

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2019-152



FINAL DECISION ON RECONSIDERATION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on June 4, 2019, and assigned the case to the staff attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision on reconsideration dated January 20, 2023, is approved and signed by three duly appointed members who were designated to serve as the Board in this case.

APPLICANT’S REQUEST AND ALLEGATIONS

The applicant, a former Lieutenant (O-3), who received an honorable discharge on June 30, 2017, asked the Board to reconsider its previous decision in docket 2016-077 dated April 7, 2017, and correct his military record by removing a 1611¹ Incident Memorandum (“1611”) dated November 16, 2010, documenting a drug incident.² The applicant also requested that the Board remove the PY16 selection board’s decision for non-selection and all subsequent non-selections for promotion to Lieutenant Commander (LCDR) from his record. In support of his application, the applicant submitted a personal statement addressed to the Board and a copy of the Board of Inquiry (BOI) transcript from June 7, 2011.

In his letter to the Board, the applicant emphasized that his November 16, 2010, documented drug incident was not a drug incident, but was a medical issue. The applicant

¹ A 1611 Memorandum was a 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 10A.2.K.1. of the Personnel Manual, COMDTINST M1000.6A, states 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.

highlighted testimony from Captain L, an O-6 with over 33 years of Coast Guard experience, who stated that the applicant's situation was an isolated incident and a unique situation. According to the applicant, Captain L stated that, had he been the applicant's Commanding Officer (CO) at the time of the incident, the applicant's documented drug incident would not have existed. The applicant asked the Board on reconsideration to look at all of the extenuating circumstances of his case and thoroughly review the BOI transcript. Specifically, the testimony provided by Captain L on pages 38 through 41 of the BOI transcript. The applicant noted the following quotes from Captain L:

- "I don't believe we should...kick anybody out for a judgement call."
- "I wish a decision had been made earlier on just to move on with business and perhaps see that this was an isolated incident. I was convinced that others would look at it and say, wow this is a unique situation. This is a remarkable individual who has his Command's highest recommendation for retention. Let's not spend a lot of resources validating that."
- "We shouldn't waste our time in the Coast Guard with people with drug problems. I agree with the policy completely that separates those members."

The applicant stated that ultimately the BOI decided to retain him in the Coast Guard and the separation proceedings were terminated, but because the underlying drug incident was left in his professional military record, his case was never really closed because it continued to affect his career. The applicant alleged that because the documented drug incident was allowed to remain in his record, his involuntary separation from the Coast Guard was only postponed, not completely avoided, because he was passed over for promotion to LCDR twice. The applicant alleged that allowing the documented drug incident to remain in his record exposed him to a form of double jeopardy, which contrary to the Board's previous decision, is both an injustice and erroneous.

The applicant argued that the Board's previous finding, specifically that he failed to prove that his documented drug incident was the reason for his non-selections, can be overcome by the newly submitted material evidence. According to the applicant, the newly submitted evidence rationalizes why both of his non-selections were caused by his documented drug incident.

The applicant alleged that shortly after his involuntary separation from the Coast Guard, from August 2017, through February 2019, he filled a Project Manager contractor position for the Coast Guard. Throughout his time as the Project Manager, the applicant alleged he personally witnessed a shortage of O-2 and O-3 officers within the entire organization, which resulted in his position being burdened with additional maintenance and repair projects across multiple Coast Guard cutters. The applicant explained that in particular, he witnessed the Coast Guard hurting for junior officers with the specialty code of CG-ENG-12 (Naval Engineer)—the same specialty code the applicant held throughout his Coast Guard career. The applicant alleged that the Coast Guard could not fill essential naval engineering positions, despite various attempts to retain junior officers who were voluntarily separating. According to the applicant, the Coast Guard's need of junior officers with the Naval Engineer specialty, coupled with the only blemish in his record being the documented drug incident, proves that the drug incident was the "smoking gun" for his non-selections to LCDR.

