

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2017-097

██████████
██████████

FINAL DECISION

This proceeding was conducted according to 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 completed application on March 1, 2017,¹ and assigned it to staff attorney ██████████ to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated October 19, 2017, 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, a former Operations Specialist who was discharged on September 24, 2015, with a general discharge under honorable conditions, asked the Board to upgrade his discharge for misconduct due to drug abuse to an honorable discharge² with an RE-1 reentry code.³

The applicant explained that he was on leave from June 13, 2015, to June 29, 2015. On June 30, 2015, he was administered a random drug test which discovered Oxycodone in his system. He was informed of the results on July 13, 2015, when a Coast Guard Investigative Service (CGIS) agent interviewed him. He stated that he was caught off guard by the investigation, but he "still tried to help the agent as best as [he] could." The applicant informed the agent that when he had been on leave, he had a headache while at a friend's house and took what he was told was an Ibuprofen. He stated that he found out after the interview that the pill was the friend's girlfriend's,

¹ The application was received by the Board on September 22, 2015. The Chair directed the applicant to apply to the Discharge Review Board (DRB) first, as he had not yet exhausted his administrative remedies, and placed his application on hold until the DRB made its determination. On February 20, 2017, the applicant informed the Chair that the DRB had denied his application in whole, and he asked that his BCMR application be docketed. He informed the Chair that he was not requesting reinstatement.

² The five authorized types of discharge are Honorable, General Under Honorable Conditions, Under Other than Honorable Conditions, Bad Conduct, and Dishonorable. Bad conduct and dishonorable discharges are only awarded by court-martial. Personnel Manual, Article 12.B.2.c.

³ An RE-1 reentry code denotes that the veteran is able to reenlist in the military. An RE-4 reentry code, which the applicant received, denotes that the veteran is unable to reenlist in the military.

KDR, and was an Ibuprofen 800mg, which has no Oxycodone in it. The applicant asserted that the agent did not contact the girlfriend to confirm what the medication was. He stated that CGIS agents also interviewed his wife, OS3 M, when they conducted a search of their home. The agents did not find any controlled substances in their home, prescription or otherwise.

The applicant contended that his urine sample was not obtained in accordance with Coast Guard policy. He stated that according to the Coast Guard Drug and Alcohol Abuse Program manual, COMDTINST M1000.10 (series), Article 4.A.6.I., an observer must clearly view the urine entering the specimen container, which must be done at a urinal for males. He alleged that the collection was taken in a bathroom in which there were no urinals, only a stall. Policy also states that the test coordinator must require participants to list all medications, prescriptions, and over-the-counter medications. The applicant claimed that it was presented as “if you have any medications *you would like* to list, put them here or you can put ‘see medical record.’” He stated that those instructions did not sufficiently notify him to list all over-the-counter medications. He added that the manual states “poor collection procedures, such as samples provided without direct observations or a break in the chain of custody of the sample undermines the credibility of the drug-testing program.”

The applicant stated that on August 3, 2015, he was advised he was being processed for discharge. He was informed that he could write a statement on his behalf objecting to the discharge and that he would be evaluated to determine whether he was drug dependent. He asserted that according to the Military Justice Manual, COMDTINST M5810.1E, Article 32, he should have received a copy of the case file at that time so that he could complete his objection statement within five days as required. He stated that Chief M had asked the Executive Officer (XO) what levels of Oxycodone were found in the applicant’s system, to which the XO replied “does it matter?” The applicant stated that he had also asked “was a gas chromatography/mass spectrometry conducted on [his] urine sample” and if he could get a copy of his recorded interview with CGIS. He stated that he did not receive any information about his case file until September 6, 2015.

The applicant explained the information that he included in his statement on his behalf. He highlighted the fact that he had an excellent record up until this incident. He discussed his various accomplishments and awards for his dedicated service. He then stated that on August 6, 2015, he had a drug tested conducted at a private lab which found no drugs in his system. He was evaluated by a medical officer on August 25, 2015, who determined that the applicant had no drug dependency and cleared the applicant to return to duty. He stated that he was told the same day that he would receive a general discharge under honorable conditions with an RE-4 reentry code.

The applicant stated that the severity of his situation finally sank in with him. At this point, he and his wife started calling all of the family members that had been around while the applicant was on leave to determine how oxycodone had gotten into his system, as the Ibuprofen 800mg that he took at a friend’s house could not have been the source. Through these conversations he was reminded that at one point during a family reunion,⁴ he had a headache and asked for a pain reliever. The applicant’s wife’s stepmother, JR, gave the applicant’s wife a pain reliever to give

⁴ The family reunion appears to have been more of a family vacation. It is unclear how long it lasted, but based on the applicant’s statements throughout the record it seems that members of his wife’s family traveled to be with her grandfather for at least a few days.

to the applicant, which he took. However, JR was prescribed multiple medications at the time due to having been diagnosed with shingles a few weeks prior, one was Ibuprofen 600mg and one was Hydrocodone. The applicant emailed his Chief with a statement from JR and pictures of her prescriptions. The Chief stated that he passed the information on to the command. The applicant contended that finding that there had been no drug incident was more suitable to his situation. He argued that the command should have withdrawn his discharge recommendation because he provided statements and evidence showing that he had ingested the drug unknowingly.

