DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2021-012

[redacted]
MKC/E-7 (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 June 26, 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 Chief Machinery Technician (MKC/E-7) who was discharged on September 22, 2020, after he was not recommended for reenlistment because his Command determined that he had failed to meet the Coast Guard's reenlistment criteria[1] due to a drug incident documented on February 6, 2020. He asked the Board to correct his military record by reinstating him on active duty or providing him with two years of constructive service credit and retiring him with 20 years of service.

The applicant, through counsel, alleged that the Coast Guard committed three material errors that were substantially prejudicial to his rights. First, the applicant alleged that under 10

[1] Chapter 1.E. of the Coast Guard Enlistments, Evaluations, and Advancements Manual, COMDTINST M1000.2B, states, "Eligibility for Reenlistment and/or Extension. The Coast Guard offers reenlistments and/or extensions only to those members who consistently demonstrate the capability and willingness to maintain high professional standards, moral character, and an adherence to the Coast Guard's core values. To be eligible for reenlistment, or extension of enlistment, a member must receive a positive recommendation from their commanding officer in accordance with Article 1.E.1. of this Manual, and meet the eligibility criteria listed in Article 1.E.2. of this Manual."

U.S.C. § 1176[2] he was wrongfully separated upon the expiration of his service contract because he had over eighteen years of service. Second, the applicant alleged that the denial of his reenlistment application was an abuse of discretion because the underlying misconduct occurred over 14 years ago, during previous periods of enlistment. Third, the applicant alleged that he was wrongfully denied a reenlistment board.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on July 23, 2002, and entered into the Machinery Technician rating where he continued to advance.

On November 3, 2014, pursuant to a federal job application while still on active duty, the applicant completed and certified a Standard Form 86 (SF-86)[3] Questionnaire wherein he admitted to having unlawfully smoked marijuana on one occasion while on active duty in July 2009.

On January 13, 2015, the applicant underwent a U.S. Customs and Board Protection (CBP) polygraph examination pursuant to his job application, and he admitted to using marijuana two times between 2002 and 2009 while serving on active duty in the Coast Guard. During that same polygraph, the applicant admitted to using an inhalant to obtain a high while on active duty in 2005.

On July 16, 2018, the applicant was assigned as the Engineering Petty Officer (EPO) of a unit.

On April 9, 2018, the applicant completed another SF-86 questionnaire, pursuant to his security clearance, with answers that allegedly conflicted with his November 3, 2014, SF-86 questionnaire, and January 2015 polygraph. Specifically, the applicant answered "No" to "Have you **EVER** illegally used or otherwise been involved with a drug or controlled substance while possessing a security clearance other than previously listed?"[4]

On November 7, 2019, the Director of the Coast Guard Security Center sent a memorandum to the applicant, through his Command, to notify the applicant of the intent to revoke his security clearance based on his admissions of drug use while on active duty and on conflicting answers he had provided on his sf-86 security forms and during his polygraph test for CBP in

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[2] 10 U.S.C. § 1176 provides a "safe harbor" for enlisted members who are denied reenlistment and are within two years of qualifying for a 20-year retirement under 10 U.S.C. §§ 7314, 8330, or 9314, which are the Army, Navy, and Air Force retirement statutes, respectively:

> (a) Regular members.--A regular enlisted member who is selected to be involuntarily separated, or whose term of enlistment expires and who is denied reenlistment, and who on the date on which the member is to be discharged is within two years of qualifying for retirement under section 7314 or 9314 of this title, or of qualifying for transfer to the Fleet Reserve or Fleet Marine Corps Reserve under section 8330 of this title, shall be retained on active duty until the member is qualified for retirement or transfer to the Fleet Reserve or Fleet Marine Corps Reserve, as the case may be, unless the member is sooner retired or discharged under any other provision of law.

[3] The SF-86, or Standard Form 86, is a security clearance questionnaire that must be filled out and certified by an applicant seeking federal employment.

[4] The April 9, 2018, date provided here conflicts with the date provided by CGIS investigators, who stated this SF-86 was certified by the applicant on October 25, 2017.

