

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2020-109


SN (former)

FINAL DECISION

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 April 30, 2020, and assigned the case to the staff attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision dated April 14, 2023, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT’S REQUEST & ALLEGATIONS

The applicant, a former Seaman (SN/E-3) who received a General¹ discharge on April 27, 2020, after being administratively separated for misconduct, asked the Board to correct his record by reinstating him in the Coast Guard or, in the alternative, by upgrading his reenlistment code from an RE-4 to an RE-3.

The applicant argued that under the Military Drug and Alcohol Policy, COMDTINST M1000.10A, an action does not constitute a drug incident if the “conduct occurs without the member’s knowledge, awareness, or reasonable suspicion,”² and so his CO should not have determined that he had incurred a drug incident. The applicant explained that on the night of his alleged drug incident, he went downtown to listen to some jazz bands and after leaving and returning to his vehicle, he was approached by a man who asked the applicant for a ride to his car. The applicant claimed that he had spoken to this same individual while listening to the jazz bands,

¹ There are five types of discharge: three administrative and two punitive. The three administrative discharges are honorable, general—under honorable conditions, and under other than honorable (OTH) conditions. The two punitive discharges may be awarded only as part of the sentence of a conviction by a special or general court-martial.

² Article 5.C.6. of the Military Drug and Alcohol Policy Manual, COMDTINST M1000.10A, states, “[i]f the conduct occurs without the member’s knowledge, awareness, or reasonable suspicion or is medically authorized, it does not constitute a drug incident.”

so he agreed to give him a ride. The applicant alleged that as they were approaching his vehicle, the man pulled out what appeared to be a regular black and mild cigar and asked if he could smoke it. The applicant allowed the man to smoke the cigar on the condition that he not drop any ashes in his vehicle. The applicant further alleged that the man offered the applicant to share the cigar with him, but the applicant declined. The applicant claimed he dropped the gentleman at his car and then headed L.

On his way home, the applicant was pulled over for speeding and upon making contact with the deputy, the deputy asked if the applicant had been smoking, stating that the car smelled like marijuana. The applicant told the deputy that he had not been smoking because he is in the Coast Guard. According to the applicant, after the deputy returned to his patrol car, the applicant noticed a small bag on the floorboard near the passenger seat. The applicant explained that in a fight or flight decision, or a moment of panic, he decided to pick up the bag and dispose of it later. The applicant claimed that the deputies searched him and his vehicle, but found no evidence of any wrongdoing. However, after speaking with the deputies, he immediately handed over the bag, which was taken in for evidence. The applicant stated that he was released with a speeding ticket and a ticket for possession.

The applicant alleged that he does not use illegal substances and did not intend to have any illegal substances in his possession. The applicant further alleged that he submitted to a drug test after the incident, and his urine tested negative for any illegal substances. The applicant claimed that pursuant to a plea agreement, he completed an agreed upon drug program, tested negative for drugs, and paid his speeding ticket fines, and as a result, civilian authorities dropped the possession charges filed against him.

The applicant stated that he takes full responsibility for not using sound judgment and allowing someone he had just met into his vehicle. The applicant admitted that he should have been paying better attention to his speed and that upon his initial interaction with the deputy, he should have been honest when he found the unknown bag in his car. However, the applicant stated that at no time did he have the intent to possess illegal drugs.

Again, the applicant stated that he has taken full responsibility for his lack of judgment and the consequences of his actions. He claimed that he has learned from the experience and now understands that it is okay to say no, that he needs to be a better judge of character, and that he needs to think about situations and all of their possible outcomes. The applicant stated that he believes that he has what it takes to move past this incident and contribute more to the Coast Guard or another branch of the military.

To support his request, the applicant submitted several character references. These references universally spoke of the applicant's integrity, work ethic, humility, and leadership. The applicant was described as a family man who comes from a military family and as an exceptional Coast Guard member who served with honor. These references universally upheld the applicant's character and expressed confidence that the applicant's lack of judgment on February 2, 2020, was not reflective of who the applicant was as a person or service member. These references also expressed a universal confidence that the applicant's lack of judgment would never happen again and that the Coast Guard would be losing a great service member. Some of the references were Coast Guard officers and petty officers who stated that they have a firm understanding of the Coast

Guard's zero tolerance drug policy, but despite the policy believe that the applicant should be retained. Finally, the applicant was described as someone who always shows support and respect for his supervisors.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on November 6, 2017.