The applicant added that from the time he was drug tested to the time he was discharged, over fifty days, he was never removed from the Radio and Combat Information Center access lists, which are classified systems. He re-qualified for three small arms the week after he was informed that he had failed the drug test. He remained billeted in armed watch stander positions until the day he was discharged. The applicant argued that these actions are “in total contradiction of the CO...endorsement for [him] to be discharged as a drug abuser.” The applicant argued that had his CO truly thought he was a drug abuser he would have been pulled from these various positions and qualifications.

The applicant stated that he believes it was unjust for him to receive a general discharge under honorable conditions with a reentry code of RE-4. He stated that this leaves a negative connotation on his service record after he served honorably and “in an exemplary manner.” He asserted that he has provided enough evidence to prove that he ingested the Oxycodone unknowingly by way of witness statements, character statements, and pictures of the medications. The applicant reiterated that he did not believe that CGIS conducted a thorough enough investigation to determine how the drug could have entered his system. Coast Guard policies were not followed in the collection of his urine sample. He argued that his CO erred when he did not withdraw the applicant’s recommendation for discharge after receiving additional information from the applicant. He stated that a general discharge can hinder his career opportunities and subject him to prejudice. He added that he has a family to support which will be difficult to do with such a blemish on his record. He therefore respectfully requested that his discharge be upgraded to honorable and his reentry code be upgraded as well.

When the applicant asked that his BCMR case be docketed following his receipt of the Discharge Review Board’s (DRB) decision, he added that the decision stated that he had joined the Coast Guard at age 18. The applicant stated that he joined the Coast Guard at age 28 and that he was concerned the DBR did not take his case very seriously if it made mistakes such as this. He asserted that his DD 214 will mark his life forever and it is a very serious matter to him. He stated: “to think people could pass a negative judgment on another human being that has served in the same service as themselves, but not even have the courtesy to get the details right is quite disheartening.”

Supporting Evidence

In support of his application, the applicant provided several documents which are described below in the Summary of the Record. He also provided several photographs. The first two are of a restroom. The pictures show that it is a somewhat small restroom, with one sink and one stall.

There are no urinals pictured in the photographs. He also provided two pictures of JR's prescriptions. The first is a prescription medication for JR for Ibuprofen 600mg. There is no date visible in this picture. The second is a prescription for JR for Hydrocodone/Acetaminophen. This prescription was filled on June 10, 2015.

The applicant provided the results of a drug test he voluntarily took at a private laboratory on August 7, 2015, following the positive results from the Coast Guard drug test. The report states that the collection was observed by a staff member of the laboratory. The results show that the applicant's urine tested negative for any drugs in his system.

The applicant provided statements from several friends and family members who were present at various times during his leave. The first is an undated letter from KDR, the girlfriend of the applicant's friend. The applicant stated that this statement was created shortly after the applicant found out he had tested positive for Oxycodone, and is the letter he provided to his command shortly thereafter. She stated the following:

In June 2015 [the applicant] visited friends...with his family where he was given one 800 milligram Ibuprofen that was prescribed to me, [KDR]. This medicine was given to [the applicant] for a headache that he was experiencing at the time. This medicine does not contain Oxycodone and I was never contacted by an investigator to clarify these details.

The second statement is from an Independent Duty Health Services Technician (HS1 S) with the Coast Guard. She stated that at no point while the applicant was under her care did he request any narcotics. She also stated that she was never contacted by CGIS or asked for his medical record by CGIS. The applicant's command had asked her to perform a review of his medical record for medications that had been prescribed to him.

The applicant provided a letter from a Yeoman in the administrative branch of his command. The letter stated:

This is a letter verifying employment information for [the applicant]. I have reviewed the member's military SPO personnel record and have verified that member has no negative documentation in his record pertaining to performance, evaluations, or personnel character. There is also no report or documentation for disciplinary action of any kind. Member has been Active Duty in the Coast Guard since April 16, 2012.

The applicant provided a statement dated September 2, 2015, from JR, his wife's stepmother. She stated the following:

The purpose of this letter is to give information in regard to a possible mix up in giving a prescription pain medication versus an OTC pain reliever to a family member, which may have resulted in a negative drug screen for that family member. June 20th my husband [the applicant's wife's father] and I took a vacation to get all his kids together at his father's house for a family gathering. Prior to the visit on June 10th I was diagnosed with shingles and was prescribed a pain medication (hydrocodone) for pain. In preparation for our trip I put my OTC pain relievers, allergy pills and my prescriptions in my pillbox. Sometime during the visit I was asked for a headache pain reliever by my stepdaughter, [OS3 M, the applicant's wife] and must have grabbed the prescription medication rather than the ibuprofen.

The applicant provided a character letter written by Chief M. The letter states that the Chief had been the applicant's good friend and supervisor since the applicant had reported to his

final command. The Chief noted that he personally believed the applicant's contention that he did not intentionally ingest an illegal substance, and he knew the applicant to be an honest man who did not use drugs. He stated that he had presented the information the applicant provided regarding the wife's stepmother to his chain of command, but that it was their ultimate decision to discharge the applicant. The letter states the following:

In my interaction with him he consistently exceeds expectations in his problem solving abilities and work ethic. Specific examples of [the applicant's] performance comes to mind while he was on board... I hope this helps you understand what kind of person [the applicant] is. He not only qualified in the [Combat Information Center]/Radio watch stations ahead of schedule, he qualified in his Gangway Petty Officer of the Watch (GPOW), Damage Control Performance Qualifications (DCPQS) both basic and advanced ahead of schedule. He also on his own time and not needing too for his duties qualified as a Rescue Swimmer, Boarding team member and small boat crew member.

