DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2016-077

[redacted] LT

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 application form on March 18, 2016, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated April 7, 2017, 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 lieutenant (LT) on active duty, asked the Board to remove from his record a 1611 incident memorandum (hereinafter, "1611")[1] documenting a "drug incident,"[2] as well as his non-selections for promotion to lieutenant commander (LCDR) in 2015 and 2016. The applicant alleged that the 1611 is unjust, that it should not have been in his personnel data record (PDR) when it was reviewed by the selection boards, and that it unjustly caused his non-selections for promotion.

The applicant explained that in September 2009, he was diagnosed with Stage IIB metastatic testicular cancer, which had spread into his lymph nodes, and he did not believe he would survive. He quickly began treatment that included surgery and three cycles of chemotherapy, which each required five days of in-patient care. He then received a shot of Neupogen to gener-

[1] A 1611 is a memorandum template often used for documenting officers' drug and alcohol incidents pursuant to the Personnel Manual (COMDTINST M1000.6A) in effect prior to October 2011.

[2] Article 20.A.2 k.1. of the Personnel Manual provides that the intentional, illegal use of drugs constitutes a "drug incident as determined by the commanding officer." Article 20.A.2 k.2. states that a "member need not be found guilty at court-martial, in a civilian court, or be awarded NJP for the conduct to be considered a drug incident." Article 20.C.4. states that any member found to have committed a "drug incident" following an investigation shall be processed for separation. In September 2011, these policies were moved to the Drug and Alcohol Abuse Program Manual, COMDTINST M1000.10, which is currently in effect.

ate white blood cells.[3] During this treatment, the applicant stated, he broke down mentally from the pain that left him paralyzed. After the Neupogen shot, he suffered "unimaginable back pain. In fact, I thought the medicine had completely destroyed or broken every bone within my spine." The applicant stated that his "nausea, anxiety, depression, and unbearable pain … compelled me to seek relief by ingesting marijuana." His oncologist had "endorsed use of the drug for medicinal purposes in order to help alleviate these symptoms." The applicant stated that he ingested the marijuana "[w]ith a heavy heart and conscience" and stopped using it when his condition improved. After eight months of treatment, he went into remission.

The applicant stated that in April 2010, during an investigation by the Coast Guard Investigative Service (CGIS), he voluntarily admitted to having ingested marijuana and signed a confession. In November 16, 2010, he was formally counseled, and his "drug incident" was documented on the disputed 1611 memorandum. He was advised that he would be processed for separation.

The applicant stated that on March 8, 2011, he was informed that a "Determination Board" was being convened to decide whether he should have to "show cause for retention" in a hearing before a Board of Inquiry (BOI).[4] On March 30, 2011, he was informed that he would have to show cause of retention. The BOI convened on June 7, 2011, and the applicant was represented by counsel. Following the hearing, the BOI recommended that he should be retained in the Service, rather than discharged. On October 18, 2011, he learned that that the BOI's recommendation had been approved.

The applicant alleged that COMDTINST M1080.10I, the current PDR Manual in effect since May 2011, does not include 1611s or documented drug incidents on the list of information to be entered in a PDR and since they are not entered in an officer's PDR, they should not be reviewed by selection boards considering officers for promotion.

The applicant noted his accomplishments since this incident and stated that he still has "plenty to offer the Coast Guard and only strongly desire to move on with my career. … I have sought closure through professional counseling to ensure this isolated lapse of judgment does not impede my professional or personal life."

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[3] The chemotherapy regimen for Stage II testicular cancer consists of doses of etoposide and cisplatin for five consecutive days, two or three times, at three-week intervals. HARRISON'S PRINCIPLES OF INTERNAL MEDICINE, 18th Ed. (McGraw Hill, 2012), p. 808. According to the U.S. National Library of Science, the side effects of these drugs include nausea, vomiting, tiredness, dizziness, weight loss, and pain in the stomach, hands, feet, or eyes (*https://medlineplus.gov/druginfo/meds/a697011.html#side-effects*, last visited April 5, 2017). Some patients given Neupogen reported increased skeletal pain. (*https://dailymed.nlm.nih.gov/dailymed/drugInfo.cfm?setid=3bc802bd-76b4-4f45-8571-a436ec26228e&audience=consumer*, last visited on April 5, 2017).

