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

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Application for Correction of
the Coast Guard Record of:

**BCMR Docket No. 2020-149**

[redacted]
SN (former)

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# 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 August 21, 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 September 30, 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, a former Seaman (SR/E-3) who received a General – Under Honorable Conditions[1] discharge from the Coast Guard on April 22, 2010, for illegal use of marijuana, asked the Board to correct his record by upgrading his discharge to honorable and assigning a corresponding separation code that would allow him to re-join the United States Armed Forces.

The applicant, through counsel, alleged that in 2009, he was assigned to a Coast Guard housing unit, where he lived with his wife, who smoked marijuana on a regular basis. The applicant alleged that he did his best to avoid his wife when she was smoking marijuana. The applicant claimed that his only options were to order his wife to stop taking her medication, or physically separate himself from her while she medicated.[2] The applicant further argued that his place of residency was in California, where the use of medical marijuana was legal, which allowed its

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[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.
[2] The applicant does not clarify, but it is assumed that by "medicate" he means smoking marijuana.

residents and his family members to freely use marijuana in public.[3] The applicant further alleged that as a result of his time with his wife and family members, he was exposed to secondhand smoke on a regular basis. According to the applicant, in approximately April 2009, he was contacted by Coast Guard Investigative Services (CGIS) because someone had reported the smell of marijuana smoke coming from his home. The applicant alleged that CGIS investigators failed to disclose the specifics of the complaint, such as the time of day the complaint was reported, which according to the applicant was relevant in determining if he was home at the time of the complaint. The applicant claimed that CGIS investigators interviewed his wife who admitted that she, and she alone, smoked marijuana in the home. As a result of this admission, the applicant claimed he was ordered to undergo a drug test. The applicant alleged that the Coast Guard chose to conduct a hair follicle test instead of the traditional urine test. The applicant stated that, "[f]or an unknown and unexplained reason, CGIS chose to conduct a hair sample test instead of the usual urine test, although this appeared odd to [applicant], he complied…"[4] The applicant also stated that "every branch of the military, overwhelmingly utilizes the urine drug test because it has been repeatedly proven to accurately verify *intentional* drug use. Whereas a Hair sample test has not."[5]

The applicant contested his commanding officer's (CO's) decision to use the results of the hair follicle testing as grounds for finding that he had incurred a drug incident and awarding him Non-Judicial Punishment (NJP) because hair follicle testing often produces false positives for those exposed to secondhand smoke. The applicant claimed that because his head was shaved at the time, CGIS agents collected leg hair samples for a drug test. According to the applicant, after his drug test came back positive, he proclaimed his innocence. The applicant argued that the positive drug test was the result of exposure to secondhand smoke from his wife, who regularly smoked marijuana in their shared home. The applicant argued that the only evidence his CO considered in making his finding of a drug incident were the results of the "unorthodox" hair sample test and the applicant's statements proclaiming his innocence and attributing the positive drug test to second-hand smoke exposure due to his wife's medical marijuana usage. He stated that, "[a]t this point in time it is impossible to determine how much credibility… [the CO] afforded to [the applicant] [sic] declaration [proclaiming his innocence]." The applicant argued that "[c]onsidering the commonly known and scientifically proven fact that a properly confirmed urine test rarely returns a false positive from secondhand exposure, it is reasonable…that [the CO] likely disregarded it."[6] The applicant further argued that his CO "adjudicated [the applicant] guilty based solely on the bare minimal leg hair test result that failed to describe how the sample was tested, negating all mitigating evidence proffered by [applicant]."

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[3] The federal government still considers marijuana an illegal substance and prohibits its employees from using it. In addition, the applicant did not provide any supporting documentation showing his wife had a medical prescription for her marijuana use.

[4] The applicant does not provide a citation to support his contention that a urinalysis test is the "usual" drug test, or why the hair sample test seemed "odd" to the applicant.

[5] While the applicant provides support for this statement with the citation "See Generally Exhibit 4 and 5," it is unclear where specifically this information regarding the efficacy of various drug tests can be found, as he has not provided full exhibits or citations to specific chapters and/or sections of the cited documents.