I hope these examples show what a hard-working and proactive person [the applicant] is and can help you make your decision. Employees of [the applicant's] caliber are hard to replace, but I honestly believe that he is ready for the challenges that lay ahead of him. [The applicant] is an intelligent young man that will go far in life if given the opportunity.

The applicant provided a letter from OS1 S, who was his direct supervisor for thirteen months at his final command. She stated:

As his direct supervisor, I saw him and interacted with him on a daily basis. We've sailed together for months at a time, 7 days a week/24 hours a day. At no point had he ever displayed any erratic behavior or 'habitual' addiction behavior. He was always professional and on time for his duties. During both underway, and in-port work days, any time he was tasked with something it was completed proficiently and without any excuses. He was a trusted and dependable member of the ship and was investigated and given a SECRET clearance. He is a qualified Boarding Team Member, Migrant Watch Stander and COMBAT watch stander, all which place him in highly responsible sensitive security situations. He never once faltered or showed signs of fatigue or displayed any other symptoms clinically associated with the addiction or habitual use of the illegal substance in which he is accused of.

To this day, I would still trust [the applicant] with the Safety and Security of the ship I'm on. I am aware of the US Coast Guard policy regarding drug use, both intentionally and unintentionally. I understand zero tolerance. However, [the applicant's] inevitable discharge should be Honorable without a drug use caveat associated. It is not in line with his character as I've and other have known him. I hope to see the result of his discharge as it should be, with him proud of his service to this country and the ability to provide for his family without the dark cloud of a possible false positive, unintentional usage or improper handling/testing that could have occurred.

A letter was provided by Lieutenant Junior Grade (LTJG) S, who stated that she lived in the same apartment complex as the applicant in 2014. She stated that she and the applicant got puppies at the same time and they often let their dogs play together. When the applicant and his wife had a child, she and her husband would watch their baby for them, which she continues to do. She went on to say:

Through my interactions with [the applicant] both while our dogs were playing as well as when babysitting... I have always seen him as a clear-minded, mature and responsible individual. During conversations it became clear that [the applicant] cared greatly about his fitness and it is my opinion that he would not knowingly or intentionally put anything dangerous or illegal into his system. He practices martial arts, which involves a great deal of self-control and strength and I believe he exhibits these traits in all facets of his life.

[The applicant] has expressed concern to me over the results of his drug test and has taken measures to determine the source of the results including seeing a doctor and requesting another test. He is upset by the implications and I believe he is truly surprised at the situation. I have never seen [the applicant] take anything illegal nor have I ever witnessed him in anything but a sound state of mind.

The applicant provided a letter from ET2 M who stated that he had sailed with the applicant for the previous two years. He stated that the applicant was always an “excellent shipmate and a close personal friend.” He asserted that he was never led to believe that the applicant “was or has ever been involved with any type of drugs.” He described the applicant as responsible, hardworking, and an excellent role model. ET2 M stated that the applicant was a team player, and always assisted new personnel on board. He also stated that he spent nearly every port call with the applicant, including port calls in Colombia and Cuba, and not once throughout the travel “did he display any type of behavior that would lead [him] to believe he was or has ever been a person would use or abuse drugs.” ET2 M asserted that during his time in the Coast Guard, he has found that if a person is bound to “make a bad decision or stray from the USCG core values and abuse drugs, a foreign port of call is usually where it happens.” He stated that he was “blatantly shocked” at the accusations against the applicant. He considered the applicant’s discharge a great loss to him and to the Coast Guard as a whole.

The last statement provided was from OS2 G. OS2 G stated that he knew the applicant throughout his military career as a supervisor, shipmate, and a close friend. He stated that he “wholeheartedly vouched for his excellent character and unwavering belief in the Coast Guard core values.” He spoke of the applicant’s ability to learn quickly and lead members effectively. The applicant was said to be reliable, consistent, and resourceful. OS2 G noted that the applicant had never been cited or reprimanded “for any unprofessional behavior including substance abuse.” He stated that he could not have asked for a better OS3, and he would proud to serve with the applicant again. OS2 G also spoke of the applicant’s civilian life as “one of stability and family values.” He stated that he spent time with the applicant on and off duty and asserted that he could give his word “that there has never been a sign of any form of substance abuse.” He highly endorsed the applicant’s request for an upgraded discharge.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on April 16, 2012, at age 28. On April 16, 2012, the applicant signed an acknowledgment of various Coast Guard policies and regulations, including the Coast Guard’s drug policies. The acknowledgement states that he was advised that the illegal use or possession of drugs will not be tolerated and that he may be subject to a general discharge if a urine test detects the presence of illegal drugs.

Prior to the incident at issue here, the applicant had received only neutral and positive entries in his military record. One administrative entry from May 23, 2013, commends the applicant for his performance at that command and noted his professionalism, devotion to duty, pride, dedication, technical expertise, positive attitude, and adaptability. An administrative entry from April 14, 2015, noted the applicant’s “outstanding teamwork, performance, and devotion to duty” and thanked him on a “job exceptionally well done” for his duties surrounding a commissioning ceremony.

The Coast Guard provided a copy of a “Drug Testing Program – Testing Register.” It includes twelve names, all redacted except the applicant’s. The applicant’s name and social security number appear as number 10. The applicant signed under his name and wrote “N/A” under “Comments and disposition.” Other members wrote “N/A,” “Vitamins,” or “See medical record” in this column.

