2015

[redacted]