

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2020-113


AET3/E-4 (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 October 3, 2019, and assigned the case to a Staff Attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated September 9, 2022, 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 is a former Avionics Electrical Technician (AET3/E-4) who was administratively separated and received a General discharge¹ on March 2, 2020, while his application was pending, for violating the Coast Guard's drug policies and for providing a false official statement. He asked the Board to correct his record by removing a Notification of Intent to Discharge, dated November 21, 2019; a negative CG-3307 ("Page 7") dated November 21, 2019; and a Recommendation for Discharge, dated November 19, 2019, and he wants to be reinstated on active duty.

The applicant alleged that the Coast Guard lacked sufficient evidence to administratively separate him for the distribution and possession of marijuana and providing a false official statement to Coast Guard Investigative Service (CGIS) investigators. The applicant claimed that at no time did he send text messages in a group chat as cited in the CGIS investigation report. The

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. A special court-martial may award a bad conduct discharge (BCD), and a general court-martial may award a BCD or a dishonorable discharge.

applicant further alleged that he did not realize that CGIS investigators relied upon a mistaken belief that he had sent text messages which purportedly reflected knowledge of marijuana use amongst colleagues until after he was afforded the opportunity to review the evidence against him. The applicant alleged that he did not send the text messages relied upon by CGIS investigators and he did not provide a false official statement when speaking to CGIS. The applicant claimed that he was falsely accused of violating Article 80 (Attempts) of the Uniform Code of Military Justice (UCMJ), Article 107 of the UCMJ (False Official Statement), and Article 112(a) of the UCMJ (Wrongful use, possession...of a controlled substance). The applicant also alleged that he was denied due process.

According to the applicant, on September 26, 2018, he provided a hair sample to be tested for the illegal use of a controlled substance—marijuana. He claimed that the test result was negative. The applicant alleged that on September 27, 2018,² he waived his rights to representation under Article 31(b) of the UCMJ and provided statements to CGIS investigators during an in-person interview. The applicant alleged that during this interview he learned that he was suspected of having violated Article 112(a) of the UCMJ by wrongfully using and possessing a controlled substance. The applicant further claimed that during this interview he was asked a series of questions, one of which was whether or not he had knowledge of any Coast Guard members using illegal controlled substances, to which he replied in the negative. The applicant further alleged that at the conclusion of the interview it was determined that there was insufficient evidence to support allegations of UCMJ violations for wrongful use and possession of a controlled substance, and the charges against him were dropped. However, the applicant stated, the CGIS investigation concluded that—because of evidence recovered during the interview and the text messages on his phone—a preponderance of the evidence showed that it was more likely than not that he had knowledge of Coast Guard members engaging in the illegal use of a controlled substance.

The applicant further alleged that on November 27, 2018, he was removed from his permanent duty unit as premature punishment for the alleged offenses, which he had not committed.

The applicant argued that as a result of these allegations, on November 22, 2019,³ his Commanding Officer (CO), a Captain, notified the applicant of his intent to initiate the applicant's discharge from the Coast Guard. The applicant claimed that he initially refused to sign this notification because he did not believe he had made any false official statements, thereby violating Articles 80 and 107 of the UCMJ, as alleged in the negative Page 7 he received.

According to the applicant, on December 12, 2019,⁴ he acknowledged the notification, provided statements, and objected to his discharge by utilizing the first endorsement option on the

² The applicant stated that this interview occurred on September 27, 2018, but records show the interview took place on October 2, 2018.

³ Records reflect a Letter of Intent to Discharge was issued on November 21, 2019.

⁴ Records reflect a First Endorsement date of December 19, 2019.

Notification of Intent to Discharge Memorandum.⁵ The applicant stated he never received a response to his rebuttal.