The Coast Guard provided a copy of the CGIS Case Report dated July 23, 2015. The synopsis states that the applicant “tested positive for oxycodone/oxymorphone during a random drug urinalysis, collected on 30 June 2015. [The applicant] was found to not have a legal prescription, so the positive urinalysis is probable cause of illegal drug use.”⁵ The report states that the applicant was to be brought to Captain’s Mast and administratively separated with a general discharge.

The CGIS report included documentation of the urinalysis processing and results, which show that the applicant’s urine was collected on June 30, 2015, along with urine samples from eleven other members, and that the collection was “observed.” The results were reported on July 9, 2015. On the log, the Coast Guard redacted all but number 10, with the applicant’s Social Security number, which shows a positive result for oxycodone or oxymorphone.

The reporting CGIS agent included a note indicating that he was contacted on July 10, 2015, by the applicant’s XO who informed him that a member of his crew, the applicant, had tested positive for oxycodone/oxymorphone after a random drug test. The XO added that he was unaware of any legal prescription for these drugs.

The CGIS report states that on July 13, 2015, the applicant was interviewed by CGIS agents. He was read his rights, which he waived in writing. The applicant stated that he had “no idea why he tested positive.” He stated that he had no recent injuries and the only medications he had taken recently were “off brand, over the counter, acetaminophen from CVS pharmacy for headaches.” The applicant stated that his wife did not have a current prescription for oxycodone or oxymorphone. The applicant added that he had taken what he believed to be an Ibuprofen while at a friend’s house on leave.

On July 14, 2015, CGIS agents contacted the applicant’s friend. The friend stated that while the applicant was visiting him in June, his wife⁶ gave the applicant an 800 mg Motrin on one occasion. The friend and wife told the agent that they were not on any prescriptions and do not know if the applicant took oxycodone or oxymorphone.

The report notes that a CGIS agent went to the applicant’s home on July 14, 2015, and spoke to his wife, OS3 M. She stated that she did not have any current prescriptions for oxycodone

⁵ The Coast Guard’s “cutoff” minimum level for a positive urinalysis result for oxycodone use is 100 ng/ml for both the initial screening and the gas chromatography-mass spectrometry confirmation test. COMDTINST M1000.10, Article 4.B.4. Oxycodone use may be detected in urine at the 100 ng/ml level for up to two to three days. U.S. Department of Health and Human Services, Substance Abuse & Mental Health Services Administration (SAMHSA), “Oxycodone and Hydrocodone: Detection in Urine, Oral Fluid, and Blood (June 10, 2014), available at https://www.samhsa.gov/sites/default/files/meeting/documents/flegel-research-studies-dtab-june-2014_0.pdf (last viewed on October 16, 2017).

⁶ The applicant refers to her as the friend’s girlfriend. The CGIS report refers to her as the friend’s wife.

or oxymorphone. She stated that the applicant's friend gave him an Ibuprofen but she did not see the pill. She stated that she did not know how the applicant had access to the drug.

CGIS agents went to the applicant's home again on July 20, 2015, and spoke to OS3 M, the applicant's wife. She stated that she had a prescription for Percocet⁷ for a surgery she had in April. She stated she was the only one who used the drug, she did not have it refilled, did not have any remaining pills, and that she threw away the empty bottle. OS3 M consented to the agents searching the bathroom and kitchen cabinets. The agents found a prescription for prenatal care and no other prescriptions.

The report states that CGIS agents contacted the base medical clinic and received a report on both the applicant and his wife regarding all past prescriptions. The applicant "was found to not have any legal prescriptions of oxycodone/oxymorphone." The applicant's wife, OS3 M, had been prescribed oxycodone on April 29, 2015, and had the prescription filled at CVS.

The report states that on July 24, 2015, the applicant was entered into the FBI National Instant Criminal Background Check System as a prohibited person as a user or addict of a controlled substance.

On August 3, 2015, the applicant received an administrative entry in his record regarding the positive drug test. It states the following:

On 09JUL15 it was determined that you were involved in a drug incident based upon a positive result for oxycodone metabolites during the 30JUN15 urinalysis.

You were counseled on Chapter 3 of the Coast Guard Drug and Alcohol Abuse Program, COMDTINST M1000.10 (series). The unit Command Drug and Alcohol Representative (CDAR) will arrange an appointment with a provider who will determine the nature of your relationship with drugs.

You will be processed for separation, in accordance with Chapter 2 of the Coast Guard Drug and Alcohol Abuse Program, COMDTINST M1000.10 (series). If a medical officer determines that you are drug/chemical dependent, you will be offered treatment prior to separation.

On August 3, 2015, the applicant received a notification of intent to discharge from the Commander of the command. The notification stated the following:

1. This is to inform you that I have initiated action to discharge you from the Coast Guard pursuant to [Military Separations, COMDTINST M1000.4, Article 1.B.17.b(4)] by reason of misconduct due to illegal use of a controlled substance. The reason for my action is your involvement with drugs as evidence of a positive result from a urinalysis screening conducted on 30 Jun 2015.

2. The decision on your discharge and type of discharge you will receive rests with Commander (CG PSC-EPM-1). You have the following rights.