On February 2, 2020, the applicant was pulled over by local authorities for speeding. Upon reaching the applicant's vehicle and smelling marijuana, the authorities conduct a search of the applicant and his vehicle. They found a bag containing marijuana. The police report contained the following relevant comments:

R/D conducted a traffic stop on a vehicle traveling at a high rate of speed, and the subsequent field investigation resulted in seizure of a small quantity of suspected narcotic. R/D was traveling southbound along [redacted] approaching [redacted] when a lone vehicle (a black Jeep Wrangler bearing [redacted] registration [redacted]) passed in the opposite direction (northbound) at a high rate of speed, estimated at 70mph. The rear radar unit verified the maximum speed of the suspect vehicle at 69mph in a posted 45mph zone. R/D made a U-turn and attempted to catch up to the Jeep, which turned right on to [redacted] and continued to accelerate in apparent attempt to evade. R/D was able to catch up to and position behind the suspect vehicle, initiating a traffic stop just prior to [redacted]. R/D made contact with the driver ([applicant]) at the front passenger window, where R/D detected the aroma of burnt marijuana emanating from the passenger compartment interior. After obtaining [applicant's] driver's license and vehicle documents, R/D requested a back-up unit to respond in order to assist with the imminent probable cause search. Deputies [H] and [E] arrived soon after and assisted with the search of the suspect vehicle and occupants. While being checked, [applicant] was found to possess an empty small plastic baggie, and admitted to having an additional bag in his pants. A small, partially torn piece of white plastic bag was retrieved and found to contain an amount of green plant material, which subsequently field-tested positive for THC/marijuana. The total weight was determined to be approximately 1.05gm. The suspected narcotic was seized, and [applicant] was issued a Courtesy Summons summary court charge for Simple Possession of Marijuana.

In addition, [applicant] was cited for Speeding 54/45 (In lieu of a 4-pt charge for the original violation) and for No Proof of Insurance (after only providing a USAA policy card with an expiration date of five (5) months prior.) He was released from the scene with a warning for expired registration (from 2018) outside the grace period afforded to active military personnel. The seized contraband was entered into evidence and submitted for subsequent forensic testing.

On February 13, 2020, the applicant was issued a negative CG-3307 ("Page 7") wherein he was counseled for his February 2, 2020, drug possession. This Page 7 indicated that the substance found within the bag found in the applicant's vehicle tested positive for marijuana/THC. The Page 7 found that the applicant had been in possession of 1.05 grams of marijuana. The applicant was informed that he would be processed for separation in accordance with Article 5 of the Military Drug and Alcohol Policy Manual, COMDTINST M1000.10A.

On February 21, 2020, the applicant's Officer in Charge (OIC) issued a memorandum, "Notification of Intent to Discharge," wherein he notified the applicant of his intent to initiate the applicant's discharge by reason of misconduct due to his February 2, 2020, drug incident.

On February 27, 2020, the applicant acknowledged, via a First Endorsement," his OIC's intent to discharge him. He elected to submit a written statement, objected to his discharge, and

acknowledged that he had been provided with the opportunity to consult with counsel. In his written statement, dated February 28, 2020, he made the similar claims about having given a ride to a stranger who smoked something and must have dropped the baggie of marijuana in his vehicle that he made in his application to the Board.

On April 27, 2020, the applicant was administratively separated for misconduct due to his February 2, 2020, drug incident. He received a General—Under Honorable Conditions characterization of service, an RE-4 reenlistment code, and a separation code of JKK.

VIEWS OF THE COAST GUARD

On September 1, 2020, a judge advocate (JAG) for the Coast Guard submitted an advisory opinion in which he 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 as a matter of procedure, the Coast Guard recommends that the Board administratively close the case because the applicant failed to exhaust all of his administrative remedies as required by 33 C.F.R. §52.13. The JAG argued that the applicant first needed to appear before the Discharge Review Board (DRB) as required by 33 C.F.R. part 51 and Correcting Military Records, COMDTINST 1010.1.

The JAG further argued that the applicant's OIC found, by a preponderance of the evidence, that the applicant was involved in a drug incident which is prohibited by Coast Guard policy, and as a result of this finding, initiated the applicant's administrative separation. The JAG stated that while the applicant should be commended for his completion of a drug abuse program and the expungement of his drug possession charges, these actions do not impact the Coast Guard's authority to proceed with the applicant's administrative separation. Therefore, the JAG argued that relief should be denied because the applicant has failed to prove an error or injustice.