The applicant explained the advances of medical marijuana and the ability of scientists to extract the cannabidiol component of marijuana, thereby offering the medicinal and healing

components of the herb without the THC, would now render his drug incident moot. According to the applicant, had this been available during his battle with cancer, he would never have had a documented drug incident, because he would never have actually used marijuana.

Finally, the applicant argued that because the BOI voted to retain him on active duty, the documented drug incident should have been removed from his record. Had the drug incident been removed, the applicant stated, he is confident he would have been promoted to LCDR during his two promotion cycles. In addition, the applicant alleged that had Captain L's recommendation been upheld by the unit CO at the time, then the drug incident would never have been issued.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on July 2, 2001, and became a commissioned officer on December 16, 2005, where he continued to promote to Lieutenant (O-3).

On June 16, 2007, the applicant was promoted to Lieutenant junior grade (O-2), where he received increasingly high marks on his OERs, and found to be an "exceptional officer" on his July 31, 2009, OER.

In September 2009, the applicant was diagnosed with Stage IIB, metastatic testicular cancer, which spread to his lymph nodes. He immediately began treatment that included surgery and three cycles of chemotherapy. During the applicant's treatments, to treat the pain, anxiety, and depression, he ingested marijuana for medicinal purposes.

On December 16, 2009, the applicant was promoted to Lieutenant (O-3).

For the rating period of August 1, 2009, through May 31, 2010, the applicant was given a "Continuity OER," which shows assigned duties but no numerical ratings for the period because the applicant was out on an authorized absence for 8 out of the 10 months for cancer treatment.

On November 16, 2010, the applicant received a documented drug incident in the form of a 1611, wherein the applicant was counseled for incurring a drug incident while undergoing chemotherapy. The applicant was informed that because he had received a drug incident, in accordance with Article 20.C.4. of the Coast Guard Personnel Manual, COMDTINST M1000.6A, he would be processed for separation under Article 12.A. of the Personnel Manual. The applicant digitally signed the 1611, thereby acknowledging his receipt.

On November 17, 2010, the applicant's Captain issued a memorandum, "Recommendation for Separating an Officer for Cause," wherein he recommended that administrative separation procedures be initiated against the applicant for incurring a drug incident while on convalescent leave. According to the memorandum, the applicant admitted to a junior enlisted member that while being treated for cancer, the applicant ingested marijuana to relieve his pain and anxiety. The Captain noted that by revealing his actions to a junior enlisted member, it is evident that the member demonstrated a lack of judgment to a degree the Captain considered unacceptable. The Captain also noted that during the course of the investigation the applicant was surprisingly forthright, even though he could have elected to exercise his Miranda Rights, which demonstrated the applicant's noteworthy integrity. The Captain stated the throughout counseling the applicant displayed serious regret for his drug use while undergoing chemotherapy and elected to refrain

from further use of marijuana. Finally, the Captain stated that before and after counseling, the applicant had shown significant progress in the development of his Naval Engineering skills and continued to put forth his best efforts to support the Coast Guard. However, the Captain stated that although he did not think that separating the applicant under the circumstances was the target objective of the Coast Guard, he submitted the memorandum under the strictest interpretation of Article 20 of the Coast Guard Personnel Manual, COMDTINST M1000.6A, and pursuant to the Coast Guard's Substance Abuse Program.

On March 8, 2011, the applicant was informed that because of his drug incident a Determination Board would be convened in accordance with Article 12.A.15. of the Personnel Manual.

On March 30, 2011, the applicant was notified that based on the result of the Determination Board, he would be required to "show cause" for retention in the Coast Guard before a BOI and was entitled to legal representation. The applicant signed and acknowledged receipt on April 5, 2011.

On June 7, 2011, a BOI convened and issued a recommendation that the applicant be retained in the Coast Guard instead of being 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 judgement or moral dereliction. Notwithstanding the decision...to declare a drug incident, this Board was able to view additional evidence (e.g., sworn testimony or 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 mission was not hampered by the effects of [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 [applicant's] character. Overall performance, leadership, and character, as reflected in previous and subsequent OERs, and other evidence, is solid 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 his case would be reopened if any further adverse information was received. The applicant acknowledged receipt of the BOI's approval on October 24, 2011.