January 2015. Upon reviewing this memorandum, the applicant's Coast Guard command notified the Coast Guard Investigative Service (CGIS) of the information in the Director's letter, and CGIS opened an investigation into the applicant's drug use and conflicting statements.

On January 17, 2020, CGIS concluded their investigation and distributed their findings to the applicant's District and unit commands.

On January 31, 2020, the Director of the Coast Guard Security Center signed memorandum titled "Retention of Security Clearance with Caution" wherein he approved the applicant's retention of his security clearance, but admonished the applicant, stating,

> While this decision is favorable, you are cautioned that illegal use of controlled substances while maintaining a Security Clearance and your personal conduct and lack of candor, could call into question your honesty, integrity, trustworthiness and judgement, which in turn raise a security concern about your ability to properly handle and protect classified National Security Information.

The memorandum pointed out the discrepancies between the applicant's 2018 SF-86 where the applicant answered "No" to "Have you **EVER** illegally used or otherwise been involved with a drug or controlled substance while possessing a security clearance other than previously listed?" and his 2014 SF-86 where the applicant answered "Yes" to "Have you used illegal drugs or a controlled substance in the past seven years?" The Director stated that the applicant must answer "Yes" to the questions related to EVER having used an illegal substance while possessing a security clearance on all future security questionnaires for the federal government. Finally, the applicant was warned that any future receipt of derogatory information, especially of a similar nature, would be cause for an immediate reconsideration of his security clearance.

On February 6, 2020, the Officer in Charge (OIC) of the applicant's station issued the applicant a CG-3307 ("Page 7") wherein he found, by a preponderance of the evidence, that the applicant's drug use while on active duty, as disclosed on the applicant's November 3, 2014, SF-86 and January 13, 2015, CBP polygraph exam, constituted a "drug incident." The applicant acknowledged and signed the negative Page 7 and wrote, "The statement regarding 2002 is inaccurate, the marijuana was used one night in 2009."

On February 6, 2020, as a result of the January 17, 2020, CGIS investigation, the OIC submitted a request that the applicant be temporarily relieved for cause from his position as the EPO.

On April 24, 2020, the Personnel Service Center (PSC) issued a memorandum permanently relieving the applicant as EPO.

On April 28, 2020, the applicant received a Page 7 documenting a reenlistment interview and was notified that he would not be receiving his Commanding Officer's (CO's) recommendation for reenlistment/extension because he did not meet the requirements for reenlistment/extension due to the drug incident documented on February 6, 2020. The applicant was also informed that due to his drug incident, he would not be entitled to a reenlistment board and the CO would request that PSC-EPM discharge the applicant upon the expiration of his current enlistment.

On May 5, 2020, the applicant acknowledged a disciplinary Enlisted Evaluation Report (EER) for the period ending February 6, 2020. On this EER, the applicant received one Unsatisfactory Conduct mark and was not recommended for advancement.

On May 8, 2020, the applicant's OIC submitted a request to PSC that the applicant be discharged at the expiration of his current enlistment due to his February 6, 2020, drug incident finding. The OIC also recommended that the applicant be given a General[5] discharge with a reenlistment code of RE-4 (ineligible).

On May 20, 2020, the CO of Military Personnel for the applicant's Sector endorsed the OIC's recommendation that the applicant be discharged, but recommended an Honorable characterization of service instead of a General characterization given the amount of time that had passed since the incident.

On June 17, 2020, the CO of Military Personnel for the applicant's Sector found, by a preponderance of the evidence, that the applicant had violated Article 107 of the Uniform Code of Military Justice (UCMJ)—making false official statements—during his interview with CGIS on November 15, 2019. This finding was documented on a CG-3307 (Page 7).

On June 30, 2020, the CO of Military Personnel for the Sector filed an additional endorsement for the applicant's separation and forwarded a copy of the Page 7 dated June 17, 2020. In this memorandum, the CO again recommended an Honorable discharge because of the length of time that had passed since the incidents. He stated that the applicant had failed to uphold the Coast Guard's core values by ingesting illegal drugs while on active duty. In addition to the misconduct, the CO recommended not retaining the applicant because he had not been preforming at a high level in his position as Engineering Petty Officer (EPO) prior to his relief and the documentation of his drug incident. According to the CO, a great deal of effort was being invested into the applicant to bring him up to the level expected of an EPO and a Chief Petty Officer.

On September 22, 2020, the applicant was Honorably discharged at the end of his enlistment with an RE-4 reenlistment code, having served 18 years and 2 months on active duty.

VIEWS OF THE COAST GUARD

On May 5, 2021, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which she recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared by PSC.

The JAG argued that the applicant has failed to show that the Coast Guard committed an error or injustice when they denied him a recommendation for reenlistment. The JAG also argued that the applicant's reliance on 10 U.S.C. § 1776, the Department of Defense's Safe Harbor statute,

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[5] 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.

is erroneous. The JAG stated that title 14, which is applicable to Coast Guard servicemembers, provides no such safe harbor. The JAG further argued that voluntary retirement after twenty years of service is governed by 14 U.S.C. § 2306, which states, "Any enlisted member who has completed twenty years of service may, upon his own application, in the discretion of the Commandant, be retired from active service."[6]

In addition, the JAG argued that the applicant's allegations that the Coast Guard abused its discretion by denying him reenlistment is misplaced. According to the JAG, although Administrative Remarks, Form CG-3307, COMDTINST 1000.14D, requires documentation of incidents within two years from the date of the incident, or within two years of the date command knew, or should have known, about the incident,[7] there is no such time constraint on documenting drug incidents.[8] The JAG claimed that the applicant's OIC found, by a preponderance of the evidence, that the applicant had previously used illegal drugs while on active duty and so had incurred a drug incident. Therefore, the OIC issued the applicant a negative Page 7 on January 17, 2020, which was within two years of when the OIC learned about his prior drug use. Furthermore, the JAG argued that upon the Sector Command's review of the facts, it also found, by a preponderance of the evidence, that the applicant had violated Article 107 of the Uniform Code of Military Justice (UCMJ), False Official Statement, resulting in an additional negative Page 7 being issued on June 17, 2020. The JAG concluded that based on the underlying facts that indicate multiple voluntary admissions of drug use while on active duty, the applicant has failed to meet his burden of proof required to show that the Coast Guard committed an error or an injustice when he was denied reenlistment.

Finally, the JAG argued that the applicant has failed to show that he was entitled to a reenlistment board. According to the JAG, the applicant's command found that he had committed a drug incident and violated Article 107 of the UCMJ and therefore failed to meet the reenlistment criteria as required Article 1.E.2.e. of the Enlistments, Evaluations, and Advancements Manual, COMDTINST M1000.2C. The JAG claimed that it was within the OIC's authorized discretion to withhold a reenlistment recommendation and as such, the Coast Guard did not commit an error or injustice.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 2, 2021, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. On July 8, 2021, the Chair received the applicant's response.

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[6] 14 U.S.C. §2306 does not apply to the applicant because he had not reached twenty years of service. The JAG also referenced Article 1.C.1.e.2 of the Enlisted Personnel Administrative Boards Manual, PSCINST M1910.1, but that article is not relevant here because the applicant was not requesting voluntary retirement after reaching twenty years of service.

[7] Paragraph (j) of COMDTINST 1000.14D, the Commandant's instruction regarding Page 7s (CG-3307) states, "Authorized personnel may issue Administrative Remarks, Form CG-3307, documentation for incidents within two years of the date of the incident, or within two years of the date that the command knew, or should have known, about the incident."

[8] Chapter 5.D.2. Initiating an Investigation, of the Coast Guard Military Drug and Alcohol Policy, COMDTINST M1000.10A states, "Upon receiving a positive, confirmed urinalysis result or other evidence of misuse, trafficking, or unlawful controlled substance possession within a command, COs/OICs must promptly notify and consult with the regional Coast Guard Investigative Service (CGIS) office regarding the specific incident circumstances."

Through counsel, the applicant argued that the JAG's reference to 14 U.S.C. § 2306 is inapplicable because it was never intended to address questions of safe harbor. In addition, the applicant alleged that Article 1.C.1.e.2 of the Enlisted Personnel Administrative Boards Manual, PSCINST M1910.1 simply states that service members can be separated for misconduct after they are eligible for retirement, but this case is not about misconduct or a member who is seeking voluntary retirement, but rather a member who was denied reenlistment.

Second, the applicant disputed that he ever made a false official statement. He alleged that the only basis for the applicant's denied reenlistment was the drug use that occurred during previous enlistments. According to the applicant, any discussion of a false official statement is a revisionist history of this case. The applicant alleged that the false official statement he was accused of making was never provided to him, nor was he ever told the contents and/or the nature of the statement. The applicant also alleged that he was never given the opportunity to explain any statement. The applicant also noted that despite the alleged false official statement, he was still granted his security clearance.

Finally, the applicant alleged that it was an enlisted member who denied him his reenlistment and that such a denial should never have been at the enlisted level. According to the applicant, it was a complete abuse of the OIC's discretion, especially considering the eight intervening years of exemplary service between his drug use and his discharge. The applicant claimed that on June 22, 2020, he was permitted to reenlist for three months for purposes of accruing sufficient time in service for retirement.[9] The applicant argued that with his honorable service, there is no rational basis for separating him for conduct that had occurred during previous enlistments.

APPLICABLE LAW AND POLICY

Article 5 of the Coast Guard Military Drug and Alcohol Policy, COMDTINST M1000.10A (June 2018), provides the necessary guidance on the preponderance of the evidence for drug incidents. Under Article 5.C., a member's CO or OIC may determine that a member has incurred a drug incident due to the intentional use, possession, or trafficking of illegal drugs or the use of other substances, such as inhalants, "to obtain a 'high,' contrary to their intended use." Article 5.E.2. states the following about the standard of proof the CO or OIC must apply:

> **5.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.

Article 5.E.3. states that if the CO or OIC determines that a member has incurred a drug incident, the CO or OIC must initiate the member's separation for misconduct.

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[9] A Coast Guard retirement requires 20 years of active duty. Upon his discharge, the applicant had 18 years, 2 months of active duty.

Article 1.B.17. of the Military Separations Manual, COMDTINST Ml000.4 (August 2018), provides the necessary guidance on discharging members for misconduct and on how the Coast Guard defines the "commission of a serious offense." In relevant part:

> **l.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:
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> (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.
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> …
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> **1.B.17.b.4. Involvement with Drugs.** Any member involved in a drug incident or illegal, wrongful, improper sale, transfer, manufacture, or introduction onto a military installation of any drug, as defined in the Military Drug and Alcohol Policy Manual, COMDTINST M1000.10, Ch.7, will be processed for separation from the Coast Guard with no higher than a general discharge (under honorable conditions).

Article 1 of the Coast Guard Enlistments, Evaluations, and Advancements Manual, COMDTINST M1000.2C (January 2020) provides the necessary guidance on reenlistment eligibility. In relevant part, it states:

> **1.E. Eligibility for Reenlistment and/or Extension**. The Coast Guard offers reenlistments and/or extensions only to those members who consistently demonstrate the capability and willingness to maintain high professional standards, moral character, and an adherence to the Coast Guard's core values. To be eligible for reenlistment, or extension of enlistment, a member must receive a positive recommendation from their commanding officer in accordance with Article 1.E.l. of this Manual, and meet the eligibility criteria listed in Article l.E.2. of this Manual.
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> …
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> **l.E.2. Eligibility Criteria.** Each member must meet the basic eligibility requirements listed below during their current period of enlistment/reenlistment, including any extensions, unless an appeal is approved by Commander (CG PSC-EPM) or (CG PSC-RPM):
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> e. Have no documented offense for which the maximum penalty for the offense, or closely related offense under the UCMJ and Manual for Courts-Martial, includes a punitive discharge during the current period of enlistment. Use the following guidance to assist.
>
> (1) This criteria [sic] is aimed at serious offenses, analogous to those warranting the "Commission of a Serious Offense" basis for discharge identified in Reference (c), Military Separations, COMDTINST M1000.4 (series). Commission of a serious offense does not require adjudication by non-judicial or judicial proceedings. In some circumstances, military justice action is precluded due to state or federal court proceedings, but a commanding officer may remain convinced that credible evidence establishes, by a preponderance of the evidence, that the member has committed a serious offense. In these circumstances, if warranted by the

> particular facts of the case, Commander (CG PSC-EPM) or (CG PSC-RPM), may determine that a serious offense has been committed, even without a judicial adjudication, and deny the member the opportunity to reenlist.
>
> (2) An acquittal or finding of not guilty at a judicial proceeding or not holding nonjudicial punishment proceeding does not prohibit proceedings under this provision. However, the offense must be established by a preponderance of the evidence. Police reports, Coast Guard Investigative Service reports of investigation, etc., may be used to make the determination that a member committed a serious offense.
>
> f. Have no special or general courts-martial conviction(s) during the current period of enlistment.
>
> g. Have no conviction(s) by a civil court (or other civilian judicially imposed decision amounting to a conviction such as, but not limited to: adjudication withheld; deferred prosecution; entry in a pretrial intervention program; or any similar disposition of charges which includes imposition of fines, probation, community service, etc.) for any civilian offense, that could warrant a punitive discharge if prosecuted under the UCMJ and Manual for Courts-Martial, during the current period of enlistment.

Article l.E.4.c. of COMDTINST M1000.2C states that members who are discharged from the active or reserve component because they do not meet the eligibility criteria will be issued an RE-3 or RE-4 reentry code.

FINDINGS AND CONCLUSIONS

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

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

2. The 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.[10]

4. The applicant alleged that he was wrongfully separated from service upon the expiration of his term of enlistment after the Coast Guard denied him reenlistment because of his admission of illegal drug use during previous enlistment periods and that he was wrongfully denied a reenlistment board. When considering allegations of error and injustice, the Board begins its

[10] *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).

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.[11] Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."[12]

5. The applicant alleged that his involuntary separation was an error and injustice and that he should have been retained under 10 U.S.C. § 1176 because he had more than eighteen years of service. However, 10 U.S.C. § 1176, which is known as the Safe Harbor statute, is only applicable to enlisted members who are within two years of qualifying for a 20-year retirement under 10 U.S.C. §§ 7314, 8330, or 9314, which are the Army, Navy, and Air Force retirement statutes, respectively. The Safe Harbor statute does not mention the Coast Guard retirement statute and there is no comparable statute providing a safe harbor at 18 years in Title 14. The applicant has not proven by a preponderance of the evidence that he was entitled to remain on active duty pursuant to 10 U.S.C. § 1176.

6. The applicant alleged that he was wrongfully denied reenlistment so that he could earn a 20-year retirement because it was erroneous and an abuse of discretion to discharge him for drug use that had occurred during a prior enlistment. The record shows that in late 2018 or 2019, the applicant's OIC learned that he had admitted to using illegal drugs while on active duty and initiated an investigation as required by COMDTINST M1000.10. The investigation showed that when applying for a job with Customs and Border Protection in 2014 and 2015, the applicant had admitted to having used illegal drugs and inhalants while he was serving on active duty as a member of the Coast Guard in 2005 and 2009. However, the Coast Guard, and in particular the applicant's Command, remained unaware of his drug use until November 2019, and following an investigation, his OIC documented his illegal drug use as a drug incident on February 6, 2020.

7. Under Article 1.E.2.e. of the Enlistments, Evaluations, and Advancements Manual, COMDTINST M1000.2B, to qualify for reenlistment, an enlisted member must have "[n]o documented offense for which the maximum penalty for the offense, or closely related offense under the UCMJ and Manual for Courts Martial, includes a punitive discharge during the current period of enlistment." Under Article 112a—Wrongful Use, Possession of a Controlled Substance—of the UCMJ, the maximum punishment for the illegal use of drugs is a dishonorable discharge. Therefore, documentation of illegal drug use in violation of Article 112a of the UCMJ is one of circumstances that makes a member ineligible to reenlist under Article 1.E.2.e. of COMDTINST M1000.2B.

8. The applicant argued that the wording of Article 1.E.2.e. of COMDTINST M1000.2B means that his illegal drug use during prior enlistments could not cause him to be ineligible to reenlist in 2020. The Board disagrees. Article 1.E.2.e. states that a member is ineligible to reenlist if, "during the current period of enlistment," the member has a documented offense for which the maximum punishment under the UCMJ includes a punitive discharge or a court-martial or civil conviction for such an offense. Crimes are sometimes discovered long after

[11] 33 C.F.R. § 52.24(b).
[12] *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

the fact and judicial and non-judicial proceedings may happen years after the actual crime and discovery of the crime. There is no requirement in Article 1.E.2.e. that both the crime and the documentation or conviction of the crime occur "during the current period of enlistment." Nor is it an abuse of discretion or contrary to policy for an OIC to determine and document a drug incident even if it occurred years before, because the applicant was serving on active duty at the time of his illegal drug use. The Coast Guard is a law enforcement agency and drug interdiction is one of its major missions. As the JAG noted, the Coast Guard Drug and Alcohol Program Manual, COMDTINST M1000.10, does not place a time limit on determining that a drug incident has occurred, and paragraph (j) of COMDTINST 1000.14D provides that a CO, OIC, or other authority may document an incident on a CG-3307 within two years of discovering the alleged misconduct, which his OIC did.

The applicant has failed to provide any law or policy that prohibits previous drug use while on active duty from being documented as a drug incident if the Coast Guard discovers the drug use in subsequent enlistment periods. Nor has he shown that a drug incident documented during the current enlistment is not a proper basis for finding that a member is ineligible to reenlist under Article 1.E.2.e. of COMDTINST M1000.2B. The applicant has failed to prove by a preponderance of the evidence that he was eligible to reenlist after his OIC documented the drug incident in his record in February 2020.

9. The applicant alleged he was wrongfully denied a reenlistment board, but under the Military Separations Manual, the applicant was not entitled to a reenlistment board. Article 1.B.5.c. of the Military Separations Manual, COMDTINST M1000.4, states:

> Members who have eight or more years of total active duty and/or reserve military service that meet the reenlistment eligibility criteria in reference (1), Enlisted, Accessions, Evaluations, and Advancements Manual, COMDTINST M1000.2 (series), but are not recommended for reenlistment by their commanding officer, are entitled to a reenlistment board. ***However, members who do not meet the eligibility criteria are not entitled to a reenlistment board, even if they have eight or more years of total active and/or reserve military service.*** (Emphasis added.)

Therefore, the preponderance of the evidence shows that the applicant was not entitled to a reenlistment board because, as explained above, he failed to meet the reenlistment eligibility criteria.[13]

10. The applicant made numerous arguments about the actions and attitude of his OIC and chain of command. Those allegations and arguments not specifically addressed above are considered to be unsupported by substantial evidence sufficient to overcome the presumption or regularity and/or are not dispositive of the case.[14]

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[13] The Board notes that under Article 1.B.17.b.4. of the Military Separations Manual, M1000.4, the applicant could have been processed for separation from the Coast Guard for "Misconduct" with no higher than a General discharge (under honorable conditions) and a separation code denoting drug abuse on his DD 214. However, his Command recommended that he receive an Honorable discharge for "Completion of Required Active Service" instead.

[14] 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").

11. Therefore, the Board finds that the applicant has failed to prove, by a preponderance of the evidence, that the Coast Guard committed an error or injustice when it involuntarily separated him when his enlistment ended because he was ineligible to reenlist due to his illegal use of drugs while on active duty. His request for relief should be denied.

ORDER

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

September 9, 2022

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