APPLICANT'S RESPONSE TO VIEWS OF THE COAST GUARD

On October 5, 2020, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within 30 days. The Chair received the applicant's response on November 20, 2020.

The applicant explained that he learned his lesson and humbly requested that the Board upgrade his discharge from a Bad Conduct characterization of service to a General characterization of service and to have his RE-4 reenlistment code upgraded to an RE-3.³

The applicant alleged that on the day he received his tickets, he informed his Chief of what had occurred. According to the applicant, his honesty resulted in him being immediately released from his scheduled A School and returned to his duty station, where the CO and OIC instructed him to draft a statement describing the events that took place. The applicant alleged that at no time was he provided with a military lawyer, nor was he counseled on how to get in contact with one.

³ It is unclear what the applicant means by upgrading his Bad Conduct discharge to a General discharge. The applicant's DD214 shows that he did receive a General—Under Honorable Conditions characterization of service.

The applicant argued that under Article 1.B.17.E.3. of the Military Separations Manual, COMDTINST M1000.4, his CO and OIC were required to Afford him “[a]n opportunity to consult with a lawyer as defined by Article 27(b)(1), UCMJ, if contemplating a general discharge. If the member requests counsel and one is not available, the commanding officer must delay discharge proceedings until such time as counsel is available.” The applicant alleged that no legal counsel was afforded to him and that all of his paperwork was rushed and only briefly explained to him.

The applicant further alleged that his CO and OIC assured him that if his drug test came back negative and if his record was expunged by civilian authorities, they would try to avoid filing a drug incident in his case. However, the applicant claimed, even though he abided by all of his CO and OIC’s orders, they pulled the rug out from under him by informing him that he would be subjected to Non-Judicial Punishment (NJP) and that he should prepare to be discharged. Throughout all of this, the applicant alleged, he never received any legal counsel. He claimed that they rushed the NJP proceedings and two weeks later he was discharged. The applicant argued that under Article 1.B.23.a. of the Military Separations Manual, COMDTINST M1000.4, both the government and the respondent are entitled to legal representation before Administrative Separations Boards, but none of this was provided to him.⁴

The applicant alleged that there was no “preponderance” (the quality or fact of being greater in number, quantity, or importance) of evidence in accordance with Military Drug and Alcohol Policy COMDTINST M1000.10A Chapter 5. section E (2) Preponderance of Evidence Standard. Findings of a drug incident must be determined by the CO/OIC 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 military 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 drug use admission or a positive confirmed test result, standing alone, may be sufficient to establish intentional use and thus suffice to meet this burden of proof.

The applicant stated that he has exhausted all of his options for relief. He explained that his ticket for possession was dismissed, his urinalysis came back negative, and he completed all of the substance abuse training and sought out his own counseling. He further stated that changing his character of service and reenlistment code will give him an opportunity to create other career opportunities for himself and his family.

To support his response, the applicant submitted documentation of his negative drug tests, the expungement of his drug possession charges, and his drug abuse program completion.

APPLICABLE LAW AND POLICY

Article 1 of the Military Separations Manual, COMDTINST M1000.4 (August 2018), provides the following guidance on discharging a service member with General discharge:

1.B.2.f.2. Standards of Discharge. General Discharge. The member’s commanding officer or higher authority may effect a separation with a general discharge if the member is subject to discharge and a general

⁴ Article 1.B.23.a. of the Military Separations Manual, COMDTINST M1000.4, is for those service members being discharged with an Under Other than Honorable Conditions characterization of service. The applicant was given a General — Under Honorable Conditions characterization of service, therefore, this article does not apply to him.

discharge is warranted under the standards prescribed in this paragraph. When a general discharge is issued for one of the reasons listed in Article 1.B.2.f. (1)(a) of this Manual, the specific reason shall be stated in an entry on an Administrative Remarks, Form CG-3307, entry in the member's PDR. A general discharge applies in these situations:

a. The member either:

- 1. Has been identified as a user, possessor, or distributor of illegal drugs or paraphernalia;

Article 1.B.17.b.(4)(a) of the Military Separations Manual authorizes the discharge of members for misconduct due to their involvement with illegal drugs as follows:

Involvement with Drugs. 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, as defined in Article 1.A.2.k. of reference (h), Coast Guard Drug and Alcohol Abuse Program, COMDTINST M1000.10 (series), will be processed for separation from the Coast Guard with no higher than a general discharge (under honorable conditions).