[4] Article 12.A.15.c. of the Personnel Manual lists a drug incident among the reasons an officer would be required to "show cause" for retention in the Service before a BOI. Article 12.A.15.h. provides that the BOI reviews an officer's entire record and information presented by the officer and "determines whether the Coast Guard should or should not retain the respondent." The determination is made by majority vote. The BOI also "makes appropriate recommendations consistent with its determination." There is no provision for entering a BOI report in an officer's PDR.

To support his request, the applicant submitted copies of his records and a letter from his oncologist, dated July 22, 2010, who wrote that the applicant's cancer "required a very aggressive chemotherapeutic regimen which unfortunately causes severe nausea and vomiting. During that time, through October and November 2009, he required the use of marijuana to help control his nausea." The oncologist stated that by reducing the applicant's symptoms, the marijuana may have helped him continue his treatment.

SUMMARY OF THE RECORD

The applicant attended the Coast Guard Academy and was commissioned an ensign in December 2005. He was originally assigned to a large cutter as an Engineer Officer in Training and he received good Officer Evaluation Reports (OERs) in this position. In June 2007, he was promoted to lieutenant junior grade.

In September 2007, the applicant was transferred to a shore unit in California[5] as a port engineer, and he received increasingly good OERs in this position and was rated an "exceptional officer" on the officer Comparison Scale (the sixth spot of seven) on his OER dated July 31, 2009. The applicant was selected for promotion that summer and promoted to lieutenant in December 2009.

The period from August 1, 2009, through May 31, 2010, is covered by a "Continuity OER" in the applicant's record,[6] which shows his assigned duties but no numerical marks in the performance dimensions and includes only one comment: "Member is an excellent Coast Guard Officer who has had limited opportunities for observation (authorized absence for first 8 of 10 month Reporting Period)."

The disputed 1611 memorandum, dated November 16, 2010, has the subject line "LETTER OF COUNSELING – DOCUMENTED DRUG INCIDENT" and states that he was "receiving a drug incident due to your drug use while undergoing treatment for cancer. … [Y]ou were counseled on regarding [sic] Coast Guard policies concerning drug use and abuse as well as the serious nature of this incident. … Since this is considered a documented drug incident, per paragraph 20.C.4. of [the Personnel Manual], you are hereby advised that you will be processed for separation under Chapter 12.A. of [the Personnel Manual]." The applicant signed this letter in acknowledgment.

On March 8, 2011, the applicant was advised that a Determination Board would be convened in accordance with Article 12.A.15. of the Personnel Manual because of the drug incident. On March 30, 2011, the applicant was notified that he would be required to show cause for reten-

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[5] The Compassionate Use Act of 1996, California Health and Safety Code § 11362.5, gave cancer patients the right under State law to grow, use, or obtain marijuana for medicinal purposes when recommended by a doctor and prohibited the State from punishing the doctor, but the applicant was subject to Article 112a of the Uniform Code of Military Justice (UCMJ), which prohibits the use of marijuana.

[6] Article 10.A.3. of the Personnel Manual then in effect states that a command may prepare a Continuity OER for an officer "in cases where an OER is required by these instructions, but full documentation is impractical, impossible to obtain, or does not meet officer evaluation system goals."

tion before a BOI and was entitled to legal representation. The applicant acknowledged this notification on April 5, 2011.

On June 7, 2011, the BOI convened and recommended that the applicant be retained, rather than discharged. The BOI stated that the applicant had "demonstrated that his improper decision while under treatment for life-threatening cancer was not indicative of a pattern of poor judgment or moral dereliction. Notwithstanding the decision … to declare a drug incident, this Board was able to view additional evidence (e.g. sworn testimony of respondent, witness testimony, various character references) which placed the case in a broader context. The Board believes that this action meets the goal of the Coast Guard's Substance Abuse policy … and affirms that the Coast Guard's ability to accomplish its missions was not hampered by the effects of [the applicant's] substance abuse. … [T]his officer's record and actions do not meet the threshold to support separation … [T]he conduct in question which prompted this Board was not indicative of [his] character. Overall performance, leadership, and character, as reflected in previous and subsequent OERs, and other evidence, is sold and indicates the potential for continued service." On October 18, 2011, the applicant was informed that the BOI's recommendation to retain him had been approved but that his case would be reopened if any further adverse information was received. The applicant acknowledged receipt of this notification on October 24, 2011.