On June 6, 2011, the applicant received his first OER since his return from convalescent leave, for the rating period of June 1, 2010, through May 31, 2011. The applicant received one 4, five 5s, nine 6s, and three 7s. The applicant also received a mark of "Excellent Performer," which is a 5 out of 7 on the officer comparison scale.³

In August 2015, the applicant was "in zone" for promotion to LCDR. During this promotion cycle, the applicant provided a letter to the selection board, wherein he explained the

³ 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."

circumstances of his drug incident. The applicant stated that he had a momentary lapse in judgement and felt compelled to ingest marijuana with the limited intention of reducing the pain. The applicant noted that the BOI had recommended that he be retained on active duty, although the report from the BOI was not in his record, and asked the board not to consider the drug incident in a negative light. The applicant also informed the selection board that he was initiating an application to have the 1611 removed from his record.

The applicant's new CO endorsed the applicant's letter to the selection board, noting that it is "difficult to imagine the pain, suffering, anxiety, and life-altering decisions that accompany intensive chemotherapy to combat aggressive cancer." The CO further 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." Finally, the CO stated that he believed that the applicant's drug use "was the result of a one-time lapse in judgement that was absolutely out of character and completely driven by the considerable extenuating circumstances severely impacting his health and judgement."

In August 2015, the applicant was not selected for promotion to LCDR. ALCGPSC 109/15, which announced the selections, stated 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.

In August 2016, the applicant was not selected for promotion to LCDR. ALCGPSC 104/16, which announced the selections, stated 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 the applicant was passed over for promotion twice, the applicant was separated from the Coast Guard on June 30, 2017.

On April 7, 2017, in its decision for BCMR docket number 2016-077, the Board denied the applicant's request to have his 1611, which documented the drug incident, removed from his record, in addition to all references to his non-selections to LCDR.

On April 15, 2019, the applicant applied to this Board for reconsideration of its 2016-077 decision, once again requesting that the negative 1611 and all subsequent documents related to his non-selection to LCDR be removed from his record.

VIEWS OF THE COAST GUARD

On October 20, 2019, a Judge Advocate (JAG) for the Coast Guard submitted an advisory opinion in which she recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center.

The JAG argued that the "new" evidence submitted by the applicant does not warrant reopening his case for additional consideration. According to the JAG, the applicant's request is predicated on information that was reasonably available to the applicant at the time of his original application. The JAG pointed to the applicant's submission of the BOI transcript as evidence that was available to the applicant at the time of his original application. While technically "new," the JAG argued that this evidence does not justify reopening the applicant's case because (1) it was

reasonably available to the applicant at the time of his original application but was not presented; and (2) the findings of the BOI and the general issues and information considered by the BOI were all available to and explicitly considered by the Board as part of its final decision. The JAG further argued that this information, when originally considered, was found to be insufficient to establish error or injustice.

For the same reasons presented above, the JAG argued that the applicant's submission of Promotion Year (PY) 2016 and 2017 LCDR selection percentages does not justify reopening the applicant's case. According to the JAG, the PY2016 and 2017 selection percentages actually support the Board's decision. The JAG explained that for PY2016, only 66% of "in zone" lieutenants were selected for promotion, and in PY2017, only 27% of "above zone" lieutenants were selected for promotion. According to the JAG, these selection rates confirm that promotion to LCDR was not guaranteed, and presumably, a number of "well qualified," but not "best qualified" lieutenants other than the applicant were not selected for promotion. The JAG argued that with such low selection rates, it is possible that good performers, with no instances of misconduct or drug use within their record, were not selected for promotion to lieutenant commander. As such, the JAG argued that the evidence submitted by the applicant could not establish that an error or injustice had taken place.