Finally, the applicant argued that the statements he provided to CGIS investigators were in response to an open-ended question and his answer was based on the question being asked at the time. The applicant claimed he did not know or believe his statements to be false. The applicant further alleged that he had no intent to deceive when providing his official statements to CGIS investigators during his October 2, 2018, interview. He stated that the text messages found and relied on by CGIS investigators were sent more than six months before his CGIS interview, were not found on his own phone during the data extraction, and were therefore “far removed from my memory bank.” Because of this distance in time, the applicant argued, he simply did not remember the conversations and so did not believe his statements to CGIS investigators were false at the time. In addition, the applicant stated that he had waived his rights to representation under Article 31(b) of the UCMJ and spoken freely to the CGIS agents because he had no intent to deceive and wanted to cooperate. The applicant alleged that when he told them that he did not know any Coast Guard members partaking in drug activities, he was responding to the fact that no Coast Guard member did drugs around him, nor had any Coast Guard member seemed under the influence of illegal substances while in his presence.

To support his application, the applicant submitted eleven character statements and one letter of appreciation from former supervisors and shipmates, who highly praised his integrity and work ethic.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on September 16, 2014, and completed Avionics Electrical Technician school on November 10, 2016.

On October 2, 2018, the applicant was interviewed by CGIS agents about possible drug use among service members assigned to the applicant’s duty station. According to the CGIS report, during this interview, the applicant denied knowing anyone who used drugs and stated that he did not talk to other service members about drugs. The applicant also told the agents that since enlisting in the Coast Guard, he had not used drugs, purchased drugs, or attempted to purchase drugs. During the course of the CGIS investigation, the applicant and several other service members consented to having their text messages extracted from their phones. In the extracted messages, the CGIS agents found several conversations wherein the applicant discussed the logistics and methods for purchasing and possessing marijuana.

According to the CGIS agents’ report, when the applicant was read text messages extracted from his phone which implicated him in the purchase and illegal possession of marijuana, he told them, “It was just a conversation” and that he was “bummed out about implicating himself in the

⁵ Administration Separations Board Manual, COMDTINST M1910.2, Article 2D.1. *Acknowledging Notice*. The respondent shall acknowledge receipt of the convening authority’s notice of intent to take administrative action without delay by completing the acknowledgement of rights and election of counsel portion of the convening authority’s notice of administrative action.

chat.” The agents also found text messages wherein the applicant had discussed the use of marijuana by other Coast Guard service members.

On August 20, 2019, the applicant’s CO issued a Preliminary Inquiry Memorandum wherein he directed a lieutenant at the unit to serve as a Preliminary Inquiry Officer (PIO) and conduct a “single-officer standard investigation” under chapter 4 of the Administrative Investigations Manual, COMDTINST M5830.1, into all facts and allegations that the applicant had knowledge of, or had participated in, controlled substance abuse among Coast Guard members and had failed to report this knowledge to Coast Guard authorities.

On September 10, 2019, the PIO reviewed the CGIS agents’ report and evidence and submitted a report to the CO wherein he concluded that on multiple occasions the applicant had exchanged text messages with other Coast Guard members that showed extensive knowledge of illicit drug activity. The PIO also found that the applicant had, multiple times over an almost two-year period, acknowledged texts from other Coast Guard members who were discussing being high, smoking marijuana, or using other illegal substances. The PIO noted that the applicant had never tested positive for the use of controlled substances while serving in the Coast Guard. In addition, the PIO stated that neither Coast Guard members nor civilians had incriminated the applicant for using drugs in their statements to CGIS. According to the PIO, a string of text messages on August 8, 2018, indicated that the applicant had discussed various strains of marijuana for purchase and that the applicant was considering transferring money for the purchase of marijuana. Ultimately, however, the PIO found that there was insufficient evidence to support court martial or non-judicial punishment (NJP) for violations of Articles 80 and 112a of the UCMJ. However, the investigator found that there was sufficient evidence to send the applicant to Captain’s Mast for NJP for violating Article 107 of the UCMJ by making false official statements to police officials. The investigator recommended the following: that the applicant have his security clearance revoked; that the applicant be brought before Captain’s Mast for violating Article 107 of the UCMJ; that the applicant receive counseling from a Chief’s Counsel on the Coast Guard’s zero-tolerance policy; that the applicant be required to meet with a member of the Chief’s Mess for supervised Extra Military Instruction (EMI) on the hazards of drug use twice a month; that the applicant receive a negative Page 7 for his disregard of Coast Guard policy and for violating the trust placed in a Petty Officer Third Class for his failure to report drug use among peers and encouraging illicit behavior by other members; and finally, that the applicant be discharged under other than honorable circumstances for violating Article 107 of the UCMJ.