Following his treatment, the applicant continued to receive strong OERs, with primarily marks of 5 and 6 (out of 7) in the various performance dimensions. He has been rated an "excellent performer" (fifth spot of seven) on the officer Comparison Scale[7] on these OERs.

In August 2015, the applicant was "in zone" for promotion to LCDR. In his letter to the selection board, he explained that "[d]uring chemotherapy treatment for my life threatening challenges with cancer, an incident occurred when I had a momentary lapse of judgment and felt compelled to ingest marijuana with the limited intention of reducing pain." The applicant noted that he had been retained on active duty following a BOI, although the report of the BOI was not in his record, and asked the selection board not to consider the drug incident in a negative light. He noted that he was initiating an application to have the 1611 removed from his record.

The applicant's new commanding officer (CO) endorsed this letter and noted that it is "difficult to imagine the pain, suffering, anxiety, and life-altering decisions that accompany intensive chemotherapy to combat aggressive cancer." The CO noted that although the applicant's decision to use marijuana was not right given his status as a Coast Guard officer, "it is difficult to predict how anyone would act when faced with this set of challenging and extenuating circumstances." The CO wrote that he believes that the applicant's drug use "was the result of a one-time lapse in judgment that was absolutely out of character and completely driven by the considerable extenuating circumstances severely impacting his health and judgment."

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[7] On a lieutenant's OER form, the Reporting Officer chooses one of seven marks on the Comparison Scale by comparing the reported-on officer to all other lieutenants the Reporting Officer has known throughout his or her career. The seven possible marks are "performance unsatisfactory"; "marginal performer"; "fair performer"; "good performer"; "excellent performer"; "strongly recommended for accelerated promotion"; and "best officer of this grade."

The applicant was not selected for promotion to LCDR in August 2015. ALCGPSC 109/15, which announced the selections, states that the overall opportunity of selection (OOS) before the board was 75%; that 66% of "in zone" lieutenants were selected; and that 25% of "above zone" (second time before the board) lieutenants were selected.

The applicant was not selected for promotion to LCDR in August 2016. ALCGPSC 104/16, which announced the selections, states that the OOS was 80%; that 71% of "in zone" lieutenants were selected; and that 27% of "above zone" lieutenants were selected. By statute, because he has been twice non-selected for promotion, the applicant will be separated from active duty on June 30, 2017.

VIEWS OF THE COAST GUARD

On August 5, 2016, 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 pursuant to the current Health Promotion Manual, COMDTINST M6200.1C, which was in effect when the applicant was non-selected for promotion, all drug incidents must be documented in the member's record on an Administrative Remarks form, CG-3307.[8] However, in 2010, the Health Promotion Manual in effect, COMDTINST M6200.1A did not specify the form of documentation but required that commanding officers "accurately and completely document all substance abuse incidents and alcohol-related situations"; that "all documentation surrounding alcohol/drug problems must be documented in the member's service record"; and that the Command Drug and Alcohol Representative "together with the command will ensure that all entries made in the member's service record completely and accurately document the incident." PSC argued that the 1611 was therefore correctly issued and entered in the applicant's PDR in 2010 and that it is not an error or injustice that, under current policy, drug and alcohol incidents are now documented in members' PDRs on Page 7s, instead. PSC further noted that under the PDR Manual, all such Page 7s must be included in an officer's PDR. (PSC recommended that the drug incident be re-documented on a Page 7, instead of the 1611, in light of current policy.)

PSC recommended that the Board deny relief, concluding that the applicant's claim that the documentation of his drug incident should not have been in his PDR is incorrect. Nor, PSC argued, was the applicant prejudiced by the change in documentation format in the interim. PSC noted that the 1611 contains the same information that a Page 7 prepared today to document a drug incident would contain. Therefore, PSC argued, there are no grounds for removing the 1611 from the applicant's PDR.