3. As you are being considered for a general discharge, you have the right to consult with a lawyer...

4. If you are awarded a general discharge, you may expect to encounter prejudice in civilian life.

⁷ Percocet is composed of acetaminophen and oxycodone.

5. You may submit a statement on your own behalf within (5) working days of today's date.
6. You may disagree with my recommendation; if so, your rebuttal will be forwarded with my recommendation.

Also on August 3, 2015, the applicant acknowledged the proposed discharge and stated that he would be providing a statement on his behalf. He also stated that he objected to being discharged.

On August 3, 2015, the applicant's commanding officer (CO) sent a recommendation for the applicant's discharge to the Personnel Service Center. The CO recommended that the applicant be separated with a general discharge by reason of misconduct due to illegal use of a controlled substance. The recommendation was based on the June 30, 2015, positive drug results for oxycodone metabolites.

The applicant's statement on his behalf is dated August 7, 2015. He stated that since he joined the Coast Guard on April 16, 2012, he has taken at least ten random drug tests, and even more during his professional civilian career, and he never failed a drug test until the June 30, 2015, test. He stated that he had never received a negative entry in his military record nor had he had any disciplinary issues. During his time in the Coast Guard, he had been assigned to three "major cutters" which were underway roughly six months out of the year. As a result, he lived and worked in close proximity to his coworkers and supervisors, and he had never been accused or suspected of substance abuse. He stated that he honestly did not understand "how or why the test and subsequent investigation came to the conclusion that it has."

The applicant outlined some of his most notable accomplishments during his time in the Coast Guard, including earning the title Honor Graduate at boot camp, class leader at his "A" School, and "excellent marks" on all of his evaluations. He asserted that the Coast Guard has trusted his "potential, judgment, and drive" by allowing him to become a Boarding Team Member, Alien Migrant Interdiction Operations watch stander, and an Anti-Terrorism Force Protection watch stander. He added that he holds a security clearance and qualified as a cutter rescue swimmer.

The applicant stressed that he was less than six months from beginning terminal leave and after three and a half years of good behavior in the Coast Guard he would not endanger an honorable discharge by "starting to abuse any substance." He added that he is happily married and he and his wife just had a baby girl. He stated that he "would never purposely risk not only [his] job in the Coast Guard, but [his] reputation in and out of the Coast Guard, along with possibly even losing [his] family."

The applicant went on to argue that he did not engage in any of the activities listed in the Coast Guard Drug and Alcohol Abuse Program, COMDTINST M1000.10 (series) as the definition for a drug incident. He stated that his ingestion was unintentional as he took a pill he thought was over the counter when he had a headache on vacation. The applicant stated that the fact oxycodone was found in his system is consistent with his statement during the CGIS investigation when he stated that he took what he thought was an Ibuprofen. He added that during the investigation he was honest, truthful, and forthcoming. He stated that when he is not home, if he is in physical pain

(such as suffering from a headache) he will “ask someone around if they have Tylenol, Motrin, etc., that could relieve the pain.” The applicant also stated that at most he was “guilty of naively accepting medication without reading or inquiring as to the specific ingredients, which is an error that will never occur again.” He understood the Coast Guard policy regarding drugs and understood that his discharge was inevitable. However, he hoped that the situation could be “resolved in a way that [would] not prevent [his] future employment or opportunities to provide for [his] family.” He reiterated that he did not intentionally ingest a controlled substance and that he was not a drug or substance abuser. He attached to this statement the results from the drug test he took on August 7, 2015.

On August 24, 2015, PSC authorized the applicant’s separation on September 24, 2015, and directed that he receive a general discharge under honorable conditions due to misconduct for involvement with drugs. The separation code was to be JKK with a reentry code of RE-4.

On September 2, 2015, the applicant emailed his Chief and included the pictures of JR’s medications and her statement, as discussed above. The applicant informed the Chief that the CGIS investigators had not contacted HS1 S, which concerned him and caused him to suspect they had not done a thorough investigation. The applicant explained what he had discovered:

So I contacted my friend...to get his girlfriend’s contact info so I could verify if there was any oxycodone in her ibuprofen. It turns out that her medicine has no oxycodone in it. She also told me that the investigator never called to confirm that with her either. Now this made me immediately start to think if it didn’t get into my system in that situation how did it. So me and [my wife] started to think and we both came to the conclusion that I [needed] a pain reliever while we were [at the family reunion]. So we started contacting everyone at the family reunion to see if we could make any [sense] of this. Talking to [my wife’s] stepmother we found out when I did need something for a headache while I was there [sic]. We thought it was ibuprofen at the time and nothing out of the ordinary. This would explain why the levels were high because that instance would have been right before we came back from leave and the drug test was on my first day back. This would also make [sense] on why I didn’t notice I had taken anything. We were drinking that night with [my wife’s] siblings, catching up and having a good time so I would have just assumed I had one to many drink [sic] instead of thinking I ingested a drug. I have attached to this email [my wife’s] stepmother’s statement of photos of her medications. Coast Guard manuals state that the outcome of this situation can be changed up until my discharge date. I hope you will show this to the XO and CO so this can be made right.

On September 4, 2015, the applicant emailed the cutter’s Executive Officer (XO) regarding his upcoming discharge. He wrote that the Chief had stated that he was awaiting word from the XO about whether the applicant would be discharged. The next day, the XO responded, “File attached, please let me know if you need anything else.” The email print-out does not contain the name of the attachment. The applicant responded on September 6, 2015; stated that he had sent more information to the Chief; and asked if anything would be done about the additional information and research. The same day, the XO replied that he had looked over the additional information and sent it to the legal team for their review.