On November 21, 2019, the applicant’s CO formally notified of him of his intent to administratively discharge him for misconduct due to his “commission of a serious offense.” The CO cited the investigation as well as the false statements the applicant had knowingly made to CGIS investigators regarding his knowledge of illicit drug use among Coast Guard service members as his reasons for initiating the applicant’s administrative discharge for misconduct.

Also on November 21, 2019, the applicant’s CO entered a negative Page 7 in his record with the following text:

Following an investigation into drug use amongst multiple members assigned to various units throughout [the region], Special Agents from Coast Guard Investigative Service (CGIS) discovered evidence contained in consensually searched electronic communications between you and other

active duty Coast Guard members discussing logistics and methods for purchasing and possessing marijuana. These text messages included a conversation between you and two other Coast Guard members who had previously discussed their open drug use with you. During the conversation, you specifically requested that your shipmate purchase “any” kind of marijuana, and that you did not have a preference between type, which included, “black mamba, kosher kush, blue berry, moon rocks, buckeye purp”, all of which are specific strains of the cannabis plant. You took overt steps to possess 3.5 grams of marijuana by telling your friend to get you “3.5 gram for \$50”, then, to facilitate the payment for the marijuana, you downloaded and set up the cash app. I find by a preponderance of the evidence that in March of 2018, you violated Article 80 of the UCMJ when you attempted to possess illegal substances (marijuana).

Additionally, multiple electronic statements discovered between you and these other active duty Coast Guard members indicated that you had firsthand knowledge of their personal drug use. In these conversations, they told you of their drug use and you acknowledged these statements. In your official statement to CGIS in October 2018, however, you specifically provided false information in violation of Article 107, UCMJ, with the intent to deceive, when you told CGIS that you do not talk to any Coast Guard members about drugs and you do not know anyone that used drugs. You knew that this statement was totally false. Accordingly, I find by a preponderance of the evidence that you violated Article 107 when you knowingly made a false official statement to law enforcement.

On December 11, 2019, the applicant submitted a sworn statement in rebuttal to his CO’s Notification of Intent to Discharge in which he stated he was completely shocked by the allegations made against him. The applicant alleged, “I do not use nor distribute or buy marijuana. I also never lied to CGIS about this.” According to the applicant, when he gave his statements to CGIS investigators he was being completely truthful. The applicant further alleged that dates shown in the evidence for his CGIS interview, drug test, and phone extraction were all incorrect. The applicant claimed that after seeing the discrepancies when he was shown the report, he asked for a copy of the evidence but was told he was not allowed to have copies. The applicant also alleged that at no time did he ever send or draft text messages dealing with the distribution of drugs to the group of individuals allegedly found on his phone. The applicant stated that “I could not have sent these text messages and I do not recall sending these messages from my phone. I am positive I did not send the texts, and there is no proof that these text messages even came from my phone.” Finally, the applicant stated that he maintains his innocence that he did not send the text messages that implicated him in the purchase and possession of an illegal substance and that the forensic evidence “proves 100%” that he did not send the text messages at issue here.

On December 19, 2019, the applicant’s CO submitted a Recommendation for Discharge Memorandum to PSC, recommending that the applicant be separated from the Coast Guard with a General discharge for reasons of misconduct for the commission of a serious offense.

On March 2, 2020, the applicant was administratively separated from the Coast Guard with a General characterization by reason of Misconduct, for the Commission of a Serious Offense.

VIEWS OF THE COAST GUARD

On November 10, 2020, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which she recommended that the Board grant alternate relief in this case and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

The JAG argued that the applicant has failed to show that the Coast Guard committed an error or injustice when it separated him. Specifically, in regard to the applicant's claim that he was not afforded due process and was prohibited from reviewing evidence, the JAG argued that in the applicant's December 11, 2019, affidavit, he stated that he was given an opportunity to review evidence, including the related CGIS report, proving that the Coast Guard did not commit an error or deprive the applicant of due process.