Regarding the applicant's claim that the report of the BOI should be in his record, PSC stated that the inclusion of the BOI report in a PDR is unauthorized by the PDR Manual.

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[8] Chapter 7.K. of the current Health Promotions Manual, concerning the documentation of substance abuse cases, states at paragraph 3.a. that "[t]he only documents authorized in a member's PDR, pertaining to an alcohol or drug incident, are the appropriate Performance and Discipline (P&D) Administrative Remarks, CG-3307 entries."

PSC also stated that the applicant has not shown that his non-selections for promotion were caused by the 1611. PSC noted that the proceedings of selection boards are confidential by law and so the impact of the 1611 cannot be known. PSC stated that the only inference that can be drawn from the applicant's non-selection is that he was not among the best qualified. Therefore, PSC recommended that the Board not remove his non-selections for promotion.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

The applicant was granted an extension of the time to respond to the Coast Guard's advisory opinion and submitted his response on October 22, 2016.

The applicant argued that the Board has authority to correct injustices as well as errors. The applicant argued that his use of marijuana should not have been treated as a drug incident. The applicant noted that a captain in his previous chain of command has signed a letter for him stating that he recommended that the CO find that no drug incident had occurred, which was allowed if the CO determined that the drug use was not wrongful.

The applicant repeated his argument that if the drug incident can be documented in his PDR, then the BOI report, which shows why he was recommended for retention, should be entered in his PDR as well. The applicant argued that the inclusion of one without the other "gives the reader of my PDR a misleading and unfair impression." The applicant also alleged that without the BOI report, the documentation of his drug incident is not complete and accurate, as the policy requires. He also alleged that without the BOI report, the selection boards could not know that the outcome of the BOI—i.e., that the BOI had recommended to retain him based on their assessment of his performance, leadership, and character.

Regarding PSC's argument that the applicant has not shown that the 1611 caused his non-selections, the applicant noted that the 1611 is the only blemish in his service record and that he has received high marks and been recommended for promotion on all of his OERs. The applicant argued that the LCDR selection boards would have selected him for promotion but for the documented drug incident based on his excellent OERs; that he could not possibly have been selected for promotion with a drug incident in his record; and that the BOI intended to "fully reinstate" the applicant in the officer corps and to negate the detrimental effect of the incident on his career. The applicant argued that the BOI clearly disagreed with his CO's decision to document a drug incident in his record. Therefore, the applicant argued, leaving the 1611 in his record thwarted the intention of the BOI.

The applicant argued that because he used marijuana only to alleviate the extreme pain he experienced during chemotherapy, the Board should find that the inclusion of the 1611 in his record when it was reviewed by the LCDR selection boards was both erroneous and unjust, especially because they were not made aware of the outcome of the BOI. The applicant stated that based on his circumstances, his CO should have made a finding of no drug incident and so the 1611 should not be in his record at all.

The applicant noted that under 14 U.S.C. § 263, if the Board finds that a selection board "did not have before it for consideration material information" or that the action of the selection board "was contrary to law" or "involved material error of fact or a material administrative error," then the Board should direct the Coast Guard to convene a special selection board (SSB) for him. The applicant argued that it was a material administrative error to include the 1611 in his record since his new command has taken a contrary position and the selection boards did not have before them material information in the form of the BOI report. Therefore, he argued, under this statute he is entitled to an SSB.

The applicant noted that 14 U.S.C. § 263 does not provide for SSBs due to injustices, which fall within the Board's jurisdiction. Therefore, the applicant argued, the Board should apply the previous *Engels* standard[9] and find that because his record was unjust when it was reviewed by the selection boards, the burden should shift to the Coast Guard to prove that he would have been passed over even if the 1611 had not been in his record, which the Coast Guard has not proved. Thus, he argued, he should be entitled to relief based on both error and injustice. The applicant noted that the Coast Guard's recommendation that the 1611 be switched for a Page 7 would not remove the drug incident from his record.