On September 24, 2015, the applicant was discharged. His DD 214, which he signed, shows that he was discharged “under honorable conditions” (a general discharge) because of “misconduct” with a JKK⁸ separation code, and an RE-4 (ineligible for reenlistment) reentry code.

⁸ The SPD handbook states that a JKK separation code denotes an involuntary discharge for a member who “commits drug abuse, which is the illegal, wrongful or improper use, possession, sale, transfer or introduction on a military

VIEWS OF THE COAST GUARD

On August 8, 2017, the Judge Advocate General (JAG) of the Coast Guard recommended that the Board deny relief in this case. The JAG noted that per Coast Guard policy, if the ingestion of a drug occurred without a member's knowledge or awareness, then it does not constitute a drug incident. A CO may make a finding that no drug incident occurred in such circumstances and close the investigation. The JAG stated that in this case, the applicant's command did not determine that the ingestion was unintentional, and therefore the question is whether the command abused its discretion in making this determination. The JAG argued that the command did not abuse its discretion "because there were several factors discovered" in the CGIS report to support the command's decision. First, the applicant's "wife originally told CGIS investigators that she did not have a prescription for oxycodone, she later confirmed that she had a prescription for Percocet, which is oxycodone/paracetamol," which had been filled on April 29, 2015. The JAG therefore argued that this prescription was "a possible source of the oxycodone found in the applicant's urine."

The JAG also stated that the CGIS agents did investigate the applicant's claim that he had received an Ibuprofen from a friend. The friends confirmed that they have given the applicant an Ibuprofen, and not a controlled substance. "Since the only possible source of the oxycodone discovered during the CGIS investigation was the applicant's wife's prescription, the conclusion that the incident qualified as a drug incident is reasonable." The JAG contended that there is no reason to believe that an error or injustice occurred during the CGIS investigation.

The JAG noted that "the applicant is now making" a new argument regarding the source of the oxycodone. However, the JAG stated that the applicant did not offer "a reasonable explanation for why this was not raised to CGIS during their initial investigation, nor does he address the fact that his wife was discovered to have a prescription for the drug and appeared to have initially misled investigators." The JAG also noted that the wife's stepmother's prescription was for Hydrocodone, which has a different chemical composition than Oxycodone. In addition, the stepmother's letter "indicates the family reunion...took place sometime around 20 June 2015." However, the JAG claimed, oxycodone is generally only detectable in urine for three to four days after ingestion. The JAG argued that it is unlikely that ingestion on June 20, 2015, would show up in his system on June 30, 2015. Therefore, the JAG did not find sufficient evidence to disturb the findings of the CGIS investigation or recommend granting relief in this case.

The JAG included a copy of the CGIS report, discussed above in the Summary of the Record, and a print-out from a website titled Home Health Testing regarding health testing information.⁹ The website states that oxycodone will show up in urine within 0-2 hours, and will remain in urine for 3-4 days.

installation of any narcotic substance, intoxicating inhaled substance, marijuana, or controlled substance...when supported by evidence not attributed to urinalyses administered for identification of drug abusers or to a member's volunteering for treatment under the drug identification and treatment program."

⁹ <https://www.homehealthtesting.com/blog/2015/10/how-long-does-oxycodone-stay-in-your-system>

With his recommendation, the JAG also adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC). PSC stated that according to Article 3.B.2. of the Coast Guard Drug and Alcohol Abuse Program manual, COMDTINST M1000.10 (series), a drug incident is determined by the CO using a preponderance of the evidence standard; which in this case means when all the evidence is fairly considered it is more likely than not that the member intentionally ingested drugs. PSC added that a positive test result standing alone may be sufficient to establish intentional drug use and meet this burden of proof. According to Article 3.B.4., if a CO determines that a urinalysis result was faulty or that the drug use was not wrongful, then the CO will make a finding that no drug incident occurred.

PSC noted that Article 4.A.6. of the manual states that proper collection of urine samples “is key to a successful urinalysis program.” PSC argued that the purpose of this section is to ensure that the credibility of the drug testing program is not undermined. Questionable samples or breaks in the chain of custody can result in dismissed court-martial proceedings. Therefore, the purpose of this section is not to protect a member, but to protect the Coast Guard from faulty tests. PSC further noted that the applicant did not dispute the validity of the test but the “lack of counseling he received regarding the required information in the comments block of this form.” On the form, the applicant did not indicate the use of any medications or supplements.

The applicant argued that proper procedures were not followed during the urinalysis process. He argued that his urine sample was not collected in a location that would allow an observer to have a clear view of the urine flow entering the specimen container. PSC argued that the integrity of the urinalysis process is lost when members attempt to deceive the screening process in order to receive a negative screening result. However, the integrity of the program is not lost “when a positive urinalysis specimen is collected and positive test results are identified.” PSC therefore argued that the applicant did not identify an error or injustice in the urinalysis process.

PSC argued that the applicant did not prove by a preponderance of the evidence that his discharge was erroneous or unjust. The applicant tested positive for Oxycodone on June 30, 2015, and his command reviewed his medical record and determined he had no prescription medications. His CO determined after an investigation into the applicant’s use of drugs that a drug incident did occur and the applicant was then properly processed for separation due to misconduct for illegal drug use. A member discharged for this reason may not receive higher than a general discharge under honorable conditions, therefore the applicant received the proper character of service upon discharge. While the applicant argued that his ingestion of the drug was unintentional, PSC contended that the applicant did not provide enough evidence to overcome the presumption of regularity given to his military record.¹⁰

¹⁰ PSC included in the memorandum a copy of the CGIS investigation and a printout from a website called “Always Test Clean,” which advises people how to pass drug tests and may have been submitted to the CGIS agents. The printout states that research “has shown that urine drug tests generally produce a false positive test more than the other drug tests.” According to this site, studies have shown that less than 100 of the 1,000 labs in the United States meet federal standards and that most states do not regulate these labs. The site states that over the counter medications, prescription medications, certain foods, and common vitamin supplements can cause a false positive. Among medications that can cause a false positive, the site listed pain relievers such as Advil, Motrin, and Ibuprofen.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 16, 2017, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 days. The applicant responded on August 24, 2017, and disagreed with the Coast Guard's advisory opinion. He argued that the command did abuse its discretion in choosing to discharge him for drug abuse, and at the same time allowing him to qualify on small arms. Regarding the CGIS investigation, the applicant contended that his wife never lied to the investigators. The first time they showed up at his home, they asked his wife if she had any *current* prescriptions and she said no. After the investigators looked into the medical history and asked his wife again, she confirmed that she did have a prescription for Percocet in April. The first time the investigators spoke with the wife, they had asked if there were any prescriptions in the house, which there were not. The applicant noted that the investigators did not ask about previous prescriptions, so his wife did not think of a medication she had taken for a surgery months prior. Additionally, his wife was unaware that one of the ingredients of Percocet is Oxycodone. He stressed that his wife never intended to mislead the investigators in any way and that he and his wife were both cooperative throughout the process.

The applicant went on to argue that the Coast Guard's actions in this case were not reasonable, as the advisory opinion stated. Regarding the fact that the applicant did not bring up the possibility of accidentally taking the drug from his wife's step-mother, he stated that to this day he is still unsure how the drug got into his system. He only found out that his wife's step-mother's pill could have been the source after he received his notification of intent to discharge. He stated that it seemed as though he was "the only person trying to figure out what happened while everyone else was just trying to figure out how to discharge [him] the fastest." He asserted that his Chief encouraged him to put 100% effort into finding out what happened. He did that, and he stated that now his efforts are being used against him to imply that he was changing stories. He again asked that the Board correct his record by upgrading his discharge, and asked that the Board not find that the Coast Guard's actions were reasonable and keep a "lifelong negative mark" on his military record that will affect him and his family.

APPLICABLE POLICY

Article 1.B.17.b.(4) of the Military Separations Manual, COMDTINST M1000.4 (series) states that any member involved in a drug incident or the illegal, wrongful, or improper sale, transfer, manufacture, or introduction onto a military installation of any drug will be processed for separation from the Coast Guard with no higher than a general discharge under honorable conditions.

The Coast Guard Drug and Alcohol Abuse Program, COMDTINST M1000.10 (series), Article 1.A.2.k.(1) states that the intentional use of drugs or prescription medications to obtain a "high" contrary to their intended use constitutes a "drug incident" as determined by the CO. A member need not be found guilty at a court-martial, civilian court, or be awarded a non-judicial punishment for conduct to be considered a drug incident. Article 1.A.2.k.(2) notes that if the conduct occurred without the member's knowledge, awareness, or reasonable suspicion then it does not constitute a drug incident.

According to Article 3.A.2., a CO will initiate an investigation into possible drug incidents following the receipt of a positive confirmed urinalysis test. Article 3.B.1. states that in determining if a drug incident occurred a CO should consider “all the available evidence” including a positive urinalysis test, prescription documentation, medical records or chain of command recommendations. “Evidence relating to the member’s performance or duty, conduct, and attitude should be considered only in measuring the credibility of a member’s statement(s).” When a positive urinalysis test is included in the evidence, the command should also consider whether it was conducted in accordance with Coast Guard policy.

Article 3.B.2. states the following regarding the preponderance of the evidence standard:

The findings of a drug incident shall be determined by the commanding officer...using the preponderance of the 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.4. states that when a CO determines that the results of a urinalysis test resulted from an administrative error, faulty chain of command, or that the drug use was not wrongful due to a prescription or unknowing ingestion, the CO must make a finding that no drug incident occurred.

Article 4.A.6. discusses collecting urine samples. It states that proper collection is key to a successful urinalysis testing program. A member must report to the coordinator with identification and the coordinator must record the member’s information, including batch and specimen number. The coordinator must “[a]dvice the member to note all prescription and over-the-counter drugs they are currently taking... If the member is taking or has taken any prescription drugs in the last two weeks or has had a dental procedure within the last 72 hours, the coordinator will record the remarks block of the ledger.” The coordinator must label the bottle with the member’s social security number and the member must verify the information and sign the label. Once a bottle is prepared using the label, the coordinator will give the bottle to the observer. The observer must then ensure that he has “full view of the specimen bottle at all times.” Males are instructed to “use only the urinal” for the specimen collection.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application is timely because it was filed within three years of the applicant’s discovery of the alleged error or injustice in his record, as required by 10 U.S.C. § 1552(b).

2. The applicant alleged that the characterization of his discharge and his reentry code are erroneous and unjust. 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.¹¹ 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.”¹²

3. The applicant argued that the proper procedures were not followed during his June 30, 2015, urinalysis test in that the observer could not have seen the specimen enter the container because he was asked to use a bathroom where only a stall was available and not a urinal, as required by Article 4.A.6. of the Coast Guard Drug and Alcohol Abuse Program manual. In support of this allegation, the applicant provided photographs of a restroom which appears to have only one stall and no urinals. The Board does not find that applicant has provided enough proof to overcome the Coast Guard’s presumption of regularity. While it is possible that the observer did not witness the applicant’s urine enter the specimen container, the documentation states that the observer did witness it, and the applicant is not claiming that he put someone else’s urine in the vial marked with his Social Security number while standing in the stall. The Board notes that Coast Guard’s argument that the policy pertaining to proper specimen procedures being only for the benefit of the Coast Guard is not persuasive. While it is important that the test be accurate for reasons beneficial to the Coast Guard, members too have an interest in ensuring that their urine samples are being processed properly to ensure they are not punished for something they have not done. However, the Board finds that the applicant has not submitted evidence that casts doubt on the urinalysis procedures his unit followed or the chain of custody of his urine sample.

4. According to Article 3.B.4. of the Coast Guard Drug and Alcohol Abuse Program manual, a CO must make a finding that no drug incident occurred if he finds that a drug was unknowingly ingested, but the CO should find that a drug incident occurred if he finds that the preponderance of the evidence shows that the member knowingly ingested the drug. The applicant’s argument is that his CO erred in finding that a drug incident had occurred because he unknowingly ingested the drug. The record shows that upon returning to his unit from leave on Monday, June 30, 2015, the applicant’s urine contained metabolites of oxycodone or oxymorphone at a level exceeding the cutoff, 100 ng/ml. According to the Substance Abuse & Mental Health Services Administration of the U.S. Department of Health and Human Services, this positive result means that that the applicant had ingested oxycodone or oxymorphone, for which he had no prescription, within no more than three days of Monday, June 30, 2015.¹³ However, the applicant did not mention any medication on the urinalysis log, and when questioned by CGIS, he did not mention having recently taken his wife’s stepmother’s pill. Instead, he attributed the urinalysis result to having recently taken a friend’s pill, which was later found not to have contained oxycodone or oxymorphone.

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).

¹³ U.S. Department of Health and Human Services, Substance Abuse & Mental Health Services Administration (SAMHSA), “Oxycodone and Hydrocodone: Detection in Urine, Oral Fluid, and Blood (June 10, 2014), available at https://www.samhsa.gov/sites/default/files/meeting/documents/flegel-research-studies-dtab-june-2014_0.pdf (last viewed on October 16, 2017); SAMHSA, Drug Testing White Paper (April 2, 2011) (noting that the duration of positive test results depends upon how much of the drug was consumed), available at http://www.ncsacw.samhsa.gov/files/Drug_Testing_White_Paper_508.pdf

5. The applicant provided a statement from his wife's stepmother about having provided a pill to him, which she thought was ibuprofen, but there is no evidence that this occurred within three days of the urinalysis; no evidence that the alleged hydrocodone pill was indistinguishable from his wife's stepmother's ibuprofen pills; no reasonable explanation of why she would have mixed all of her pills together in a single container if they did look the same; and no sworn statement from the applicant's wife—who is subject to the UCMJ—regarding the applicant's claim about taking her stepmother's pill. The Board notes that the applicant was very vague about dates and the time he claims to have taken his wife's stepmother's pill, which also did not help his case and made the finding more difficult. The JAG speculated that the applicant might have taken his wife's oxycodone because she had been prescribed Percocet two months earlier. But the wife's statements to the investigator that she did not think about her April prescription when he asked her about a current prescription in July and that she had used all of the Percocet herself following her surgery in April are credible. Nevertheless, there are other sources of oxycodone, and the applicant did not submit credible evidence showing that the stepmother's hydrocodone would likely have been identified as oxycodone or oxymorphone, instead of hydrocodone, by the laboratory.

6. The record shows that the applicant presented these claims about his wife's stepmother's pill belatedly to his Chief, who passed them up the chain of command, but the CO apparently did not change his mind about whether the applicant had incurred a drug incident and continued to process him for discharge. The Board notes that there is evidence that his new claims reached the command cadre because the XO stated in an email that he had received them and forwarded them for legal review. The lack of a signed statement from the CO about the applicant's new claims in the record before the Board makes this finding more difficult, but the CO was not required to enter any further documentation in the applicant's record once the discharge orders had been issued. By law, the CO's determination of a drug incident is afforded a presumption of regularity, and although many of the applicant's colleagues have highly praised his performance, the Board finds that he has not overcome the presumption by a preponderance of the evidence. In light of all the circumstances of this case, the Board cannot conclude that the applicant's CO erred or abused his discretion in finding that the applicant had incurred a drug incident by knowingly ingesting oxycodone or oxymorphone. Therefore, the Board will not overrule the CO's finding that the applicant had incurred a drug incident based on the June 30, 2015, urinalysis results.

7. Under Coast Guard regulations, members involved in a drug incident may receive no better than a general discharge "under honorable conditions" for misconduct, with the corresponding JKK separation code and RE-4 reenlistment code. Accordingly, relief should be denied because the applicant has not proven by a preponderance of the evidence that his general discharge for misconduct and RE-4 reenlistment code are erroneous or unjust.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

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

October 19, 2017