Regarding the applicant's claim that the Coast Guard was unable to retain junior officers, the JAG stated that the applicant provided anecdotal information but his personal observations do not constitute competent evidence sufficient to establish that his statements are fact. However, the JAG stated that even if the Coast Guard needed Naval Engineers in 2016/2017, this information does not justify opening his case because the LCDR selection board precepts for PY2016 and 2017 did not permit special consideration of one's status as a Naval Engineer as a criterion for being "best qualified" for promotion.

The JAG argued that the applicant's presentation of the legalization of marijuana in various states does not justify reopening the applicant's case because marijuana use is still a federal crime and is punishable by the Uniform Code of Military Justice (UCMJ). The JAG further argued that drug use, whatever the reason, is contrary to the Coast Guard's values and policies and was apparently sufficient to justify the applicant's preclusion as "best qualified" before the LCDR selection boards.

The JAG explained that a BOI is convened for the sole purpose of determining whether an officer shall be retained on active duty or discharged. In contrast, a selection board is charged with "evaluating members based upon their records to select the strongest performers and leaders with the potential for continued growth and sustained excellence." Given that these two boards have different purposes and consider different information, the JAG argued that the applicant's contention that because the BOI's recommendation was approved, the Coast Guard should have stricken the documentation of his drug incident—a pertinent, permissible, policy-required document from his record—is incorrect.

Finally, the JAG argued that even if the only reason the applicant was not selected for promotion was his drug use, that does not render his non-selection to LCDR an injustice or an error. The JAG stated that the applicant voluntarily and knowingly violated federal law, the UCMJ, and Coast Guard policy by consuming marijuana. The JAG explained that while marijuana may

be legal under some state laws, and the circumstances that surrounded the applicant's dry use deserve sympathy, the applicant's conduct was rightfully considered by the selection board. The JAG argued that promotion to LCDR is a highly selective process, which looks at the entirety of a service member's record and considers multiple factors and criteria, and the applicant was not entitled to a promotion. For the reasons outlined above, the JAG argued that the applicant's request for relief should be denied.

To support her opinion, the JAG submitted the following documents:

- Commandant's Guidance: PY2016 & 2017 Officer Selection Boards and Panels –

3. Selection to O-3 and O-4, and Panel Considering Officer in Those Grades

Promote action oriented junior officers who possess core professional knowledge, deep commitment to our Core Values and significant leadership potential.

Officers in this grade should leverage every opportunity to acquire and employ competencies within their specialty through operational experience and formal training. In cases where officers may have limited opportunity for operational experience, these officers nevertheless must seek responsibilities that support operations or provide exposure to operations. Attaining key qualifications or certifications within prescribed windows is the expectation across all specialties, and will position the officer optimally for continued professional growth and promotion.

Advanced education and special assignments, e.g., White House, aide, congressional affairs, etc., complement experience gained through operational assignments. These challenging opportunities reflect intellectual energy, broad vision and adaptability which the Coast Guard values. However, it must be appropriately integrated into career timelines based on the particular specialty profile. The Service investment in officers selected for key professional training and education programs is significant, and reflects the trust and confidence in their potential to contribute in future demanding positions.

Coast Guard missions are conducted in a fast-paced and often unforgiving environment. Junior Officers will make mistakes as part of the learning process. Evaluate errors against Service standards and impacts. Consider subsequent performance and conduct that positively reflect lessons learned and demonstrate the officer's potential to serve in the next higher grade.

Junior reserve officers are expected to demonstrate the same progression in responsibility and technical experience as their active duty counterparts.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 5, 2019, the Chair sent the applicant a copy of the Coast Guard's advisory opinion and invited him to respond within thirty days. The Board received the applicant's response on December 2, 2020.

The applicant restated his argument that he was exposed to a form of double jeopardy, because despite the BOI's recommendation that he be retained, he was still subjected to involuntary separation by being passed over for promotion twice, as a result of his documented drug incident. The applicant questioned the fairness of the documented drug incident being allowed to remain in his official military record, but not the BOI's final decision. According to the applicant, and contrary to the Board's original decision, this is both an injustice and erroneous.