In support of his allegations, the applicant submitted copies of records that are included in the summary above and the following:

- The captain who counseled the applicant in 2010 asked the Board to consider the applicant's extenuating circumstances and grant relief. The captain stated that after considering the fact that the applicant's doctor had "prescribed" his use of marijuana, he originally thought that no drug incident should be documented because the applicant is not someone who indiscriminately uses illegal drugs. However, his recommendation was overridden by their Commander. The captain stated that he was "thoroughly impressed with [the applicant's] work ethic, professionalism, and enthusiasm" and that the applicant's performance has been exemplary. The captain stated that the applicant "could continue being a strong contributor."

- The applicant's current CO, another captain, recommended that the Board grant relief because the applicant is "a superior officer who has assumed significant responsibilities in addition to his primary duty. … His exceptional performance contributes significantly to the unit's success and esprit de corps." The CO stated that based on his performance, the applicant is "well deserving of the opportunity for continued service within the Coast Guard officer corps." The CO stated that he does not believe that the applicant was treated fairly given the extreme discomfort he was in during chemotherapy and his doctor's

[9] Before the enactment of 14 U.S.C. § 263 in 2012, this Board decided whether to remove a non-selection for promotion in accordance with *Engels v. United States*, 230 Ct. Cl. 465, 470 (1982), which stated that it making the decision, the Board should answer two questions: "First, was the claimant's record prejudiced by the errors in the sense that the record appears worse than it would in the absence of the errors? Second, even if there was some such prejudice, is it unlikely that he would have been promoted in any event?" Since the enactment of the statute, the Board may no longer use this test. Instead, if the Board finds that the applicant is entitled to a special selection board (SSB) under the statute, the Board must direct the Coast Guard to convene one. *Porter v. United States*, 163 F.3d 1304, 1324 (Fed. Cir. 1998) (finding that since the enactment of the Title 10 SSB statute, 10 U.S.C. § 628, the "harmless error test" espoused for the BCMRs in *Engels* no longer applies to the Air Force BCMR).

prescription for marijuana. The CO "question[ed] the appropriateness of the finding of a drug incident" and argued that the BOI should have directed the removal of the 1611. He also stated that the 1611 should not be "the sole reference to this incident" to be considered by the selection boards. The CO stated that the 1611 undoubtedly harmed the applicant's chances for promotion.

- In an email dated August 30, 2016, the CO congratulated the applicant and another lieutenant for being nominated for the Junior Officer of the Year Award. The applicant also submitted the supporting documentation for his nomination.

- The attorney who represented the applicant before the BOI recommended that the Board grant relief. The attorney stated that in her opinion the Coast Guard should either have expunged the 1611 or included the report of the BOI in the applicant's record. She stated that it is virtually impossible for officers to be promoted with either a drug or alcohol incident in their record. She stated that she believes the BOI intended to "fully reinstate" the applicant in the officer corps and to "negate the otherwise detrimental effect of the drug incident." She argued that if the Board does not grant relief, then the BOI's decision just deferred the applicant's separation.

APPLICABLE LAW AND POLICY

Drug Abuse

Article 20.A.2.k.1. of the Personnel Manual in effect in 2009 states that the intentional use of drugs constitutes a "drug incident as determined by the commanding officer." Article 20.A.2.k.2. states that a "member need not be found guilty at court-martial, in a civilian court, or be awarded NJP for the conduct to be considered a drug incident."

Article 20.C.3.a. provides that "[c]ommanding officers shall initiate an investigation into a possible drug incident, as defined in Article 20.A.2., following receipt of a positive confirmed urinalysis result or any other evidence of drug abuse. The absence of a positive confirmed urinalysis result does not preclude taking action based on other evidence." Article 20.C.3.d. states that "[i]n determining whether a drug incident occurred, a commanding officer should consider all the available evidence, including positive confirmed urinalysis test results, … Evidence relating to the member's performance of duty, conduct, and attitude should be considered only in measuring the credibility of a member's statement(s)." Article 20.C.3.e. states that "[t]he findings of a drug incident shall be determined by the commanding officer … using the preponderance of evidence standard. … A member's admission of drug use or a positive confirmed test result, standing alone, may be sufficient to establish intentional use and thus suffice to meet this burden of proof." Article 20.C.4. states that after the investigation is complete, the CO must determine whether a drug incident occurred and, if it did, will process the member for separation and may take disciplinary action. The same rules currently appear in the Drug and Alcohol Abuse Program Manual, COMDTINST M1000.10.

Chapter 2.O.3.a. of the Health Promotion Manual in effect in 2009 and 2010, COMDTINST M6200.1A, states that "[a]ll documentation surrounding alcohol/drug problems

must be documented in the member's service record. The CDAR, together with the command, will ensure that all entries in the member's service record completely and accurately document the incident, self-referral, or command referral, and all actions/counseling afforded to the member." Since then, the manual has been revised, and Chapter 7.K.3.a. now states that "[t]he only documents authorized in a member's PDR, pertaining to an alcohol or drug incident, are the appropriate Performance and Discipline (P&D) Administrative Remarks, CG-3307 entries. … The CDAR … will ensure that all entries made in the member's PDR completely and accurately document the circumstances of each incident."

Board of Inquiry

Article 12.A.15.h.1 of the Personnel Manual states that the purpose of a BOI is to "afford[] officers a fair, impartial hearing at which they have an opportunity to establish their retention in the Coast Guard is warranted. The officers concerned may present evidence to refute matters of record offered against them or otherwise establish they should be retained. The board of inquiry will consider all relevant evidence presented at the hearing and make findings and a recommendation based on a preponderance of evidence." Article 12.A.15.h.6.b.(4) states that when deciding whether to recommend retaining an officer, the BOI "must consider an officer's record as a whole and make its recommendation based on a preponderance of evidence." Article 12.A.15.h.8. provides that the BOI's report with a recommendation to retain or separate an officer is forwarded to Commander, PSC who informs the applicant of his final decision.

Article 12.A.15.h.4. states that if an officer is required to show cause for retention on active duty before a BOI, the officer must have access to the evidence against him and may be represented by counsel, present witnesses, and question witnesses.

Special Selection Board Statute

Title 14 U.S.C. § 263, enacted in Public Law 1120213, Title II, § 208(a), on December 20, 2012, states the following:

> (b) Officers considered but not selected; material error.--
> (1) In general.--In the case of an officer or former officer who was eligible for promotion, was considered for selection for promotion by a selection board convened under section 251, and was not selected for promotion by that board, the Secretary may convene a special selection board to determine whether the officer or former officer should be recommended for promotion, if the Secretary determines that--
> (A) an action of the selection board that considered the officer or former officer--
> (i) was contrary to law in a matter material to the decision of the board; or
> (ii) involved material error of fact or material administrative error; or
> (B) the selection board that considered the officer or former officer did not have before it for consideration material information.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. Although the applicant waited five years to challenge his drug incident, the application is considered timely because he has remained on active duty in the interim.[10]

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

3. The applicant alleged that the drug incident documented on a 1611 in his record in 2010 is erroneous and unjust and asked the Board to remove it and either remove his 2015 and 2016 non-selections for promotion from his record or direct the Coast Guard to convene an SSB to consider him for promotion without the 1611 in his record. In considering allegations of error and injustice, the Board begins by presuming that the disputed records in an applicant's military record are correct and fair, and the applicant bears the burden of proving by a preponderance of the evidence that they are erroneous or unjust.[11] Absent specific evidence to the contrary, the Board presumes that Coast Guard officials have acted "correctly, lawfully, and in good faith."[12]

4. Propriety of 1611 in Applicant's PDR: In his original request, the applicant alleged that the 1611 should not have been in his record because the current PDR Manual does not list either 1611s or "drug incidents" as documents that should be entered in a PDR. As PSC pointed out in the advisory opinion, however, the current PDR Manual states that all Page 7s should be entered into a member's PDR, and drug incidents are now documented on Page 7s, pursuant to Chapter 7.K.3.a. of the current Health Promotions Manual, which also states that Page 7s documenting drug and alcohol incidents should be entered into the member's PDR. The previous edition of the Health Promotions Manuals in effect in 2009 and 2010 did not specify the form of documentation of drug and alcohol incidents but did require that the documentation be entered in the member's record. Therefore, the Board finds that the applicant has not shown that the 1611 should not have been entered in his PDR pursuant to applicable policy even though drug incidents are currently documented on Page 7s.

5. Validity of Drug Incident: In his response to the advisory opinion, the applicant argued that in 2010 his CO's determination that he had incurred a drug incident was erroneous and unjust. He argued that the CO should not have found that he had incurred a drug incident because his use of the drug was not wrongful since he was suffering pain and nausea from cancer treatment and his oncologist recommended that he use marijuana to alleviate his symptoms. The

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

[11] 33 C.F.R. § 52.24(b).

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

applicant submitted a letter from an oncologist who acknowledged recommending marijuana to the applicant while he was undergoing chemotherapy in October and November 2009 and another from a captain who wrote that he had recommended to the CO that he make a finding of no drug incident because of the circumstances. To find that the applicant's use of marijuana was not wrongful would in essence place California State law about medical marijuana use over federal law and the UCMJ. Under Article 112a of the UCMJ, the intentional use of marijuana is prohibited and there is no exception for cancer patients. The applicant was well aware of this at the time, as he stated that he made the decision to use marijuana to alleviate his symptoms "with a heavy heart and conscience." Under Article 20.C.3. of the Personnel Manual, the determination of a drug incident rests with the CO, and the Board cannot conclude, based on the evidence presented, that the applicant's CO abused his discretion in finding that the applicant's use of marijuana was wrongful and that he had incurred a drug incident as defined in Article 20.A.2.k.1. of the manual. The Board finds that the applicant has not proven by a preponderance of the evidence that his CO's determination was erroneous or unjust.[13]

6. Completeness and accuracy of 1611: The applicant argued that the 1611 was not sufficiently accurate and complete as required by Chapter 2.O.3.a. of the Health Promotions Manual. The applicant did not point out any inaccuracies or any required but missing information, however, and the 1611 clearly states that he had incurred the drug incident "due to [his] drug use while undergoing treatment for cancer." Moreover, the applicant and his CO were able to fully explain the circumstances from their point of view in their communications to the selection boards. The Board finds that the applicant has not proven by a preponderance of the evidence that the 1611 is erroneous or unjust because of any inaccurate information or missing but required information. As PSC noted, the 1611 includes essentially the same information that a Page 7 prepared today to document a drug incident would include.

7. BOI report: The applicant alleged that the BOI report should be in his record but cited no policy that authorizes the entry of the report in his PDR, and the Board knows of none. PSC has stated that BOI reports may not be entered in members' PDRs under the policies in the PDR Manual. The applicant argued that this policy is unfair because in the absence of the BOI report, the selection boards could not know the outcome of the BOI. However, as prescribed in Article 12.A.15.h. of the Personnel Manual, a BOI's authority is limited to recommending whether an officer should be retained in the Service despite whatever misconduct the officer has committed to trigger the BOI. Therefore, the outcome of the BOI—that the board had recommended his retention after reviewing his whole record and the circumstances of the drug incident—is apparent from the fact that the applicant had in fact remained on active duty. The applicant has not proven by a preponderance of the evidence that his PDR is erroneous or unjust because it does not contain the BOI report.

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[13] *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976) (defining "injustice" for the purposes of the 10 U.S.C. § 1552 as "treatment by the military authorities that shocks the sense of justice but is not technically illegal"); *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"); Docket No. 2002-040 (DOT BCMR, Decision of the Deputy General Counsel, Dec. 4, 2002) (finding that the Board has the authority to determine whether an injustice exists on a case-by-case basis).

8. Contradicting the intention of the BOI: The applicant alleged that the 1611 prevented his selection for promotion in 2015 and 2016 and so its retention in his record contradicted the intention of the BOI to retain him in the Service. The lawyer who represented him before the BOI supported this allegation. While this Board cannot be certain that the 1611 caused the applicant's non-selections for promotion, it clearly could have been an important factor. As noted in finding 7, however, the BOI's purview and authority is limited to considering and recommending whether an officer should be retained in the Service based on his entire performance record, and the applicant was retained in 2011, in lieu of being discharged. Therefore, the BOI's recommendation to retain the applicant on active duty despite the drug incident was fulfilled. The BOI had no authority, however, to decide whether a drug incident had occurred or whether the applicant should be promoted to LCDR in the future and did not make any such comment in its report. The Board finds that the applicant has not proven that the retention of the 1611 in his record contradicted or frustrated the intention or outcome of the BOI in 2011.

9. Special Selection Board: The applicant argued that he is entitled to an SSB under 14 U.S.C. § 263 because the Coast Guard's inclusion of the 1611 was a "material administrative error" and because the selection boards did not see the "material information" in the report of the BOI. The Board disagrees. As shown in findings 4, 5, and 6, above, the applicant has not proven by a preponderance of the evidence that the 1611 in his record was erroneous or that it was erroneously placed in his record, and so its presence in his record is not a "material administrative error." Nor has he shown that the report of the BOI should have been in his PDR. Pursuant to COMDTINST 1410.2, to ensure that the selection process is fair, selection boards are allowed to see only certain categories of performance documentation, such as OERs, medals, and training records, as well as one communication from the candidate with one endorsement from the candidate's CO. There is no policy that allows selection boards to view the proceedings or reports of BOIs or other boards. As the BOI was not to be viewed by a selection board, the applicant has not proven that the 2011 BOI report, which explains briefly why the BOI decided to recommend the applicant's retention, is "material information" for the purposes of the selection boards in 2015 or 2016. Therefore, the applicant has not shown that he is entitled to an SSB under the provisions of 14 U.S.C. § 263.

10. Injustice: The applicant argued that having the 1611 in his record when it was reviewed by the selection boards in 2015 and 2016 was unjust and that because this Board has the authority to remove injustices, as well as errors, the Board should remove his non-selections pursuant to the old *Engels* rule, under which the Board decided whether to remove a non-selection by deciding whether an error or injustice had prejudiced the officer's record and, if so, deciding whether it was unlikely that the officer would have been promoted in any event (harmless error). Removing the applicant's non-selections would allow him to remain on active duty for re-consideration by two more annual LCDR selection boards. However, as noted in findings 4, 5, and 6, above, the applicant has not shown that having the 1611 in his record is unjust. Moreover, in *Porter v. United States*, 163 F.3d 1304, 1324 (Fed. Cir. 1998), the court held that since the passage of 10 U.S.C. § 628[14] (the SSB statute for the other military services), "[t]he

[14] 10 U.S.C. § 628 includes the following SSB provisions for the Army, Navy, and Air Force:

> (b) Persons considered by promotion boards in unfair manner.--(1) If the Secretary of the military department concerned determines, in the case of a person who was considered for selection for

harmless error test, while necessary to adjudicate cases such as this before the enactment of section 628, is not only unnecessary now, but grafting it onto section 628 is sufficiently problematic for us to reject that possibility. In cases such as this, the harmless error rule has no application." Although the Coast Guard's SSB statute, 14 U.S.C. § 263, was enacted after 10 U.S.C. § 628, it provides the same bases and means for handling complaints about unfair selection proceedings. Therefore, in light of the decision in *Porter* and subsequent, similar decisions, the Board finds no legal grounds for applying a harmless error test in this case to remove the applicant's non-selections from his record.

11. 1611 vs. Page 7: In the advisory opinion, PSC recommended exchanging the applicant's 1611 for a Page 7 because drug incidents are currently documented on Page 7s. However, as stated in finding 4, the 1611 was a proper template to use to document officers' drug incidents in 2010 and was correctly entered in the applicant's record at the time. The Coast Guard's various forms and templates are frequently modified over the years, and members' records are not rewritten each time that happens. The fact that the applicant's drug incident is documented pursuant to a template no longer used for that purpose does not cause the applicant's record to be erroneous or unjust. The Board finds no grounds for changing the format of the documentation.

12. Accordingly, the applicant's request for relief should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

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promotion by a promotion board but was not selected, that there was material unfairness with respect to that person, the Secretary may convene a special selection board under this subsection to determine whether that person (whether or not then on active duty) should be recommended for promotion. In order to determine that there was material unfairness, the Secretary must determine that--

(A) the action of the promotion board that considered the person was contrary to law in a matter material to the decision of the board or involved material error of fact or material administrative error; or

(B) the board did not have before it for its consideration material information.

ORDER

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

April 7, 2017

[redacted]