[6] The applicant does not provide citations to support his assertion that it is "commonly known and scientifically proven fact that a properly confirmed urine test rarely returns a false positive from secondhand exposure." *See* Application, at 6.

The applicant argued that his discharge and reenlistment code were based on "erroneous findings derived from a perfunctory drug incident investigation," which "constitutes impropriety and inequity." The applicant alleged that his characterization of service and narrative reason for separation are inequitable because he did not intentionally ingest marijuana. He questioned the methodology for the hair sample test and argued that the Coast Guard should have conducted a confirmatory urinalysis test. Further, the applicant contended that the marijuana identified in the hair sample could have been from pre-service ingestion. The applicant also argued that the Coast Guard committed an error of law by failing to advise him of his rights prior to the Coast Guard's investigation of the drug incident at issue in the instant matter.

**A. The applicant's characterization of service and narrative reason for separation are inequitable because he did not *intentionally* ingest marijuana.**

According to the applicant, before a service member can be administratively separated for drug use, the individual's CO must find, by a preponderance of evidence, (i.e., more likely than not) that a drug incident occurred. A drug incident is defined as "*intentional* use of drugs for non-medical purposes." The applicant claimed that, under the Military's drug policy, "if conduct occurs without the member's knowledge, awareness, or reasonable suspicion that it is medically authorized, it does not constitute a drug incident."[7] Once the CO initiates an investigation into a possible drug incident, they "must consider all available evidence," including the servicemember's statement, in order to determine if a drug incident occurred.[8]

The applicant argued that, because the drug test at issue used a hair follicle test, there is "no possible way" to determine when or how marijuana was introduced into the applicant's leg hair. In his application, he explained that "[l]eg hair grows at a slower rate than head hair and only grows to a certain length and then stops growing," and "[o]nce the drug is introduced to the hair it does not dissipate unlike a urine test."[9] Further, the applicant argued, "[s]ince the drug stays in hair forever, a historical timeline of the persons drug use can be derived only if head hair is tested."

The applicant argued that the hair sample test conducted in this case does not indicate that the sample was washed in accordance with best practices to exclude environmental exposure and, therefore, may have identified drug use from years prior to the instant matter.[10] The applicant argued that he has provided two credible theories to explain his positive drug test; environmental

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[7] The applicant did not provide the specific military policy he is quoting, but the Board did find a similar statement in Chapter 20.A.2.k.3 of the Coast Guard Personnel Manual, COMDTINST M1000.6A (June 2007).

[8] The applicant did not provide the necessary citation for this policy and the board was unable to locate it in a reasonable amount of time.

[9] The applicant's exhibits submitted in support of these assertions include his own statement submitted at the time of his original Captain's Mast (citing a 1999 *New York Times* article entitled "Hair Testing by Schools Intensifies Drug Debate"), a document that appears to be a Quest Diagnostics fact sheet (but does not provide citation information and/or a URL, and a fact sheet published by Truth Verification Laboratories (while no citation is included, the company does not seem to have a credible internet presence/website, and the url listed on the publication, www.drugd-tech.com/hairanalysis.html, is non-functional)

[10] The applicant did not provide citations and/or exhibits to support his statement that "The hair test conducted in this case does not indicate the sample was washed in accordance with best practices to exclude environmental exposure and was capable of identifying drug use from years prior." *See* Application, at 9.

exposure and pre-service ingestion, and, therefore, "the positive hair sample test lacked sufficient weight to satisfy the burden of proof necessary in this case."

Because a hair sample test was conducted, rather than a urinalysis, the applicant's CO was not required to ensure that the drug test was conducted in accordance with proper testing and collection procedures. The applicant argued that a urinalysis test would have required that certain procedures were followed. In contrast, a hair analysis test requires only the signature of lab employees representing that all procedures were followed, without outlining what those procedures were.

**a. The Coast Guard should have conducted a confirmatory urinalysis to ensure that the applicant intentionally ingested marijuana.**

The applicant argued that a confirmatory urinalysis test would have confirmed that he had not intentionally ingested marijuana. He argued that, while precedent dictates hair sample tests are an acceptable method of drug testing servicemembers to ascertain whether a drug incident occurred, they are not highly regulated.[11] The applicant explained that hair tests differ from urinalysis tests because the CO is only required to ensure that proper collection and testing protocols are followed for urinalysis tests, not hair tests. He alleged that hair sample tests can result in false positives due to environmental exposure, which does not occur with urinalysis tests. According to the applicant, urinalysis tests have a limited window of detection, but because drugs do not dissipate from hair, they can be detected in a hair sample for an indefinite period of time. The applicant argued that this limited window of detection coupled with more stringent protocols for urinalysis testing reduces the probability of a false positive while still accurately testing for intentional drug use.

**b. Urinalysis tests have extensive protocols and requirements for the collection, transportation, and testing of the samples.**

The applicant argued that all branches of the military primarily rely upon urinalysis drug testing. Further, he alleged that urinalysis testing is the only form of drug testing with an established set of policies and procedures that must be followed for the drug test to be considered a confirmed positive result. The applicant stated that, "[t]here are no such standards for hair tests, thus negating the Commanders [sic] duty to ensure the sanctity and accuracy of the test to preserve [applicant] [sic] rights."

**c. The marijuana identified in the hair sample could be from pre-service ingestion.**

The applicant argued that "[t]he unique aspect of a hair sample test is its ability to identify when and how much of a drug the subject used." He explained that, because the drug does not dissipate in the hair, the quantity of the drug detected in a sample can determine whether the individual was a light, moderate, or heavy user of the drug. Using a process called segmentation, technicians can determine the exact timeline of exposure. Segmentation, however, cannot be performed on body hair, only head hair, because body hair grows at a slower rate and tends to stop

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[11] The applicant has not provided a specific citation to support his claim that "urine tests are highly regulated, hair tests are not." *See* Application, at 10.

growing once it reaches a predetermined length. In short, the hair sample taken from the applicant could not be used to determine when he may have ingested and/or was exposed to drugs.

Because the applicant used marijuana when he entered the Coast Guard, approximately 15 months prior to the drug test at issue, he argued, it is possible that this prior ingestion of marijuana resulted in the positive hair sample test. A confirmatory urinalysis test would have ruled out the possibility that the positive hair sample test was the result of pre-service marijuana ingestion.

**d. The marijuana identified in the hair sample could be from secondhand smoke.**

The applicant argued that the difference between a urinalysis test and a hair sample test is that the urinalysis test requires that the drug is intentionally ingested to be detected above the cut off level, while a hair sample test can result in a positive result from simply standing in a room with marijuana smoke without inhaling the smoke. Because drugs can attach to hair through various forms of environmental exposure such as being exposed to secondhand smoke or coming into contact with a marijuana user, a technician evaluating a test should consider the possibility of environmental exposure when interpreting test results.

The applicant explained that the Society of Hair Testing publishes best practices for hair sample tests, which include washing every hair sample prior to testing to remove any external contamination and to avoid a false positive. Because the applicant and his wife have disclosed that she is a regular marijuana user, it is possible that his positive drug test is the result of secondhand exposure. Since the drug test result provided by the laboratory did not indicate if the samples were washed, there is no possible way to rule out environmental exposure through second-hand smoke or contact transfer by the applicant's wife. A confirmatory urinalysis test would have accurately verified the results of the positive hair sample test.

## SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on January 8, 2008. On that day, he signed a "Record of Military Processing – Armed Forces of the United States," on which he denied having ever used marijuana or any other illegal drugs. After bootcamp, the applicant attended Electronics Technician (ET) "A" School until he requested voluntary disenrollment on or about July 22, 2008.

On August 18, 2008, the applicant reported to a new unit on temporary active-duty orders (TAD). During his TAD assignment, the applicant resided in the local Coast Guard military housing with his wife.

On June 19, 2009, the applicant was interviewed by CGIS investigators. According to the CGIS report the Base housing authorities reported the following:

- On February 24, 2009, a Base housing authority conducted a just-cause inspection of the applicant's base housing unit in addition to the four other units attached the applicant's building because neighbors reported the smell of marijuana in the area. The housing authority reported no smell of marijuana in the other four units, but detected a slight smell of marijuana in the applicant's residence, which was masked by the smell of air fresheners. The applicant's wife was present during the inspection, but the

applicant was not. At the initial inspection, the applicant's wife did not explain the marijuana smell.

- On February 25, 2009, the Base housing authority spoke to the applicant, who stated that he did not smoke marijuana and that although he knew that his wife smoked marijuana, he had told her not to do so in the house.
- On June 2, 2009, the applicant filed a Notice of Intent to Vacate Government Owned or Leased Quarters.

On June 9, 2009, during the pre-final inspection of the applicant's apartment, another Base housing official saw what appeared to be a marijuana joint on the applicant's end table and reported it. Approximately a week later, the Base housing authority spoke with both the applicant and his wife together and informed them of the consequences of smoking marijuana in military housing. At this point, the applicant's wife admitted to being the one smoking marijuana in the home and said she would not do it again. The Base housing authority reported that the applicant stated that he did not smoke marijuana and that he had spoken with his wife about not smoking marijuana in military housing.

According to the CGIS report, on June 19, 2009, the applicant was interviewed by CGIS agents. He acknowledged that he was aware of his rights, both verbally and in writing, and agreed to be interviewed without a lawyer present. The applicant provided CGIS agents with the following information:

- The applicant stated that he knew his wife smoked marijuana prior to marrying her because she had been given a medical marijuana card.
- The applicant claimed he had never witnessed his wife smoke marijuana, but sometimes she would get in her car and leave and would return smelling like marijuana.
- Toward the end of May 2009, the applicant claimed, he noticed a plastic baggie in her purse with two or three marijuana buds inside. In addition, he stated, he began to notice what looked like marijuana plant stems on the floor inside their residence. He stated that he did not confront his wife about what he had seen because he did not think of it at the time.

On June 23, 2009, CGIS investigators reinterviewed the applicant. Prior to the interview the applicant was again advised of his rights under Article 31b of the Uniform Code of Military Justice (UCMJ) and warned that he was suspected of possession and use of marijuana. Investigators stated that the applicant acknowledged understanding his rights, both verbally and in writing. The applicant also agreed to be interviewed without a lawyer. During this interview, the applicant provided the following information:

- The applicant told investigators that he had last smoked marijuana about a year-and-a-half before the interview as part of a religious ceremony.
- The applicant stated that he frequently witnessed his wife smoke marijuana in front of her young daughter while he was in a car with her. According to the applicant, his wife both drove and smoked marijuana at the same time. He alleged that he never confronted

her about it because he did not want to get into an argument. He further explained that he was not concerned about the effects the marijuana might have on him because his entire family smoked marijuana and it never affected him in the past. The agent noted that the applicant's current testimony conflicted with his June 19, 2009, interview where he told investigators that he had never witnessed his wife smoking marijuana. In addition, the applicant's statement about the last time he had smoked marijuana conflicted with his previous statements as well.

On June 26, 2009, after the applicant's hair follicle test returned a positive result for marijuana use, the applicant was reinterviewed by CGIS investigators. Prior to the interview the applicant was again advised of his rights under Article 31b of the UCMJ and told that he was suspected of possession and use of marijuana and of making false official statements. Investigators stated that the applicant acknowledged understanding his rights, both verbally and in writing, and agreed to be interviewed without a lawyer being present. The applicant provided the following information:

- The applicant told investigators he could not explain the positive drug test. He further stated that he had not smoked marijuana in about a year, but may have smoked marijuana once after bootcamp. He stated that everyone he hung out with smoked marijuana, but he did not.
- The applicant stated that after moving out of government housing he went home with a girl whom he met at a bar twice. According to the applicant, this woman was a heavy marijuana smoker both times he was at her house. He stated that kissing her may have negatively affected his drug test. The applicant also admitted to going to friends' homes who were also marijuana smokers.
- The applicant also stated he was exposed to a great deal of secondhand smoke due to his wife's heavy marijuana smoking. The applicant told investigators that he had been around his wife while she smoked marijuana three times a day. The applicant claimed that his wife never smoked marijuana in military housing but did smoke in the car and at parks, hotels, and friends' homes.
- When confronted with his inconsistent statements, the applicant could not explain the inconsistencies regarding his marijuana use and exposure. The applicant told investigators that his memory was not very good when it comes to recalling times and that it was hard for him to remember events, especially if the events dated back longer than a year.
- The applicant admitted to knowing many other service members who did drugs like marijuana and "shrooms."

On June 26, 2009, CGIS investigators interviewed the applicant's wife. The applicant's wife admitted to having smoked marijuana while living in base housing, but stated that she had stopped as soon as she learned it was prohibited. The applicant's wife also stated that her husband never smoked marijuana.

On October 16, 2009, the applicant received a memorandum from his CO entitled Notification of Intent to Discharge, which formally notified him of his command's intent to

administratively separate him from the Coast Guard for misconduct related to his illegal use of a controlled substance.

On October 18, 2009, the applicant submitted an acknowledgement of receipt of the Memorandum; this document also objected to his discharge from the U.S. Coast Guard, and confirmed that the applicant had consulted with an attorney. The applicant's acknowledgement also included a personal statement, dated October 18, 2009, in which he objected to his discharge, challenged the efficacy of a hair sample drug test, and, again, denied that he had used marijuana.

On February 24, 2010, the applicant received NJP at Captain's Mast. The applicant was charged with violating Article 112a of the UCMJ for wrongful use of a controlled substance, specifically, marijuana. The applicant was sentenced to 30 days' restriction to base, 30 days of extra duty, and reduction to paygrade E-2, with the reduction in paygrade suspended for six months or until discharge.

On April 22, 2010, the applicant was discharged from the Coast Guard. He received a General discharge for Misconduct with an RE-4 reenlistment code.

On July 21, 2015, the applicant applied for relief through the Coast Guard Discharge Review Board (DRB), where his relief was ultimately denied.

(The applicant alleged that on February 23, 2017, he once again applied to the DRB for relief, but he never received a response to his application.)

## VIEWS OF THE COAST GUARD

On March 16, 2021, a Judge Advocate (JAG) for the Coast Guard submitted an advisory opinion in which they recommended that the Board deny relief in this case. The Coast Guard stated that relief should be denied because the applicant has failed to meet the burden of proof required to show that the Coast Guard committed an error or injustice.

The JAG explained that the applicant erroneously claimed that the Coast Guard lacked sufficient evidence to substantiate the allegations underlying his separation. Specifically, while the applicant expended substantial effort in questioning the evidentiary credibility of the hair analysis, he incorrectly applied a higher standard of proof to his administrative processing than that provided by policy. Pursuant to Personnel Manual, Art. 20.C.3.e. and Military Justice Manual, Art. 1.D.1.f., the administrative finding of a Drug Incident, NJP, and Administrative Separation each apply a preponderance of the evidence standard. When this standard is applied to the totality of evidence regarding applicant's misconduct, which included both the hair analysis as well as his contradictory statements regarding drug use volunteered during CGIS interviews, it is reasonable to reach similar conclusions to those of the masting official and separation authority (even with a lessened reliance on the laboratory analysis).

Next, the JAG addressed the applicant's claim of error or injustice in that he was not afforded proper due process in the form of rights advisement prior to his interview by CGIS. Documentary evidence, however, corroborated that applicant knowingly, intelligently, and voluntarily waived his rights and elected to speak with CGIS interviewers. Because the applicant

was advised of and voluntarily waived his rights, his statements against interest were properly considered.

Finally, the JAG explained that the applicant's argument that his re-enlistment code works an injustice upon him and his future military employment is invalid. Information summarized on applicant's Certificate of Release or Discharge from Active Duty (DD Form 214) is not binding on other military services; their discretion and judgment are their own.

In light of the above, the JAG concluded that 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. The applicant was advised of, and subsequently waived, his rights prior to his CGIS interviews, and when considered together, the applicant's hair sample and interview testimony supplied sufficient basis for his command to find that he had committed Art. 112a, UCMJ, at NJP. Therefore, the Coast Guard recommended that the Board deny relief in the instant matter.

## APPLICANT'S RESPONSE TO VIEWS OF THE COAST GUARD

On April 23, 2021, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within 30 days. No response was received.

## APPLICABLE LAW AND POLICY

Chapter 20.C. of the Coast Guard Personnel Manual, COMDTINT M1000.6A (June 2007), provides the necessary guidance on drug incidents. In relevant part:

> 20.3.C.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.
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> …
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> 20.3.C.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). If the evidence of a possible drug incident includes a positive urinalysis result, the command should also determine whether the urinalysis was conducted in accordance with this article and whether the collection and chain of custody procedures were properly followed.
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> 20.C.3.e. **Preponderance of 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.

Chapter 12.B. of the Coast Guard Personnel Manual, COMDTINST M1000.6A provides the necessary on misconduct discharges for enlisted service members. In relevant part:

> 12.B.18.b.3. **Reasons to Discharge for Misconduct**. 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.
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> 12.B.18.b.4.a. **Involvement with Drugs**. Any member involved in a drug incident…will be processed for separation from Coast Guard with no higher than a general discharge.

Article 1.D. of the Military Justice Manual, COMDTINST M5810.1D (August 2000), provides the necessary guidance on the necessary burden of proof the Coast Guard must meet in order to award NJP. In relevant part:

> 1.D.1.f. **Burden of Proof**. The burden of proof required in order to award punishment at NJP is a preponderance of evidence. This standard means that before NJP may be awarded, the commanding officer must determine it is "more likely than not" that the member committed an offense(s) defined by the UCMJ. Each element of each offense as defined in the Manual for Courts-Martial [MCM] must be supported by a preponderance of the evidence (i.e., it is "more likely than not" that the element occurred). This is a lower standard of proof than the "beyond a reasonable doubt" standard used at a court-martial to find the member committed an offense.

Rule 314, Searches Not Requiring Probable Cause, of the Manual for Courts Martial provides the necessary guidance on the consent required for searches. In relevant part:

> (e) *Consent searches.*
>
> (1) *General rule.* Searches may be conducted of any person or property with lawful consent.
> (2) *Who may consent.* A person may consent to a search of his or her person or property, or both, unless control over such property has been given to another. A person may grant consent to search property when the person exercises control over that property.
> (3) *Scope of consent.* Consent may be limited in any way by the person granting consent, including limitations in terms of time, place, or property and may be withdrawn at any time.

## 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. An application to the Board must be filed within three years after the applicant discovers the alleged error in his record or within three years of receiving a decision from the

Discharge Review Board (DRB).[12] The applicant's separation from the Coast Guard occurred in 2010, and his decision from the DRB was issued on August 25, 2016. However, the applicant contends in his application that he was not made aware of the DRB decision until November 14, 2019.[13] Therefore, the Board considers the application at issue to be timely.

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.[14]

4. The applicant alleged that his General discharge should be upgraded, and his reenlistment code changed because the Coast Guard lacked sufficient evidence to substantiate the allegations underlying his separation and he was not afforded proper due process. He further alleged that the Coast Guard committed an error of law by failing to advise the applicant of his rights before or during the investigation of the drug incident at issue. 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.[15] 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."[16]

5. The applicant alleged that the hair follicle test that was used to support his CO's finding of a drug incident and ultimately led to his separation was erroneous and unjust because Coast Guard policy does not provide procedures for hair follicle testing. However, the applicant has failed to show that hair follicle testing is prohibited by the Coast Guard. In addition, the applicant failed to acknowledge the fact that on June 19, 2009, he provided CGIS investigators with a voluntary consent to search, thereby allowing them to legally remove from his person the hair follicles that led to his positive drug test. Rule 314(e)(1) of the Manual for Courts Martial (MCM) states that searches may be conducted of any person with lawful consent. Rule 314(e)(2) states that a person may consent to a search of his body, and paragraph 314(e)(3) states that consent may be limited in any way by the person granting consent. Therefore, the record shows that Coast Guard obtained the necessary legal consent from the applicant to retrieve samples of his leg hair. The record also shows that the applicant was informed of the reason for the hair removal. The applicant was free to deny consent and/or restrict the scope of his consent, but he chose not to do so. The applicant was informed of the basis for his interview and still chose to consent to this search, knowing that the if the drug test results were positive, they could be used against him in criminal and administrative separation proceedings.

The Board notes that the original complaint regarding the smell of marijuana emanating from the applicant's residence was made on February 24, 2009. However, CGIS investigators did

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[12] 10 U.S.C. § 1552(b); 33 C.F.R. § 52.22; *Ortiz v. Secretary of Defense*, 41 F.3d 738, 743 (D.C. Cir. 1994).
[13] *See* Application, p. 2.
[14] *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).
[15] 33 C.F.R. § 52.24(b).
[16] *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

not retrieve the applicant's hair until June 19, 2009. Arguably the delay between when the original complaint was made and when CGIS investigators conducted their first formal interview with the applicant was the reason for their choice in drug testing. Given that urinalysis tests cannot accurately detect drug use that occurred past 30 days and sometimes even less, and that hair follicle tests are known for their reliability for detecting drug use that occurred longer than 30 days ago, the Board finds that the Coast Guard's reliance on hair follicle drug testing in this situation was not unreasonable.

6. The applicant alleged that he never used drugs while on active duty and that, had the Coast Guard conducted a urinalysis test instead of a hair follicle test, his name would have been cleared. However, the record shows that the applicant admitted to multiple encounters with illegal substances, namely marijuana, none of which he reported to the proper authorities. The record also shows that the applicant permitted the use of illegal drugs while living in military housing. Finally, the applicant made various inconsistent statements about his own prior drug use: he told the CGIS agents that he had not used marijuana, he told them that he had not used it since a religious ritual 18 months earlier, and he told them that he may have used marijuana once after bootcamp. Although the date of that usage is unclear, his admission shows that either the applicant had used drugs while on active duty or he had lied about his prior drug use upon his enlistment. Under Article 20.C.3.e of the Personnel Manual, provides the following:

> **Preponderance of 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.

The record is presumptively correct, and the applicant has failed to show that his CO erred when, after considering all of the evidence fairly, he concluded that it was more likely than not that the applicant had intentionally ingested drugs while on active duty. In addition, policy states that a member's own admission of drug use or a positive confirmed drug test, standing alone, may be sufficient to establish intentional use and thus suffice to meet the burden of proof. Here, the Coast Guard arguably had both.

7. The applicant further alleged that the Coast Guard erred when they failed to inform him of his rights before interviewing him. However, the record shows that the applicant was informed of his rights under Article 31b of the UCMJ before all three interviews with CGIS investigators. The record also shows that the applicant acknowledged understanding these rights both verbally and in writing. Finally, the applicant agreed to meet with investigators without the presence of an attorney. The record is presumptively correct, and the applicant has failed to prove by a preponderance of the evidence that the record is incorrect.

8. Finally, the applicant alleged that he never made a false official statement. However, the record shows that during the course of his three interviews with CGIS investigators, the applicant provided inconsistent answers to questions posed by investigators, not only about his own drug use, as stated in finding 6 above, but also about his wife's drug use. Despite the

applicant's contentions that he never made false official statements, the record shows otherwise, and the record is presumptively correct.

9. To the extent that the applicant argued that his reenlistment code works an injustice upon him and eliminates the possibility of future military employment, the Certificate of Release or Discharge from Active Duty, DD Form 214, COMDTINST 1900.4E, Article 9.b. states that the purpose of the DD Form 214 is to serve as "an authoritative source of personnel information for administrative purposes, and for making enlistment or reenlistment eligibility determinations." According to Enclosure (2) to COMDTINST 1900.4E, the Separation Program Designator (SPD) Handbook, an RE-4 is the only reenlistment code authorized for members discharged for misconduct and is therefore appropriate in the instant matter.

10. Under Article 12.B.18. of the Personnel Manual in effect in 2010, a member who incurs a drug incident must be discharged with no better than a General discharge. The same is true today. Therefore, and 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 separating him with a General discharge for misconduct with an RE-4 separation code.[17] Accordingly, the applicant's request should be denied.

**(ORDER AND SIGNATURES ON NEXT PAGE)**

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

**ORDER**

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

September 30, 2022

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