To support his allegations that his documented drug incident was the “smoking gun” that led to him being passed over for promotion twice, the applicant pointed to the fact that he received both of his number one picks on his “dream sheet” for his next tour of duty. According to the applicant, he received his first pick for his July 2011, through July 2015, tour, and he also received his first pick on second tour from July 2015, through the end of his Coast Guard service in 2017.

Finally, to support his application, the applicant presented an undated Department of Veterans Affairs (DVA) letter wherein the applicant was given a disability rating of 100%. The applicant argued that this rating is the direct result of his battle with cancer. The applicant stated that he is considered to be totally and permanently disabled due solely to his service-connected disabilities. According to the applicant, had he never been diagnosed with cancer, had he never would have ingested marijuana in a state where it is legal and encouraged for medicinal purposes, he would not be disabled and he would still be serving his country, because he never would have received the documented drug incident, which he alleged ultimately ended his career.

APPLICABLE LAW AND POLICY

The Coast Guard Personnel Manual, COMDTINST M1000.6A, in effect at the time of the applicant’s drug incident, provides the necessary guidance on drug incidents, in relevant part:

Article 20.A.2.k.1. states that “intentional use of drugs” constitutes a drug incident as determined by the Commanding Officer.

Article 20.C.3. Drug Incident Investigations.

20.C.3.a. General. Commanding 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.

...

20.C.3.d. Determining a Drug Incident. In determining whether a drug incident occurred, a commanding officer should consider all the available evidence, including positive confirmed urinalysis test results, any documentation of prescriptions, medical and dental records, service record (PDR), and chain of command recommendations. Evidence relating to the member's performance of duty, conduct, and attitude should be considered only in measuring the credibility of a member's statement(s).

20.C.3.e. Preponderance of the Evidence Standard. The findings of a drug incident shall be determined by the commanding officer and an Administrative Discharge Board, if the member is entitled to one, using the preponderance of evidence standard. That is, when all evidence is fairly considered, including its reliability and credibility, it is more likely than not the member intentionally ingested drugs. A preponderance of the evidence refers to its quality and persuasiveness, not the number of witnesses or documentation. A member's admission of drug use or a positive confirmed test result, standing alone, may be sufficient to establish intentional use and thus suffice to meet this burden of proof.

...

Article 20.C.4. Findings of a Drug Incident. If after completing the investigation described in Article 20.C.3, the commanding officer determines that a drug incident did occur, he or she will take these actions:

1. Administrative Action. Commands will process the member for separation by reason of misconduct under Articles 12.A.11., 12.A.15., 12.A.21., or 12.B.18., as appropriate. Cases requiring Administrative Discharge Boards because of the character of discharge contemplated or because the member has served a total of eight or more years, will also be processed under Articles 12.B.31. and 12.B.32., as appropriate.

Article 2 of the Health and Promotions Manual, COMDTINST M6200.1A, in effect at the time of the applicant's drug incident, provides the following guidance on documenting drug incidents:

Article 2.O.3. Administrative Documentation.

a. Service Record Entries. All 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 made 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.

Article 12.A.15.f. of the Personnel Manual states the following about convening a Determination Board:

1. At any time and place Commander (CGPC) may convene a board of officers to review any Regular Coast Guard officer's record to decide whether the officer should be required to show cause for retention on active duty because:

- a. The officer's performance of duty has declined below the prescribed standards; or
- b. The officer has demonstrated moral or professional dereliction; or
- c. Retention is clearly inconsistent with the interests of national security.

2. A board of officers convened to review an officer's records (a "determination board") shall consist of at least three officers in the grade of commander or above who all are serving in a grade senior to the grade of any officer they consider.

3. The determination board will impartially review the officer's PDR, the initiating officer's recommendation, and all other available information relevant to the reasons for separation to determine whether it should require the officer to show cause for retention.