Article 1.B.17.e. states that before initiating an administrative discharge for misconduct for a member who, like the applicant, has fewer than eight years of total military service, the command must take the following steps:

- (1) Inform the member in writing of the reason(s) for being considered for discharge (specifically state one or more of the reasons listed in Article 1.B.17.b. of this Manual supported by known facts).
- (2) Afford the member an opportunity to make a written statement. If the member does not desire to do so, the commanding officer sets forth that fact in writing over the member's signature. If the member refuses to sign a statement his or her commanding officer will so state in writing.
- (3) Afford the member an opportunity to consult with a lawyer as defined by Article 27(b)(1), UCMJ, if contemplating a general discharge. If the member requests counsel and one is not available, the commanding officer must delay discharge proceedings until such time as counsel is available.

The Coast Guard Drug and Alcohol Abuse Program Manual, COMDTINST M1000.10A, provides the relevant guidance on the preponderance of the evidence standard used when determining if a drug incident has occurred and the illegal use of prescription drugs. The relevant sections are as follows:

5.A. Objective. Detect and separate military members who misuse or abuse, traffic in, or unlawfully possess illicit, controlled, and certain non-controlled, substances. The following are Coast Guard substance abuse policy enforcement tenants.

...

5.C. Drug Incident. Any of the following conduct constitutes a drug incident as determined by the CO/OIC:

...

- 2. Wrongful possession of drugs

...

5.E. Determining a Drug Incident.

- 1. Evidence Collection. In determining whether a drug incident occurred, a CO/OIC must consider all the available evidence, including: positive confirmed urinalysis/blood test results; any

prescription documentation; medical and dental records; service record (PDR); and, chain of command recommendations. Evidence relating to the military member's performance of duty, conduct, and attitude should be considered only to measure the credibility of a member's statement(s). If the possible drug incident evidence includes a positive urinalysis result, the command must also verify that the urinalysis was conducted in accordance with policy, including properly followed collection and chain of custody procedures. The CO/OIC may delay final determination to pursue any of the following options.

2. Preponderance of Evidence Standard. Findings of a drug incident must be determined by the CO/OIC 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 military 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 drug use admission or a positive confirmed test result, standing alone, may be sufficient to establish intentional use and thus suffice to meet this burden of proof.

3. Drug Incident Finding. If after the investigation is complete, as described in Paragraph 5.C. of this Manual, the CO/OIC determines that a drug incident occurred, the following actions must be taken.

a. Administrative Action. The command must process the military member for separation by reason of misconduct per Reference (b), Military Separations, COMDTINST M1000.4 (series), as appropriate. Cases requiring Administrative Discharge Boards because of the character of discharge contemplated or because the member has served eight or more total years, must also be processed per Military Separations, COMDTINST M1000.4 (series), as appropriate.

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. Although the Coast Guard argued that the applicant should have applied to the DRB, the Board disagrees because the applicant requested reinstatement on active duty, and under 10 U.S.C. § 1553, the DRB does not have the authority to void the applicant's discharge and reinstate him on active duty.

2. The application is timely because it was filed within three years of the applicant's discovery of the alleged error or injustice in the record, as required by 10 U.S.C. § 1552(b).

3. The applicant alleged that the Coast Guard erred when they issued him a drug incident due to his February 2, 2020, encounter with local authorities. The applicant further alleged that the Coast Guard erred by failing to give him access to counsel and by discharging him for misconduct with an RE-4 reenlistment code. 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 the military record, and the applicant bears the burden of proving,

by a preponderance of the evidence, that the disputed information is erroneous or unjust.⁵ 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.”⁶

4. **Validity of Drug Incident.** The applicant alleged that the drugs found in his possession were not his and that because he tested negative for marijuana use and the charges were dismissed, he should not have incurred a drug incident. The Board finds his arguments unpersuasive. The record shows that on February 2, 2020, at approximately 4:30 a.m., local authorities observed the applicant’s vehicle speeding. According to the police report, the applicant’s vehicle was recorded as going 69 miles per hour in a 45 mile per hour zone. The police report states that when the authorities attempted to catch up to the applicant’s vehicle, the applicant turned right onto a nearby street and began to accelerate in an apparent attempt to evade authorities. Despite this apparent attempt to evade, authorities were able to stop the applicant and upon approaching his vehicle, the officers detected the smell of marijuana emanating from the applicant’s vehicle. When asked by an officer if he had been smoking, the applicant responded in the negative. However, upon searching both the applicant’s car and person, authorities located approximately 1.05 grams of marijuana on the applicant’s person, in addition to an empty small “baggie.” The applicant was cited for speeding and possession of marijuana, but the charges for possession were eventually dropped pursuant to a plea deal.