The JAG further argued that no error was committed when separating the applicant. According to Article 1.B.17.b.3. of the Military Separations Manual, COMDTINST M1000.4, the Coast Guard argued, the commission of a serious offense does not require adjudication by non-judicial or judicial proceedings and must only be established by a preponderance of the evidence. Therefore, CGIS reports of investigations can be used to determine a serious offense was committed. In addition, according to the JAG, the Separations Manual states that a member may be separated for committing a serious offense when the specific circumstances of the offense warrant separation and the maximum penalty under the UCMJ includes a punitive discharge. In the applicant's case, the JAG claimed, his CO determined that the September 10, 2019, Preliminary Inquiry Report and the underlying CGIS ROI sufficiently proved, by a preponderance of the evidence, that the applicant had attempted to possess an illegal substance in violation of Article 80 of the UCMJ when he texted fellow service members to acquire for him 3.5 grams of marijuana for \$50. The JAG argued that when the applicant was confronted with these text messages, he simply stated, "It just a conversation," and he was "bummed out about implicating himself in the chat," rather than, as he is now, alleging that he did not send the text messages or that he did not participate in the group chat. The JAG also claimed that the Preliminary Inquiry Report sufficiently proved that the applicant lied to his CGIS interviewers in violation of Article 107 of the UCMJ when he stated he did not know anyone who uses drugs and does not talk to Coast Guard members about drugs. In addition, the JAG argued that the applicant stated something to the effect of, "Since he has been in the Coast Guard, he has not used drugs, purchased drugs, or attempted to purchase drugs." This statement, according to the JAG, is in direct conflict with the text messages recovered from the applicant's phone wherein he discussed marijuana and purchasing marijuana from other service members. The JAG argued that the offenses under Articles 80, 107, and 112a of the UCMJ each have a maximum penalty that includes a punitive discharge. As such, the JAG argued that the Coast Guard committed neither an error nor an injustice when it followed the required policies and separated the applicant.

Finally, the JAG argued that the applicant's treatment does not shock the sense of justice. The Coast Guard followed stated policy when separating the applicant for the commission of a serious offense. According to the JAG, it was the applicant's own December 11, 2019, statements that were ultimately used against him as evidence. The JAG claimed that the applicant was provided an opportunity to rebut the allegations against him after reviewing the evidence, but did not do so in his December 10, 2019, statement to the separation authority. Lastly, the JAG argued that the Coast Guard has a strict zero tolerance drug policy and the applicant knowingly violated these standards by attempting to possess a controlled substance. As such, the JAG argued that the applicant has failed to meet his burden of establishing, by a preponderance of the evidence, that the Coast Guard committed an error or an injustice and his request for relief should therefore be denied.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On December 15, 2020, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. To date, no response has been received.

APPLICABLE LAW AND POLICY

The Manual for Courts-Martial United States and the Uniform Code of Military Justice provide the following rules about the alleged criminal offenses in this case:

Article 80.a. Attempts. An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense.

Elements:

- (1) That the accused did a certain overt act;
- (2) That the act was done with the specific intent to commit a certain offense under the code;
- (3) That the act amounted to more than mere preparation; and
- (4) That the act apparently tended to effect the commission of the intended offense.

Maximum Punishment: Any person subject to the UCMJ who is found guilty of an attempt under Article 80 to commit any offense punishable by the UCMJ shall be subject to the same maximum punishment authorized for the commission of the offense attempted.

...

Article 107. False Statements. Any person subject to this chapter who, with intent to deceive, signs any false record, return, regulation, order, or other official document, knowing it to be false, or makes any other false official statement knowing it to be false, shall be punished as a court-martial may direct.

Maximum Punishment: Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

...

Article 112a. Wrongful Use, Possession, etc., of a Controlled Substance.

(a) Any person subject to this chapter who wrongfully uses, possesses, manufactures, distributes, imports into the customs territory of the United States, exports from the United States, or introduces into an installation, vessel, vehicle, or aircraft used by or under the control of the armed forces a substance described in subsection (b) shall be punished as a court-martial may direct.

(b) The substances referred to in subsection (a) are the following:

- (1) Opium, heroin, cocaine, amphetamine, lysergic acid diethylamide, methamphetamine, phencyclidine, barbituric acid, and marijuana and any compound or derivative of any such substance.

Maximum Punishment: Marijuana (possession of less than 30 grams or use), phenobarbital, and Schedule IV and V controlled substances. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for two years.

The Coast Guard Military Separations Manual, COMDTINST M1000.4, provides the necessary guidance on the standards of discharge, reasons for receiving a general discharge, and what is considered misconduct. In relevant part:

1.B.2.f.2. 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 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...

(b) The member is eligible for discharge for one of the reasons listed in Article 1.B.2.f.(1)(a) of this Manual and...

(2) When based on the individual's overall military record or the severity of the incident(s) which results in discharge, Commander (CG PSC-EPM-1) directs issuing a general discharge.

Commander (CG PSC) may direct discharging a member for misconduct in any of these cases:

1.B.17.b.3. Commission of a Serious Offense. Commission of a serious offense does not require adjudication by non-judicial or judicial proceedings. An acquittal or finding of not guilty at a judicial proceeding or not holding non-judicial punishment proceeding does not prohibit proceedings under this provision. However, the offense must be established by a preponderance of the evidence. Police reports, CGIS reports of investigation, etc. may be used to make the determination that a member committed a serious offense.

(a) Members may be separated based on commission of a serious military or civilian offense when:

(1) The specific circumstances of the offense warrant separation; and

(2) The maximum penalty for the offense or closely related offense under the UCMJ and Manual for Courts-Martial includes a punitive discharge. The escalator clause of Rule for Courts-Martial 103(d) shall not be used in making this determination.

1.B.17.b.4.a. 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). (emphasis added.)

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 concerning this matter pursuant to 10 U.S.C. § 1552.
2. The application was 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 requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.⁶

4. The applicant alleged his discharge was erroneous and unjust because the Coast Guard lacked sufficient evidence to discharge him for the illegal possession of marijuana and because he never made a false official statement. 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.⁷ 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."⁸

5. The applicant argued that the Coast Guard lacked sufficient evidence to administratively discharge him for violating Article 80 of the UCMJ by attempting to possess an illegal substance. To be convicted of an "attempt" under Article 80, there must be more than mere preparation, there must be an overt act of some kind.⁹ In the PIO's report dated September 10, 2019, the PIO opined that a violation of Article 80 (Attempt) could not be proven. He stated that the text messages dated March 8, 2018, show that the applicant "discussed various strains of marijuana for purchase, and indicate [the applicant] *was considering* transferring money for the illicit items." (Emphasis added.) However, in the Page 7 dated November 19, 2019, the CO wrote that the applicant had taken "overt steps to possess 3.5 grams of marijuana by telling your friend to get you '3.5 gram for \$50', then, to facilitate the payment for the marijuana, you downloaded and set up the cash app." Therefore, according to the CO, the texts show that the applicant was not merely discussing a possible purchase of drugs, but had actually contacted someone whom he knew could supply illegal drugs; placed an order for the drugs by texting that person about the kinds of marijuana they liked and texting him a written request to purchase a certain amount for a certain sum; and then downloaded and set up a cash transfer application to effect the purchase. Under these circumstances, placing the order for the delivery and purchase of illegal drugs could

⁶ *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).

⁷ 33 C.F.R. § 52.24(b).

⁸ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁹ MANUAL FOR COURTS-MARTIAL UNITED STATES (2019), p. IV-5, explains that an "attempt" violation of Article 80, UCMJ, requires the following:

(1) In general. To constitute an attempt there must be a specific intent to commit the offense accompanied by an overt act which directly tends to accomplish the unlawful purpose.

(2) More than preparation. Preparation consists of devising or arranging the means or measures necessary for the commission of the offense. The overt act required goes beyond preparatory steps and is a direct movement toward the commission of the offense. For example, a purchase of matches with the intent to burn a haystack is not an attempt to commit arson, but it is an attempt to commit arson to apply a burning match to a haystack, even if no fire results. The overt act need not be the last act essential to the consummation of the offense. For example, an accused could commit an overt act, and then voluntarily decide not to go through with the intended offense. An attempt would nevertheless have been committed, for the combination of a specific intent to commit an offense, plus the commission of an overt act directly tending to accomplish it, constitutes the offense of attempt. Failure to complete the offense, whatever the cause, is not a defense.

be considered an overt, essential step of the purchase—not mere preparation—because the purchase could not happen without it.

The PIO and the CO clearly disagreed regarding whether the texts showed that the applicant had taken an overt action toward purchasing illegal drugs, which would substantiate a violation of Article 80 (Attempt). Both are entitled to a presumption of regularity under 33 C.F.R. § 52.24, but their contradictory assessments of whether the applicant violated Article 80 cannot both be correct. Without the underlying text messages, however, it is impossible for the Board to know whether the PIO or the CO was correct regarding whether the applicant had committed an overt act and thus committed an attempt.

6. The applicant alleged that he never violated Article 107 of the UCMJ because he never knowingly made false official statements to the CGIS agents. According to the applicant, the answers he provided to CGIS agents regarding marijuana were the result of open-ended questions and he did not know or believe the answers he provided to be false. However, the preponderance of the record shows that during his October 2, 2018, interview, the applicant stated that he was not aware of any service members who did drugs, and that since entering the Coast Guard, he had not used drugs, purchased drugs, or attempted to purchase drugs. But CGIS investigators retrieved a string of text messages that show that the applicant exchanged numerous text messages with other service members about purchasing and using drugs. These text messages sufficiently support a finding that the applicant did knowingly deceive CGIS investigators when he, with the intent to deceive, told them he was not aware of any service members who used illegal drugs, when he did in fact know service members who used illegal drugs.¹⁰ Although the applicant alleged that these messages did not and could not have come from his phone, he has failed to provide any evidence to support his allegations. Finally, the record shows that during his interview with CGIS investigators, the applicant acknowledged the string of text messages, claiming they were “only conversation” and that he was “bummed” for having implicated himself. There is no evidence that the applicant contested the validity or accuracy of the text messages during his interview with the CGIS agents, as he does now. The record is presumptively correct, and the applicant has failed to show that the Coast Guard erred when it relied on these text messages and conflicting statements made to CGIS agents on October 2, 2018, to conclude that the applicant had violated Article 107, UCMJ, by making one or more false official statements to CGIS agents.

7. The applicant presented numerous letters from current and former service members who shared their opinions on the applicant’s character and his value as a Coast Guard member. Specifically, these letters indicated that the applicant was a trustworthy and valued service member who showed great eagerness to learn and enthusiasm with every task. These letters acknowledged the poor choices the applicant had made by associating with individuals who do not make the right choices, but their authors still believed that the applicant deserved a second chance and would add value to the Coast Guard. However, the members who wrote the letters of reference were not privy to all of the events and evidence. Nor does their opinion of the applicant’s value to the Coast Guard outweigh the opinions of the superior officers who effected his discharge. The Board finds that the applicant’s administrative separation is supported by the preponderance of the evidence, as

¹⁰ The applicant himself never tested positive for illegal substances. As such, his statement that he had never done drugs since entering the service was factual and could not support a finding that he violated Article 107—Making False Official Statements—of the UCMJ.

explained in the previous findings, and these letters do not persuade the Board that the applicant's separation was erroneous or unjust.

8. The applicant made numerous allegations about the Coast Guard being unable to prove that the text messages retrieved by CGIS came from his phone, that he does not recall sending the texts, and that text messages were never deleted from his phone. Those allegations and arguments 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.¹¹

9. Therefore, although the record contains insufficient evidence for the Board to assess the validity of the charge that the applicant violated Article 80 of the UCMJ, the record does support a finding that the preponderance of the evidence shows that the applicant violated Article 107 by making one or more false official statements to the CGIS agents and so the Coast Guard was acting within its policies and authority to discharge the applicant for misconduct due to his commission of a serious offense. Thus, the applicant has failed to prove by a preponderance of the evidence that the Coast Guard committed an error or injustice when it involuntarily discharged him for misconduct. His request for relief should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

¹¹ 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”).

ORDER

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

September 9, 2022

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