4. The determination board does not examine witnesses. It is limited to considering the documents presented to it.

5. Commander (CGPC-opm) sends the determination board's findings to Commander (CGPC-c), who will notify the officer concerned the determination board has found either:

- a. The officer should not be required to show cause for retention and the case is closed; or
- b. The officer should be required to show cause for retention.

Article 12.A.15.h.1. states that if a Determination Board finds that an officer should be required to "show cause" for retention in the Service, a BOI shall be convened, which "affords 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.7. states that in its report the BOI makes findings and “an appropriate recommendation, limited to either retention or separation without qualifications.”

Article 12.A.15.i. states that the recommendation of the BOI goes before a Board of Review, which makes a recommendation to the Commandant regarding retention or separation.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction over this matter under 10 U.S.C. § 1552(a) because the applicant is requesting correction of an alleged error or injustice in his Coast Guard military record. The Board finds that the applicant has exhausted his administrative remedies, as required by 33 C.F.R. § 52.13(b), because there is no other currently available forum or procedure provided by the Coast Guard for correcting the alleged error or injustice that the applicant has not already pursued.

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. All Board members concurred in that recommendation.⁴

3. Under 10 U.S.C. § 1552(a)(3)(D), “[a]ny request for reconsideration of a determination of a board under this section, no matter when filed, shall be reconsidered by a board under this section if supported by materials not previously presented to or considered by the board in making such determination.” Because the applicant has submitted new evidence that was not in the record when the decision in BCMR Docket No. 2016-077 was issued, the Board finds that his request meets the statutory requirements for reconsideration. Therefore, the Board will review his case on the merits.

4. The applicant alleged that his drug incident, as documented in a November 16, 2010, 1611 and his discharge for twice being passed over for promotion were erroneous and unjust and should be removed from his official military record. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed evaluation in an applicant’s military record is correct and fair, and the applicant bears the burden of proving by a preponderance of the evidence that it is erroneous or unjust.⁵ Absent specific evidence to the contrary, the Board presumes that Coast Guard officers and other government officials have acted “correctly, lawfully, and in good faith” in preparing their evaluations.⁶

⁴ *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

⁵ 33 C.F.R. § 52.24(b).

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

5. The applicant alleged that he was twice passed over for promotion because of his November 16, 2010, documented drug incident; that allowing the 1611 to remain in his record was erroneous and unjust because the BOI recommended that he be retained on active duty; and that by not removing the 1611 from his record, he was ultimately passed over for selection to LCDR (O-4) twice. For the following reasons, the Board disagrees:

- a. The applicant has failed to provide any policy or instruction manual that states the documentation of his drug incident was erroneous and unjust. Nor has he submitted any evidence to show that the 1611 should have been removed upon the recommendation of the BOI that he be retained for active duty. According to the Personnel Manual in effect in 2011, the sole purpose of a “show cause” BOI and the sole recommendation it is authorized to make concerns whether the member should be retained on active duty or discharged⁷—not whether a documented drug incident is valid or should be removed and not whether the officer should be promoted. In addition, the applicant’s BOI did not find that the applicant did not use drugs, only that the applicant had shown cause for his retention. The fact is that the applicant admitted to using marijuana, which continues illegal under federal law, and under Article 2.O.3. of the Health and Promotions Manual, COMDTINST M6200.1A, the applicant’s CO was required to document the drug use in the applicant’s personnel file. Again, the applicant has failed to produce any instruction or manual that required a different outcome. As such, his request to have the 1611 removed from his record, should be denied.
- b. The applicant alleged that his drug incident should never have been documented in the first place, because it was not a drug incident. To support this claim, the applicant submitted the BOI transcripts wherein Captain L stated that if he had been the applicant’s CO, he would never have documented the applicant’s drug use as a drug incident. However, Captain L was not the applicant’s CO at the time, and the applicant has failed to prove, by a preponderance of the evidence, that his previous CO’s actions were erroneous or unjust and against Coast Guard policy. Captain L’s claim that he would have handled the applicant’s situation differently than the applicant’s previous CO did does not render the documented drug incident erroneous or unjust. In addition, and as noted in finding 5.a., the applicant admitted to using marijuana. Regardless of the applicant’s extenuating circumstances, which the Board is sympathetic to, marijuana is a prohibited substance under Coast Guard policy, and there is no exception found in policy that allows for its use. Therefore, the applicant has failed to prove, by a preponderance of the evidence, that he did not incur a drug incident as defined by Coast Guard policy or that his documented drug incident was erroneous and unjust. His request for removal of the drug incident should be denied.