Article 5.A. of the Military Drug and Alcohol Policy Manual, COMDTINST M1000.10A, states the objective of the military’s drug policy is to detect and separate military members who unlawfully possess illicit, controlled, and certain non-controlled, substances. And Article 5.C.2. of COMDTINST M1000.10A states that wrongful possession of drugs constitutes a drug incident. In light of the detailed police report, the Board finds that the applicant’s command did not err in finding that the preponderance of the evidence showed that the applicant’s possession of marijuana constituted a drug incident under the COMDTINST M1000.10A. The applicant’s claim that he had been unaware that he was in possession of marijuana is unpersuasive given that the police smelled the scent of burning marijuana in his car and found a baggie of marijuana in his pocket. Nor does the fact that the charge of possession was dropped by civilian authorities pursuant to a plea deal undermine the command’s finding that he had incurred a drug incident by possessing marijuana. Therefore, the Board finds that the applicant has failed to prove, by a preponderance of the evidence, that the Coast Guard erred in finding that he had incurred a drug incident by illegally possessing a controlled substance in violation of Coast Guard policy and federal law.

5. **Due Process and Right to Counsel.** The applicant alleged that the Coast Guard rushed his discharge, failed to notify him that he was being discharged before having him provide his written statement, and failed to provide him with legal counsel in violation of Coast Guard policies. To support his arguments, the applicant cited Article 1.B.17.e.3. of the Military Separations Manual, COMDTINST M1000.4, pursuant to which he was entitled to be notified of the basis for his discharge, to consult an attorney, to object to his discharge, and to submit a written statement. However, the record shows that the applicant was notified of the basis for his discharge in writing on February 21, 2020. Then on February 27, 2020, he signed a “First Endorsement”

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).

acknowledging his discharge notification, his right to consult counsel, his right to object, and his right to submit a written statement. This acknowledgement specifically states, “I hereby acknowledge I have been provided with the opportunity to consult with a military lawyer.” And on February 28, 2020, the applicant submitted a detailed statement about his pending discharge. Therefore, the preponderance of the evidence shows that the applicant received all due process afforded under the Military Separations Manual, including the opportunity to consult with an attorney.

6. **Propriety of Discharge and Reenlistment Code.** Because the applicant has not proven by a preponderance of the evidence that his command erred in determining that he had incurred a drug incident by knowingly possessing marijuana or that he was denied due process or the right to consult counsel during his discharge proceedings, the Board finds that he has not shown that his discharge for misconduct due to his involvement with drugs was erroneous or unjust. Therefore, there are no grounds for voiding his discharge or for reinstating him on active duty. Furthermore, the Board notes that in accordance with Article 1.B.17. of the Military Separations Manual, any member of the Coast Guard discharged due to a drug incident may receive no better than a General discharge “under honorable conditions,” which is what the applicant received. And in accordance with the Separation Program Designator (SPD) Handbook, the only reenlistment code authorized for a member discharged for a drug incident is an RE-4, which means ineligible to reenlist. Therefore, the Board also finds no grounds for upgrading the applicant’s discharge or reenlistment code.

7. The applicant made varied allegations and arguments. 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.⁷

8. 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 in determining that he had incurred a drug incident and discharging him.⁸ He has not proven, by a preponderance of the evidence, that the Coast Guard erroneously separated him for misconduct with an RE-4. Accordingly, the applicant’s requests should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

⁷ 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”).

⁸ *Muse v. United States*, 21 Cl. Ct. 592, 600 (1990) (internal citations omitted).

ORDER

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

April 14, 2023

[REDACTED]
[REDACTED] Digitally signed by [REDACTED]
[REDACTED] Date: 2023.05.04 14:13:46 -04'00'

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