⁷ Personnel Manual, COMDTINST M1000.6A, Article 12.A.15.h.1. (“The board of inquiry affords officers a fair, impartial hearing at which they have an opportunity to establish their retention in the Coast Guard is warranted. ... [Paragraph 7, the BOI makes] “an appropriate recommendation, limited to either retention or separation without qualifications.”

- c. The applicant alleged that his documented drug incident was the “smoking gun” that caused him to be passed over for promotion to LCDR twice. However, the applicant has submitted no evidence to support his claims that the only reason he was passed over for LCDR was because of his documented drug incident or that the consideration of the drug incident by the selection board was erroneous and unjust. The Board begins its analysis with the presumption that Coast Guard officials carried out their duties “correctly, lawfully, and in good faith.” Selection boards and panels look at the entirety of a service member’s records, and must compare each record to the many other promotable officers it has before it. This Board will not presume that it did not consider each candidate’s record fairly and justly in arriving at its promotion list. As stated above, the applicant has not pointed to any instruction or policy that rendered his documented drug incident void once the BOI recommended that he be retained. The applicant has also failed to cite any instruction or policy that made it an error or injustice for the selection board to consider his documented drug incident during the LCDR selection process. Moreover, even if the Board assumes that the drug incident documentation did cause the applicant’s non-selections for promotion, that would not render his non-selections erroneous or unjust. The Board finds that the applicant has not proven by a preponderance of the evidence that the 1611 documenting his drug incident is erroneous or unjust.
- d. The applicant alleged that he was subject to “double jeopardy” when he was discharged based on his non-selections for promotion. “Double jeopardy,” however, refers to two disciplinary proceedings based on the same misconduct. As noted above, a “show cause” BOI is convened solely for determining whether the member should be retained or administratively discharged from the Service based on his overall record, whereas selection boards are convened for determining whether an officer is one of the “best qualified” for promotion. The fact that two consecutive non-selections may result in the officer’s separation pursuant to 14 U.S.C. § 2143 does not render a separation for two non-selections following retention pursuant to a BOI “double jeopardy.”

6. The applicant made numerous allegations with respect to his documented drug incident. Those allegations not specifically addressed above are considered to be unsupported by substantial evidence sufficient to overcome the presumption of regularity and/or are not dispositive of the case.⁸

7. For the reasons outlined above, the applicant has not met his burden, as required by 33 C.F.R. § 52.24(b), to overcome the presumption of regularity afforded the Coast Guard that its administrators acted correctly, lawfully, and in good faith.⁹ He has not proven, by a preponderance of the evidence, that either his documented drug incident or his subsequent discharge for non-selection for promotion were erroneous or unjust. Accordingly, the applicant’s requests for relief should be denied.

⁸ 33 C.F.R. § 52.24(b); *see Frizelle v. Slater*, 111 F.3d 172, 177 (D.C. Cir. 1997) (noting that the Board need not address arguments that “appear frivolous on their face and could [not] affect the Board’s ultimate disposition”).

⁹ *Muse v. United States*, 21 Cl. Ct. 592, 600 (1990) (internal citations omitted).

ORDER

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

January 20, 2023

[REDACTED] [REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED]

[REDACTED] [REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED]

[REDACTED] [REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED]